

Statement of John Boswell,
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Before the House Judiciary Subcommittee on Courts,
Intellectual Property and the Internet
“Abusive Patent Litigation: The Impact on American Innovation & Jobs,
And Potential Solutions”
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Chairman Coble, Ranking Member Watt, and Members of the subcommittee, it is an honor to be here with you this morning, to share with you SAS’ perspective about abusive patent litigation and ways we might alter the business paradigm that is driving the problem. While several Members of this Subcommittee are from North Carolina and are familiar with SAS, I thought a bit of perspective about the company might be helpful.

SAS is the world’s largest privately held software company, providing business and organizational customers with advanced analytics. We help our customers use the tremendous amounts of data they have to make better decisions. Those decisions include using data to detect and prevent fraud, personalize health care, deliver inventory and other supplies on time, in the right quantities, to the right places, and improve and innovate in new products.

We are not a new company. In fact, we have been in business since 1976. We are proud of our record of innovation and results, which we attribute in no small part to our people and our intellectual property.

One of our most important measures of success is where we rank in Fortune’s survey of 100 Best Places to work. In the last four years, we have been ranked no lower than third on that list, and held the top spot for two consecutive years. This is important because it is a cumulative ranking based on employee feedback. Our founders have worked hard to create a culture that nurtures and encourages employee creativity, and this in turn, translates into new products, new research, and new ways of conducting business for us. In short, while SAS believes that its employees are the most important assets, the intellectual property generated by these employees is the second most important asset.

While SAS does patent its innovations, we are not, relative to other technology companies, a big user of the patent system. As most of you probably know, for the first two decades of the company’s existence, software patents were not recognized, so we could not have obtained patents on our products and features even if we had wanted to do so. After the State Street Bank decision, we started to patent our intellectual property.

Today, 37 years after our start, the litigation filed against SAS is patent litigation. In none of these patent cases is SAS a plaintiff. In all of these cases, SAS is a victim, being victimized with suits threatening patent infringement. In many of these cases, SAS actually invented the technology that forms the basis of the patent. We simply did not and could not have pursued patents on this technology because of the state of the law at the time. Because much of the prior art was contained in software

user manuals and technical specifications of our products and those of our peer companies, and not in patent filings, this prior art was not available to the USPTO. This has led to patents being issued to people who did not create the inventions.

In none of the cases where SAS has been sued for patent infringement is the plaintiff an operating company that makes anything, sells anything, produces anything or employs anyone (other than a bunch of lawyers). All of these cases involve what I call “patent trolls” – which others more demurely call Non-Practicing Entities, or Patent Assertion Entities—as plaintiff. It is a problem that is only becoming worse for companies like SAS¹ for one simple reason: it is a business model that is incredibly cheap to pursue, remarkably profitable to the pursuers, and disproportionately damaging to the victims.

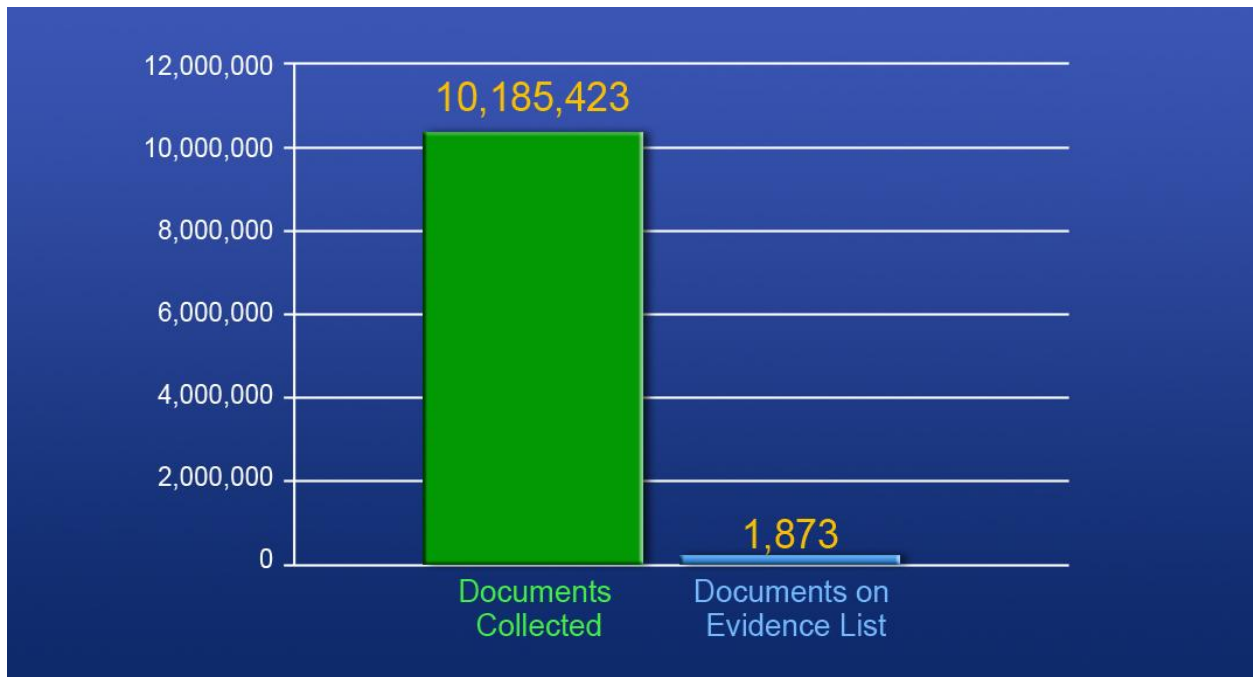
Here are the basic parameters of what is happening with these suits. A patent troll sets up shop in a jurisdiction known to be supportive of patent plaintiffs. It does this by leasing a post office box to establish an address. It buys patents from defunct companies or patents that companies no longer want to keep. It does not hire employees; it does not engage in research; it does not even practice the invention—nor does it ever intend to practice it. The patent troll then either serves a demand letter on the victims, or effects legal service of a complaint. The troll then pursues settlement by threatening massive and costly discovery, or if the case has already been filed, the troll actually seeks costly discovery. For example, the troll seeks discovery of any and every electronic document that might touch upon the alleged claims, by any person inside the defendant’s operations. This can run to hundreds of millions of documents and millions of dollars to produce. Patent trolls bring these cases in jurisdictions that allow this type of expensive discovery. It is this cost to defend the litigation that is the hammer that drives settlement.

In the case of my company, it is really not an overstatement to say that we communicate almost completely electronically—by email, text, IM, you name it. So, when, in the context of patent litigation, we must respond to an electronic discovery request, we are instantly looking at legal and consulting bills that will run into the millions of dollars if we choose not to settle. In contrast, patent trolls have no witnesses, they have no documents, they have no evidence to discover. In short, there is an asymmetry in the patent troll context. Patent trolls can and do pursue litigation strategies that make the litigation as expensive as possible because that same tactic cannot be used against them. With no documents to produce and no witnesses to depose, they have very little cost associated with their obligation to respond to discovery requests. It is this asymmetry that the trolls are using as a primary tactical weapon against those they have chosen to pursue in their quest to extort money.

The chart on the next page illustrates the fundamental problem. The bar on the left-hand side represents the number of documents that SAS had to collect in one recent case. The number of electronic documents that we had to collect exceeded 10 million. The cost to collect those documents,

¹ According to Patent Freedom, the percentage of suits involving NPEs has grown on average 36% per year since 2004, with a very steep increase between 2011 and 2012, in part due to the AIA’s joinder provision. See www.patentfreedom.com. A more staggering result is contained in Professor Feldman’s study where she documents that patent trolls accounted for 40% of patent litigation in 2011, up from 22% in five years. See Jeruss, Feldman & Walker, “The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation,” 11 Duke Law & Technology Review 357 (2012).

before considering the attorney's fees to review and make production determinations, was about \$1.5 million. Again, \$1.5 million was just the cost to collect; considering attorney's fees, the cost of the collection was easily double that amount. Of those documents, only 1,873 documents, or .000183%, appeared on an evidence list as possibly being introduced at trial. These are not documents that were actually used, and it is debatable whether any of the 10 million documents collected were even read by the troll.



(*not to scale as the bar on the right would disappear if actually to scale)

SAS won summary judgment in this case and it is now on appeal to the Federal Circuit. So far this case has cost us in excess of \$8 million. If SAS ultimately wins this case it will be a Pyrrhic victory at best. We spent \$8 million and huge amounts of developer time and executive time etc., for what? This victory does not resolve the other patent troll cases that we face, or will face in the future. This \$8 million and the millions more we are spending on other cases is money SAS no longer has to invest in people, facilities, research, or product development; and we are a relatively small player in this world. In short, the cost to us, and to the economy as a whole is simply staggering.

The dilemma here is that when a company like SAS receives a complaint from a patent troll, it is faced with a Hobson's choice: defend the litigation, which will cost literally millions of dollars, or settle, for a smaller, but not insignificant amount of money. If you do settle, then the company develops a reputation for being an easy target, which just invites more extortion attempts from the patent troll community. In fact, the patent trolls are counting on the settlement dollars, both to fund ongoing litigation and because, at the end of the day, they really do not want to litigate--more often than

not, they will lose. By some estimates, the patent troll success rate at trial is only 8%; 9.2% if default judgments are included.²

To restate, it does not cost much to be a troll and to make broad, vague demands. On the other hand, the risk to the company receiving a troll threat is enormous. The costs and risks to the companies like SAS are disproportionate to the value of the patent, and are wholly divorced from whether any harm has been caused. In fact, companies like SAS have not done something wrong—quite the opposite, we are engaged in innovating, employing, developing—all the things we should be doing. In other legal realms, we do not award compensation unless there has been some injury, and the compensation that is awarded when causation of injury has been established is directly related to the amount of harm caused. In the patent realm, strict liability is the rule—which is to say that there is liability imposed even in the absence of wrongdoing. What the trolls are doing is taking this standard one step farther by essentially recouping almost unbounded economic rents by merely alleging the existence of a property right. It stands law and reason on its hand and is bankrupting the innovative capacity of this country in the process.

With this backdrop, SAS began to consider ways, not simply to attack the problem but to change the fundamental paradigm of patent troll litigation. While there may be any number of helpful suggestions, we believe strongly that eliminating discovery asymmetries, and the ability to exploit these asymmetries, is essential to effect meaningful change.

SAS proposes to build on the Model Order on Electronic Discovery first propounded by Chief Judge Rader of the Federal Circuit, which I have attached. Judge Rader's basic concept is that in patent litigation, the discovery needs are relatively straightforward. The critical discovery relates to certain "core documents". These core documents include the patent at issue, the technical specifications of the allegedly infringing product or feature, and the prior art. SAS proposes that in any patent lawsuit, normal rules of discovery would apply with respect to these core documents--that is, the person producing the documents pays the cost of production. But SAS would go one step further. We would propose that additional discovery is permissible and that parties could ask for whatever other documents they need. The difference is that the party requesting such other discovery bears the cost of paying for that discovery. To ensure that parties have financial viability to underwrite the additional discovery, we would seek to have financial information disclosed at the outset, or the posting of a bond.

We believe that this approach is narrowly tailored, without restricting the ability of parties to get evidence that would be enlightening. What it does do is remove the ability to use discovery as an abusive weapon. Everyone knows at the outset what the rules are, and faced with bearing the cost for unnecessary discovery, we think will dramatically reduce the number of frivolous, exploitive suits and demand letters. We also would propose this rule in all patent suits, thus avoiding the need to define who is and is not a patent troll. This proposal enables parties to make decisions about whether to litigate or settle based on the economic merits of the case, without fear of extortion. It does not

² See Michael Masnick, "Vast Majority of Software patents in Lawsuits Lose," published in TechDirt, September 24, 2010, reviewing a study by Allison, Walker & Lemley, "Patent Quality and Settlement Among Repeat Patent Litigants," Stanford Law and Economics Olin Working Paper No. 398, September 16, 2010.

materially impact those patent cases between operating companies. In these contexts, the discovery burden is roughly equally split between the parties, and the parties are always free to agree to a different procedure relating to discovery. But, if you are a troll, and the biggest weapon you have to obtain financial remuneration is the asymmetrical discovery advantage, you obviously will never agree to a reasonable discovery process. Finally, we have heard about the poor individual inventor who gets threatened by the big company with unlimited discovery. This rule would serve to discipline those cases as well, giving that small inventor relief from the specter of a big company using the cost of litigation to ruin the small company.

As I said earlier, there are many factors that have converged to create and energize this business model. Some of the factors, such as poor quality patents and an overworked patent examination staff, will be addressed by the America Invents Act and better guidance from the PTO. Some of these issues will be worked out over the long-term as well by better judicial decisions understanding these cases for what they are and because SAS and other companies will continue to litigate on the basis of non-infringement and invalidity. We do, though, need immediate solutions, and while there are any number that should be discussed, SAS believes that addressing using discovery as a weapon to force settlement would provide immediate relief if enacted into law.

There is one final point I would like the Committee to consider. The patent troll problem is completely a federal government issue. Trolls are suing on:

1. Poorly drafted and broad software and business method patents, issued by a federal agency, the USPTO,
2. To enforce broad rights and remedies allowed by federal law, and
3. In federal courts that allow broad discovery and will not give early decisions in cases.

Only another federal institution, Congress, can fix this problem.

I thank you for this opportunity to appear before you today, and am happy to answer any questions you may have.