PROMOTING AUTOMOTIVE REPAIR, TRADE, AND SALES (PARTS) ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

ON

H.R. 1057

FEBRUARY 2, 2016

Serial No. 114–59

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
98–486 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

BOB GOODLATTE, Virginia, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
LAMAR S. SMITH, Texas
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
RAÚL LABRADOR, Idaho
BLAKE FARENTHOLD, Texas
DOUG COLLINS, Georgia
RON DeSANTIS, Florida
MIMI WALTERS, California
KEN BUCK, Colorado
JOHN RATCLIFFE, Texas
DAVE TROTT, Michigan
MIKE BISHOP, Michigan

JOHN CONYERS, JR., Michigan
JERROLD NADLER, New York
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
JUDY CHU, California
TED DEUTCH, Florida
LUIS V. GUTIERREZ, Illinois
KAREN BASS, California
CEDRIC RICHMOND, Louisiana
SUZAN DelBENE, Washington
HAKEEM JEFFRIES, New York
DAVID N. CICILLINE, Rhode Island
SCOTT PETERS, California

SHELLEY HUSBAND, *Chief of Staff & General Counsel*
PERRY APELBAUM, *Minority Staff Director & Chief Counsel*

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

DARRELL E. ISSA, California, *Chairman*
DOUG COLLINS, Georgia, *Vice-Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
LAMAR S. SMITH, Texas
STEVE CHABOT, Ohio
J. RANDY FORBES, Virginia
TRENT FRANKS, Arizona
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
BLAKE FARENTHOLD, Texas
RON DeSANTIS, Florida
MIMI WALTERS, California

JERROLD NADLER, New York
JUDY CHU, California
TED DEUTCH, Florida
KAREN BASS, California
CEDRIC RICHMOND, Louisiana
SUZAN DelBENE, Washington
HAKEEM JEFFRIES, New York
DAVID N. CICILLINE, Rhode Island
SCOTT PETERS, California
ZOE LOFGREN, California
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia

JOE KEELEY, *Chief Counsel*
JASON EVERETT, *Minority Counsel*

CONTENTS

FEBRUARY 2, 2016

PROMOTING AUTOMOTIVE REPAIR, TRADE, AND SALES (PARTS) ACT OF 2015

TUESDAY, FEBRUARY 2, 2016

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Committee met, pursuant to call, at 4 p.m., in room 2141, Rayburn House Office Building, the Honorable Darrell E. Issa, (Chairman of the Subcommittee) presiding.

Present: Representatives Issa, Collins, DeSantis, Nadler, Conyers, Chu, Jeffries, Cicilline, Lofgren, and Cohen.

Staff Present: (Majority) Vishal Amin, Senior Counsel; Eric Bagwell, Clerk; and (Minority) Jason Everett, Minority Counsel.

Mr. ISSA. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order. Without objection, the Chair is authorized to declare a recess of the subcommittee at any time. We welcome everyone here today for a hearing on H.R. 1057, the "Promoting Automotive Repair, Trade, and Sales Act of 2015," otherwise known as the PARTS Act. I will now recognize myself for an opening statement.

This afternoon's hearing is about an important piece of pro-consumer legislation, the PARTS Act. It is narrowly focused and designed to once and for all call, appropriately, attention to the use of ornamental patents for broader than their original purpose. For a great many years, patents, known as design patents, were clearly understood to be ornamental, meaning if someone were to duplicate the appearance of a patented product, they would be violating that look for a period of 14 years. Under the PARTS Act, this is a limited bill. It relates only to car parts that are typically replaced after collision, and it allows a limited exemption to the design patents so the aftermarket parts of like use, of form, fit, and quality can be available for basic repairs.

This does not mean that marginal or low quality parts are by definition to be considered as acceptable. In no way, shape, or form is this about the quality, as we all know, and we know too well, automobile companies around the world have made magnificent automobiles. They also made the Pinto, the Vega, the Yugo, the Lada, and I need not go on to tell you there have been cars that have been shoddy in their manufacturer, unreliable, and yes, I

have visited the Corvair Museum. There are cars with other notability. But in this case, we are simply creating a balance between the rights of the manufacturer to produce an ornamental design and protect it for a period of 14 years from its competitors, people who would produce a similar automobile look. That is the intent of a design patent. It was never intended to be, in fact, a substitute for the ability to simply repair a portion of something you have purchased.

Now, let's understand the automobile industry is unique. They do create rolling pieces of art. Those rolling pieces of art should, in fact, enjoy their distinctive advantage. However, it is notable that it is very seldom does General Motors sue Toyota, Toyota sue Honda, or any of them sue Mercedes when they make cars that are so close together that even their commercials find it hard to find the automobile that matches. They make fun of how similar cars look and yet, you do not see automobile patent suits related to their design patents, meaning the auto companies do not consider there to be a great value to the design patents when they are looking at similar designs between automobile companies. Having said that, the very lucrative auto aftermarket business related to collision parts is an area in which the auto companies have attempted to establish greater and greater exclusivity. And I support that exclusivity, but for a limited period of time. The PARTS Act is intended, recognizing that an automobile exceeds $30,000, and one would spend three or four times that if you were to buy it in parts from the manufacturer that in fact, instead of pounding out a fender, welding or bondoing it, an affordable replacement in a competitive market is in the best interest of safety, and of course, the consumer.

Additionally, a healthy aftermarket means more affordable parts for everyone, and particularly in the case of small production, or out of date older automobiles, or automobiles that are no longer produced, such as the Saturn or the DeLorean, or for that matter, the 1965 Mustang. These parts, without the PARTS Act, if a healthy aftermarket industry does not exist, will not and are not typically made at an affordable price by the manufacturer. Manufacturers do not want to have a lifetime responsibility to keep a set of tooling to make a part. If they did, certainly they would be a desirable place for the classic car repair business. People in Europe already enjoy some of the considerations that are in the PARTS Act, and for a good reason. The consumer has an expectation that it is, and a reasonable expectation, that there will be a competitive market for repair parts for their automobile. There certainly is for brake pads. Why would there not be for a bent fender? I look forward to working with people on both sides of the aisle, and on both sides of this issue to ensure we make the kind of limited, narrow, and appropriate changes to the patent law to allow automobiles to be repaired, while in fact protecting the intellectual property of the auto manufacturer or any other original equipment producer now or in the future.

[The bill, H.R. 1057, follows:]

I

114TH CONGRESS
1ST SESSION

H. R. 1057

To amend title 35, United States Code, to provide for an exception from infringement for certain component parts of motor vehicles.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 25, 2015

Mr. ISSA (for himself, Ms. LOFGREN, Mr. JOHNSON of Georgia, and Mr. SENSENBRENNER) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 35, United States Code, to provide for an exception from infringement for certain component parts of motor vehicles.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Promoting Automotive Repair, Trade, and Sales Act of 2015" or the "PARTS Act".

SEC. 2. EXCEPTION FROM INFRINGEMENT FOR CERTAIN COMPONENT PARTS OF MOTOR VEHICLES.

Section 271 of title 35, United States Code, is amended by adding at the end the following new subsection:

"(j)(1) With respect to a design patent that claims a component part of a motor vehicle as originally manufactured—

"(A) it shall not be an act of infringement of such design patent to make or offer to sell within the United States, or import into the United States, any article of manufacture that is similar or the same in appearance to the component part that is claimed in such design patent if the purpose of such article of manufacture is for the repair of a motor vehicle so as to restore such vehicle to its appearance as originally manufactured; and

"(B) after the expiration of a period of 30 months beginning on the first day on which any such component part is first offered to the public for sale as part of a motor vehicle in any country, it shall not be an act of infringement of such design patent to use or sell within the United States any article of manufacture that is similar or the same in appearance to the component part that is claimed in such design patent if the purpose of such article of

manufacture is for the repair of a motor vehicle so as to restore such vehicle to its appearance as originally manufactured.

"(2) For purposes of this subsection—

"(A) the term 'component part'—

"(i) means a component part of the exterior of a motor vehicle only, such as a hood, fender, tail light, side mirror, or quarter panel; and

"(ii) does not include an inflatable restraint system or other component part located in the interior of a motor vehicle;

"(B) the term 'motor vehicle' has the meaning given that term in section 32101(7) of title 49;

"(C) the term 'make' includes any testing of an article of manufacture; and

"(D) the term 'offer to sell' includes any marketing of an article of manufacture to prospective purchasers or users and any pre-sale distribution of the article of manufacture.".

SEC. 3. CONFORMING AMENDMENT.

Section 289 of title 35, United States Code, is amended—

(1) in the first paragraph, by striking "Whoever" and inserting the following:

"(a) IN GENERAL.—Whoever";

(2) in the second paragraph, by striking "Nothing" and inserting the following:

"(c) RELATIONSHIP TO OTHER REMEDIES.—Nothing"; and

(3) by inserting after subsection (a), as designated by paragraph (1), the following:

"(b) INAPPLICABILITY.—This section shall not apply to an act described in paragraph (1) or (2) of subsection (a) if that act would not be considered an act of infringement under section 271(j)".

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act shall take effect upon the expiration of the 90-day period beginning on the date of the enactment of this Act and shall apply to any patent issued, or application for patent filed, before, on, or after that effective date.

○

Mr. ISSA. I look forward to our witnesses today, and I look forward to working with the Chairman and Ranking Member on this area as we move forward with the PARTS Act and it gets signed into law. I now would like to recognize the Ranking Member of the Subcommittee.

Mr. Nadler from New York, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman. Today, we consider H.R. 1057, the "Promoting Automotive Repair, Trade, and Sales," or "PARTS Act of 2015." This legislation introduced by Chairman Issa and the gentlewoman from California, Ms. Lofgren, would reduce the term of design patent protection for exterior automotive repair parts like fenders, side view mirrors, and headlights from 14 years to two and a half years. Supporters see it as a pro-consumer bill to foster much needed competition in the collision repair parts market. But opponents see it as an unfair exemption to established patent law at the expense of one industry, with potential safety implications. Each side makes compelling arguments, and I appreciate the opportunity to examine these issues in greater detail today.

According to supporters of the PARTS Act, thousands of consumers each year pay artificially inflated prices for car repairs because auto manufacturers control more than 70 percent of the market for repair parts. To make matters worse, they say, manufacturers have recently begun to enforce their design patents against generic parts makers, threatening to eliminate whatever competition currently exists for aftermarket parts. Without the PARTS Act, they argue, consumers could see already high prices soar even higher as the generic market shrinks and automakers seize a near monopoly on repair parts. These consumers see a market with little competition, and wonder why there is a thriving market for generic drugs, but not for generic taillights. According to some estimates, since generic auto parts can cost up to 50 percent less than brand name alternatives, consumers would pay over $1 billion a year more for repair parts if the independent market were to be eliminated altogether. And if repair parts cost more, insurance companies will be forced to raise their rates too, further hurting consumers.

The PARTS Act would provide automakers 30 months of design patent protection for aftermarket products, long enough, supporters argue, for automakers to receive a healthy return on investment, but not so long that it would stifle the competitive market for repair products that consumers deserve. And car companies would still retain a full 14 years of protection against other automakers that might seek to copy their designs on new cars, since the bill only applies to repair parts. But this begs the question why single out only one industry for weaker patent protection? Opponents of the PARTS Act believe it would set a dangerous precedent in intellectual property law. They fear a slippery slope in which more and more industries are carved out for special treatment under the patent system, leading to a system that is both incoherent and unfair. How should we draw the lines between which industries are deserving of full protection, full 14-year protection, and which are not? We may not always appreciate the aesthetic design of a car's component parts, but automakers invest significant resources to de-

sign every aspect of their products so that they stand out to potential buyers.

Opponents of the PARTS Act argue that it would be unfair to deprive these manufacturers of the full return on their investment. They also note that auto manufacturers employ nearly 30,000 people in the U.S. in design centers. We risk losing some of these jobs if we reduce the incentives for automakers to create the innovative designs. Opponents further warn that the bill could threaten the safety of unsuspecting consumers who purchase a generic repair part, which may be of lower quality than its brand name equivalent. If a generic bumper looks identical but provides insufficient protection in an accident, it is certainly no substitute. As we examine the PARTS Act, we should consider whether additional safeguards ought to be put into place to protect consumers from shoddy parts before encouraging a significantly larger market for such generic products. Today's hearing hopefully will help us to determine the answers to these and other important questions, as we examine the proper balance between respecting the rights of creators and ensuring that customers enter a safe, competitive marketplace. We have an excellent set of witnesses to help us sort through these issues, and I look forward to their testimony. I yield back the balance of my time.

Mr. ISSA. I thank the gentleman. We now go to the gentleman from Michigan, the home of most, but not automobiles.

Mr. CONYERS. All the big three.

Mr. ISSA. Oh, yes, but Cleveland rocks. Thank you, Mr. Chairman. I will now recognize the gentleman from Michigan.

Mr. CONYERS. Thank you so much, Mr. Chairman. Members of the Committee, this bill would create an exception for certain automotive parts from patent protection, and so we should review the bill's impact on patent law, but also on consumers. To begin with, we should consider whether the exception in this bill to design patent law undermines our intellectual property system. Intellectual property protection is a cornerstone of our economy. This legislation, however, creates an exception for design patents, and could arguably weaken our patent system. It could foster the importation and sale of all unauthorized copies of patent protected vehicle parts. Automotive companies make significant investments in the development of new exterior automotive parts. Then they acquire a design patent so other companies cannot use these designs without their approval. Our patent system protects the patent holder, as it should.

Now, if Congress is going to legislate a carve-out in patent law, the reasons for it should be exceptional. Supporters of this legislation contend that Congress needs to create an exception because the cost of replacement parts offered by car companies is too expensive. They argued that lower prices would benefit consumers who need to make repairs to their vehicles. But automotive manufacturers may raise prices on new cars to replace lost revenue parts that would otherwise infringe their design patents are allowed on the trade market. This will hit consumers' pocketbooks when they go to purchase new cars and trucks, and it will hurt car companies who are still getting back on their feet. We have heard this cost argument in other situations, but if we weaken the patent system

by creating an exception, we will be weakening the incentive for companies in every industry to be innovative and to bring new products to market. Finally, we must consider how the bill would impact consumer safety. I am concerned that off brand parts in general may be less safe than those provided by car companies because there are no Federal regulations requiring minimum safety standards for off-brand parts. In fact, the vast majority of these parts are never subject to inspection by third party testing organizations.

Without Federal minimum safety standards on the quality of non-original replacement parts, consumers' safety may be at risk. Consumers already have a difficult time telling the difference between a quality part and an inferior or even dangerous one. An exception to patent protection as proposed by the measure under examination this afternoon could make this problem worse. While a part protected by a design patent is not necessarily a guarantee of quality, the fact is, is that if car companies churn out inferior or defective parts, they are ultimately held accountable. I am sympathetic to the consumer cost concerns that supporters of this bill are raising today. But I am not yet convinced that such an exception will bring forth the benefits they claim will come. While there is no guarantee that the insurance companies will pass savings onto consumers, what is guaranteed is that if this bill passes, there will be more unregulated, untested car parts on the market, and we will see many more groups seeking exceptions to our patent laws. And for these reasons, I come to this hearing skeptical of creating an exception in our design patent laws as envisioned by the measure before us today. And I thank the Chairman, and yield back.

Mr. ISSA. I thank the gentleman. I now ask unanimous consent that the Chairman of the full Committee, Chairman Goodlatte's opening statement be placed in the record. Without objection, so ordered. Without objection, other Members' opening statements will be made a part of the record.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Good afternoon. Today's hearing will look at design protection to determine whether amendments should be made to the law to limit protection for component parts of automobiles.

Chapter 16 of the Patent Act allows an inventor a design patent for any new, original, and ornamental design for an article of manufacture.

However, the chief limitation on the patentability of designs is that they must be primarily ornamental in character.

If the design is dictated by the performance of the article, then it is judged primarily functional and ineligible for design patent protection.

Combined with the cost of patenting, this explains why some inventors, including car companies, have traditionally filed for relatively few design patents. However, auto manufacturers assert that automotive suppliers lose upwards of $12 billion annually to counterfeit products. And at least one prominent car company invests $100 million or more in the design of each new car line.

There has been a recent increase in the number of applications for design patents for individual parts of vehicles. This has raised the ire of those who work in the automotive aftermarket parts industry. Independent garage owners fear they will go out of business if the Patent Act is used by the auto manufacturers to obtain design

patent protection for more and more individual parts rather than for the design of the car as a whole. Insurers worry that the cost of insuring vehicles will increase for consumers if manufacturers aggressively assert these rights because there will be less competition for replacement parts.

The aftermarket parts industry argues that we cannot afford to maintain the legislative status quo on patent designs. It argues the auto manufacturers are filing more design patents under current law to reap more profits, meaning the independent garages could lose a war of attrition.

Representative Issa has introduced H.R. 1057, better known as the PARTS Act. While the bill does not prevent auto makers from patenting designs on replacement parts, it greatly reduces the time period during which they may sue competitors for patent infringement from 14 years to 30 months.

Today we will weigh these competing interests and the consequences of establishing the precedent of creating an exemption to design patent law. I remain open-minded on this issue and look forward to the testimony that we will receive.

I think we have a great panel assembled today and I look forward to hearing from all of our witnesses.

Mr. ISSA. Today, we have a distinguished panel before us, two witnesses for the bill, two witnesses who are skeptical, as the Ranking Member said. The witnesses' opening statements or written statements have been entered into the record in its entirety, and I ask please for you each to summarize in approximately 5 minutes. If you can stay within the time, it will allow us not only to get through your opening statements, but through a robust set of questions from this side of the dais, and still adjourn before our votes, which will come some time probably shortly after 5.

Before I introduce the witnesses, and pursuant to the Committee's rule, would all four of you please rise to take the oath? And please raise your right hands.

[Witnesses sworn.]

Please be seated. Let the record reflect that all witnesses answered in the affirmative. Our witnesses today include Mr. Jack Gillis, director of public affairs for Consumer Federation of America; Ms. Kelly Burris, intellectual property attorney and owner of Burris Law Firm, PLLC; Ms. Pat Felder, owner and founder of Felder's Collision Parts. And which city in Louisiana, ma'am?

Ms. FELDER. Baton Rouge.

Mr. ISSA. Baton Rouge. I love to just say that. That is such a pretty, pretty city. And Mr. Dan Risley, president of the Automotive Service Association. Again, your entire written statements will be placed in the record, and Mr. Gillis, you are first up.

Mr. GILLIS. Thank you very much.

Mr. ISSA. I am afraid, Mr. Gillis, for the record, if you could either turn on your mic, or pull it closer, or both.

Mr. GILLIS. It was off.

Mr. ISSA. Thank you.

TESTIMONY OF JACK GILLIS, DIRECTOR OF PUBLIC AFFAIRS, CONSUMER FEDERATION OF AMERICA

Mr. GILLIS. In addition to representing the Consumer Federation, I am also representing the Advocates for Highway and Auto Safety, the Center for Auto Safety, Consumers Union, which is the policy and research arm of Consumer Reports, and Public Citizen. We are extremely grateful for your invitation to appear today. I would like

you to consider any of the following experiences, which happen every day. You back into a pole, you sideswipe your car, and fortunately, these fender benders generally do not result in injuries, but they do result in shocking repair costs. Why does a fender bender have to cost $2,000 to $3,000 to get your car fixed? Well, one reason is the cost of the parts that we need to get our cars repaired. For example, Ford charges the same price for a fender as Dell charges for a computer and a flat screen monitor. An unpainted door from Toyota costs the same as a Sears refrigerator, and that refrigerator comes with two doors already painted and already installed.

In fact, a variety of products are cheaper and better today thanks to one thing, competition. In the early 1990's, the car companies asked Congress for special design copyright patent protection on these replacement parts and Congress said no. Blatantly ignoring Congress' admonition, there has been an enormous spike in the number of design patents by companies like Honda, Toyota, and Ford. For these companies to come before you today and say that suddenly, these parts are patentable, when for years and years they were not, is both disingenuous and extraordinarily costly for the American consumer. This is a newfound business strategy, not a legitimate use of U.S. patents. The competition that the car companies are trying to kill lowers prices, provides choice, and improves quality. When we plunk down our hard-earned dollars for a new car, we are buying a car, not a lifetime of indenture to the car companies to buy their brand of parts.

Regarding the safety of these parts, the very organization cited by the car companies, the Insurance Institute for Highway Safety, did address this issue, and determined in both low-speed damage tests and high-speed crash safety tests, that alternative parts, CAPA certified to be the same, in fact performed nearly identically. I have been fighting for safer cars for over 35 years, and I find it bizarre that the car companies are coming before this Committee to allege that their illicit use of design patents is for safety reasons. This very Congress has caught these car companies red-handed, foisting unsafe air bags, ignition switches, and other defects on their very own customers. In fact, in addition to cheating on fuel economy standards for the last 2 years, about three times as many cars have been recalled as have been actually sold. The most tragic irony of the lack of competition is what I call the automaker's double whammy. Not only can the car companies charge whatever they want for the parts that we need to fix our cars, but when they charge so much that the car is totaled, our only recourse is to go back to them and buy another one of their products. Imagine that business model.

And here is the icing on the cake. In spite of all of their admonitions against competitive parts, Ford, GM, and Chrysler have all entered into special agreements, specifically allowing independent manufacturers to make their patented parts with no oversight or specifications. Are not these the very parts that they are railing against? Nevertheless, because of these patents, they are getting royalties for the manufacture of the very parts they are telling this Committee should not exist. That, to me, is the height of hypocrisy. So we applaud Representatives Issa and Lofgren for introducing

H.R. 1057. It is a step forward in protecting the American consumer from being forced to pay unfair prices to fix our own cars, while still enabling the car companies to retain the design patent protection on the overall vehicle. So on behalf of the Consumer Federation of America, the Advocates for Highway and Auto Safety, the Center for Auto Safety, Consumers Union, and Public Citizen, I strongly urge Congress to adopt the repair clause to the design patent law. And we thank you very much for providing us with the opportunity to discuss this issue we did today.

[The prepared statement of Mr. Gillis follows:]

Statement of Jack Gillis, Director of Public Affairs,
Consumer Federation of America

On behalf of the

Consumer Federation of America
Advocates for Highway and Auto Safety
Center for Auto Safety
Consumers Union, the policy and advocacy arm of Consumer Reports
and
Public Citizen

Before the House Judiciary Subcommittee on Intellectual Property, Competition, and the Internet
Hearing on H.R. 1057, the "Promoting Automotive Repair, Trade, and Sales Act"

February 2, 2016

Chairman Issa, Ranking Member Nadler, and Members of the Subcommittee, my name is Jack Gillis, and I am Director of Public Affairs for the Consumer Federation of America. In addition to the Consumer Federation of America, I also am testifying today on behalf of Advocates for Highway and Auto Safety, the Center for Auto Safety, Consumers Union, the policy and advocacy arm of Consumer Reports, and Public Citizen. We are grateful for your invitation to appear today on an issue of tremendous importance to millions of Americans – the maintenance and repair of automobiles.

Consider any of the following experiences, which happen to thousands of Americans each year: you back into a pole at a shopping mall; someone in front of you stops suddenly and your bumpers collide; or, you inadvertently sideswipe your car in a cramped parking lot. Fortunately, few of these "fender-benders" result in injuries, but they often result in shocking repair bills.

Why are these repair bills so high? One reason is the cost of the parts for the needed repairs. For example, Ford charges the same price for a fender as Dell charges for a high speed computer and flat screen monitor. A simple grill for your car costs the same as a combination flat screen TV/DVD player. An unpainted door from Toyota costs the same as a Sears's refrigerator. And, the refrigerator comes with *two* doors, already painted and installed! You'll typically have to pay someone an additional $500 or more to paint and install the Toyota door. General Motors charges the same price for a rubber bumper cover as Garmin charges for a full color GPS, programmed with directions and maps to anywhere in the United States. The fact is,

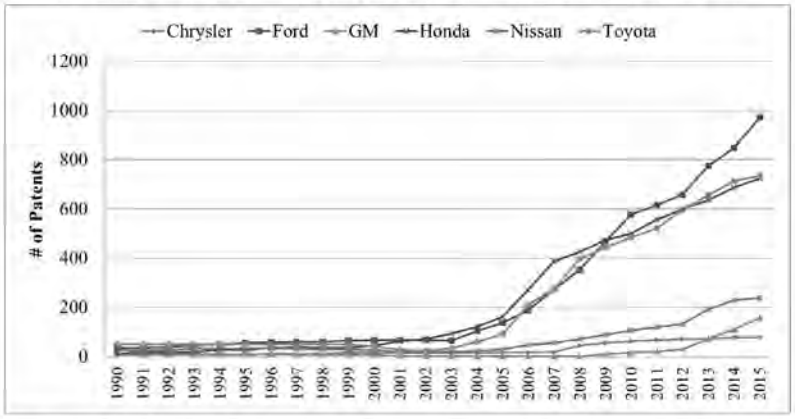
computers, TVs, refrigerators, and GPS systems are cheaper and better today than five years ago for one reason – "competition".

In the early 1990s, the car companies came to Congress and asked for special design copyright protection on these replacement parts and Congress said no. Our concern today is that the car companies are now using design patents, not for the important and legitimate protection of the overall design of their vehicles, but to prevent competition when it comes to getting the parts we need to repair our vehicles.

Over the past several years, there has been an enormous spike in the number of design patents on crash parts, which companies like Honda, Toyota, and Ford have received on their external crash parts. (See chart below.) Historically, while car companies have understandably received design patents on the overall design of a car, only recently have they begun to seek patents on the individual replacement crash parts.

DISTURBING TREND: COLLISION REPAIR PART DESIGN PATENTS GRANTED

Cumulative Numbers of Collision Repair Part Design Patents Granted to Major Car Companies



The number of design patents awarded to the major car companies on collision repair parts has increased dramatically since the 1990s, after Congress said NO to their strategy to enact legislation providing copyright protection for repair parts. **Note 1**: The term "collision repair parts" includes bezels, bumper covers, deck lids, door shells, fenders, fascias, front/rear grilles, header panels, headlamps, high-mounted brake lights, hoods, pickup beds, pickup box sides, quarter panels, radiator supports, side markers, side mouldings, tailgates, taillamps, and wheel houses as defined by the Certified Automotive Parts Association at http://www.capacertified.org/whatparts.asp. **Note 2**: Figures shown are cumulative. **Note 3**: Data based on design patents issued through December 31, 2015.

In May of 2008, Ford filed a section 337 complaint at the International Trade Commission (ITC) against manufacturers and U.S. distributors of auto exterior repair parts on the 2005 Ford Mustang. This complaint followed on the heels of the previous section 337 complaint filed by Ford relating to the Ford F-150, which resulted in the effective elimination of a competitive choice for seven exterior Ford F-150 repair parts. As a result of a court settlement in April 2009, which ended legal actions on the Ford F-150 and Mustang, today the millions of F-150 and Mustang owners in the U.S. have limited alternative options for quality replacement collision parts. The settlement awarded one aftermarket competitor with a temporary, exclusive license to distribute aftermarket Ford parts. This was a further detriment to the consumer, who has had to shoulder the added cost of the royalty in the increased prices of parts. The settlement in 2009 was limited and temporary in nature between one car company and one distributor, leaving consumers open to whims and exploits of the car companies. Since then, the royalty agreement has been extended in time frame, and to other manufacturers -- for the one distributor.

This type of design patent enforcement action that began with the Ford F-150 emerged as a new business strategy for automakers. As automakers continue to ramp up their design patents on crash parts, the possibility of many additional design patent enforcement actions being brought at the ITC (or in the federal courts) continues to be very real. The cost of defending such cases is enormous. Even defending just a small number of such cases could easily drive competitors out of business altogether, regardless of whether they ultimately were to win on the merits.

What is particularly disturbing about the action taken by the car companies is that they are only selectively putting design patents on those parts where competition, albeit limited, is available.

Quality and Safety Must be Paramount for All Parts

The consumer organizations supporting this effort do so with the insistence that all parts, whether they be service parts sold by the car companies or parts made and sold by independent companies, must not compromise the integrity or safety of the vehicle. Not only do consumers have the right to competition, but they have the right to safe and high quality competitive parts.

We take a back seat to no one on insisting that all parts meet rigorous standards for safety and quality. However, there is no reason to allow patent law to be misused to block availability of more affordable alternative parts that are just as safe and high-quality.

So What Does This Mean for Consumers?

For over 25 years, consumers have benefited from competition, albeit limited, between car company brand replacement parts and independently branded parts. Such competition, where it exists, lowers prices, provides choice, and improves quality. In fact, many independent brand parts have lifetime warranties, something the car company parts lack. Unfortunately, however, car companies still have a 73% market share, competitive suppliers have 12%, and the remainder comes from recycled parts. Without congressional intervention, automakers will be able to hijack design patent laws to capture the entire collision repair parts market. Who are the victims if Congress does not intervene? The thousands of Americans who experience low-speed collisions each year.

It's no surprise the car companies don't want competition. Competitive replacement crash parts are typically 34% - 83%[1] less expensive. Car companies would have to lower their own prices for car company brand replacement crash parts to compete.

Elimination of Competition will Increase the Cost of Repairs

Right now, the elimination of competition from independent brand crash repair parts would cost automobile owners more than $1 billion a year.

The lack of competition for repair parts will seriously harm consumers. Already-high accident repair costs could skyrocket. Right now, in low-speed crash tests conducted by the highly respected Insurance Institute for Highway Safety, the cost of a simple 5 mph bump into a pole can cost thousands of dollars to fix. Why does it cost so much to repair these vehicles? Because the car companies are able to charge monopolistic prices because of lack of competition.

Eliminating Competition Will Increase Insurance Premiums for Consumers.

If the automakers succeed in using design patents to eliminate competition for crash parts, it will not only result in higher repair costs, but also higher auto insurance premiums. When collision repair crash parts cost more, insurers will have no choice but to pass those cost increases on to their policyholders in the form of higher rates. In addition, in the face of already

[1] Analysis of the Impact of Banning Aftermarket Parts. Property and Casualty Insurers Association of America. January 19, 2010.

rising insurance premiums, many consumers are opting for higher deductibles. That means that more of these exorbitant crash repair costs will be coming directly out of consumers' pockets. This will have a disproportionate impact on low- and fixed-income consumers.

Eliminating Competition in Crash Parts Could Diminish Safety.

On the safety side, tragically, as the cost of needed repair parts rises, many consumers will be forced to forgo or delay needed repairs, leaving them with a vehicle that may not offer needed safety. Delaying or ignoring the replacement of a headlight, side mirror, or brake light could have serious safety implications. Consumers with low incomes, seniors on fixed incomes, and those consumers who pay for crash repairs out of their own pockets may not be able to afford needed repairs.

Eliminating Competition Will Result in More "Totals".

Higher repair costs due to less competition among the parts needed to repair our cars will force insurers to "total" more vehicles because the cost of repairing otherwise repairable vehicles no longer makes economic sense. Consumers lose when a vehicle is needlessly totaled. First of all, consumers who owe more on the car than it is worth will be left with debt payments for a loan on a non-existent car. In addition, total losses not only hurt the body shop industry by providing fewer vehicles to repair, but a needlessly 'totaled' vehicle can also harm the environment.

Eliminating Competition Protects the Automakers "Double Whammy".

The most tragic irony in the lack of competition is what I call the automakers' "double whammy." Not only will the lack of competition allow car companies to charge whatever they want for the parts we need to fix our cars, but when they charge so much that the car is "totaled," our only recourse is to go back to them and buy another one of their products.

The bottom line: If automakers succeed in eliminating competition, the cost to consumers will be enormous.

Unless Congress addresses the automakers' misuse of design patents on their crash replacement parts, consumers will be faced with mounting repair bills, more 'totaled' vehicles, increasing insurance costs, and deferring necessary repairs affecting safety.

Congress Can Preserve Consumer Access to Affordable, Competitive and Quality Crash Parts by Adopting a "Repair Clause" in the Design Patent Law.

HR 1057 is not a perfect solution. Allowing the car companies to place patents on parts for the purposes of preventing competition is just as wrong for 30 months as it is for 14 years. Shortening the time period by which you allow monopolistic market behavior does not make that monopolistic market behavior acceptable. Two years ago, Congresswoman Lofgren proposed a truly elegant solution to the problem: Allow the car companies the right to patent parts for the purposes of protecting their designs from being copied by competing car companies, but also allow the independent production of such parts when they are used solely as replacement repair parts. At that time, powerful car company and manufacturing lobbyists blocked Representative Lofgren's efforts to protect consumers from car companies' monopolizing replacement repair parts. In the face of this intense lobbying to protect the use of design patents to prevent competition, HR1057 represents a compromise. We appreciate the commitment and leadership of Representatives Issa and Lofgren in developing HR1057 as an important step forward in better protecting the American consumer from being forced to pay unfair prices for the parts we need to fix our vehicles. It is now time for Congress to embrace HR1057 and open the market to competitively priced, high-quality alternatives to the expensive car company brand parts. By providing a "repair clause" in the design patent law, Congress will be providing consumer choice and promoting an open and competitive market for repairs, while enabling the car companies to retain the design patent protection on the overall vehicle.

HR1057 is an important step forward in eliminating the increasingly unfair, unacceptable, and unnecessary practice of using design patents to prevent competition. By establishing this "repair clause" in the design patent law, Congress will be preserving the consumer's access to a competitive marketplace for quality alternative crash parts. Such a repair clause would establish a very narrow, practical exception to the design patent law so that if a car company does receive a design patent on a replacement part, independent companies could still make and distribute competing parts for the sole purpose of repairing the vehicle. Such a very narrow practical exception to the design patent law would not – and rightly should not – interfere with an automaker's right to prevent competing car companies from using their patented vehicle and part designs.

Design does play an important role in consumers' original choice of a car. However, after the purchase, consumers need the meaningful repair choices. When we plunk down our

hard-earned dollars for a new car, we are doing just that, buying a car, not a lifetime indenture to the car company to buy their parts. It is simply not fair for consumers to be forced to pay monopolistic prices for needed crash repair parts.

Other markets have successfully addressed and solved this problem. Nine European countries and Australia have enacted what is called a "repair clause" law, whereby the making and use of a matching exterior auto parts to repair an automobile is not an act of infringement, even though the original part is design protected. The adoption of such a law, EU-wide, is now under active consideration. American consumers deserve no less.

Consumer Federation of America, Advocates for Highway and Auto Safety, the Center for Auto Safety, Consumers Union, the policy and advocacy arm of Consumer Reports, and Public Citizen believe that a competitive crash parts marketplace, which has been evolving over the past few decades, has served consumers well. On behalf of these groups, I strongly urge Congress to adopt a repair clause to the design patent law and pass HR 1057. American consumers will thank you for ensuring a competitive market resulting in high quality, fairly priced alternatives to expensive car company brand parts.

We look forward to working with the Committee to advance this important legislation. Again, thank you for providing me the opportunity to discuss this important issue with you today.

Mr. ISSA. Thank you. Ms. Burris?

TESTIMONY OF KELLY K. BURRIS, INTELLECTUAL PROPERTY ATTORNEY, BURRIS LAW, PLLC

Ms. BURRIS. Good afternoon, Chairman Issa, Ranking Member Nadler, and distinguished Members of the Subcommittee. Thank you for the opportunity to be here today, and to share my views on another version of the PARTS Act, the PARTS Act of 2015, on none other than Groundhogs Day. I cannot be the only one that noticed that, right? So I have serious concerns with the legislation and the impact it would have in three primary areas. First of all is jobs, good, high paying, white-collar jobs. Second, as we have all been discussing, the safety, and the quality of the vehicles. And third, more important to me, is the impact it would have on our legal system, and more specifically, the degradation of our patent systems. So jobs, briefly, which was set forth in more detail in my written statement, in the United States, this is a hub for industrial designers in the United States for automotive vehicle design. You have 15 OEMs with 21 design centers in the United States, in Michigan, in Ohio, and in California. Those design centers employ roughly 30,000 industrial designers and there is to the tune of billions of dollars being spent in the United States on the look of that car, something that is eye pleasing to the consumers.

And so, this is a hub for industrial designers here in the United States. And in a time when we are pushing STEM education to our youth, I just find it odd that we are pushing students to go that direction, but yet devaluating what it is that an industrial designer produces as a result of their engineering efforts. So number two is the safety and quality, which we will I know talk about more. And one of the things I do not think we have really flushed out a lot is we are not looking at these parts in a vacuum. These parts, these exterior parts of the vehicle, are part of an overall system. And as the automotive manufacturers are putting collision avoidance technology into the vehicles, lane avoidance, lane detection, there are sensors all over the car. And are we looking at the interaction between those sensors and the exterior parts? And what if you replace a part that does not have the same quality standards, will it function the same with the rest of the system? And as we move toward autonomous vehicles, I think that situation gets a little more intense, so that is something I think we should have a conversation around. Third and more important to me as a patent attorney is, okay, so we carve out this exception for repair parts. What is next? I drop my smartphone on the floor. I have to get it repaired. It is too expensive. Do we go to Apple and Samsung and say, "Hey, guys, guess what? We are going to take away your design patents, too" because they have many more design patents, and I would love to look at a curve of what their design patents look like in that industry, especially after the Apple-Samsung case.

Secondly, I think the practical impact of the 30 months is really—amounts to much less than 30 months if any term whatsoever, because it is from the date of the offer for sale, and automotive manufacturers, any design patent applicant does not have that design patent in hand as soon as they go launch their product at an auto show, at a trade show, off to the trimmers. So by the time the

consumer gets in the car and hits the road, I do not think you are going to see any patent term at all, so that 2-1/2 years does not—it is not 2-1/2 years from a practical standpoint. The language of the bill also talks about motor vehicles. It is not automobiles. We are talking about motorcycles, scooters, farm equipment. If you look at Caterpillar, Harley-Davidson, they own hundreds of design patents themselves, so this is reaching into other industries besides automotive. So that is another concern that I have. And I know that there has been discussions about this type of legislation being enacted in Australia and also in Europe, but I have not seen any facts to show what impact that is having in those countries. And I will also note that the deliberations in the European Union, they are talking about making sure that those parts are being marked and that there is compensation to the original design patent owner. So I will stop my remarks there, and I thank you for your time, and I look forward to our discussions today.

[The prepared statement of Ms. Burris follows:]

WRITTEN STATEMENT OF KELLY K. BURRIS
Burris Law, PLLC

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

Hearing on: H.R. 1057, the "Promoting Automotive Repair, Trade, and Sales Act of 2015" ("PARTS Act")

Tuesday, February 2, 2016 – 2:00 p.m.
2141 Rayburn House Office Building

Chairman Issa, Ranking Member Nadler, and members of the Subcommittee, thank you for the opportunity to be here again. My name is Kelly Burris, and I am a patent attorney in private practice with my own firm of Burris Law, PLLC. I have been practicing patent law for over sixteen (16) years, I am an adjunct professor of intellectual property law at Thomas M. Cooley Law School, and previously, a design engineer in the aerospace industry for over eleven years. I appreciate the opportunity to share my views on H.R. 1057, the Promoting Automotive Repair, Trade and Sales Act of 2015 (PARTS Act).

As in 2012 with H.R. 3889, and before that in 2010, I continue to share the concerns that this type of legislation would lead us down a slippery slope. If an exception for automotive repair parts is made, what will be next, and when will it stop? More importantly, I believe that innovation in automotive design, and potentially the entire industrial design community, will be stifled by legislation of this nature.

As a patent practitioner, and formerly a design engineer myself, I am familiar with the significant time and expense involved in new product development. Years of design and testing, many long nights and weekends away from families, missed vacations, and hundreds if not millions of dollars are spent refining the design before production "launch." These designers earned the right to call those parts their own for the period under which they bargained for under our patent laws, fourteen (and now fifteen under The Hague Agreement) years. Patents provide an incentive to be creative, why would we expect that creativity to continue when we remove the incentive?

Instead of a quid pro quo, this legislation amounts to a quid pro nihil, or something for nothing for design patent applicants. Auto manufacturers consistently lead the world in R&D spending, to the tune of about $18 billion a year in the US and over 100 billion globally. Design protection encourages innovation and creates jobs in the United States. In fact, fifteen different Original Equipment Manufacturers (OEMs) – most of them headquartered outside the U.S. – maintain design centers in the U.S. to create vehicles that will appeal specifically to American consumers. According to the Alliance of Automobile Manufacturers, there are twenty-one separate design facilities in three states (Michigan, Ohio and California) that account for roughly 30,000 jobs. Being from Michigan and the Detroit area, and growing up in a blue-collar family that always instilled the values of working hard to create your own success, I find this legislation

to be moving in the wrong direction at the exact time that the auto industry is fueling the economy – as was noted with the 17.5 million record new car sales in 2015.

First, design patents are only one form of patents, and patents are only one form of intellectual property under our existing laws. There are three types of patents available under our current system: design patents, the intended target of the proposed legislation, which cover the ornamental appearance of an article of manufacture; utility patents, which generally protect how something works or how it is constructed; and plant patents, which protect asexually reproduced plants. These different types of patent protection are not exclusive of one another. A patentee may obtain both design patent protection and utility patent protection on the same part, where one covers the part's appearance and the other covers its utility.

Moreover, trademark protection is also available for certain designs, provided the design is a source identifier. For example, take the Jeep® grille, which is covered by both design patents and trademarks, and quite possibly utility patents. Similar to the overlap with design and utility patent protection, design patent protection and trademark protection are also not exclusive of one another. In other words, even if the design patent cannot be infringed, the trademark could be.

As another example, the way in which these exterior parts are fastened to the underlying structure is also often covered by utility patents. In fact, it is very common to engineer unique connection systems for wear replaceable items so that the design cannot be copied as easily. In essence, the repair parts that are the subject of the proposed legislation could be covered by a design patent, a utility patent, and a trademark, in some instances. As a result, from a legal perspective, the proposed legislation may not accomplish its objective without additional legislation to undercut both the Lanham Act (Title 15 – our trademark statute) and also utility patent infringement under our patent laws. From a practical perspective, the proposed legislation will not accomplish its objective because I think most consumers can agree that there is serious doubt that our insurance premiums will actually be reduced, which I will address in further detail below.

As previously put forth in prior discussions of the PARTS Act, non-OEM parts will likely be lower quality and present unknown safety risks without any controls on their specifications. In fact, testing has shown that non-OEM parts do not perform as they should and *do* present

safety risks[1]. Even the Chief Research Officer for the Insurance Institute for Highway Safety (IIHS) acknowledged that "You can't willy nilly change those parts, because the system won't work the way it was designed." [2] The revised version of the PARTS Act attempts to skirt this safety issue with its revised definition of a "component part." The component part definition now excludes "an inflatable restraint system or other component part located in the interior of a motor vehicle." This new exclusion misses the mark because exterior component parts, including the parts that make up their overall assembly, are designed in part to distribute loads that are introduced from an impact or crash.

What sub-standard non-OEM parts translates to for the brand owners, such as Ford, Chrysler, and GM, is a tarnishment of their image because the replacement part is presumed to be made by the OEM once the vehicle is back on the road. When the plastic is crazing or the chrome is rusting, consumers will likely think that the OEM does not make quality vehicles. And when the air bag does not deploy because a cheap imitation bumper beam was used in a repair, consumers will also conclude that the OEM does not make safe vehicles. Although the Lanham Act can protect some parts as I mentioned above, Under the Lanham Act, this erosion of their famous brands may be difficult to prove, especially if evaluated on the replacement part level. All the more need to maintain design patent protection for the parts that will keep us safe in our vehicles and maintain the quality that we as consumers have paid for and come to expect.

On the face of the proposed bill itself, I see at least one practical issue and a broader sweep than what might be intended. First, the language refers to "a period of 30 months beginning on the first day on which any such component part is first offered to the public for sale ... in any country." In other words, the patentee has 30 months from this offer for sale in which a third party would be liable for infringement of their design patent. The problem with this language is that there is often no issued design patent at the time of the offer for sale. In almost every instance, patent applications are filed just before the public disclosure, for example, on the eve of a big auto show or meetings with potential customers, or even suppliers. This is because changes to the design are constantly being made, and the designs are iterated and refined right up until the "release" date, or when the design is finally locked down. It is only after this date that the patent applications are filed in order to cover the actual final production design – which if granted then extends for 14-15 years.

---

[1] http://news.consumerreports.org/cars/2010/07/ford-tests-show-aftermarket-replacement-parts-can-present-safety-risk.html

[2] Id.

The average pendency for design patent applications in the USPTO (United States Patent and Trademark Office) currently stands at over one year[3], and for these particular designs in the classes of, for example, D26 – lighting, and D12 – transportation, the average is about one and a half years. So in effect, the proposed 30 months is actually about 12 months in the best-case scenario. I say best case because even when the part or vehicle is offered for sale, the vehicle does not actually get delivered and will not hit the road for months afterwards. The language of the bill broadly defines the "offer for sale" as "any marketing of an article of manufacture to prospective purchasers or users and any pre-sale distribution of the article of manufacture." The bottom line is that with every new vehicle introduction, the part will be "offered for sale" but the design patent will not issue until after the expiration of the proposed 30-month period. A patent cannot be enforced until it issues, and so what this amounts to is no patent term whatsoever for these design patents. In a nutshell, a patent applicant spends thousands of dollars and pays the government their fees, only to have nothing to show for it but a plaque on the wall that is rendered meaningless by the legislation we are discussing today. Where is the fairness in that?

The broader sweep I refer to above is with respect to the "motor vehicle" language, which is defined in section 32101(7) of title 49 as "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line." Accordingly, this language would also include tractors, motorcycles, mopeds, and motor scooters, among others. Caterpillar alone currently holds 271 design patents, and Harley Davidson is up to 155. And a closer look into all of the "motor vehicles" would reveal a number of industries with designers that would be equally impacted by this proposed legislation. Not only is there the danger that this legislation will open the door for other service industries to demand equal rights and their exception to design patent infringement, but it will also immediately pull in other motor vehicle design communities besides automotive.

I have heard more than once that design patents "just" cover the appearance, or what the article of manufacture looks like, as opposed to the utility or function of the article as provided by utility patents, as if utility or function were more important or more highly valued. True, utility patents can provide broader coverage through the language of the patent's claims; however, this does not correlate to more engineering and/or design effort on the front end to create that utility or function. Nor should the broader claim scope of utility patents diminish the

[3] http://www.uspto.gov/web/offices/ac/ido/oeip/taf/design.htm

value of industrial design. Industrial design is the bridge between engineering and the end consumer, and without it, I believe we would be living in a very dull and impractical world. Moreover, creating an exemption for automotive designs would underscore and conflict with the goals of Congress and the Administration to advance STEM (Science, Technology, Engineering, Math) education and advanced manufacturing.

Although the law dictates that a design must be "primarily ornamental," there *are* functional features of the design patents at issue. Take for example a hood with changing contour and lateral steps. The hood includes these features for structural stiffness, aerodynamics, and to accommodate engine components under the hood. The aerodynamic contour and lateral steps are functional, but the overall design is aesthetic or ornamental. Because there are alternative designs for this hood, the design is not solely dictated by its function, and thus it is protectable under our existing design patent laws. However, the aerodynamic contour and/or the lateral steps may not be enough to overcome the "nonobviousness" requirement under Title 35, Section 103, in order to provide utility patent protection. Therefore, a design patent fills the void and provides protection for the engineering and design effort put into this hood so that it cannot be unfairly copied. What I am saying is that design patents offer a unique form of protection for innovative and "eye-pleasing" products that otherwise would not be available. If the ability to obtain these design patents is pilfered, I'm afraid we will find ourselves back to the day of the K-Car.

The proponents of this bill claim that consumers "need options." Well, consumers have many options without a wholesale taking of the existing legal rights of our industrial designers. First, there are alternative designs currently on the market that can be used instead of the OEM parts. Take for example, the SEMA (Specialty Equipment Market Association) community. "SEMA members make, buy, sell and use all kinds of specialty parts and accessories to make vehicles more attractive, more unique, more convenient, faster, safer, more fun and even like-new again[4]." These aftermarket parts can be offered to the consumer as repair alternatives to the OEM parts, therefore providing that "consumer choice" everyone is looking for. So what if their vehicle doesn't look exactly like the originally manufactured version? As to the matter of symmetrical parts on the vehicle such as headlights or tail lights, when only one is damaged in an accident, why can't they be provided in pairs and the non-damaged version salvaged for another repair?

[4] www.sema.org/about-sema

More fundamentally, non-OEM suppliers should not be allowed to take the easy road and copy the patented design, and should instead be required to develop a "design around," just like every other industry. Take for example windshield wipers. The non-OEM suppliers and distributors routinely review OEM patents (and also non-OEM patents) to make sure that their replacement wiper blades do not infringe any patent claims. And this involves both design patents and utility patents. Still, their non-OEM replacement wiper blades are less expensive than the OEM blades. Why should there be a different standard for component parts covered by design patents under the proposed bill? Of course if a company is allowed to copy the design without expending any design effort, it will be cheaper - - where is the fairness in that?

Another option for the consumer is to repair or refurbish their damaged parts. There is a legal doctrine commonly referred to as repair/reconstruction[5]. In a nutshell, the purchaser of a patented article has the right to use, repair, modify, discard, and resell, subject to conditions of the sale. However, the rights do not include the right to reconstruct the entire patented article. I understand that repairing the damaged part may not be possible in every collision; however, it is an option that should not be ignored. And perhaps there could even be incentives to conduct such repairs more frequently in order to reduce the amount of landfill waste to support environmental initiatives.

And under the administration's now operational National Network for Manufacturing Innovation (NNMI)[6], additive manufacturing is a newer technology that is receiving unprecedented attention and could potentially be used to repair damaged parts. This technology is often referred to as "3D printing" and generally builds up objects by adding materials in very thin layers. As new U.S. manufacturing jobs are created in this technology, repair of automotive parts could be an industry that would feed that job growth.

The insurance industry says this bill will lower costs for consumers, but that has not been true in other countries that have passed similar provisions. A study conducted shortly after the enactment of the "Designs Act of 2003" in Australia concluded that the "provision was yet to have a significant effect on industry and consumers."[7] Moreover, the legislation overseas is *not* retroactive and only applies to new designs registered on or after the date of enactment,

---

[5] *Husky Injection Molding Systems Ltd. v. R & D Tool & Engineering Co.*, 291 F.3d 780 (Fed. Cir. 2002)

[6] manufacturing.gov/nnmi.html

[7] Attachment 1 – Australian Government Review of "Spare Parts" Provision in the Designs Act 2003, conducted December 2005

whereas the proposed PARTS legislation unfairly applies before, on, or after the date of enactment. And in Europe, the European Union is currently in discussions about how and how long to protect automotive repair parts, which *are* protected in various countries, including Germany.

The automotive industry has made a comeback, due in great part to the innovative and award-winning designs coming out of the OEMs. Why do we want to throttle that comeback and send a message to the industrial design community that their eye-pleasing designs are no longer valued?

Abraham Lincoln elegantly said: "The patent system added the fuel of interest to the fire of genius." Let's keep fueling job growth in the engineering community by maintaining the integrity of our patent system.

Thank you again for the opportunity to comment on the proposed PARTS legislation, and I look forward to answering any questions.

Mr. ISSA. Thank you, and I will mention that I had to get on three airplanes, one after another, and get off of them before I finally got on the plane that brought me here, so I feel groundhog is with us. Ms. Felder?

TESTIMONY OF PAT FELDER, OWNER AND FOUNDER, FELDER'S COLLISION PARTS, INC.

Ms. FELDER. Chairman Issa and Ranking Member Nadler, and Members of the Subcommittee, I am Pat Felder. My husband and I own Felder's Collision Parts in Baton Rouge, Louisiana. Felders is a small business, which has been making quality, lower-cost, aftermarket collision repair parts available in the marketplace since 1987. At the outset, I would also like to thank Chairman Issa and Representative Lofgren for their bipartisan leadership in sponsoring the PARTS Act, as well as the other House Judiciary Committee co-sponsors of this bill. I am testifying on behalf of all of the independent aftermarket distributors throughout the country, who have, like Felder's, been on the front lines of the car companies' efforts to eliminate competition through design patent enforcement. It has been a gut-wrenching experience having to lay off good, long-term employees who are all like family.

To help frame this issue, if you have ever been in a fender bender, and at that time you had your car repaired, you have benefited from competition in the collision repair part marketplace, whether you knew it or not. This competition has existed for decades between the car companies and the aftermarket industry. The collision repair parts to which I am referring are cosmetic in nature; the exterior parts of a car, such as a fender, a hood, or a grill; generally speaking, these parts are not structural or safety-related parts. The purpose of these parts is to restore the vehicle's original, pre-accident appearance. These are must-match parts that leave no room for innovation by alternative suppliers. The car companies currently have two-thirds of the collision repair market, while alternative suppliers have about 14 percent, with salvage making up the difference. Despite our relatively small market share, the competition that we provide is important because alternatively-supplied collision repair parts typically are 26 to 50 percent less expensive than the car company parts. But even if a consumer uses a more expensive car company part, the competitive marketplace has caused companies, car companies, to lower their collision part prices. The estimated total benefit to consumers from the availability of alternative parts is approximately $1.5 billion per year.

Despite the benefit of competition, some car companies are seeking to eliminate competition, and expand their dominant share of the market by obtaining 14-year design patents on their collision parts, and enforcing them against alternative suppliers. In 2005 and 2008, Ford filed design patent infringement complaints at the International Trade Commission against aftermarket suppliers of collision repair parts for the F-150 pickup truck and Mustang, respectively. Ultimately, these suits resulted in an exclusive settlement by which one of the aftermarket competitors must pay a royalty to Ford for every Ford aftermarket part it sells, a cost that will be passed along to the consumer. And for all of the aftermarket suppliers like Felder's, who are not part of this exclusive settle-

ment with Ford, we are at risk of design patent infringement suits if we continue to sell these parts as we have done in the past. As a result, Ford effectively created a duopoly, diminishing competition in the repair parts marketplace for owners of Fords. Since that time, Chrysler and General Motors have followed Ford's lead.

The impact of eliminating competition in the collision repair market falls directly on consumers in several ways. $1.5 billion would be added to insured automobile repair costs every year, resulting in higher premiums. Consumers paying out of pocket might choose to forego repairs, and higher repair costs may increase the likelihood of a vehicle being declared a total loss. The impact would be much greater on those of low income or fixed income consumers who can least afford it. Moreover, the average consumer keeps their vehicle for 11 or more years, and it depends on the competitive repair marketplace, not only for the affordable quality repairs, but also to the extent that the car companies no longer can sell these certain or do sell these certain collision parts. We are not here today to advocate for the use of one part over another. We believe that the PARTS Act will preserve competition in the market for collision repair parts and benefit consumers by helping to keep the cost of car ownership as low as possible. Thank you.

[The prepared statement of Ms. Felder follows:]

Testimony of
Ms. Pat Felder
Owner and Founder of Felder's Collision Parts

on behalf of

Quality Parts Coalition and
Auto Body Parts Association

House Judiciary Subcommittee on Intellectual Property

Hearing on H.R. 1057, the "Promoting Automotive Repair, Trade, and Sales Act of 2015"

February 2, 2016

Introduction

Chairman Issa, Ranking Member Nadler, and members of the Subcommittee, I am Pat Felder, owner and founder, along with my husband Wayne, of Felder's Collision Parts, Inc. in Baton Rouge, Louisiana. Felder's Collision Parts is a small business, which has been making quality, lower cost aftermarket collision repair parts available in the marketplace since 1987. I appear before you today as a small business owner, a member of the board of the Auto Body Parts Association (ABPA), and a member of the board of the Quality Parts Coalition (QPC)[1].

Thank you for holding this important hearing, and thank you and your staff for this opportunity to testify in strong support of H.R. 1057, the "Promoting Automotive Repair, Trade, and Sales Act" or PARTS Act. At the outset, I also want to thank Chairman Issa and Representative Lofgren for their bipartisan leadership in sponsoring the PARTS Act. In addition, I want to thank the other House Judiciary Committee cosponsors of the PARTS Act: Representatives Sensenbrenner, Jackson-Lee, Farenthold, Cohen, Johnson and Cicilline. I would note that the Senate companion to H.R. 1057 is S. 780, introduced by Senators Hatch and Whitehouse.

It is my understanding that this is the fourth hearing the Subcommittee and Committee have held on this issue or the PARTS Act, and it is our hope that this hearing will serve as the springboard to move the bill forward in this Congress.

[1] The ABPA represents over 140 members occupying more than 400 separate collision parts distribution, bumper sales, recycling facilities and manufacturing plants. Collectively, they are responsible for distributing more than 75 percent of independently produced aftermarket collision replacement parts sold to the collision repair trade. The ABPA is a member of the QPC, which represents the interests of the automotive collision parts industry, the insurance industry, seniors, and consumers.

Competition in the Automotive Collision Repair Parts Market is Good for Consumers

To help frame this issue, I would start by asking whether you have ever been in a fender bender or car crash? If so, I am sorry to hear that. But whether you knew it or not, at that time when you had your car repaired, you benefited from competition in the collision repair parts marketplace. This competition has existed for decades between the car companies and aftermarket companies like mine, Felder's Collision Parts.

To be more specific, the collision repair parts which I am talking about are the cosmetic, exterior parts of a car, such as fenders, quarter panels, bumper covers and grilles. Generally speaking, these parts are not structural or safety related parts designed to be part of a vehicle's collision management system, like reinforcement bars or bumper brackets.[2]

In the collision repair parts marketplace, the car companies already have captured two thirds of the market, while alternative suppliers – like my company – have about fourteen percent[3]. Despite our relatively small market share, the competition we provide is still very important to consumers. That's because alternatively supplied collision repair parts typically are 26 to 50 percent less expensive than the car company parts. But even if a consumer uses a more expensive car company part, the competitive marketplace has caused car companies to lower their collision part prices by an average of about 8 percent[4]. The estimated total benefit to consumers from the availability of alternative parts is approximately $1.5 billion per year[5].

Car Companies are Using Design Patents to Eliminate Competition

Clearly, consumers benefit from lower costs thanks to competition from alternative suppliers of collision repair parts, like Felder's. However, some car companies appear to have created a business strategy to eliminate competition and expand their already dominant share of the market by obtaining 14-year[6] design patents on their collision parts and enforcing them against alternative suppliers.

Beginning around 2003, several car companies began to dramatically increase the number of design patents they were obtaining on individual component collision parts of the automobiles they manufacture. Obtaining design patents on these individual parts is a significant departure from the car companies' past behavior, when they may have obtained 14-year design patents on the overall design of their cars, but did not place much, if any, emphasis on the

---

[2] Status Report," Insurance Institute for Highway Safety, Vol. 35, No. 2, Feb. 19, 2000. See also, Insurance Institute of Highway Safety, Statement Before the Property-Casualty Insurance Committee of the National Conference of State Legislators, "Institute Research on Cosmetic Crash Parts," July 7, 2005. In fact, the Insurance Institute for Highway Safety ("Institute"), through crash testing and crashworthiness evaluations, consistently has found that, generally speaking, cosmetic, exterior parts "serve no safety or structural function... [t]hey merely cover a car like a skin." Moreover, the Institute has found that whether a cosmetic collision repair part is a car company part or an alternatively supplied part "is irrelevant to crashworthiness."

[3] Salvage parts comprise the remainder of the market.

[4] Consumer Benefits from a Competitive Aftermarket for Crash Parts, R.W. Boulten, MiCRA Consulting & Research Associates, Inc., 2008.

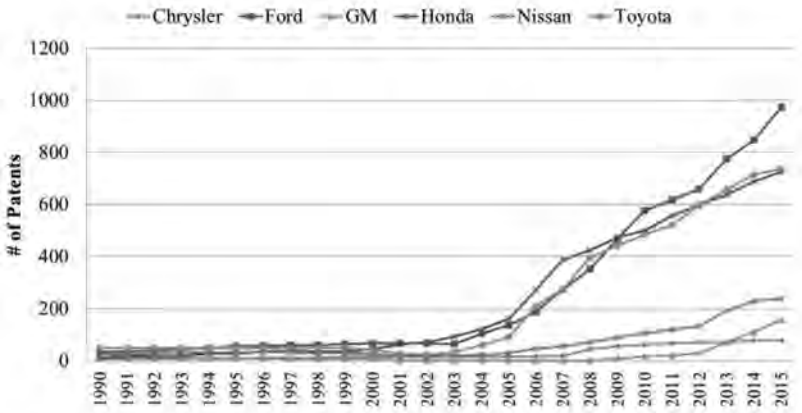
[5] *Id.*

[6] On December 19, 2012, the Patent Law Treaties Implementation Act was enacted into law, which extends the term of design patents filed after December 19, 2013 to 15 years. However, for the purpose of simplicity in this testimony, all reference are to 14 years.

interchangeable component collision parts. Included below is a chart of the cumulative number of crash part design patents owned by a number of the major car companies. As you will see, some of the companies now have hundreds and hundreds of 14-year design patents on a wide variety of collision parts.

DISTURBING TREND: COLLISION REPAIR PART DESIGN PATENTS GRANTED

Cumulative Numbers of Collision Repair Part Design Patents Granted to Major Car Companies



The number of design patents awarded to the major car companies on collision repair parts has increased dramatically since the 1990s, after Congress said NO to their strategy to enact legislation providing copyright protection for repair parts. **Note 1**: The term "collision repair parts" includes bezels, bumper covers, deck lids, door shells, fenders, fascias, front/rear grilles, header panels, headlamps, high-mounted brake lights, hoods, pickup beds, pickup box sides, quarter panels, radiator supports, side markers, side mouldings, tailgates, taillamps, and wheel houses as defined by the Certified Automotive Parts Association at http://www.capacertified.org/whatparts.asp. **Note 2**: Figures shown are cumulative. **Note 3**: Data based on design patents issued through December 31, 2015.

Then, in 2005, despite decades of competition in the parts industry, Ford filed an unprecedented design patent infringement complaint at the International Trade Commission (ITC) against a number of aftermarket suppliers of collision repair parts for the F150 pickup truck. The ITC ruled in favor of Ford, and an exclusion order went into place in 2007 banning the sale of those aftermarket parts in the United States. Therefore, competition effectively was eliminated for those F150 parts -- and Ford was the one and only source for the purchase of those F150 repair parts if an F150 owner got into a fender bender.

I would point out that the purpose of these parts is only to restore the vehicle's original, pre-accident appearance. Naturally, that is what consumers demand after an accident and what insurance policies provide. Therefore, these are "must match" parts. There is no room for

innovation by alternative suppliers so as to avoid allegations of infringement. In fact, a number of state insurance laws require that alternatively supplied collision repair parts be of "like kind and quality" in "form, fit, and finish" to car company parts.

But after Ford's unprecedented actions at the ITC, alternative suppliers were, for the first time ever, in the untenable position of complying with state laws and meeting consumer demand while simultaneously facing allegations of design patent infringement by car companies. Fourteen year design patents, when applied to these parts in the aftermarket, serve only to restrict or eliminate competition and facilitate a monopoly on cosmetic replacement parts.

Consumer groups, aftermarket companies like Felder's, and insurers became very alarmed about this disturbing development and worried about when the next shoe might drop. That came in 2008, when Ford filed yet another design patent infringement complaint at the ITC, this time for a number of collision repair parts for the Ford Mustang. Ultimately, this case and the F150 case were part of a large, exclusive settlement agreement reached in 2009 between Ford and one aftermarket competitor, to the exclusion of Felder's Collision Parts and all other aftermarket competitors.

The one aftermarket competitor who entered into this exclusive settlement reportedly now must pay a royalty to Ford for every Ford aftermarket part it sells. We expect those royalties on these aftermarket parts to be passed along to consumers, resulting in higher prices for consumers who use Ford aftermarket parts. And for all other aftermarket suppliers, like Felder's, who were not part of the exclusive settlement with Ford, we are at risk of design patent infringement suits if we continue to sell the parts as we had in the past.

As a result, Ford effectively has taken the consumer benefits of a free market that existed for decades and, through its design patent strategy, created a duopoly -- substantially diminishing competition in the repair parts marketplace for owners of Fords. Moreover, in 2014, Chrysler followed suit, bringing a design patent infringement suit in federal district court against an aftermarket supplier of collision repair parts; a similar exclusive settlement to those in the Ford cases was reached with the resulting decrease of competition for Chrysler owners and for all other aftermarket competitors, like Felder's. On top of this, we, presumably along with other aftermarket companies, recently have received "cease and desist" letters from a number of car companies warning of our infringement liability risk if we continue to sell our parts as we had in the past.

In addition to the harm these actions cause consumers, the design patent strategy has been a huge blow to Felder's and other aftermarket competitors, especially on top of the other methods car companies are using to try and drive out competition. One such method is GM's aptly named "Bump the Competition" program, which enables their dealerships to sell only GM parts -- but at the lower aftermarket competitors' price -- and GM will reimburse the dealership for the difference. I did not come to Congress to complain about this program, but it does reflect the fact that competition does keep downward pressure on car company parts pricing. If competition ultimately is eliminated through the use of design patents, then there would be no such downward pressure. Surely, programs like "Bump the Competition" will then vanish -- and the car companies will have monopoly power to price as they see fit.

After all has been said and done, aftermarket companies have gone out of business or will soon. Jobs are being lost. Regrettably, Felder's is down to four employees after having had 25 at one point. We cannot sit and simply cross our fingers and hope that the car companies will simply ignore future opportunities to eliminate or diminish competition through design patent enforcement.

Who knows when the next design patent suit will be filed and by which car company? We believe this is a disturbing trend enabled by the use of design patents to eliminate competition -- a trend Congress must stop now through enactment of the PARTS Act in order to preserve free market competition -- and its attendant consumer benefits -- that have existed for decades.

The Harmful Effects of Eliminating Competition in the Collision Repair Parts Market

The impact of eliminating competition in the collision repair parts market would fall directly on consumers. If competition is eliminated, the insurance industry estimates that $1.5 billion would be added to insured automobile repair costs every year. Ultimately, the higher costs of those repairs would be passed onto consumers in the form of higher insurance premiums[7]. Nor would the effect of eliminating competition on collision repair parts be limited to consumers' auto insurance costs. Consumers that pay for their own repairs out of pocket would bear these costs directly, or might choose to forgo repairs, leading to more rapid deterioration and depreciation of their vehicles.

Higher repair costs also mean that there is an increased likelihood of a vehicle being declared a total loss, compelling consumers to replace the vehicle, pay off a loan that may exceed the value of the vehicle, and seek financing for the purchase of a replacement vehicle, all of which depletes savings. In tough economic times like these, these kinds of added costs hurt consumers that much more, especially as autos age and depreciate. The impact of all of these factors would be much greater on those low or fixed income consumers who can least afford it.

Moreover, at a time when the average motorists keep their vehicles for 11 or more years, consumers depend on a competitive repair parts marketplace not only for affordable, quality repairs, but also to the extent that, as may well be the case, the car companies no longer even sell certain collision parts for older model cars.

[7] Analysis of the Impact of Banning Aftermarket Parts, Property and Casualty Insurers Association of America, January 19, 2010.

The PARTS Act is Good Public Policy, Carefully Balancing Intellectual Property Rights and Preservation of Competition

Last year, Chairman Issa and Representative Lofgren reintroduced the PARTS Act[8] in order to address the clear and present danger posed by car companies' use of design patents to eliminate competitive choices in the aftermarket for collision repair parts. The PARTS Act carefully balances the car companies' intellectual property rights with the need to protect consumers by preserving competition.

Specifically, when a part is being used "for the purpose of repair of a motor vehicle so as to restore [it] to its appearance as originally manufactured" the PARTS Act would effectively reduce from 14 years to two-and-a-half years the monopoly period during which the *sale* of alternative collision repair parts or the *use* of such parts would constitute an act of infringement of a car company's 14-year design patent. That said, under the PARTS Act, it would never be an act of infringement to make, test, market, or engage in pre-sale distribution.

We recognize that the overall design of a car can play a significant role in a consumers' choice when buying a new car and, in the very competitive market for new car sales, car companies invest a lot in their overall design of a vehicle as a result. While protecting competition in the market for collision parts, the PARTS Act would do nothing to deter car companies from obtaining 14-year design patents on their collision parts and enforcing them for up to 14 years against other car companies to prevent them from copying each another's vehicle designs in the new car sales market. Therefore, the PARTS Act does nothing to change the incentive of the car companies to innovate as they continue to design their cars to compete against each other.

We respect the investment made by the car companies in intellectual property when designing their cars to create a distinctive owning and driving experience, but when a consumer buys a car for $35,000 in the showroom, puts the title in his pocket, and drives it off the lot, it is his property, and he has compensated the car company for the overall design and manufacture of the car. American consumers should not be forced to pay a monopoly price on a part such as a fender or a quarter panel whenever it has been damaged in an unexpected accident and needs repair. Yet Americans will find themselves unknowingly in just this situation as car companies enforce their design patents on collision repair parts against alternative suppliers – unless Congress enacts the PARTS Act. The PARTS Act addresses the problem in a properly balanced manner that is similar to how a number of European countries[9] and Australia have confronted identical concerns regarding the preservation of competition for collision repair parts.

The cost of car ownership is already significant and Americans are increasingly dollar conscious in these tough economic times. We believe it is in the public interest to ensure that U.S.

---

[8] The PARTS Act was introduced in the previous two Congresses and is similar to legislation that Rep. Lofgren introduced in the 111th Congress, H.R. 3059, the "Access to Repair Parts Act."

[9] Italy, Belgium, Hungary, Ireland, Latvia, the Netherlands, Poland, Spain, and the U.K.

patent law does not eliminate a place in the market for less expensive, but perfectly functional alternative collision repair parts. The PARTS Act does not mandate the use of alternative collision repair parts, nor does it have the government facilitating new entry in the marketplace. Rather, the legislation would simply preserve the existing competition that exists in the collision repair parts.

Conclusion

We are not here today to advocate for the use of one type of part over another, but we are here in support of a measure that we believe would clearly benefit consumers regardless of their choice. At its core, this is a consumer issue. The costs of auto body repair are born by all consumers who drive, either reflected in their insurance costs, or directly when they pay for repairs themselves.

In short, we believe that the PARTS Act will preserve competition in the market for collision repair parts and benefit consumers by helping to keep the cost of car ownership as low as possible.

Again, I want to thank you again for holding this important hearing and thank Chairman Issa and Representatives Lofgren, Sensenbrenner, Cohen, Farenthold, Johnson, Jackson-Lee and Cicilline for their support for, and continued leadership on, the PARTS Act. We urge the Subcommittee to move the legislation forward this year. Consumers deserve it.

Mr. ISSA. Thank you. Mr. Risley.

TESTIMONY OF DAN RISLEY, PRESIDENT, AUTOMOTIVE SERVICE ASSOCIATION

Mr. RISLEY. Good afternoon, Mr. Chairman, and Members of the Subcommittee. My name is Dan Risley.

Mr. ISSA. We are going to need you just a little closer to the microphone.

Mr. RISLEY. Closer to the microphone.

Mr. ISSA. Thank you.

Mr. RISLEY. My name is Dan Risley, and I am the president of the Automotive Service Association, and I am here today representing our association. ASA is the largest not-for-profit trade association of its kind, dedicated to and governed by automotive service and collision repair professionals. ASA serves an international membership base and includes numerous affiliate state and chapter groups from both the collision and mechanical repair segments of the automotive service industry. Prior to ASA, I worked at a family-owned collision repair facility, served as the executive director of another automotive association, as well as spent a number of years at Allstate Insurance Company. ASA has a long history of working with insurance companies, and ensuring our customers the best possible repair experience after an accident. ASA is supportive of insured direct repair programs, provided the vehicle owner has a choice and is properly informed of it. Many of our leaders serve on direct program repair advisory boards of State and national insurance companies, including myself.

Many years ago, I participated on a top three insurance carrier's advisory panel. Although we work closely with insurers, we are mindful that our customers' vehicles are our first priority, and that these vehicles must be safely and properly repaired. We do have concerns when some insurers insist on repairs that are simply cheaper and quicker without regard to quality and safety. This is not to imply that all insurance carriers are the same. There is a difference between standard and non-standard. That is why my board of directors, made up of repair shop owners from across the U.S., wanted to meet to testify here today before you.

The automobile is the second most expensive purchase made by Americans. Although the automobile is a major part of most Americans' daily lives, few vehicle owners know much about collision repair. After an accident, other than contacting law enforcement or other emergency personnel, the vehicle owner contacts their insurance company for help and direction. Unfortunately, very few consumers have any knowledge about the types of crash parts used to repair their vehicles, and there are numerous parts choices in the marketplace, such as original equipment manufacturer parts, certified and non-certified aftermarket parts, remanufactured, and recycled. The fundamental language used in this bill would systematically validate any and all aftermarket parts to be the equivalent of an OEM part. In section 2 of the bill it states, "So as to restore such vehicle to its appearance as originally manufactured." This is impossible unless, of course, there is a standard by which all the aftermarket parts companies are required to meet. We have several standard settings parts certifiers in the marketplace today, CAPA

being one, and NSF being another, and it is supported and endorsed, recognized by the industry, both collision and insurers.

CAPA was created in the 1980's because there was no standard. There were no requirements, no monitoring of aftermarket parts. It was the equivalent of the wild, wild West. Having worked in a family-owned collision repair facility, I can assure you that we ordered, and I have personally installed, many parts in the early '80's when CAPA did not exist. These parts that were deemed to be OEM equivalent were later deemed to be inferior in terms of fit and function. Although an aftermarket part looks the same as an OEM, it does not mean it is the equivalent of an OEM-quality part. It does not mean that the part has the same corrosion resistance, metallurgical properties, or that it will perform the same in a subsequent accident, similar to how an OEM would perform. Certification helps to eliminate or narrow those gaps. Although parts certification is not perfect, it does positively impact parts quality. I have spent several years chairing a Committee, working with the Taiwanese aftermarket parts manufacturers as well as their government. One of the biggest challenges for the Taiwanese was the U.S. marketplace and balancing the cost versus quality. The fact is, certified parts do cost more to produce. Certification not only is important but critical to this debate.

Under the current language in H.R. 1057, providing a faster, less expensive path for aftermarket crash parts manufacturers to put non-certified parts in the marketplace will both harm both consumers and small businesses. It has been proven through many years of collision repair's trial and error that the vast majority of non-certified parts are inferior in many aspects, not only to the OEM, but also to the equivalent, certified aftermarket part. Aftermarket crash parts manufacturers will manufacture parts to achieve the lowest cost in an effort to sell the parts inexpensively to distributors in the U.S. demanding a low-cost basis. I have personally witnessed aftermarket parts, non-certified, that did not have holes where there are supposed to be holes to fasten it to the vehicle. I have personally witnessed parts that have additional holes, where there was not supposed to be any to fasten it to the vehicle. I have witnessed parts that were not of the same metallurgical thickness, parts that were significantly lighter, and prone to dent, missing brackets, missing headlamp parts, wrong color, improper reflective properties. When parts do not fit or there are other issues, collision shops have to return the parts to the distributor. These returns add cost to the collision repair process as well as delay the repair.

Whether it is legislation being discussed today or in mandates that insurers place on collision parts facilities such as where to buy parts, insurers will argue that these initiatives lower premium costs. We do not see where these parts savings are passed onto consumers. It is a good soundbite, but the consumer will continue to be the loser in this equation.

I want to leave you with a few key points. Number one, a free and open marketplace does not entail enacting a law that states aftermarket parts are equal to OEM. This should be decided by the people actually purchasing the parts. Competition is good. There is a need for alternative parts such as certified aftermarket parts, re-

cycled, remanufactured, used. Legislating competition so that Company X and Y are equal is similar to legislating that Walmart shirts are similar to something you might see at Macy's just because it looked the same online in a picture. You may hear or have heard testimony here today about these parts being cosmetic. I can assure you, a hood is not a cosmetic part. A hood is designed to crumple. In the event that the hood should fail to crumple, the hood is going to be pushed into the windshield and into the occupants. If it does not fold like an accordion—I am going to close it up. We ask the Committee to consider the implication this legislation will have on the consumer and small business. We ask the subcommittee to oppose the PARTS Act. I appreciate the opportunity to testify before the Committee today, and thank you very much for your time.

[The prepared statement of Mr. Risley follows:]

STATEMENT

OF

MR. DAN RISLEY
PRESIDENT
AUTOMOTIVE SERVICE ASSOCIATION
NORTH RICHLAND HILLS, TEXAS

BEFORE THE
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET
U.S. HOUSE COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C.

FEBRUARY 2, 2016

Good Afternoon Mr. Chairman and Members of the Subcommittee. My name is Dan Risley. I am President of the Automotive Service Association (ASA) and I am here today representing our association. ASA is the largest not-for-profit trade association of its kind dedicated to and governed by independent automotive service and repair professionals. ASA serves an international membership base that includes numerous affiliate, state and chapter groups from both the collision and mechanical repair segments of the automotive service industry. Prior to ASA, I was involved in a family-owned collision repair facility, served as the executive director of another automotive association and spent a number of years at Allstate Insurance Company.

ASA has a long history of working with insurance companies in ensuring our customers the best possible repair experience following an accident. ASA is supportive of insurer direct repair programs (DRP) that are open and fair to both vehicle owners and collision repairers. Many of our leaders serve on DRP advisory boards of state and national insurance companies.

Although we work closely with insurers as part of direct repair programs, we are mindful that our customer's vehicles are our first priority and that these vehicles must be safe and satisfactory to the consumer when they leave our repair shops. We do have concerns when some insurers insist on repairs that are simply "cheaper and quicker" without regard to quality and safety. This is why my Board of Directors, made up of repair shop owners from across the U.S., wanted me to testify before this Subcommittee today.

The automobile is the second most expensive purchase made by most Americans. Although the automobile is a major part of most Americans' daily lives, few vehicle owners

have much knowledge about automotive repair. This is particularly true relative to collision repair. After an accident, other than contacting law enforcement or other emergency personnel, the vehicle owner contacts their insurance company. Depending on state laws, consumers are advised about repair facilities by insurers or they may have some familiarity with repair shops or they search the Internet. It's at this point that vehicle owners lose control. Very few consumers have any knowledge about the types of crash parts used to repair their vehicles as there are numerous crash parts choices in the marketplace such as Original Equipment Manufacturer parts (OEM), aftermarket crash parts and recycled crash parts.

The fundamental language used in this bill would systemically validate any and all aftermarket parts to be equal to an OEM part. In Section 2 of the bill it states, "so as to restore such vehicle to its appearance as originally manufactured." This is impossible unless there is a standard to which all of the aftermarket parts are required to meet. We have a standard recognized by many in the industry, the Certified Aftermarket Parts Association (CAPA). CAPA was created because there was no standard, no requirements, no monitoring of aftermarket crash parts manufacturers.

Having worked in a family owned collision repair facility, I can assure you that we ordered many aftermarket crash parts that at times appeared like an OEM equivalent but these same parts were later determined to be inferior in terms of fit and function. Although an aftermarket crash part looks the same as an OEM part, it certainly does not always mean that the part is equal in quality to an OEM part. Even if the part looks similar and fits properly, that does not mean it will perform in a similar manner if involved in a collision. It does not mean that the part has the same corrosion resistance or metallurgical properties as an OEM part.

Although the CAPA system is not perfect, it does positively impact the quality of certified aftermarket parts. I spent several years chairing an industry committee that worked with the Taiwanese aftermarket parts manufacturers and their government. One of the biggest challenges that the Taiwanese manufacturers faced was the U.S. marketplace for certified versus non-certified parts. These Taiwanese manufacturers provide both certified and non-certified parts to U.S. collision repair distributors and shops. Because certified parts cost more to produce, they have to be closely monitored to ensure that quality is not compromised to reduce price. Certification is very important to this debate. Unfortunately, only a small percentage of aftermarket crash parts are CAPA certified despite CAPA being established in 1987. There are additional unregulated, self-certification and other programs in the marketplace, but this has not solved the parts quality concern for collision repairers who are on the front line and know far more about the part being placed on the consumer's vehicle than most consumers.

In the past, ASA has attempted to get the National Highway Transportation Safety Administration (NHTSA) interested in aftermarket crash parts. This effort has not been successful. Despite the problems with airbags, brakes, etc., collision repair and the parts used in those repairs remains largely unregulated. In most cases, it really is up to the insurance company as to the type parts used in the repair and what quality of repair is acceptable. This is not always the case but certainly applies in the majority of collision repairs. A number of years ago, ASA invited NHTSA professional staff to review OEM and aftermarket crash parts at a collision repair facility in the Washington, D.C. area. After noting the obvious physical differences in these OEM and aftermarket crash parts, NHTSA explained that they were only

interested in aftermarket crash parts if there was a proven history of safety concerns. NHTSA does not inspect or certify aftermarket crash parts or regulate aftermarket crash parts certification programs.

According to a Government Accountability Office (GAO) report requested by Congress entitled "Motor Vehicle Safety: NHTSA's Ability to Detect and Recall Defective Replacement Crash Parts Is Limited," the report noted:

> **NHTSA has broad authority to set safety standards for aftermarket crash parts. The Motor Vehicle Safety Act provides NHTSA with the authority to prescribe safety standards for new motor vehicles and new motor vehicle equipment sold in interstate commerce—a category that includes aftermarket crash parts. Although NHTSA has the authority to regulate aftermarket crash parts, it has not determined that these parts pose a significant safety concern and therefore has not developed safety standards for them.**

Under the current language in H.R. 1057, providing a faster, less expensive path for aftermarket crash parts manufacturers to put non-certified parts in the marketplace will harm both consumers and small businesses. It has been proven through many years of collision repairers' trial and error, that the majority of the non-certified parts are inferior in many aspects. The aftermarket crash parts manufacturers will manufacture parts to achieve the lowest cost basis in an effort to sell parts inexpensively to unknowing consumers. I've personally witnessed non-certified parts that were missing holes to fasten the part to the vehicle, holes to fasten the part to the vehicle where there wasn't supposed to be a hole, parts that were made of metals and thicknesses that made the aftermarket part significantly lighter and prone to dent, brackets missing, the headlamp was the wrong color, didn't have the proper

reflective properties, etc. When parts don't fit or there are other issues, collision shops have to return the parts to the distributor. These returns add costs to the repair process as well as delay the repair.

Whether it's this legislation being discussed today or mandates that insurers place on collision repair facilities such as where to buy parts, etc., insurers will argue that these initiatives lower premium costs. We don't see where these parts savings are passed on to consumers. It's a good sound bite but the consumer will continue to be the loser if this legislation becomes law. This legislation is not about consumers or small businesses. It is about an auto industry debate between aftermarket crash parts manufacturers, supported and encouraged by insurers, who want cheaper parts, risking quality and safety, in the marketplace and OEM's that want to protect their intellectual property. If this bill becomes law, costs will go down for aftermarket crash parts manufacturers because they will not be required to make the necessary investments in engineering, tooling and materials. Many aftermarket parts manufacturers are capable of reverse engineering an OEM part and creating a quality part but without management and oversight, the consumer will likely continue to receive a poor quality, inferior part.

We ask the Committee to consider the implications this legislation will have on the consumer and small businesses. We ask the Subcommittee to oppose the PARTS Act. I appreciate the opportunity to testify before the Committee today. Thank you.

Mr. ISSA. I thank you. We have a number of Members that have to go to the floor, so what I am going to do is I am going to take the liberty of, without objection, calling on Members that must leave for the floor out of order. If anyone objects, please let me know. Otherwise, I am going to try to accommodate Members that I know have to leave. With that, I will go to my Ranking Member, Mr. Nadler, first.

Mr. NADLER. Thank you, and I appreciate this. I do have to go to the floor to debate an amendment shortly. Mr. Gillis, what is the rationale for singling out just the auto parts industry for special treatment under the patent laws, and do you worry about the precedent that this bill would set by limiting patent protection for one narrow category of items?

Mr. GILLIS. Yes, that is a possibility. I think that overall there are probably a number of industry areas that could use this type of repair clause for manufacturers.

Mr. NADLER. What is the rationale for singling out this industry?

Mr. GILLIS. Well, at this point right now, it is one of the most expensive items that consumers experience on a day-to-day basis. When you back into a pole and it costs you $3,000 or $4,000.

Mr. NADLER. It is very expensive. That is the rationale. And the other rationales?

Mr. GILLIS. That is right. Expense is the key rationale.

Mr. NADLER. Okay, and why now? Why not 20 years ago, or, I mean, why are we seeing this now?

Mr. GILLIS. Well, 20 years ago, the car companies came before Congress, and Congress said, "No," so thankfully, to Representative Issa and Representative Lofgren, we have raised this issue again.

Mr. NADLER. But they have not changed? In other words, I thought you said that there was a change recently.

Mr. GILLIS. Yes. As you see from that chart over there, there is an exponential increase in the number of parts that are being designed patent by the car companies.

Mr. NADLER. But the change in the behavior of the auto companies in exercising these patents.

Mr. GILLIS. Exactly.

Mr. NADLER. And what sort of protections are in place or should be in place to ensure the quality and safety of generic repair parts?

Mr. GILLIS. Well, first and foremost, the parts should be certified to be functionally equivalent to the car company brand parts.

Mr. NADLER. Certified by whom?

Mr. GILLIS. Well, there is at least one agency that I am familiar with called the Certified Automotive Parts Association. It has been around since 1987, and in the interests of full disclosure, I am the executive director of that nonprofit group.

Mr. NADLER. Okay. Thank you. Ms. Burris, I am sorry. We have heard about the potential threat to safety that generic repair parts may pose. Can you point to any studies that document that there are in fact such risks?

Ms. BURRIS. Well, I believe there were some studies pointed out in a written statement that I submitted. I have also gathered information from the automotive companies that, for example, a bumper and the material that it is made out of is designed to absorb energy

from a crash, and in one specific instance there was a design with I believe some continuous glass fibers in the bumper.

Mr. NADLER. That is one specific.

Ms. BURRIS. Yeah.

Mr. NADLER. Is there data to show the generic parts involved in accidents have a greater rate than parts made by the manufacturers?

Ms. BURRIS. Yes.

Mr. NADLER. There is?

Ms. BURRIS. Yes, and as a matter of fact, there are reports in my written statement, and I would be glad to follow up with additional reports.

Mr. NADLER. Okay, and according to estimates referred today, auto manufacturers control more than 70 percent of the market for repair parts. If the industry continues to enforce these design patents against generic parts, it could achieve a near-monopoly. Without competition, how can consumers be sure they are receiving a fair price for these products, if we are not to pass this bill?

Ms. BURRIS. Well, there are options for the consumers. The consumers can use refurbished parts. They can repair the parts. There are a lot of technologies you can use to repair. You can also make the design look different.

Mr. NADLER. All right. Let me ask one last question. Under current law, design patents and auto repair parts receive 14 years of protection against infringement. Most consumers do not own their cars for that long. Does this not effectively provide car companies a lifetime protection against competition for repair parts in most instances, and if this bill, if 30 months is too short, I think somebody said 30 months is too—I think you said.

Ms. BURRIS. Yes.

Mr. NADLER. It does not go into effect right away, is there some other period greater than 30 months but less than 14 years that might be a fair solution, and how would you determine that?

Ms. BURRIS. Well, my concern with reducing it to any term below 14 years is, what other exceptions are going to be made for other industries? That is what I worry about.

Mr. NADLER. Okay, I understand that generic argument. I made it myself, but talking about design patents, one argument you made was that—I mean, there are two things here. One, people do not own cars for 14 years, and that would seem to argue against the 14-year patent, and two, you said that—I should not say nobody owns a car for 14 years. My father did, but most people do not.

Ms. BURRIS. I do.

Mr. NADLER. But that is number one, and number two, you pointed out that under this bill, it does not go into effect right away, that is 30 months after.

Ms. BURRIS. It is retroactive.

Mr. NADLER. Okay. Would there be a different period longer than 30 months but under 14 years that might be a more fair resolution?

Ms. BURRIS. Yeah, I think that is a question that the automotive companies should try to answer. From a legal policy standpoint, I

would not, I do not, again I worry about what that would do in other areas.

Mr. NADLER. So your basic argument is uniformity of the patent law?

Ms. BURRIS. Pardon me?

Mr. NADLER. Your basic argument is uniformity across different areas of the patent law?

Ms. BURRIS. Right, because as soon as you make an exception, right?

Mr. NADLER. Got it. Thank you. I thank the Chairman for allowing me to question out of order.

Mr. ISSA. I very much thank you for your comments and input. At this time, I would like to ask unanimous consent that the following documents be placed in the record. The statement by Robert L. Lyon, president and CEO of Rockingham Group, and others. Without objections, so ordered. And a second document, "Aftermarket Shock: The High Cost of Auto Parts Protectionism," by Brian Garst, 2016. Without objection, so ordered. Additionally, I will ask that design patent number 352685, dated 1994, and design patent 345317, March 22, 1994, be placed in the record, and I will note I was the designer of those and may just choose to ask questions on that. And with that, I would like to go to Mr. Collins, who also has to go to the floor.

[The material referred to follows:]

NAMIC®
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

PCI
Property Casualty Insurers Association of America

Statement of
Robert L. Lyon President & CEO, Rockingham Group
on behalf of the
National Association of Mutual Insurance Companies(NAMIC)
and
Property Casualty Insurers Association of America (PCI)

House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet,
Hearing on
H.R. 1057: the "Promoting Automotive Repair, Trade and Sales Act of 2015" or the "PARTS Act"

On behalf of the Rockingham Group – a regional property/casualty company located in Harrisonburg, VA, which offers insurance on private passenger autos – the National Association of Mutual Insurance Companies (NAMIC), and the Property Casualty Insurers Association of America (PCI), I thank you for the opportunity to express our views on HR 1057, the ""Promoting Automotive Repair, Trade and Sales Act of 2015" or the "PARTS Act".

NAMIC and PCI are also a members of the Quality Parts Coalition (QPC), which represents the interests of the automotive collision parts industry, the insurance industry, seniors, and consumers.

We commend you for holding this important hearing and thank you and your staff for this opportunity to testify in support of the PARTS Act. Also, we applaud Representatives Issa and Lofgren for their bipartisan leadership in sponsoring the PARTS Act and its predecessors in previous legislative sessions.

Background and Benefits of Competition in the Automotive Collision Repair Parts Market:

More likely than not, you, a family member or someone you know has been involved in an auto accident where the car was damaged and in need of repairs. Having your vehicle out of commission is never a pleasant experience. But even though it may not have been apparent from the repair bill, you benefited from competition in the collision repair parts marketplace; competition that has existed for decades between car companies and alternative suppliers of such parts.

Generally speaking, these competitively sourced parts are not structural or safety-related parts designed to be part of a vehicle's collision management system, like reinforcement bars or bumper brackets.[1] Instead they are the cosmetic, exterior parts of an automobile that typically get damaged in an auto accident or fender bender, such as fenders, quarter panels, bumper covers, grilles, and other similar parts.

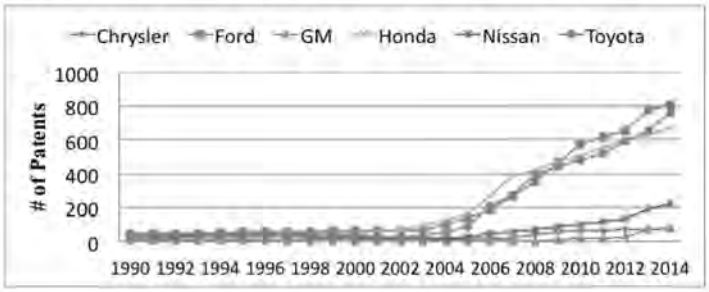
---

[1] "Status Report," Insurance Institute for Highway Safety, Vol. 35, No. 2, Feb. 19, 2000. See also, Insurance Institute of Highway Safety, Statement Before the Property-Casualty Insurance Committee of the National Conference of State Legislators, "Institute Research on Cosmetic Crash Parts," July 7, 2005. In fact, the Insurance Institute for Highway Safety ("Institute"), through crash testing and crashworthiness evaluations, consistently has found that, generally speaking, cosmetic, exterior parts "serve no safety or structural function . . . [t]hey merely cover a car like a skin." Moreover, the Institute has found that whether a cosmetic collision repair part is a car company part or an alternatively supplied part "is irrelevant to crashworthiness." Id.

It is worth noting that the car companies already supply over 60 percent of the parts used in collision repair, while competitive alternative suppliers have less than 15 percent.[2] However, despite the alternative suppliers' relatively small market share, the competition they provide is still very important to consumers. That's because alternatively-supplied collision repair parts typically are 26% to 50% less expensive than the car company parts. Even if a more expensive car company part is used, the existence of competition has been shown to cause car companies to lower their parts' prices by an average of about 8%.[3] The estimated total benefit to consumers from the availability of competitive alternatives is approximately $1.5 billion[4] a year in insurance costs alone.

Design Patents Are Being Used to Eliminate Competition:

Clearly, consumers benefit from the lower costs created by the competition from alternative suppliers of collision repair parts. However, some car manufacturers appear to have adopted a business strategy to eliminate competition and expand their already dominant share of the market by obtaining 14-year design patents on their collision parts and using the threat of enforcement against alternative suppliers. Beginning around 2003, several car manufacturers began to dramatically increase the number of design patents they were obtaining on individual component collision parts of the automobiles they manufacture. Obtaining design patents on these individual parts is a significant departure from the car companies' past behavior, when they may have obtained 14-year design patents on the overall design of their cars, but did not place much, if any, emphasis on the component collision parts. Below is a chart on the cumulative number of crash part design patents owned by a number of the major auto manufacturers. As you will see, some of the companies now have nearly one thousand 14-year design patents on a wide variety of collision parts that effectively restrain trade and competition.



[2] According to Mitchell, International, aftermarket parts represent 14 percent of the total cosmetic crash parts market. In contrast, OEM and other parts represent 85 percent of the total crash parts market.

[3] Consumer Benefits from a Competitive Aftermarket for Crash Parts., R.W. Boulten, MiCRA Consulting & Research Associates, Inc., 2008.

[4] Aftermarket Parts: A $1.5 Billion Benefit for Consumers. Property and Casualty Insurers Association of America. January 2013.

Since 2005, some car manufacturers have pursued infringement actions, both at the International Trade Commission (ITC) and in the courts. In each case, the car manufacturer reached a settlement with one alternative supplier, granting an exclusive distribution license for those patented parts. While these settlements allow a competitive product to be available, they also have a limiting effect on competition, and of course, there is nothing that prevents any of these car companies holding these design patents from pursuing an infringement action in the future. Therefore, despite the temporary settlements, we cannot assume that the car companies will simply ignore future opportunities to exploit their design patents and wipe out competition. Faced with these realities, Congress must act now, before it is too late.

Consumers Would Bear the Harmful Effects of Eliminating Competition on Collision Repair Parts:

There is no question that consumers would bear the economic burden of eliminating competition in the collision repair parts market. If competition is eliminated, the insurance industry estimates that $1.5 billion would be added to insured automobile repair costs every year. Ultimately, the higher costs of those repairs would be passed on to consumers in the form of higher insurance premiums.[5]

But the impact of reduced competition on collision repair parts would not be limited to consumers' auto insurance costs. Consumers that pay for their own repairs out of pocket would bear these costs directly, or might be forced to make the dangerous choice to forgo repairs, at best leading to more rapid deterioration and depreciation of their vehicles. Higher repair costs also mean that there is an increased likelihood of a vehicle being declared a total loss. This leaves the vehicle owner either to replace the vehicle, pay off a loan that may exceed the value of the vehicle, or seek financing for the purchase of a replacement vehicle, all of which depletes savings.

It is also important to consider that the average vehicle on the road today in the United States is over 11 years old, three years less than the 14-year enforcement period. Design patents on parts discourage competition by reducing the size of the market for alternative parts, making it far less likely that a competitive part would ever be brought to market.

No matter their economic circumstances, consumers are injured by these additional costs. But the impact is greatest on those low- or fixed-income consumers who can least afford it.

The PARTS Act is Good Public Policy, Carefully Balancing Intellectual Property Rights and Consumer Benefit:

In February of this year, Representatives Issa and Lofgren re-introduced the PARTS Act[6] in order to address the clear and present danger posed by car companies' use of design patents to eliminate competitive choice in the aftermarket for collision repair parts. The PARTS Act carefully balances the car companies' intellectual property rights with the need to protect consumers by preserving competition which has existed for decades.

---

[5] Aftermarket Parts: A $1.5 Billion Benefit for Consumers: Property and Casualty Insurers Association of America, January 2013.

[6] The PARTS Act is similar to legislation that Rep. Lofgren introduced in the 111th Congress, H.R. 3059, the "Access to Repair Parts Act."

Specifically, when a part is being used "for the purpose of repair of a motor vehicle so as to restore [it] to its appearance as originally manufactured" the PARTS Act would effectively reduce the monopoly period from 14 years to 2.5 years.

The PARTS Act also recognizes that car manufacturers invest a lot in their design of a vehicle and does nothing to deter car companies from protecting their intellectual property by allowing them to obtain 14-year design patents on their collision parts and enforce them for up to 14 years against other car companies to prevent copying each another's vehicle designs in the new car sales market. Therefore, the PARTS Act does nothing to change the incentive of the car companies to continue to innovate and design their cars to compete against each other.

While the PARTS Act respects investment made by the car companies in intellectual property when designing their cars, when a consumer buys a car for $35,000 or more, puts the title in her pocket, and drives it off the lot, it is her property, and the car manufacturer has already been compensated for that investment. American consumers should not be forced to pay a monopoly price on a part such as a fender or a quarter panel whenever it has been damaged in an accident and needs repair. Yet consumers will find themselves burdened with higher costs and fewer alternatives as car manufacturers enforce their design patents on collision repair parts against alternative suppliers – unless Congress enacts the PARTS Act. The PARTS Act addresses the problem in a manner that is similar to how many countries in Europe and Australia have confronted identical concerns regarding the preservation of competition for collision repair parts, which was by passing legislation very similar to the PARTS Act.

The cost of car ownership is already significant and growing and Americans are increasingly dollar conscious. We believe it is in the public interest to ensure that U.S. patent law does not shut out from competition more affordable competitive collision repair parts. The PARTS Act does not mandate the use of alternative collision repair parts, nor does it have the government facilitating new entry in the marketplace. Rather, the legislation would simply preserve the place in the market for competition in the sale of collision repair parts that has existed and benefited consumers for decades.

Conclusion:

At its core, this is a consumer issue; the costs of auto body repair are borne by consumers, either reflected in their insurance costs, or directly when they pay for repairs out of their own pockets. The PARTS Act will preserve competition in the market for collision repair parts and benefit consumers. On behalf of NAMIC and PCI members, I thank you again for holding this important hearing and thank Representatives Issa and Lofgren for their continued leadership on the PARTS Act.

Aftermarket Shock: The High Cost of Auto Parts Protectionism

Brian Garst

January 2016

www.freedomandprosperity.org

Executive Summary

Robust, competitive markets provide tremendous consumer benefits. In the market for collision repair parts the primary – but by no means only – benefit comes in the form of lower insurance premiums. Yet major auto companies have long sought ways to encumber competition in the collision parts aftermarket. Most recently they have turned to the International Trade Commission to sanction a novel use of design patents on individual repair parts to shut out aftermarket competition altogether. This represents a departure from the historic use of design patents to prevent infringement from other manufacturers on an automobile's overall design.

The resulting restrictions threaten consumer welfare and the competitive health of the market. This paper explores the policy implications of the changing use of design patents and considers an alternative approach adopted by other nations that provides a modified 30-month design protection window for collision parts in order to more appropriately balance the goal of promoting innovation with the interests of consumers.

Brian Garst is Director of Policy and Communications at the Center for Freedom and Prosperity

Introduction

Despite a rash of stories pronouncing the end of the era of the car, Americans continue to prefer the automobile as their primary means of transportation, and U.S. auto production is nearing all-time highs. Americans have not fully shaken off the effects of the recession, however, and recent trends in the manufacture and sale of aftermarket collision auto parts would only further put them in a financial squeeze.

Aftermarket auto parts are those sold in the secondary market, which consists of replacement or accessory parts produced by either the original equipment manufacturers (OEM) or alternative suppliers. This has historically been a competitive market, but a recent change in the use of design patents is threatening to restrict competition in collision repair parts – cosmetic, exterior parts that most typically get damaged in an accident. "Aftermarket parts" hereafter will refer exclusively to non-OEM parts, as the focus of this paper is the impact of alternative, non-branded suppliers on the market for collision replacement parts, their benefits for consumers, and certain regulatory and policy issues impacting their manufacture and sale.

The Aftermarket Parts Industry

Aftermarket parts account for about 14 percent of the collision parts market. Significant recent growth occurred prior to 2010, after which it largely leveled off.[1] The percentage of repairable vehicle appraisals including at least one aftermarket part grew considerably over a similar stretch, up from 39 percent in 2009 to 50 percent in 2013, where it also plateaued.[2] While the halt in growth is attributable in part to the rebound in new vehicle sales from recession-induced lows, policy and regulatory changes restricting competition have also played a role.

Aftermarket Competition Benefits Consumers

A competitive secondary market benefits consumers by reducing the average price of collision and other repair parts. Aftermarket parts compete with OEM brands to provide consumers with greater choice for replacement parts. They can cost between 26-50 percent less than OEM parts.[3]

Competitive pressure from aftermarket parts suppliers control the cost of OEM parts as well. When automakers monopolized the replacement parts market prior to the mid-1970's, they enjoyed up to an 800 percent markup on parts sales.[4] Facing competition from aftermarket parts has brought prices down, with the overall estimated benefit to consumers to be $1.5 billion per year.[5] OEMs also sometimes provide price matching in order to compete with aftermarket

1 "Crash Course 2015," CCC Information Services, Inc. http://www.cccis.com/wp-content/uploads/2015/03/Crash-Course-2015_FINAL.pdf.
2 Ibid.
3 Statement of Property Casualty Insurers Association of America, House Judiciary Committee, March 22, 2010. http://patentlyo.com/media/docs/2010/03/pci_20final_20testimony_20on_20hr_203059_203_2d22_2d10.pdf.
4 See Matthew W. Rearden, "OEM or non-OEM Automobile Replacement Parts: The Solution to *Avery v. State Farm*," Florida State University Law Review, Vol. 28, No. 2, Winter 2001.
5 Frederick R. Warren-Boulton and Daniel E. Haar, "Estimation of Benefits to Consumers from Competition in the Market for Automotive Parts," Microeconomic Consulting & Research Associates, Inc., www.micradc.com.

suppliers, and continue to search for new strategies to offer competitive prices.[6] The secondary market remains attractive to OEMs, however, and to put in perspective the high cost of an OEM-monopoly market, a 1999 study found that rebuilding a $23,263 Toyota Camry LE using only OEM parts from Toyota would cost $101,355.[7] A more recent 2013 Ford Escape would likewise cost $110,000 by the price of OEM parts alone before labor and other costs are factored in.[8]

Critics contend that aftermarket parts are not only cheaper in price but also in quality, and that they pose a greater safety risk. Like any market, there are products of varying degrees of quality, but tests frequently show aftermarket parts meeting reasonable safety standards.[9] Often times the only difference between an OEM and aftermarket part is the distributor. Automobile manufacturers may not fabricate the part themselves, but instead sometimes subcontract with an independent manufacturer. Some of the same subcontractors also manufacture non-OEM, aftermarket parts.[10] When it comes to collision parts, however, the question of safety is a red-herring. The Insurance Institute for Highway Safety says cosmetic, exterior parts "serve no safety or structural function," and that whether a collision repair part is produced by an aftermarket supplier or an OEM "is irrelevant to crashworthiness."[11]

---

6 See Mike Colias and Richard Truett, "GM prepares to fight aftermarket repair parts," *Automotive News*, August 3, 2015. http://www.autonews.com/article/20150803/RETAIL05/308039959/gm-prepares-to-fight-aftermarket-repair-parts.

7 Amanda Levin, "OEM Auto Parts Overpriced, Ins. Study Says," Property Casualty 360, September 10, 1999. http://www.propertycasualty360.com/1999/09/10/oem-auto-parts-overpriced-ins-study-says.

8 Data from LKQ Corporation, Inc.

9 See "Cosmetic crash parts are irrelevant to auto safety," IIHS, February 17, 2000. http://www.iihs.org/iihs/news/desktopnews/cosmetic-crash-parts-are-irrelevant-to-auto-safety.

10 See Matthew W. Rearden, "OEM or non-OEM Automobile Replacement Parts: The Solution to *Avery v. State Farm*," Florida State University Law Review, Vol. 28, No. 2, Winter 2001.

11 Stephen L. Oesch, Statement before Massachusetts Legislature's Joint Committee on Insurance, May 9, 2001. http://www.iihs.org/media/f5c873d4-ede0-4bcc-a17a-9bb9b3ae9868/918621715/Testimony/testimony_slo_050901.pdf.

OEM Efforts to Restrict Competition

Auto manufacturers compete in both the primary and secondary markets. Increased competition in recent decades for new car sales in the primary market has put pressure on manufacturers to maximize profits in the secondary market, which includes selling parts and services like maintenance and repairs. To succeed in the aftermarket, manufacturers maintain strong relationships with their dealers, steering customers to the shops where only their brand name parts are used. OEM strategies to maximize profits in the secondary market have also included legal and legislative efforts to undermine use of aftermarket parts and otherwise thwart competition.

Numerous states currently require, to varying degrees of specificity and restrictiveness, either disclosure of the use of aftermarket instead of OEM parts for insurance estimates, or that particular conditions be met before they can be used.[12] Manufacturers have also encouraged states to pursue "anti-steering" laws, which prohibit insurers from "steering" customers toward particular shops, some of which might have an arrangement with the policy providers. The laws, often pushed by manufacturers, aren't always limited to ensuring customers are able to choose between repairers, however. A number go further and inhibit the ability of insurers to even make recommendations, or otherwise restrict commercial speech.[13]

Consumers benefit from recommendations by experts in an industry with significant information asymmetries, but because insurers are more directly incentivized to consider costs when seeking repairs, the practice threatens OEM efforts to replace primary market profits lost

12 See Automotive Service Association, "Summary of State Aftermarket Parts Disclosure Laws," http://takingthehill.com/wp-content/uploads/disclosure.pdf.

13 See Orrin L. Harrison III and J. Carl Cecere Jr., "'Anti-Steering' Insurance Laws: State Censorship Of Consumer Information Treads On First Amendment Rights," Washington Legal Foundation, Legal Backgrounder, Vol. 25, No. 6, February 26, 2010. https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/27156.pdf.

due to growing competition with increased share of the secondary market. As the third-party payer, insurers are most interested in keeping down repair costs. Consumers are potentially impacted by higher costs through increased insurance premiums, but are not likely to account for this fact. Manufacturers seek to exploit this by convincing policyholders that they are being denied the highest quality parts. Disclosure rules are pushed to cast legitimacy on these claims, but can be misleading for consumers who assume that disclosures are only required for unsafe or inferior products.

Complaints have also been lodged that manufacturers "restrict the ability of independent service channels to repair their vehicles by limited access to needed repair information," and "that key information is restricted to the vehicle manufacturer's dealership networks."[14] Similar strategies have been observed in other markets. The Competition Commission of India sanctioned 14 car companies, including brands popular in the U.S. market such as Ford, GM, and Toyota, for foreclosing the market to independent repairers by restricting access to spare parts and diagnostic tools, as well as imposing warranty requirements to purchase OEM parts. They were fined 2 percent of their total revenue over three years.[15]

14 "On the Road: U.S. Automotive Parts Industry Annual Assessment," U.S. Department of Commerce, 2011.
15 Press Release, "Competition Commission of India Imposes Penalty of Rs. 2544.64 crores on 14 Car Companies," Press Information Bureau, Government of India, Ministry of Corporate Affairs, August 25, 2014. http://pib.nic.in/newsite/PrintRelease.aspx?relid=109060.

Evolving Use of Patents

Car manufacturers have long lobbied to protect designs for individual collision parts, but legislators have thus far opted not to do so. What they have not been able to achieve legislatively, however, is now being implemented thanks to a Depression-era law that was created to enforce trade protectionism.

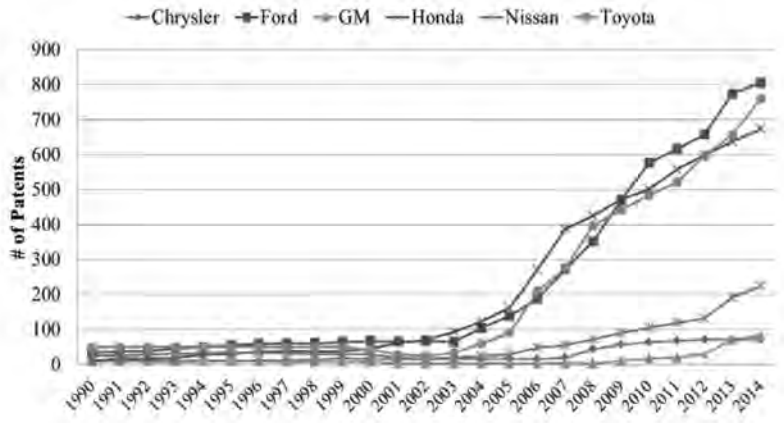
A new strategy that emerged roughly a decade ago has seen manufacturers increasingly turn to design patents to effectively eliminate competition over collision repair parts. Design patents provide 14 years of protection and are available only for 'ornamental' designs, whereas functional inventions are eligible for 20-year utility patents. Prior to this, manufacturers patented only the overall appearance of a model to protect against infringement from other manufacturers, not to prohibit competition for parts in the aftermarket.

In 2005, Ford Global Technologies filed a Section 337 case before the International Trade Commission (ITC) – an independent and quasi-judicial agency established in 1930 for dealing with a broad range of trade issues – for alleged infringements on exterior parts for the Ford F-150. An Administrative Law judge found that seven patents were valid and issued an exclusion order, which prohibits imports found to be infringing the design patents. Such patents to this point had almost never been used by automakers. The opportunity afforded thanks to globalization to seek interference through a trade body rather than district courts may account for the change in tactic, though similar cases have been brought in more recent years to the district courts as well.

The ITC decision was appealed, but before the process could play out Ford settled the dispute with a confidential agreement that made one of the defendants, "the sole distributor of

new non-Original Equipment aftermarket parts protected by Ford design patents," for a short period of time.[16] In turn they pay a royalty and cooperate with Ford in its design patent litigation against other aftermarket manufacturers. In that sense the settlement is said to be "a victory for OEMs seeking to prevent competition from non-OEM manufacturers."[17] Ford and the other OEMs apparently concur, because in the time since Ford's first actions at the ITC, the use of design patents for collision parts has grown significantly (see Figure 1).

Figure 1



Source: Quality Parts Coalition

16 Press Release, "Ford Motor Company and LKQ Corporation Settle Patent Disputes," April 1, 2009. http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=KEYS:US&sid=aMb9oKe9RpSc.

17 Norman Hawker, "Automobile Aftermarkets: A Case Study in Systems Competition," The Antitrust Bulletin: Vol. 56, No. 1, Spring 2011.

Policy Challenges

Patents and other intellectual property rights encourage innovation and provide economic benefits, but like all public policies come with trade-offs. Competition, and its derivative benefits, is sacrificed temporarily in order to encourage investment and innovation, but when rules are overly broad or competition is restricted for an excessive length of time, the benefits can be outweighed by the drawbacks. Such is increasingly the case for the collision parts market.

Design patents provide 14 years of protection compared to 20 years for utility patents. In the market for collision parts, however, that might as well be a lifetime. The average vehicle age has climbed as technology has made automobiles increasingly durable, but at 11.4 years – and typically less when considering only household vehicles – it is still less than the length of design patent protection.[18] The few vehicles that might last long enough to see their collision parts lose patent protection are unlikely to attract market investment in alternatives.

A growing body of research finds a one-size-fits-all patent system to be inefficient.[19] Multiple avenues are available for tailoring to reduce the inefficiencies introduced by a uniform patent system, including both legislative and judicial responses. The latter lacks the democratic accountability of the former, but also doesn't suffer from the same politically induced paralysis and can better keep pace with rapid technological changes.[20] The evolution in the use of design patents to prevent aftermarket competition in collision parts presents another wrinkle, however, insofar as it occurred through use of Section 337 of the Tariff Act of 1930, which addresses

18 "National Transportation Statistics," Bureau of Transportation Statistics, Table 1-26, http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_26.html.

19 See Michael W. Carroll, "One for All: The Problem of Uniformity Cost in Intellectual Property Law," American University Law Review 55 (2006): 845–900.

20 See Dan L. Burk and Mark A. Lemley, "Courts and the Patent System," *Regulation*, Cato Institute, Summer 2009. http://object.cato.org/sites/cato.org/files/serials/files/regulation/2009/6/v32n2-3.pdf.

allegedly unfair import practices. The role of Section 337 in patent cases was expanded when Congress in 1974 created the ITC and gave it jurisdiction over Section 337 cases. This foray into patents, however, "negatively impacts the integrity and functionality of U.S. patent law by establishing a dual-track system for patent enforcement."[21] Ford's subsequent decision to side-step the district courts and instead pursue its patent litigation through the ITC is significant due to the differences in available remedies between the alternative venues. Whereas the standard remedy in district courts is monetary compensation for past infringement, the ITC has access only to more disruptive injunctive relief through exclusion orders.

In addition, the collision parts market is particularly ill-suited for the use of design patents. The parts exist for no other reason than to restore the automobile to its original appearance. Consumers have no interest in parts that are unable to achieve this, meaning that "Design patents do not merely impede competition in the crash parts market; they eliminate competition."[22]

The outcome of this restriction on competition goes beyond the raising of insurance rates. Higher repair costs mean more cars will be totaled out, even for damage that seems relatively minor or might otherwise be repairable. And while manufacturers necessarily cannot innovate the aftermarket parts themselves, they can do so in the manufacturing process, marketing, or distribution of the parts, all of which provides consumer benefits. Without competition, OEMs are unlikely to produce such efficiency gains. Higher repair costs in turn also exacerbate the difficulty consumers face in estimating the lifetime costs of ownership when making new vehicle

21 K. William Watson, "Still a Protectionist Trade Remedy: The Case for Repealing Section 337," Cato Institute, Policy Analysis No. 708, September 2012. http://www.cato.org/publications/policy-analysis/still-protectionist-trade-remedy-case-repealing-section-337.

22 Norman Hawker, "Automobile Aftermarkets: A Case Study in Systems Competition," The Antitrust Bulletin: Vol. 56, No. 1, Spring 2011.

US00D352685S

United States Patent [19]

Issa

[11] Patent Number: Des. 352,685

[45] Date of Patent: ** Nov. 22, 1994

[54] SLIDE-TOGETHER RELAY SOCKET

[76] Inventor: Darrell E. Issa, 1598 Parkview Dr., Vista, Calif. 92083

[**] Term: 14 Years

[21] Appl. No.: 951,440

[22] Filed: Sep. 28, 1992

[52] U.S. Cl. D13/146

[58] Field of Search 439/701, 712, 713, 715, 439/716, 717, 732; D13/146, 147

[56] References Cited

U.S. PATENT DOCUMENTS

D. 272,061	1/1884	Moriai et al.	D13/147
D. 311,380	10/1990	Kameyama et al.	D13/147
D. 321,507	11/1991	Nagasaka et al.	D13/147
D. 333,653	3/1993	Yamanashi	D13/147
4,425,018	1/1984	Stenz	439/716
4,469,393	9/1984	Chewning, Jr. et al.	439/717
4,611,879	9/1986	Bullard	439/715 X
4,954,798	9/1990	Kasahara et al.	439/717 X
5,098,316	3/1992	Kollmann et al.	439/717

OTHER PUBLICATIONS

Slide-together relay socket marked "Exhibit A." Submitted by applicant.

Relay socket marked "Exhibit B." Submitted by applicant.

Primary Examiner—Wallace R. Burke

Assistant Examiner—Joel Sincavage

Attorney, Agent, or Firm—John J. Murphey

[57] CLAIM

The ornamental design of a slide-together relay socket, as shown and described.

DESCRIPTION

FIG. 1 is a front plan view of the socket showing my new design;

FIG. 2 is a top plan view thereof;

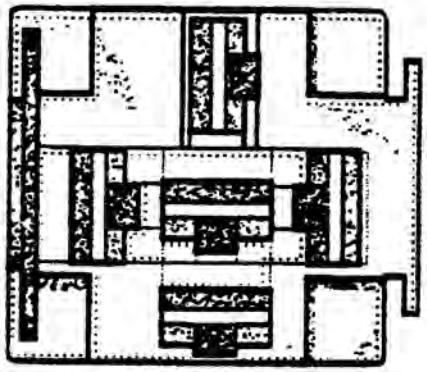
FIG. 3 is a left side view thereof showing my new design;

FIG. 4 is a right side view;

FIG. 5 is a rear plan view;

FIG. 6 is a front and upper right trimetric view. The broken line showing of the similar unit partially attached is included for the purpose of illustrating environmental elements only and forms no part of the claimed design; and,

FIG. 7 is a rear and lower left trimetric view thereof.



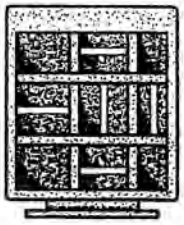


FIG. 5

FIG. 4

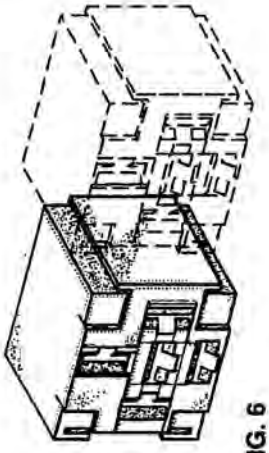


FIG. 6

FIG. 2

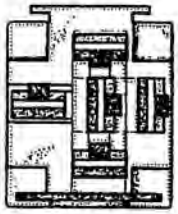


FIG. 1

FIG. 3

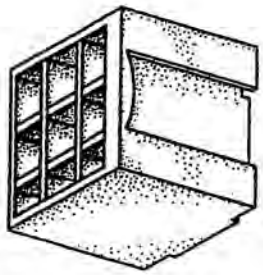


FIG. 7

US00D345317S

United States Patent [19]

Issa

[11] Patent Number: Des. 345,317

[45] Date of Patent: ** Mar. 22, 1994

[54] SIREN

[76] Inventor: Darrell E. Issa, 1598 Parkview Dr., Vista, Calif. 92083

[**] Term: 14 Years

[21] Appl. No.: 10,594

[22] Filed: Jul. 6, 1993

[52] U.S. Cl. D10/120

[58] Field of Search ..... 340/384 R, 384 E, 385, 340/386, 388, 391, 392, 394, 401, 404, 405, 406; 116/137 R, 140, 142, 147; D10/104, 106, 116, 119, 120, 121

[56] References Cited

U.S. PATENT DOCUMENTS

D. 279,771	7/1985	Hinata	D10/120
D. 279,965	8/1985	Mikami	D10/120
D. 292,498	10/1987	Hayashi	D10/120
D. 292,895	11/1987	Hayashi	D10/102
D. 297,918	10/1988	Kamada	D10/120

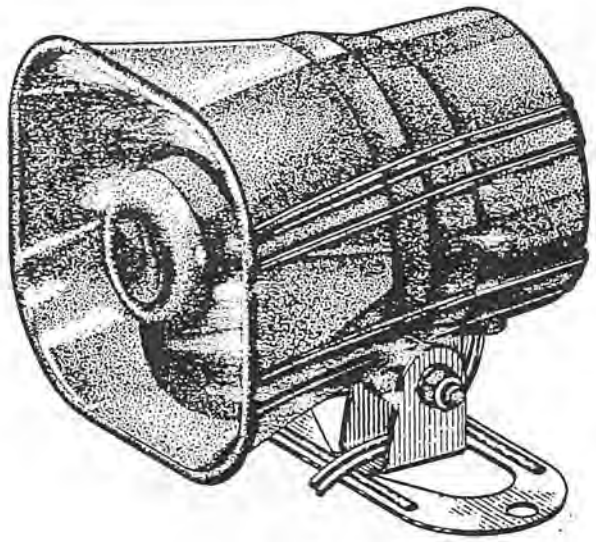
Primary Examiner—Wallace R. Burke
Assistant Examiner—Marcus Jackson
Attorney, Agent, or Firm—John J. Murphey

[57] CLAIM

The ornamental design of a siren, as shown and described.

DESCRIPTION

FIG. 1 is a trimetric view thereof showing my new design with the wires broken away to indicate indeterminate length;
FIG. 2 is a top plan view of the Siren;
FIG. 3 is a right side elevational view thereof;
FIG. 4 is a front elevational view of the siren;
FIG. 5 is a left side elevational view thereof;
FIG. 6 is a rear elevational view of the siren; and,
FIG. 7 is a bottom plan view.



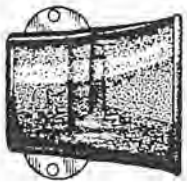


FIG. 2

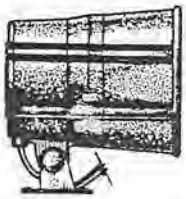


FIG. 3

FIG. 4

FIG. 5

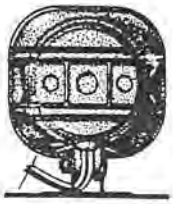


FIG. 6

FIG. 7

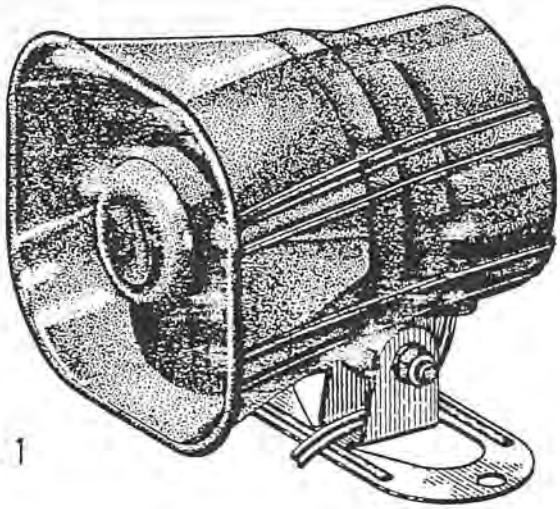


FIG. 1

Mr. COLLINS. And I do appreciate it, Chairman. It is always good to be with the Chairman. This Committee I think is really hitting on one of the biggest parts, but I will also not that the patents that just got admitted into by unanimous consent also were good for 14 years, so that is an aspect, which is good and which it needs to be. I think there are some aspects about this bill that are good. There are some aspects that need to be discussed, but there are also some very disturbing, you know, questions. Ms. Burris, you brought up some. Mr. Gillis, we are going to get to some. The heart of this, though, and I want to get back to this, and Ms. Burris, I will just start with you. If you take the premise of the bill as correct, okay, which I have no doubt the authors, you know, in looking at it and I think there are some ways that we can work together. I have some specific concerns about language in the bill, but I think there are some possibilities we can work on. The premise of the bill is, do consumers lack affordable options in the marketplace due in full to ornamental design patent protections? If you take the premise of the bill, that is what the premise of the bill basically is because we have heard about it already. It is money. Mr. Gillis just said that, so is that true?

Ms. BURRIS. No, it is not true. The consumers have choices. They can go with refurbished parts, remanufactured parts, they can repair the parts. And, you know, from my perspective as a patent attorney, they just need to make it look a little different, and then it will not be infringing the design patent.

Mr. COLLINS. Right.

Ms. BURRIS. It is not that tough.

Mr. COLLINS. No, it is not, and I think—well, take that a step further, and even if the cost differential of the parts is different, there is no evidence that consumers directly would save money if this bill is enacted.

Ms. BURRIS. That is correct. The last hearing that we had, I believe the testimony was that consumers' insurance premiums would not go down.

Mr. COLLINS. Okay, and I think Mr. Gillis, I would think you would disagree, but is there hard and fast evidence that consumers will save money post-enactment of this legislation?

Mr. GILLIS. Absolutely. When you look at the comparative cost of an OEM part to an aftermarket part, it is phenomenally different, and that is what consumers pay for if they are crashing the car themselves and paying for it themselves, or it is being incorporated into their insurance premiums.

Mr. COLLINS. Okay, and I think you take a major leap of faith there, which I am a man of faith, so I will go with your leap of faith.

Mr. GILLIS. Thank you.

Mr. COLLINS. I could understand if I was buying it myself, like my Honda has a broke front end right now. Zip ties work wonderful, but if I did it myself, then I possibly could save money there, but if I depend on the insurance company to pass their savings along to me, can you honestly sit here under oath and say that I am going to see savings from my insurance company?

Mr. GILLIS. Well, I think you are already seeing those savings because most insurance companies do already use aftermarket parts.

Mr. COLLINS. Exactly, but you are extrapolating there, if this bill was enacted, that that would happen.

Mr. GILLIS. Well, I think you have extrapolated the opposite way, and you would probably see insurance premiums raised if these parts were not available to the marketplace.

Mr. COLLINS. I think that is the wonderful thing for these hearings is discussions and disagreements such as that. But in your written testimony, I do have an interesting question, and this will—and I am going to sort of finish up here because, like I said, I think the Chairman and Ms. Lofgren, who I have the greatest respect for, there is some ideas here that we might could work for, but in your written testimony, you make a comment, and it is on page three of your written testimony. It says, "Not only do customers have the right to competition, they both have the right to safe and high quality competitive parts." I am just curious. Where are you getting a right to competition?

Mr. GILLIS. Well, I think that is a fundamental right of the American capitalistic marketplace that has caused consumers great benefit over the years and taking away competition from the consumer is un-American.

Mr. COLLINS. Well, I mean we can debate American or un-American, but really when you say a "right," you are implying almost a legal concept here, and I think that is an interesting way to hyperbole to put that.

Mr. GILLIS. I am implying a fundamental right to choice, a fundamental right to options in the marketplace, and that fundamental right is also one of the biggest benefits that corporate America experiences when they offer us different products.

Mr. COLLINS. So conversely, for someone such as myself, who believes that a strong and robust patent system actually encourages creation and not discourages creation, would you agree with me that patent owners have a right to enforce their patents?

Mr. GILLIS. They have a right to enforce those patents when those patents are legitimate, but in the case of this particular situation, I would like your opinion as to why all of a sudden, all of these parts are patentable, when 10 years ago they were not.

Mr. COLLINS. Were they patentable 10 years ago?

Mr. GILLIS. Look at the list.

Mr. COLLINS. They were. They chose not to.

Mr. GILLIS. And they chose not to patent them.

Mr. COLLINS. And again——

Mr. GILLIS. Why are they choosing to patent them today? They are choosing to patent them today because that is a way to limit competition.

Mr. COLLINS. So as a conservative who believes in free markets, you are going to run to the government to say, "Government, put your thumb on the scale." Mr. Gillis, I think that is a problem, and you make a business choice either way. I believe this bill has merit. I believe there are some things we can work on to move forward on this. But frankly, there is some concern here when you distinguish patents and you do this in such a way that you do it—as you said before, it is all about money. There are also rights of the patent holders and the protection we afford to them, so I look forward to continuing the discussion. I appreciate it, Mr. Chairman.

Mr. ISSA. Would the gentleman yield?

Mr. COLLINS. Always.

Mr. ISSA. I know you have to go, but before you go, I will just mention for example those two fenders that are down front. We brought them in for a reason. One is live, one is Memorex. Unless you look at the label, you probably will not notice the difference.

Mr. COLLINS. Can I get one for my Honda?

Mr. ISSA. Absolutely, absolutely. The gentlelady from Louisiana can help you.

Mr. COLLINS. Which speaking of which, by the way, thank you for being here. I always enjoy these panels, and when you have actually someone here who does the business every day, the one who gets up and writes the payroll checks and comes to—I love the other testifying witnesses, but when you have got someone like yourself, we may disagree in parts on this, but thank you for actually keeping America's economy running. Thank you.

Ms. FELDER. Thank you.

Mr. ISSA. But one of the things that we are going to dig into as we go further into the bill is that were these thousands, tens of thousands of design patents evaluated based on not the ornamental entirety, but the ornamental pieces, then the rules of distinct ornamental nature would have to be searched by the PTO, by the examiners, and this is one of the tests they currently do not do. In other words, when a certain car looks a lot like another car and then a particular part looks a whole lot like another part, at what point is it novel and new? And this is one of the challenges of—this is design. This legislation is designed not to take on the hard part of making the patent office evaluate the distinct nature of a mirror or other parts, so we will get into more of it, but I wanted to make sure that your concerns were allied, that we are not—allayed, that we are not planning on——

Mr. COLLINS. Well, and I think the Chairman brings up a great point. If you really want to get into the overall patent issue, which we have, you and I have, talked about many times, we have to have good, robust patent systems that are actually examined. The problem we have right now is patents that can be challenged because they frankly are bogus patents, and that goes across the spectrum. You brought up a great point, Mr. Chairman. That is the reason we have this, and it is a pleasure to be on the Committee with you.

Mr. ISSA. Thank you.

Mr. RISLEY. Excuse me, Mr. Chairman?

Mr. ISSA. Well, I apologize, but that colloquy exceeds by far the Ranking Members' time, so we will give you time, but not at this moment. Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. First, I would like to enter into the record the following two letters. One is from original equipment manufacturers, labor unions, automotive trade associations, and the Intellectual Property Owners Association opposing this legislation. The other is a letter from the American Bar Association, IP law section.

[The material referred to follows:]

March 23, 2015

The Honorable Bob Goodlatte
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

The Honorable John Conyers
Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

We the undersigned coalition of original equipment manufacturers (OEMs), labor unions and trade associations respectfully request your opposition to H.R. 1057, the Promoting Automotive Repair, Trade and Sales (PARTS) Act. This recently introduced legislation would exempt the creation, sales and/or importation of certain replicated automobile repair parts from infringing U.S. design patents.

As you know, intellectual property rights are the backbone of innovation and job creation. Design patents complement the use of utility patents to protect automotive companies against unfair competition from people or companies who copy their innovations without investing in the process or making an effort to innovate. Removing design protection promotes unfair competition to the detriment of U.S.-based designers, manufacturers, workers, and dealers. It is a license for "free riders" to deprive innovators of any reward for the commercial risk that has been taken to bring a product to market.

Automotive companies competing in the three major markets of Europe, Asia and the Americas maintain design centers in the U.S. that employ highly skilled workers who create attractive and innovative vehicles that appeal to American consumers. It is that appeal that makes each vehicle distinct, increasing competition to benefit consumers, and supports jobs throughout the industry. Not only does the PARTS Act deny businesses the ability to rightfully protect their intellectual property, it legalizes activity that would otherwise be considered piracy.

Proponents of the legislation, which include both the aftermarket parts and insurance industries, have argued that due to the bill's narrow scope not only will it lower repair and insurance costs but that the legislation is consumer friendly and provides a greater benefit than it does harm. The fact is that narrowing the focus of the legislation to "exterior component parts" singles out one industry for discriminatory treatment and misstates the value these features contribute to the overall product. Automotive companies invest billions each year to develop and patent these designs, so to retroactively reduce patent protection to just a few years upends the business decisions supporting this important segment of the U.S. economy. Additionally, at the latest hearing held on this issue/bill, when asked directly if insurance premiums would be lowered as a result of this legislation, the insurance industry representative replied, "I would not expect premiums to go down as a result".

Manufacturers of unlicensed automobile parts have to meet only one basic threshold: to produce a copy that can be passed off as an original part. Those who produce such parts incur no costs attributable to original design, research and development and most importantly, product safety testing. Automobile companies must ensure that all automotive components perform as a cohesive system during crash testing to provide the safest possible product for their customers. Accordingly, the manufacturer of the original product for whom such unlicensed replacement parts are made does not know how these parts will perform with the rest of the vehicle or how their use will impact the quality and integrity of the original product. Automotive collision repairers are also very concerned about the quality of replacement crash parts. Permitting infringement of this intellectual property also exposes consumers to significant safety, performance and durability risks without their knowledge.

The underlying premise for the PARTS Act is that competition requires copying. This premise is false. Many aftermarket companies are successful in producing interchangeable parts that do not copy the exterior appearance of the OEM component. In fact, the U.S. aftermarket is replete with headlights, taillights, grilles, and bumpers that do not copy OEM designs but are interchangeable with the original components. This type of activity by aftermarket companies is a form of fair competition that respects and comports with existing patent protections. These companies employ designers that create original designs, provide consumers with greater repair choices, encourage innovation and protect the public from mistakenly buying a generic part when they intended to purchase an OEM replacement. Seen in this light, the PARTS Act is a solution in search of a problem.

Finally, the U.S. Supreme Court has repeatedly denied attempts to overturn the important IP rights associated with design patents. Legislatively denying these rights would not only overturn decades of judicial precedent, it would also violate IP rights that are protected under the U.S. Constitution, and the World Trade Organization agreement on Trade-Related Aspects of Intellectual Property Rights.

For all of these reasons, we strongly oppose the PARTS Act and urge you to do so as well.

Thank you for your consideration of our views. Please do not hesitate to reach out to us for additional information or to answer any questions you may have.

Sincerely,

Alliance of Automobile Manufacturers
American Automotive Policy Council
American International Automobile Dealers
Association of Equipment Manufacturers
Association of Global Automakers
Automotive Service Association
Intellectual Property Owners Association
Motorcycle Industry Council
National Association of Manufacturers
National Association of Minority Automobile Dealers
National Automobile Dealers Association
Specialty Equipment Market Association
Truck and Engine Manufacturers Association
United Auto Workers

CC: Members of the United States House of Representatives

AMERICAN BAR ASSOCIATION
Section of Intellectual Property Law
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-6254
FAX: (312) 988-6800
E-mail: iplaw@americanbar.org
www.americanbar.org/iplaw

February 2, 2016

Honorable Darrell Issa
Chairman, Subcommittee on Courts,
Intellectual Property, and the Internet
U.S. House of Representatives
Washington, D.C. 20515

Honorable Jerry Nadler
Ranking Member, Subcommittee on Courts,
Intellectual Property, and the Internet
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Issa and Ranking Member Nadler:

I write to express the views of the American Bar Association Section of Intellectual Property Law on H. R. 1057, the "Promoting Automotive Repair, Trade, and Sales Act of 2015" or "PARTS Act." These views have not been submitted to the American Bar Association's House of Delegates or Board of Governors, and should not be considered as views of the Association.

Patents provide protections needed to help incentivize the outlay of investments required to develop new innovations. Design patents allow companies to protect the ornamental features that distinguish a company's product from those of their competitors. They do not provide the patent owner with rights in the functional aspects of a product, only certain aspects that affect the product's appearance. Design patents serve the important purpose of allowing original equipment manufacturers to recoup their investments in the products they design and sell by preventing unauthorized copying.

The PARTS Act would effectively void patent rights for design patents directed to automotive parts after only 30 months of what normally is a 15-year patent term. The shortening of the statutorily mandated term for any patent would deprive patent owners of significant rights, discourage innovation, and put original equipment manufacturers on unequal footing with all other patent owners.

There is no convincing argument for shortening the term of patents for any area of technology. Effects on competition due to ownership of patent rights are

sometimes a necessary result of a functioning patent system, but also encourage competitors to innovate and design around the original equipment manufacturer's design. And while this legislation is very narrowly tailored to impact only design patents covering automotive parts, the bill could easily be expanded or set a precedent for legislation that significantly shortens the patent terms of pharmaceutical drugs, software, or any valuable technology.

For those reasons, the ABA Section of Intellectual Property Law favors treating patent rights equally regardless of the area of technology to which those rights apply. We look forward to working with you to address these concerns.

Sincerely,

Theodore H. Davis, Jr.
Chair, Section of Intellectual Property Law
American Bar Association

Cc: Honorable Robert W. Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Mr. ISSA. Without objection, and I would stop the clock. I apologize. The gentleman has to leave. I just wanted to let him if he had anything to say, since he has been very patient. If you have something, I did not mean to cut you off.

Mr. RISLEY. No, not at all, Mr. Chairman. Actually, I have a family medical emergency, and I have to fly home, and so if it is okay I would like to——

Mr. ISSA. Well, you and your family will be in our prayers, and thank you very much for being here today.

Mr. RISLEY. Thank you very much.

Mr. ISSA. Thank you.

Mr. CONYERS. Quite all right. Thank you. Could I ask Attorney Burris about the ability to receive patent protection for an invention encourages innovation? It provides an incentive to create new products or improve upon other products. How would this legislation, in your view, affect creativity and innovation?

Ms. BURRIS. Well, I think it would significantly dampen that creativity. I mean, there is no incentive to create an invention, whether it be a design patent or utility patent or a plant patent under our systems. Where is the motivation to develop new technology, to advance that technology? I think I put a quote from Abraham Lincoln in my written statement. I mean, it is a fuel that provides incentive to develop new designs, new technology in our country and in countries around the world.

Mr. CONYERS. And thank you. And how, Attorney Burris, would it impact jobs in the automotive manufacturing industry?

Ms. BURRIS. Yeah, thank you. I talked a little bit earlier about the design centers in the United States. Industrial design is a little different beast than the traditional engineering that we are used to, mechanical, electrical, chemical, et cetera. There are very creative artist-type engineers, and there are, in the automotive industry, approximately 30,000 industrial designers that are working on, you know, the shape of your door handle on your car, the shape and the colors and the texturing of your side view mirrors, and there is not just one designer working on a car. There may be four designers working on just the handle. I mean, I see—I have gone to—I go to the auto show every year, and I see these really sharp-looking designs on these cars, and those I know are products of industrial designers, so jobs in the United States, not just U.S. companies, but foreign: Honda, Toyota, just in my home state, Toyota and Hyundai put in research centers right between Ann Arbor and Detroit. These are industrial designers developing eye-pleasing cars for U.S. consumers, so 30,000.

Mr. CONYERS. Thanks so much. What do you think if this legislation were to pass, other industries would request similar legislation to shorten patent protections?

Ms. BURRIS. Well, you name it. Mr. Gillis might have that answer for us on what is more expensive. That should not be too expensive. Smartphones. Consumer apparel, I mean, look at the companies who get design patent protection, you know. You have the Hewlett-Packards and, you know, the shape of a printer, the Nikes, the Apples, the Samsungs. It could go on and on forever.

Mr. CONYERS. Now supporters of this bill might argue that these are just patents on the look and style of the exterior car parts, so

they do not need usual patent term protections. Do you think they are correct?

Ms. BURRIS. Well, there are laws—our laws provide—well, it is actually now 15 years since we signed up to the Hague, but our design patent protection is 15 years to the date of issue of that patent versus utility patents, which is 20 years from the date of filing the patent application, so there is a different patent term depending on whether it is a design or utility patent.

Mr. CONYERS. Let's see, Mr. Risley has left. Let's see. Mr. Gillis, I am concerned that the consumer safety could be threatened if this legislation were to pass. Do we have Federal laws in place that would ensure that replacement parts from independent vendors or overseas vendors would meet the high safety standards that we would place on automobile manufacturers here in the United States?

Mr. GILLIS. Well, thank you, Representative Conyers. As you well know, I am one of America's leading auto safety advocates, and this is of great concern to me. The good news is that all of these parts are subject to the same recall requirements that car company brand parts would be subject to. In addition, with the concept of reverse engineering, it is relatively straightforward to make a part that is functionally equivalent to the car company parts, and finally, the industry that is probably most concerned about auto safety is the insurance industry, not only because they may be good guys, but because it is in their best interests to keep personal injury claims down, and as a result they created the Insurance Institute for Highway Safety, which has tested parts that have been certified to be the same, and they perform the same in both low-speed and high-speed crash tests, so I do not think Representative, you have to be concerned about the safety issue, as long as the manufacturer has been certified to be the same as the car company brand part.

Mr. CONYERS. Thank you very much. Mr. Chairman, I yield back.

Mr. ISSA. Thank you, and we will now go to the gentlelady from California, Ms. Chu.

Ms. CHU. Thank you. Ms. Felder, I understand that there has been uptick in number of design patents that the auto industries have filed over the years. In addition, companies like Ford began filing infringement complaints at the International Trade Commission. The complaints were filed against aftermarket suppliers of collision repair parts for popular and iconic cars like the F-150 and the Mustang. What are the outcomes of these cases, and how have they affected the overall market? Is it more difficult to find aftermarket parts for these cars today compared to years past?

Ms. FELDER. Are we talking about the settlement cases?

Ms. CHU. Yes.

Ms. FELDER. Yes? Okay. The terms of the infringement patent suits, settlement has made the parts in question more expensive since only one aftermarket distributor in the country has the exclusive right to sell these aftermarket parts. They are paying royalties in order to be able to do so. That cost is passed on to the consumer. It is not absorbed by the distributor. That in turn is creating a problem for the repair industry. We are not allowed to supply these parts. We would be sued for infringement if we were to buy the

parts from Ford, Chrysler, and now General Motors. Of course, our contention is, this is indeed a slippery slope. Pretty soon, we will not be able to do it for Toyota or Honda or any of the other parts that are made, so consequently, by allowing this patent situation to continue, we know that it has significantly diminished the competition and has created a duopoly.

Ms. CHU. And you have stated that your own company cease and desist letters from a number of car companies who warned you of your infringement liability risk if you continue with your business. How did you react when you received these warnings, and what are you doing to address them?

Ms. FELDER. The distributor that has the exclusive licensing agreement is allowed to resell those parts. We do not prefer to buy them because there is no economic incentive to do so. By the time we purchase the parts for the price that we have to pay, put them in a truck, get them to the customer, we often have lost money. We have done it because we have certain customers that have asked us to do it. They know it is going to cost a little more. We have to at least try to cover the cost of doing so, but we would prefer not to sell these parts. We have received a letter from Chrysler saying that we had—a cease and desist letter. It cost us over $3,000 to hire a patent attorney to answer this letter and state we were purchasing the parts from the licensed distributor who had the right to sell those parts to us. They did not just take our word for it, so we had to go to the expense of paying a patent attorney to represent us in this case.

Ms. CHU. Okay. Thank you, and Mr. Gillis, you are urging Congress to address the automakers misuse of design patents on their crash replacement parts. Can you explain how you believe design patents are being misused by the auto industry?

Mr. GILLIS. Well, first and foremost, I think the evidence is in this chart over to my left. All of a sudden, in an effort to disrupt the competitive marketplace, the car companies are starting to put design patents on these individual parts. There is nothing more special about these parts today than 15 years ago, but they have taken on the design issue or design patent issue as a business strategy rather than a legitimate means to protect the design of an individual part. The second issue is that by putting these patents on individual parts, they are preventing me as a consumer from having a variety of choices when I go out to get my car repaired. As I said in my testimony, I bought the car. I did not necessarily want to become an indentured buyer to the car company for the rest of that car's life. I want choice.

Ms. CHU. Okay. Thank you. Well, if I could have Ms. Burris respond to the same thing?

Mr. ISSA. Of course.

Ms. BURRIS. Sure. About the rise in the number of design patents?

Ms. CHU. Well, of this claim that design patents are being misused.

Ms. BURRIS. Right. Well, I mean, under our patent laws, our design patents cover an ornamental article of manufacture, so that is in our laws, and anyone who applies for a design patent is entitled to protection, provided it meets the requirements of the patent of-

fice. I think a couple of things are going on with the rise in the number of patents that you see, design patents. I think that number one, first of all, the parts are not the same as they were 15 years ago. They are much more advanced technologically with new materials, with integration with other sensor systems in the car, and the styling of the cars is much more attractive than it used to be 15 years ago. I think that offshore companies are able to make those parts very quickly with digital scanning technologies. They do not have to cut a tool or a mold. They scan the part. They have got a tool automatically, and they can chunk out parts very quickly, so there became—I think there came in this influx, which is why it went to the IFTC of parts that were basically copied, so that was a response to, I think in part, a response to the influx of parts that were being copied overseas.

Secondly, and I am actually going to do this when I get back home when I have time. Design patents overall have taken off. They really have shot up at a much higher rate than they have in the past overall, and there are statistics at the patent office that you can see, and I think ever since that Apple-Samsung case, design patents are—they are kind of in vogue right now. A lot of people are filing more and more design patents, and it is not just the automotive companies.

Ms. CHU. Thank you. I yield back.

Mr. ISSA. Thank you. We will now go to the gentleman from New York. I am going to do cleanup so, you know, hang around, though.

Mr. JEFFRIES. All right. Thank you, Mr. Chair, and let me just thank the witnesses for their presence here today. Ms. Burris, you are opposed to this legislation, correct?

Ms. BURRIS. That is correct.

Mr. JEFFRIES. And is your opposition anchored in large part to your view that there should be uniformity across the patent law system that we have in this country?

Ms. BURRIS. Yeah, my primary objection is this carve-out, this exception for automotive repairs parts and where might that lead us after this? What else might be too expensive for the consumers? There has got to be another way to fix this.

Mr. JEFFRIES. Now, is there any precedent for this type of carve-out as it relates to intellectual property law as you understand it?

Ms. BURRIS. In the United States?

Mr. JEFFRIES. Yes.

Ms. BURRIS. Outside of pharmaceuticals and generics, I am not aware of any. There is certainly not any in the design patent world.

Mr. JEFFRIES. Now, is there any concerns that you have as it relates to taking this approach in the automobile parts space?

Ms. BURRIS. Oh, absolutely. As I mentioned earlier the shape, the look of the car has been—the car companies have spent a lot of money with their industrial designers to come up with that eye-pleasing design, and now we are going to say, "Well, no, we are not going to allow you any protection on that." I mean, it is a lot of effort that goes into these, you know, "repair parts." It is more than that.

Mr. JEFFRIES. And with respect to the legislation's broad applicability, it is my understanding that this would be retroactive. Is that correct?

Ms. BURRIS. That is my read, yes.

Mr. JEFFRIES. And so that means that it would apply to patents that have already been issued, right?

Ms. BURRIS. Correct. Yes.

Mr. JEFFRIES. As well as applications that are pending?

Ms. BURRIS. Correct.

Mr. JEFFRIES. Could you just speak for a moment to the issue of the equity in sort of retroactively changing the length of time of a patent from I guess what would be 15 years down to 30 months?

Ms. BURRIS. Well, sure.

Mr. JEFFRIES. Some of them already had a reasonable expectation based on existing law at the time of them getting the patent, of filing the application.

Ms. BURRIS. Sure. I mean, when a patent applicant filed their application 5 years ago, the bargain was—I mean, that is the quid pro quo. I am going to disclose my design in return for a 14-year, which is now a 15-year, term. That is what you bargained for when you filed that patent application. That application that was filed 5 years ago, if this bill were to go through, would be expired if it were—it would just be gone. It would evaporate.

Mr. JEFFRIES. Do you have a sense of whether there would be any sort of Fifth Amendment takings concerns in connection with retroactive application?

Ms. BURRIS. Actually, I had not really thought about that.

Mr. JEFFRIES. Okay. If you have any thoughts subsequent to this hearing, I would be interested in you sharing those with me and or the Committee. Mr. Gillis, it is my understanding that you believe were this legislation to be enacted, that the cost savings that it would yield would inure to the benefits of the consumer. Is that correct?

Mr. GILLIS. That is correct, yes.

Mr. JEFFRIES. And so, you do not believe that the purported cost savings that would take place would not result in either the aftermarket car manufacturers yielding any additional profits or the insurance companies yielding those additional profits? It is your contention that the savings would be passed to the consumer, is that right?

Mr. GILLIS. Well, first of all, it is important to note that the parts are here today, and consumers are benefitting from those parts being in the marketplace, and they are benefitting in two ways. They have access to less expensive parts, plus their very existence keeps the costs of the car company part in check. When you pull these parts out of the marketplace, there will be no reason for the car companies to keep their prices low. They will have a monopoly, and they can charge anything they want for those prices, so thankfully the parts are here, and thankfully consumers are benefitting from those parts. The problem with these patents laws is that they are now taking these parts out of the marketplace, and that is what is going to hurt consumers.

Mr. JEFFRIES. Okay, now if this legislation were to pass, would the insurance companies likely see an increase in their profit margin, separate and apart from the question of whether that thing gets passed along to the consumer, but are they likely to see an increase in their profit margin?

Mr. GILLIS. Right now, the—probably, there are few industries that are more competitive than the insurance industry. We consumers are shopping around like crazy for insurance policies, so if the insurance companies can keep their policy prices in check, they are going to be very happy to be able to do that, and if they can lower their prices, they certainly will because that is the way we are buying insurance these days if you see any of the ads on TV about which insurance company is the least expensive. So conversely, however, if these parts are pulled out of the marketplace, you are going to see substantial increases in the cost of getting cars repaired, and that cost will be simply passed right on to us either in higher insurance premiums, or if we do not have adequate insurance out of our own pockets.

Mr. JEFFRIES. Thank you. I yield back.

Mr. ISSA. Thank you. I am going to try and get through a lot of questions quickly. Ms. Burris, I am going to go through a couple with you because you made some interesting points, and I want to make sure we get them in the record. First of all, you made the point about 30 months not necessarily being 30 months. If it was 30 months from the first sale, would that make a difference to you in the legislation, since you said they would not get 30 months? If they got 30 months, in other words, from first sale, would that matter to you?

Ms. BURRIS. No.

Mr. ISSA. Okay, so the fact that it is not—your concern is you want 14 years. Is that correct?

Ms. BURRIS. Yeah, that is what the law says; 15 now, actually.

Mr. ISSA. Well, that is what Congress made.

Ms. BURRIS. Yeah.

Mr. ISSA. Okay, how long is the patent on a dress?

Ms. BURRIS. Pardon me?

Mr. ISSA. How long is the patent on a dress?

Ms. BURRIS. How long?

Mr. ISSA. If a designer does a gown?

Ms. BURRIS. Sure.

Mr. ISSA. How long is the patent?

Ms. BURRIS. It is 15 years from the date of issue. If it is filed on or after May 13th of 2015, it is now 15 years under the Hague agreement.

Mr. ISSA. And that is something the United States did not have. We tried to have design legislation for dresses for years, right?

Ms. BURRIS. I am not familiar with the years of legislation on dresses, no.

Mr. ISSA. Okay.

Ms. BURRIS. All right, I am sorry.

Mr. ISSA. The gentleman who once sat right here, Mr. Berman and I coauthored a bill to actually create a patent for designers, which they had in Europe and we did not. So let me get through a couple of quick questions. First of all, if we made it 14 years, you would be happy, is that right?

Ms. BURRIS. The law, the design patent law——

Mr. ISSA. No, no. Just answer the question because you are here representing companies. You have talked about a lot beyond the scope of patents.

Ms. BURRIS. Well, I have an engineering background, as well.

Mr. ISSA. You have talked about the auto companies, and you—but you have included a lot of material that it clearly came outside of patent law. Would you be happy with 14 years' exclusivity?

Ms. BURRIS. I would be happy with a term that the design patent laws provide——

Mr. ISSA. Yeah, the current law.

Ms. BURRIS. The current law is now actually 15, but 14, yeah. It is 15 under the Hague.

Mr. ISSA. Okay. Okay, but you are not happy with 30 months.

Ms. BURRIS. No

Mr. ISSA. Okay, so we are arguing over your level of happiness based on length. Let's go through a few of these points. What about the fact that auto companies change their designs, and they change the arbitrarily for design reasons? Do you think a patent should go on even though a car is out of production? They are no longer making that vehicle. Do you think that should trigger any change in it?

Ms. BURRIS. No.

Mr. ISSA. Okay, is there anything that would cause you not to simply want greater exclusivity for the auto manufacturer?

Ms. BURRIS. I am sticking to the language of the design patent laws. The 15 years is what we should——

Mr. ISSA. No, ma'am, I appreciate that, but I just want to know if your position is that you like the fact that as the auto companies are currently pushing the law through litigation, and particularly through the International Trade Commission, which is not an Article 3 court, they are trying to gain exclusivity for 15 years for each and every part of an automobile, and as they are increasing that and suing to get it, you are fine with that, right?

Ms. BURRIS. I do believe a patent owner should be entitled to enforce their patent, yes.

Mr. ISSA. Okay, well, let's go through a fairly straightforward thing. Ms. Felder, you are an expert in the auto parts industry. You know about fenders and bumpers and so on. Now, you have got really good people, I am sure, in your company that deliver those pars, right?

Ms. FELDER. Yes, sir.

Mr. ISSA. How often do they confuse the wrong part if they do not check the number closely because these fenders all look alike, and a lot of these parts look alike, right?

Ms. FELDER. No, Mr. Chairman, they do not. The parts when you bring them, quite obviously, if they are wrong, it is very easy to see. We have two fenders here. If I brought in—these fenders are for a Malibu. If I were to bring in a fender for a Honda, you would be able to put it up and say, "This is not the same fender."

Mr. ISSA. Yeah, but that is not the standard for design patent. Ms. Burris, you have two patents in front of you. Looking at the siren patent that is in front of you, the one on the right, does it look like a siren?

Ms. BURRIS. Well, the title says, "Siren," so yes.

Mr. ISSA. Okay, let's be——

Ms. BURRIS. Now, I look at it. Now it looks like a siren.

Mr. ISSA. Okay.

Ms. BURRIS. Honestly, when I looked at this side, I thought, I wondered, if it was an ice cream maker, maybe because it is getting late in the day.

Mr. ISSA. Now, there is a limitation on what that patent means under the law, right? The law, the law that you are so pleased with as it currently is, there is a limitation on that patent. What is the limitation of that patent? What does somebody get if they apply for that patent and receive it in 1994?

Ms. BURRIS. This design patent covers the ornamental appearance of this article of manufacture, at this time 14 years from the date it issued.

Mr. ISSA. Right, from date of issue of the old law. And so that is an exclusivity in its entirety, correct?

Ms. BURRIS. What do you mean by in its entirety?

Mr. ISSA. If it is substantially different but looks similar, it still—it is not patented, right?

Ms. BURRIS. I am not sure I follow your question. You are talking about someone who might be trying to design around this patent?

Mr. ISSA. Yeah, exactly, somebody can make an extremely similar product. As a matter of fact, that is similar to the sirens manufactured by every single auto security company and home security company in the world in that period of time. They pretty much all look the same, so what you really had there was a very narrow patent. Is that correct?

Ms. BURRIS. I cannot say how narrow it is not knowing the prior art. I mean, there is some prior art listed here on the front, but I would have to take a closer look to see how broad or narrow it would be.

Mr. ISSA. Okay, well, this brings up the point. What should be the standard, if not this legislation, which gives absolutely exclusivity and does not raise the test for these parts? What should be the test when a fender is basically very similar previous fender? In other words, if you have nothing—and I will go to Mr. Gillis because I have left him out—if the auto companies are in fact consistently adding a line, taking away a line, putting in a line, making a change, making it rounder, making it squarer, at what point should the patent office look back 50 years, even 100 years because the auto industry is now over 100 years old, and hold them to a high standard of whether or not the ornateness of that subpart of an automobile, not the entire automobile, but that subpart—is in fact de minimis over the prior art and thus not worthy of a design patent?

Mr. GILLIS. Well, congressman, you know that our position actually is from day one, they should not be allowed to put design patents on these individual items. If it is wrong after 30 days, or if it is correct after 30 months plus one, it should be correct after plus one, so I think that where you are going with this is number one, we fully respect the design of the car should not be tampered with, and Ford should not be able to copy Chevy's car at all, nor should Ford be able to build parts to copy a Chevrolet. The beauty of your legislation is that we call it a repair clause. These parts are designed to be repaired to allow the consumer to repair the car, not build a new car or make it look like the original car, but to repair their own car, and we need the freedom to be able to buy these

parts unencumbered at a reasonable price, so if the manufacturer wants to hold these designs for 14 years, and, as you suggest, then the next year slightly put another wave in it, then they get another 14 years and another 14 years on top of that, again, we see that as an illicit use of very important design patent laws.

Mr. ISSA. Ms. Burris, you are not as old as I am, so I am going to ask, are you familiar with the history of Xerox and other photocopy companies who have tried to design their products to prohibit people from essentially making the consumable parts that go into them?

Ms. BURRIS. Oh, yes, I am very familiar with consumable part protection, yes.

Mr. ISSA. Okay.

Ms. BURRIS. For not just Xerox, for other industries as well.

Mr. ISSA. So the ability to have, if you will, quiet enjoyment of something you paid for, which includes the ability to, if you will, get toner with competition, you are familiar with that and you are comfortable with that. Is that right?

Ms. BURRIS. Well, they spent a lot of money designing a product that, I mean, that they had patent protection on. They should be able to enforce the patent.

Mr. ISSA. But they do not get design patent protection. They only get utility to the extent that they have to.

Ms. BURRIS. Yeah, I am not familiar with their patent portfolio.

Mr. ISSA. Well, you are familiar that there are aftermarket products available for your copy machine and——

Ms. BURRIS. Sure, oh, you can always design around a patent. You can always get—it is just, you know, how much more expensive is it going to be? Is it going to perform the same way? But you can—even design patents, you can design around them.

Mr. ISSA. I am sure you can always make a fender that does not match the other fender.

Ms. BURRIS. You mean, the front and the back?

Mr. ISSA. The left to the right.

Ms. BURRIS. Well, the quarter panels.

Mr. ISSA. Right. Not very desirable. First sale concept, Mr. Gillis. Your position, I assume, is that even though we are trying to find legislation that accommodates middle ground, that in fact when you purchase something and you get a ding in it, and you have a choice of pound it out, put some Bondo in it and hope for the best, or replace it, that you should be able to buy a replacement part from anywhere you want since it is only a subcomponent of that patented or unpatented product that you bought and paid for. Is that right?

Mr. GILLIS. That is exactly right, and the best evidence of that, congressman, is who among us after our warranty is expired is going to go back to Ford to buy a battery? To buy a muffler? Very important and sophisticated parts of the car, or to buy a tire. We like that freedom in mechanical parts, which are probably far more important to the safety of the vehicle than exterior cosmetic parts, so we just want that same freedom when it comes to exterior cosmetic parts.

Mr. ISSA. And your point being that if I want to put a new manifold on, they are not bothering to patent that under design patent,

and yet they do want to have the part that gets hit in a fender bender.

Mr. GILLIS. That is right, and in fact Ms. Burris alludes to the concept of utility patents in her presentation, her written presentation, and our theory is, if the hood has certain waves in it that are of a utility function, then they should get a utility patent, and that is perfectly fine, but what we are talking about is design patents for very important functional parts.

Mr. ISSA. Ms. Felder, the Chairman has indicated in his opening statement, and I know you did not get to hear him present it, but that he is open and he wants to continue with this legislation and begin, you know, finding, if you will, legitimate concerns and seeing if we cannot address them. Let me ask a question for you, and this is a question from one former business person to a current businesswoman. One of the things you mentioned in these exclusive settlements is, in fact, that you cannot produce or find a producer of a product, even if they are QS9000, ISO qualified, they are making a certified part. The fact is, they cannot get a license from the auto company, but somebody did, right? So as a businesswoman, if the auto companies like the music producers and the—and so on had a compulsory license where they had to allow anyone to get a license to use, if you will, that, would that be something where at least you would see an even playing field where you pay the $2.50 for the license on the fender, but competition can find 10 different people to produce a product and have real competition on how it is distributed and how it gets to you and whether it is competitive?

Ms. FELDER. Mr. Chairman.

Mr. ISSA. This is a business question——

Ms. FELDER. Right.

Mr. ISSA [continuing]. Not would we not love to have $2.50 in licensing fees in a product?

Ms. FELDER. Our concern, of course, is, again, restriction of competition. In a free market, which is what our country has been based on, we should not have to go and pay a licensing fee to provide a customer with a competitive product. There are many instances where, I am sure, that might be an appropriate situation. In my opinion, that is—this is not one of them.

Mr. ISSA. And I apologize, but there is a vote on the floor, so I still have to answer the bell, so if you could wrap it up, please.

Ms. FELDER. Very briefly, I want to explain that over the course of the time between the patent legislation, the patents were enforced, 2007. We have seen this industry literally almost erased. In our state alone, there were over—there were five independent distributors. Today, we are the only man standing, and this is national and this is as——

Mr. ISSA. Thank you. Mr. Gillis, I will let you do the close. Right to repair. It is talked about a lot. It is gaining speed around the world. Notwithstanding questions as to patents, both utility and design, do you believe that it should be an open market for quality certified products to be able to have access to licensing fees so as to provide a real market and not a monopoly?

Mr. GILLIS. Well, right to repair is critically important, and it has become more important as automobiles have become more sophisticated, and the car companies tend to be closing up the ability

of independent repairs to be able to get the computer diagnostic materials, the parts, even the tools, in some cases, to repair those cars. So it is clear that the fender, hood, and grill issue is just the beginning of the car companies wanting complete vertical integration over the control of this particular part, and that is bad for consumers.

Mr. ISSA. Well, there will be more to follow. I would encourage all of you to, if you will, revise and extend, if you have thoughts on things that were not asked and you would like to submit them. My expectation is that the Chairman and I will work on future hearings, including with the Patent and Trademark Office. I want to thank you for your kindness in waiting for a little later time today. That helped a great many of us work around our schedule, and with that the hearing stands adjourned.

[Whereupon, at 5:31 p.m., the subcommittee adjourned subject to the call of the Chair.]

APPENDIX

Material Submitted for the Hearing Record

Response to Questions for the Record from Mr. Jack Gillis, Director of Public Affairs, Consumer Federation of America

HOUSE JUDICIARY SUBCOMMITTEE ON INTELLECTUAL PROPERTY FEBRUARY 2, 2016 HEARING ON THE "PROMOTING AUTOMOTIVE REPAIR, TRADE, AND SALES ACT" (PARTS ACT)

Questions for the record from Representative Darrell Issa (CA-49):

Question 1: Ms. Burris testified that if the PARTS Act does not get enacted consumers will still have a choice on how to repair their car. Specifically, she stated "Consumers have choices. They can go with refurbished parts, remanufactured parts. They can repair the parts. And you know from my perspective as a patent attorney they can make it look a little different and then it won't be infringing a design patent. It's not that tough." Do you agree with this, and if not, please explain why.

Gillis Response:

There are many things wrong with Ms. Burris's comments. First of all, to limit choices to refurbished and remanufactured parts severely limits the choice consumers have when they need crash repair parts. The idea of an open, healthy marketplace is to expand, not limit, a consumer's choice. For metal and plastic exterior parts, with the exception of bumper covers, there are few, if any, refurbished or remanufactured parts. As to her suggesting that the part could be repaired, that is a fine solution when the damage is minimal (scratches or dings) but after an accident, most of the parts are simply not repairable. They are crushed, banged up and bent beyond repair.

Regarding her "perspective" as a patent attorney, suggesting that consumers replace a fender, hood, headlight or other crash part with something that doesn't look the same as the original is ludicrous. Consumers want their car to look the same after an accident as it did before.

Ms. Burris solution is essentially limiting the consumer to just one specific brand of part—something that is not in the consumer's best interests.

The thrust of Ms. Burris statement is to protect the car company brand monopoly. Car companies are abusing design patents by getting design patents on parts which never before had design patent protection. This new business policy is solely for the purpose of eliminating

competition and increasing the car company's monopoly on aftermarket parts used in collision repair. What the car companies are doing with their design patents is eliminating free choice in the marketplace, which has a devastating impact on consumers. For anyone to suggest that choice can be satisfied in the collision repair marketplace through the use of refurbished and remanufactured parts as substitutes for new, high quality, independently produced parts demonstrates a serious lack of respect for the importance of consumer choice in the marketplace.

Question 2: There have been some claims that this bill won't result in any savings for consumers or that it will lead to a race to the bottom leading to substandard parts flooding the marketplace. How do you respond to those assertions? Additionally, what are the impacts of a less competitive marketplace on our vulnerable populations, such as seniors, the middle class, and low-income earners?

Gillis Response:

Not passing this bill essentially protects the car company brand parts monopoly. That monopoly costs consumers dearly. The current presence of independently manufactured parts forces the car companies to price their parts competitively which saves consumers money. For the past few years, the car companies, reacting to increased sales due to better priced parts from independent manufacturers, have been exponentially increasing the number of design patents on the parts we need to get our cars repaired. While the overall design of the vehicle is important and needs protection, issuing design patents for individual parts of the car is being done solely to prohibit competition.

Competition not only insures fair pricing, but improves quality. Without competition, the car companies have no incentive to fairly price the parts we need to get our cars repaired. Competition is good for consumers. What the car companies are doing with their design patents is eliminating free choice in the marketplace which has a devastating impact on consumers. As evidence, consider the following: For the same price that you have to pay for a GMC Terrain plastic bumper cover ($682), you can buy 2 Acer laptops and an Epson work force printer. For less money than what Chevy charges for a simple sheet metal fender for a Chevy Traverse ($390), you can buy a Canon Powershot 16.1 MP digital camera with HD movie mode. It's the

Response to Questions for the Record from Mr. Jack Gillis, Director of Public Affairs, Consumer Federation of America

same for parts across the board: headlights that cost $2000, simple stamped sheet metal fenders for $400; hoods for $800. The reason why those laptops and cameras are not only cheaper today than ever before, but better performing, is solely due to competition. Competition is the consumer's best friend when it comes to both fairly priced and improved quality products. The car companies are working hard to kill that competition with the illicit use of important design patent laws.

The most tragic irony in the lack of competition is what we call the automakers "double whammy." Not only can the car companies charge whatever they want for the parts we need to fix our own cars, but when they charge so much that the car is "totaled," the only recourse for many consumers is to go back to the car companies to buy another one of their products.

As to leading to a "race to the bottom," nothing could be further from the truth. Competition improves quality. Virtually all improvements to quality and service in the U.S. market can be attributed to robust competition. By eliminating competition, an industry already plagued by millions of poor quality parts generating more car recalls than ever before in history, will have no incentive to build quality into their service parts.

Overpriced crash repair parts have the greatest impact on the most vulnerable of our citizens. People paying for their own repairs, people on limited incomes, people who desperately need a vehicle for work, people who have high deductibles so they can afford required auto insurance, are the biggest victims of this price gouging scheme by the car makers. Even those with proper insurance coverage will see inevitable increases in their insurance premiums if insurance companies don't have access to fairly priced repair parts.

When we buy a car, it is one of the most expensive purchases we will ever make. So, we want the right to get that car repaired with safe, reliable and fairly priced parts of our choosing. We do not want to become indentured customers of the car companies by being forced to buy the parts we need only from them at monopolistic prices.

Response to Questions for the Record from Mr. Jack Gillis, Director of Public Affairs, Consumer Federation of America

Question 3: Would opening up the repair parts marketplace after a reasonable period of time still allow car companies to recoup their investment on these collision parts, even [if] their patent term were limited to 30 months?

Gillis Response:

The issuing of design patents on these parts should be eliminated. The Parts Act attempts to appease the powerful car company lobby by giving them 30 months of exclusive market dominance in the form of monopolistic design patent protection. We have to ask that if it is ok to provide a competitive alternative a day after 30 months of exclusivity, why isn't it ok to provide competition on day one. Shouldn't consumers have choices the minute they drive their own car off of the dealer's lot?

In the early 1990s, the car companies asked Congress for special design copyright protection on their replacement parts and Congress said NO. Nevertheless, recently they have been getting design patent protection in spite of this Congressional admonition. The car companies have been making huge profits by ignoring Congress and placing design patents on their parts. Sadly, it's the American consumer who's been footing the bill for those monopolistic profits.

Response to Questions for the Record from Ms. Kelly Burris,
Intellectual Property Attorney, Burris Law, PLLC

Questions for the record from Representative Darrell Issa (CA-49):

Question 1:

You state on page 6 of your testimony that consumers already have "many options" for alternative parts, such as SEMA parts, which are specialty car parts, like muscle car parts, that change the appearance of the car. You go on to say, "[s]o what if their vehicle doesn't look exactly like the original manufactured version?" Do you really think that consumers want to use muscle car and other specialty parts to fix their cars after an accident?

Answer: I think what consumers want relative to alternative parts is really up to the individual consumer. I also suspect that many consumers would be willing to pay less money for a replacement part that looks different.

Question 2:

Central to your opposition to the PARTS Act is the idea that the bill would "remove the incentive" for car companies to innovate in design. It seems to me that car companies' incentive to innovate is the initial sale of a vehicle, where car companies compete against each other for new car sales. The PARTS Act does nothing to diminish that incentive since it maintains car companies' ability to get a 15 year design patent on a collision parts and enforce them against each other if there is copying of design occurring. It is only in the market for repair collision parts that the enforcement period would go to two and a half years. Is it really your position that the car companies would simply give up innovating in design if the PARTS Act were passed?

Answer: First, the proposed two and a half years in the proposed PARTS Act is "...beginning on the first day on which any such component is first offered to the public for sale ...in any country." As included in my written statement and in my testimony, this does not equate to an enforcement period of two and a half years because there is often no issued design patent at the time of this first offer for sale. In fact, in many cases, there would be no enforcement period with this proposed language. Second, I believe that the incentive to invent in general would be diminished if any protection afforded under our patents laws were removed. I also believe that creativity in new automotive designs would be negatively impacted if the PARTS Act were passed and that the car companies would not be innovating as much.

Question 3:

On page 4 of your testimony you claim that 'non-OEM parts translate to for the brand owners, such as Ford, Chrysler, and GM, is a tarnishment of their image because the replacement part is presumed to be made by the OEM once the vehicle is back on the road.' Apparently Ford, Chrysler, and GM do not agree with you. All three have entered into agreements with the largest alternative part supplier to, for a royalty fee, allow it to be the exclusive distributor of these aftermarket parts you claim represents a "tarnishment" of their brand. So is it the case that these parts ruin a car company's brand until a royalty is paid to the car company – and then it's ok?

Response to Questions for the Record from Ms. Kelly Burris,
Intellectual Property Attorney, Burris Law, PLLC

Answer: I am not familiar with the specifics of agreements between the OEMs and this "largest alternative part supplier," however, I suspect that the OEMs have control over the quality of the part designs that they are licensing, which is a common term in licensing agreements of this nature.

Question 4:

In 2000, a former president of IIHS said that claims about the aftermarket parts "are red herrings to try to frighten people." http://www.iihs.org/iihs/news/desktopnews/cosmetic-crash-parts-are-irrelevant-to-auto-safety
In 2005, IIHS's Chief Operating Officer said that "crash testing done by the Institute and others demonstrates that cosmetic crash parts such as door skins, fenders, and bumper covers are irrelevant to the crashworthiness performance of the vehicles."http://www.iihs.org/iihs/iihs-website-search?q=aftermarket.
In 2010, the IIHS reported, "The source of cosmetic parts is irrelevant to safety because the parts themselves serve no safety or structural function. They don't affect how a vehicle holds up in a crash. They merely cover a car like a skin."http://www.iihs.org/iihs/sr/statusreport/article/45/11/1
Ms. Burris, please explain the discrepancy between your assessment of the safety of alternatively supplied parts compared to that of the IIHS's assessment.

Answer: First, I note that these independent conclusions drawn by the insurance industry funded and supported organization of IIHS (http://www.iihs.org/iihs/about-us/member-groups) are from 1986 and 2010, during which times automotive designs were much different than the designs of today. These older designs were not outfitted with sensor technology and are not as integrated and made of impact-absorbing materials as current designs, as eluded to in my testimony. I also do not believe that IIHS's crash testing was verified by an independent third part. Therefore, I do not believe there is any discrepancy.

Response to Questions for the Record from Ms. Pat Felder, Owner, Felder's Collision Parts, Inc.

HOUSE JUDICIARY SUBCOMMITTEE ON INTELLECTUAL PROPERTY FEBRUARY 2, 2016 HEARING ON THE "PROMOTING AUTOMOTIVE REPAIR, TRADE, AND SALES ACT" (PARTS ACT)

Questions for the record from Representative Darrell Issa (CA-49):

Question 1: In her attempt to raise questions about the safety of aftermarket parts at issue in the PARTS Act, Ms. Burris (on pages 3-4 of her written testimony) references a Consumer Reports article (dated July 22, 2010), which discusses Ford's allegations (from Ford's computer-simulated crash testing) that the use of certain aftermarket bumper beams, bumper isolators, bumper bracket, and radiator supports might affect air bag deployment. Are those parts referenced by Ford in the Consumer Reports article even the type of cosmetic parts at issue in the PARTS Act?

Answer: As I understand it, the type of parts referenced in the Consumer Reports article are not at all the type of parts at issue in the PARTS Act. More specifically, they are not exterior, cosmetic parts, and they do not appear to be the type of parts for which car companies typically seek design patents. Therefore, Ms. Burris' comparison of parts in the Consumer Reports article to the parts at issue in the PARTS Act is "apples to oranges." As I mentioned in my testimony, the Insurance Institute for Highway Safety (IIHS) has consistently stated, based on its crash-testing, that there is no difference in occupant safety between car company parts and alternatively supplied parts. As you know, the car companies often cite IIHS safety ratings in their advertising, which suggests they also value the credibility of IIHS.

* * * * *

Question 2: Some have suggested that while the 15-year period of exclusivity permitted for design patents under current law is too long, that the 2.5 year period of exclusivity for repair parts under the PARTS Act is too short. What would be the impact on competition if the bill were to settle somewhere in between 2.5 years and 15 years?

Answer: At its core, the PARTS Act seeks to restore the collision repair parts marketplace to where it had been for decades – prior to the car companies enforcing their design patents – when alternative suppliers did not have to wait at all to get into the market to compete. The PARTS Act would strike a balance by providing the car companies up to two and a half years to sell their parts exclusively without competition from alternative suppliers. But after that period expires, alternative suppliers could enter the market to offer consumers cost effective independent repair parts without fear of design patent infringement liability. My understanding is that if the car companies could exclude alternative suppliers from entering the market past the two and half year mark, it becomes very difficult, if not impossible, for these independent businesses to make enough sales over the life of the part to cover the manufacturing, distribution, and other costs necessary to enter the market and compete. That would bad for consumers and bad for aftermarket businesses across the country like mine who are already shuttering their doors due to anti-competitive actions by the car companies. On a related note, it strains credulity to believe,

as the car companies argue, that preserving the competition that has existed for decades – through enactment of the PARTS Act -- will somehow, all of sudden, put the car companies' designers out of business. To the contrary, if the PARTS Act is not enacted, and competition is eliminated, thousands of alternative supplier jobs will be at risk.

* * * * *

Question 3: Some have questioned whether there are particular qualities with respect to the automotive repair parts market that sufficiently distinguish it from other consumer goods markets in order to justify the PARTS Act singling-out such parts for the narrow exception from design patent infringement under the PARTS Act. How do you respond to that?

Answer: In my view, and based on the following factors, motor vehicles are very unique relative to other consumer goods, and warrant a special public policy case for an exception from design patent infringement for automotive collision repair parts as considered under the PARTS Act. First, a motor vehicle is so prone to be in a state of disrepair (at one point or another over its lifetime), that the consumer is required to have insurance in order to own it. Second, because motor vehicle parts are so prone to be in a state of disrepair, and are very expensive relative to repair parts for other consumer goods, there is sufficient consumer demand for alternative suppliers to enter the market and compete on price against the car companies. Third, consumers typically demand (and many state consumer protection laws require) that repair parts be of "like kind and quality in form, fit and finish" as the original equipment part; in fact repair parts typically need to be "must match" parts or they won't work (e.g., if the shape of door does not match the original equipment door, it probably will not function properly). Finally, for many Americans motor vehicle ownership is essential to their everyday lives and cost of repair can be a significant cost of ownership over the life time of a motor vehicle. So, based on those factors, motor vehicles are very unique – and should be handled as a limited exception to the design patent law.

* * * * * *

Response to Questions for the Record from Mr. Dan Risley,
President & Executive Director, Automotive Service Association

Questions for the record from Representative Darrell Issa (CA-49):

Question 1:

As sponsor of the PARTS Act, I was very pleased to read ASA's Federal Legislative Objectives for the 114th Congress (http://takingthehill.com/legislation/federal/legislative-objectives/), especially #27, which reads: "ASA opposes granting vehicle manufacturers' monopoly copyright or patent rights on sheet metal parts or design patents on the shapes of other OE parts." I agree. So, Mr. Risley, I read your policy objective #27, and I frankly am at a loss as to why the ASA would ever oppose the PARTS Act, whose fundamental objective is to ensure that car companies cannot eliminate competition in the repair parts marketplace through enforcement of its design patent monopoly. Wouldn't you agree with me that the PARTS Act, if enacted, would help ASA achieve its #27 policy objective?

Response:
ASA does not believe that the current marketplace provides a monopoly for sheet metal parts or other OE parts.

ASA's greatest concern with the PARTS Act is the lack of attention the legislation gives parts quality. It ignores parts certification and only enhances a marketplace that already favors cheaper, low quality parts.

Question 2:

In ASA's Federal Legislative objectives for the 114th Congress, it states that "ASA believes a competitive parts marketplace, of tested and verified quality parts, is in the best interest of the motoring public." (http://takingthehill.com/legislation/federal/legislative-objectives/). I agree, with ASA on that. Yet, quite illogically, ASA does not support the PARTS Act. Wouldn't you agree with me that if we don't pass legislation like the PARTS Act to stop the car companies from eliminating competition through the use of their design patents, then there will be no aftermarket parts to certify at all – and it will be game over for competition?

Response:
No, we do not agree. The aftermarket parts marketplace is thriving. The major problem for autobody repair facilities is that there is no regulation of aftermarket parts quality. With many insurers focused on "cheaper, quicker" repairs, parts quality is not a priority. The PARTS Act ignores parts quality and, in fact, will only worsen a parts market that our collision shops have to deal with each day.

Question 3:

ASA criticizes the PARTS Act as being anti-consumer – can you look you explain why ASA is on the opposite side of the Consumer Federation of America, the Advocates for Highway and Auto Safety, the Center for Auto Safety, the Consumers Union, and Public Citizen?

**Response to Questions for the Record from Mr. Dan Risley,
President & Executive Director, Automotive Service Association**

Response:
ASA cannot speak for these organizations but several are tied closely to the insurance industry. Insurers insist that cheaper parts means lower premiums for consumers. We do not agree. In fact, we have found that some of these organizations have supported legislation that ignores the quality and safety of parts in an effort to follow the insurer model of "cheaper and quicker" repairs.

Question 4:

You state in your testimony that although the National Highway Traffic and Safety Administration (NHSTA) has authority to set safety standards it has determined that aftermarket collision repair parts do not need to be regulated because there is not a "proven history of safety concerns." In addition, the Insurance Institute for Highway Safety – the organization that publishes the safety ratings for the car companies – has consistently stated that there is no difference between car company collision parts and alternative replacement parts in terms of occupant safety.
My question is that if the automotive safety regulator and the organization testing these parts for safety have not identified safety concerns with collision repair parts, and the car companies are entering into settlements that provide for exclusivity agreements with an alternative distributor, how can one argue safety issues with these parts?

Response:
It is our understanding that IIHS is tied closely to the insurance industry. With regard to NHTSA, we have had much difficulty for a number of years, multiple administrations, in having NHTSA seriously consider safety analyses of aftermarket crash parts as well as a separate issue, periodic motor vehicle safety inspection. Although these are separate issues, a common theme is certainly present. Once the vehicle leaves the showroom, NHTSA's interest diminishes.

We worked with the Congress in obtaining a GAO review of aftermarket crash parts. GAO's analysis on the safety of these parts was superficial with no clear message. It is an area that needs further review by NHTSA and the Congress.

AIPLA
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

February 9, 2016

The Honorable Darrell E. Issa
Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
6310 O'Neil Federal Office Building
200 C Street SW
Washington, DC 20024

The Honorable Jerry L. Nadler
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
6310 O'Neil Federal Office Building
200 C Street SW
Washington, DC 20024

Re: Hearing on H.R. 1057, the Promoting Automotive Repair, Trade, and Sales ("PARTS") Act

Dear Chairman Issa and Ranking Member Nadler

The American Intellectual Property Law Association ("AIPLA") appreciates the opportunity to present our perspective on H.R. 1057, the Promoting Automotive Repair, Trade, and Sales Act ("PARTS") Act of 2015, and respectfully requests that a copy of this letter be made a part of the record for the February 2, 2016 hearing. For the reasons set forth below, we are opposed to the legislation.

AIPLA is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

The United States has long recognized that patent protection is a necessary and beneficial incentive to foster the investment in and development of innovative new designs to enhance the attractiveness and appeal of products for consumers. Congress enacted the first design patent law in 1842.[1] Some thirty years later, the U.S. Supreme Court acknowledged the important role design patents play in innovation:

[1] Act of Aug. 29, 1842, ch. 263, §2,5 Stat. 543 (codified as amended at 35 U.S.C. §171).

> "The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts.... The law manifestly contemplates that giving certain protection to certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public." *Gorham Co. v. White*, 81 U.S. 511, 525 (1871).

Over the years, as competition has come to rely not only on the function but also on the appearance of a wide variety of products, predictable design protection laws play an increasingly important role in the nation's dynamic economy. With the advent of new tools and technologies, such as computer-aided design, computer-aided manufacturing, and computer-aided engineering, the engineering and manufacturing of all kinds of new products has greatly accelerated. However, the same capability that can be employed to develop innovative new designs can also be employed to cheaply and rapidly copy the designs of competitors. Without strong design patent protection, modern tools of reproduction would be used to copy the designs of any number of products and consumer goods that were developed at great expense and effort. Accordingly, strong laws to protect designs are more important than ever. In this respect, U.S. design patent law has played a critical role in protecting American industry against domestic and foreign imitators.

AIPLA foresees that shortening the term of design patent protection, as proposed in H.R. 1057, will have a negative impact on the patent system. The legislation proposes to reduce the length of design patent protection for certain motor vehicle component parts from 14 years (or 15 years for design patent applications filed after the May 13, 2015 implementation of the Hague Agreement) to 30 months. This reduction of patent protection will discourage important innovation by designers and manufacturers of motor vehicle parts. While proponents of the legislation argue that H.R. 1057 would benefit consumers by lowering the cost of replacement parts and insurance, it would do so only by curtailing the intellectual property rights of those who created or invested in the innovative design deemed worthy of patent protection. This legislation would give competitors a very early opportunity to freely copy innovative designs without bearing the innovators' burden of investing in research and development. Furthermore, the bill could also set a negative precedent for other legislation that would similarly reduce design patent terms for other industries.

To the extent that there is a concern for overreaching by patent owners, judicial precedent has appropriately differentiated permissible repair from impermissible reconstruction of patented items. The U.S. Supreme Court has already recognized that, while it is an infringement to reconstruct a patented article, no infringement results from the repair of such articles that have been properly licensed from the patent owner.[2] The repair of a patented article of manufacture is

---

[2] *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 337 U.S. 476 (1964); *see also Sage Products, Inc. v. Devon Industries, Inc.* 45 F.3d 1575 (Fed. Cir. 1995); *FMC Corp. v Up-Right Inc.* 21 F.3d 1073 (Fed. Cir. 1994); *Porter v. Farmers Supply Service, Inc.*, 790 F.2d 882 (Fed. Cir. 1986); *Dana Corp. v. American Precision Co.*, 827 F.2d 755 (Fed. Cir. 1987).

permitted so long as the parts used for repair are not covered by other separate design or utility patents.

Finally, as design protection becomes increasingly important around the world, the PARTS Act would place the United States out of step with existing international laws and treaties. The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") speaks to a requirement for design protection in Article 25.1, requiring member countries to protect "new or original" designs through either industrial design or copyright law.[3] The agreement also specifically requires a minimum of 10 years for the duration of design protection.[4] Additionally, the 1999 Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs ("Hague Agreement") provisions took effect in the United States on May 13, 2015, allowing U.S. applicants to file international design patent applications in member countries. The Hague agreement has a provision which requires a 15-year term of protection from issuance.[5]

Design patents provide important and necessary protection which fosters innovation in creative new designs. If H.R. 1057 is enacted, it would deprive patent owners of necessary rights and would erode the repair/reconstruction doctrine. As a result, the bill, if enacted, would put at risk many individual innovators and companies who have faithfully invested in creating new, innovative, and patentable designs in the motor vehicle field.

AIPLA would like to thank the Subcommittee for considering our views on these important issues, and we look forward to further opportunities to assist the Subcommittee in this matter.

Respectfully submitted,

Denise W. DeFranco
President
American Intellectual Property Law Association

Cc: Chairman Goodlatte and Ranking Member Conyers

[3] Article 25(1), TRIPS, General Agreement on Tariffs and Trade, available at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.
[4] *Id.*; Article 26.3.
[5] Article 17, Initial Term and Renewal of the International Registration and Duration of Protection, Hague Agreement Concerning the International Registration of Industrial Designs, Geneva Act (1999), available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=285214#article5.

○