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

HEARING

BEFORE THE

SUBCOMMITTEE ON
INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

H.R. 3889

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

WEDNESDAY, AUGUST 1, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:37 p.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Quayle, Coble, Chabot, Issa, Jordan, Poe, Chaffetz, Griffin, Amodei, Watt, Chu, Lofgren, Jackson Lee, and Waters.

Staff present: (Majority) Blaine Merritt, Subcommittee Chief Counsel; Olivia Lee, Clerk; and (Minority) Stephanie Moore, Subcommittee Chief Counsel.

Mr. GOODLATTE. Good afternoon. This hearing of the Subcommittee on Intellectual Property, Competition, and the Internet of the Committee on the Judiciary will come to order. And I will begin with my opening statemen.

Today the Subcommittee will consider the issue of patent 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 automobile 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.

It is understandable that car manufacturers want to reap a return on their investments, and they have attempted this in a variety of ways. For one, in the past, manufacturers have argued for Congress to amend the Patent Act or the copyright design statute to provide greater protection for designs.

In addition, there has been a recent increase in the number of applications for design patents for individual parts of vehicles. This latter approach 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, meaning the independent garages could lose a war of attrition.

Representative Issa has introduced H.R. 3889, 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 the Subcommittee 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.

[The bill, H.R. 3889, follows:]

I

112TH CONGRESS
2D SESSION

H. R. 3889

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 2, 2012

Mr. ISSA (for himself and Ms. ZOE LOFGREN of California) introduced the following bill; which was referred to the Committee on the Judiciary

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

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

"(C) 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:

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

(3) by adding at the end the following;

"(c) INAPPLICABILITY.—This section shall not apply to any person who applies a patented design, or colorable imitation thereof, described in subsection (a) to any article of manufacture if that act would not be considered an act of infringement under section 271(j)".

SEC. 4. EFFECTIVE DATE.

These 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. GOODLATTE. And it is now my pleasure to recognize the Ranking Member, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. And I managed to mess up my microphone here. Either it is an ornament, or a design, or—— [Laughter.]

Functional issue. But regardless, I have to hold it up because I broke it. So, I see how he was such an efficient automobile thief. [Laughter.]

Mr. ISSA. You know, from anyone else, I might think you were disparaging the Member. [Laughter.]

Mr. WATT. That is an inside joke, you all.

Well, I thank the Chairman for holding the hearing. Today marks at least the fourth consecutive Congress that we have considered the scope of design protection under our patent laws. Design patents protect the new, unique, and ornamental designs of industrial and consumer products. Design patents differ from utility patents. While utility patents provide exclusive rights over new and useful inventions, design patents provide a fundamentally different protection. In laymen's terms, design patents protect the style and look of consumer products.

Like all patents, they reward creativity by conferring upon the creator the exclusive right to market or otherwise control commercialization of his or her design for a 14-year period. This reward allows the creator to achieve a return on his or her investment, and incentivizes further design innovation.

The Department of Justice and the Federal Trade Commission have noted that intellectual property and antitrust laws are "complementary bodies of law that work together to bring innovation to consumers."

The exclusive rights granted to intellectual property holders are not presumed by the enforcement agencies to create monopolies because consumers may have alternatives or other substitutes in the market.

The PARTS Act, the subject of today's hearing, in effect limits the auto makers' exclusive right to their design to, at most, 30 months, depending upon when the 30-month clock begins, perhaps even less time to enjoy the exclusivity of a design patent.

The proponents and opponents of the proposed modifications to the protections afforded to automobile aftermarket parts under current law have fundamentally different views of the market dynamics in the replacement parts industries.

Supporters, and I am sure we will hear from Mr. Issa and Ms. Lofgren shortly, so they will correct me if I am misinterpreting what they are saying. Supporters of the bill tend to believe that automobile manufacturers' ability to assert their design patent rights in the aftermarket may establish a monopoly in that secondary market.

Under this view, the original equipment manufacturer may corner the secondary market for the 14-year life of the patent by excluding all others, exacting high licensing fees, and providing limited choices to the consumer. It is estimated that consumers keep their cars between 9 and 11 years, so the 14-year patent term engulfs the entire period during which there would be any demand for replacement parts.

Most supporters would have automobile manufacturers recoup their investment in the primary market when they first sell their vehicles, leaving the secondary market more competitive.

The opponents, on the other hand, argue that they invest massive sums of money into research and development, and are entitled to the rewards that the patent system provides. Especially in light of advancements in technology that now allow and facilitate immediate copying of patented designs and reproduction at lower costs often outside the United States. Automobile manufacturers maintain that these free riders, as they call them, will retard innovation while providing consumers with substandard quality, substandard parts.

The equities involved on both sides of this issue are seemingly compelling, yet necessarily self-interested. I think what is missing from this debate is input from the government, both from a domestic and international perspective.

Recently in February of this year, the Department of Justice announced that it had uncovered international price fixings in the aftermarket industry for auto lights, which could be covered by design patents. The indictments and guilty pleas give rise to some speculation whether consumers are victims of anti-competitive practices within the aftermarket industry generally, and whether the alleged cost savings that would result from opening the market to none original equipment manufacturers' parts will ever reach the consumer.

I am also mindful of ongoing efforts to enact legislation to implement the Patent Law Treaty and the Geneva Act of the Hague Agreement regarding design patents. Both were signed during the Clinton Administration and ratified during the Bush Administration.

The proposed Hague Agreement Implementation Act makes two substantive changes in United States' designed patent law, including extending the patent term for designs from 14 to 15 years after the grant. Director Kappos is on record urging the Congress to move quickly to implement these treaties.

Therefore, it concerns me that this bill may take us in the opposite direction, limiting rather than strengthening the design protections of a U.S. industry. So while I come to this issue with an open mind, I believe that in addition to hearing from the affected stakeholders, it would be useful at some point to hear the government officials who deal with these issues on an ongoing basis.

And with that, Mr. Chairman, I yield back. I have not taken a position one way or another, but that is what hearings are for.

Mr. GOODLATTE. I thank the gentleman. In part, to allow the gentleman to defend his reputation and, more importantly, to allow the gentleman, who is the author of the legislation that is the subject of the hearing, I will recognize Mr. Issa for an opening statement for 5 minutes. And then after that, I will recognize the gentlewoman from California, Ms. Lofgren, for an opening statement. And then we will ask that all other opening statements be made a part of the record.

So without further ado, the gentleman from California is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman. As in the Constitution to say "To promote the progress of science and useful arts by securing for a limited times to authors and inventors the exclusive right to their respective writings and discoveries."

I have read that so many times before I came to Congress while I was inventing, while I was patenting both utility patents and design patents. And I like most people who have design patents knew that, in fact, my design patents were ornamental. They were limited. That anyone could take a box that contained one of my security products and take off a few ornamental lines that were put on that represented both a patentable item and perhaps even a trade dress in time. But they could produce the same box. It just would not be the same, but the screws would line up. Nuts and bolts would match. The PC board could fit exactly the way it was. In other words, in form, fit, and function, they could totally produce a replacement part. And in some cases, people did.

That is what we are talking about here today. We are talking about a recognition that first, as my colleague so aptly said as he was stating both sides of the issue, and I appreciate that. From our side, this is narrow. This is limited. It relates only to the outside of an automobile. It is necessitated only by what appears to be, in my opinion, expansion beyond the intent of these ornamental patents to try to create effectively a 14-year utility patent on the entire automobile.

Now that is not new. The auto companies have formally tried to do that in the past, and I am a complete supporter that a part which is confusingly similar, a part that bears the trade name of the manufacturer, a part that would imply a given level of quality predictability or originalness, should, in fact, not be what we allow the aftermarket to produce.

But when you consider the balance the Constitution intended, which included the, if you will, a long-established for sale concept, when I buy an automobile and then somebody bangs it up in the parking lot, I own that fender. I can repair that fender to an inferior level and nobody has a gripe. Why is it I cannot buy a form, fit, and function identical part and buy it on a competitive market? The answer is sometimes you can, sometimes you cannot. It depends on who is suing whom. Who has gone to the ITC to enforce in a way that was not enforced for the first 100 years of the auto company this replacement parts right.

That is the reason that bumpers, fenders, side mirrors, and door panels are, in fact, the subject of this legislation. Now I will tell you, Mr. Chairman, the aftermarket parts manufacturers would like this to be shorter or flat to not at all. We tried to balance that, and there is no magic number. We found a number that seemed to allow the auto companies a launch period. And by the way, this would be a launch period in which if every model year they changed their fender, they would enjoy yet a new exclusive period.

But we tried to have it short enough that in a relatively short period of time, as accidents happen, collisions, rust out, and other damage, that they would be able to buy a replacement part on a competitive market. Even if they could not buy one in a competitive market in some cases, the auto companies would tend to price their

product based on a hypothetical competitive market. We believe that that limits the antitrust characteristic of parts pricing.

Additionally, a healthy aftermarket means that when you get to end of life, when that 10-year period is over and the patent is still in effect, but the auto company, in the case of a small production or, let us say, a Saturn, no longer wants to produce those products or they are no longer available, there is a healthy aftermarket to provide that.

People in Europe already enjoy some of these considerations and for good reason. The consumer has a balance, and one of those balances is a reasonable expectation that a competitive market exists. A high competitive market exists for the automobile, but without legislation like this, over time, in the ITC particularly, I believe that there will be an erosion of the competitive market and the availability of alternatives when that car is hit in the parking lot or hit on the highway.

And so, Mr. Chairman, I appreciate the unusual opportunity to be able to introduce the bill and an opening statement. I look forward to working with people on both sides of the aisle, such as Congressman Lofgren and others, to ensure that we make sure that this is limited, narrow, and dealing only with the likely parts that get hurt on an automobile in everyday wear and tear in which we would much rather have a competitive replacement part available than have a consumer unable to fix that part properly, and yet unable to afford a replacement part.

I thank the Chairman and yield back.

Mr. GOODLATTE. I thank the gentleman. The gentlewoman from California, Ms. Lofgren, is recognized for an opening statement.

Ms. LOFGREN. Thank you, Mr. Chairman. And I am happy to be a co-sponsor of this bill with my friend, Congressman Issa. In a previous Congress, I had a bill that took a slightly different approach. Basically, that approach protected the design from being copied by competing car companies, but also allowed for the independent production of parts when they were used solely as replacement repair parts. And, as I think Mr. Issa has noted, that bill, although I thought a good approach, was not successful, did not become a law.

It is worth noting that several European countries and Australia have actually enacted a repair clause provision in their laws. And I think we can take a look at what has happened there and see that there is real benefit to consumers, and I do not think real damage to automobile manufacturers, which none of want to do.

This bill that Congressman Issa and I are promoting is a different approach. It limits the protection period to allow for competition when it comes to the aftermarket scene. And why would we do this?

Well, the Consumer Federation of America, the Center for Auto Safety, the Consumers Union, and the policy and advocacy arm of Consumer Reports, are all in favor of this bill. And I think the reason why is that competition will lower costs for consumers. Now that is important in a time when the economy is tough. But it is also important in some other ways.

Right now, the elimination of competition from independent brand crash repair parts is estimated to cost automobile owners

about a billion dollars a year. That is a lot of money. Because of the high cost, there are individuals who actually do not do the kind of repairs that they ought to do. And that increases the safety risk to motors.

I agree with Mr. Issa that the time frame put in the bill was our best guess. You could argue for more. You could argue for less. But I think that this is calculated to provide for some relief for consumers when it comes to repair of automobiles while protecting completely the design when we have the sale of automobiles. And that is part of the genius of the American auto industry.

I will not go on at great length, Mr. Chairman. I am appreciative that we are having this hearing, and I am hopeful that we can actually move this bill because I think it will help promote safety. It will promote competition. And it will also save consumers a great deal of money while preserving the patent protection that auto manufacturers deserve for their design when they sell automobiles.

And with that, Mr. Chairman, I would yield back.

Mr. GOODLATTE. I thank the gentlewoman. And without objection, other Members' opening statements will be made a part of the record.

We have a distinguished panel of witnesses today. And as is the custom of this Subcommittee, before we begin, I would like to swear in the witnesses. If you all would please stand.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you, and please be seated.

Each of the witnesses' written statements will be made a part of the record in its entirety. And I ask each witness to summarize their testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

Our first witness is a constituent and friend of mine, Mr. Neal Menefee, President and CEO of Rockingham Group Insurance Company in Harrisonburg, Virginia. He will be testifying on behalf of the National Association of Mutual Insurance Companies and the Quality Parts Coalition.

Prior to joining Rockingham, Mr. Menefee spent 15 years with Exxon Company USA in their marketing and corporate planning departments. He also serves on a number of boards for various business, civic, and charitable organizations. He received a B.S. in Electrical Engineering with distinction from Virginia Tech, and his MBA from the University of Pittsburgh.

Our next witness is Kelly Burris, shareholder of the Ann Arbor law firm Brinks, Hofer, Gilson, and Lione. She chairs the Brinks' Green Technology Practice Group and focuses on the preparation and prosecution of U.S. and foreign patent applications in the mechanical, material science, and electrical arts.

Before practicing law, Ms. Burris spent more than 11 years in the aerospace industry with McDonnell Douglas and Boeing. A patent holder in the area of fiber optics, she has taught IP law and published widely in the field. Ms. Burris received her B.S. in Aeronautical Engineering from Western Michigan University, her M.S.

in Material Science and Engineering from Washington University, and her J.D. from St. Louis University.

Our final witness is Jack Gillis, Director of Public Affairs with the Consumer Federation of America, the Nation's largest consumer advocacy organization. This is the third time he has testified before us on the subject of automotive design patents.

Mr. Gillis is the author, co-author, and editor of more than 60 books, including The Car Book, The Car Repair Book, and The Armchair Mechanic. In addition, he has served as a contributing consumer correspondent for the Today Show.

Mr. Gillis received his B.A. in English from the University of Notre Dame and his MBA in Marketing and Consumer Behavior from the George Washington University.

I want to welcome you all, and we will begin. And a special welcome to Mr. Menefee. You may want to turn that microphone on and keep it close.

TESTIMONY OF W. NEAL MENEFEE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, ROCKINGHAM GROUP

Mr. MENEFEE. The green light, thank you. Good afternoon, Chairman Goodlatte, Ranking Member Watt, and other esteemed Subcommittee Members. I am Neal Menefee, the President and CEO of the Rockingham Group Insurance Companies whose home office is in Harrisonburg, Virginia. The group currently underwrites and markets property and casualty insurance products, including auto in Virginia and Pennsylvania. And we have annual revenues in excess of $40 million.

On behalf of the National Association of Mutual Insurance Companies, the Property Casualty Insurers Association of America, and the Quality Parts Coalition, I would like to thank the Subcommittee for its attention to this very important issue.

To begin, I would start by asking you to consider whether you or a family member has ever been in an auto accident or had to repair your car. I am sorry to hear that if that is the case, but whether you knew it or not, you have benefitted from competition in the collision repair parts marketplace, competition that has existed for decades between car companies and alternative suppliers of such parts.

To be clear, we are talking about collision repair parts, which are the cosmetic exterior parts of an automobile, such as fenders, quarter panels, bumper covers, and grills. Generally speaking, these are not structural or safety-related parts.

Although the car companies have already captured two-third of the market for collision repair parts, the competition that alternative suppliers provide is still very important to consumers. Alternatively supplied collision repair parts typically are 26 to 50 percent less expensive than the car company parts. But even if a more expensive car company part is used, the mere existence of competition puts downward pressure on car company prices.

The estimated total benefit to consumers from the availability of competitive alternatives is upwards of $2.4 billion per year. It is a great example of the free market at work for the benefit of consumers.

Unfortunately, some car companies appear to want to disrupt this well-functioning market and expand their already-dominant share. Beginning around 2003, they began obtaining 14-year design patents, not just on the overall design, but also under individual collision repair parts, and then enforcing those patents against alternative suppliers. This is a significant departure from the car companies' past behavior.

I would point out that the purpose of such collision parts is to restore the vehicle's original pre-accident appearance. Naturally, that is what consumers demand, and it is what insurance policies provide for. 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. Today, alternative suppliers are in the untenable position of complying with State law and meeting consumer demand, while simultaneously facing allegations of design patent infringement by the car companies. These patents are simply being used to eliminate competition and facilitate a monopoly on cosmetic replacement parts to the detriment of consumers.

Ultimately, the impact of such a monopoly would fall directly on consumers, first in the form of higher insurance premiums, and secondly, on consumers that pay for their own repairs out of pocket. Moreover, they might choose to forego repairs all together, leading to more rapid deterioration in the appreciation of their vehicles.

Higher repair costs also meant that there is an increased likelihood of a vehicle being declared a total loss, compelling consumers to replace it, pay off a loan that may exceed its value, and seek financing for the purchase of replacement. In tough economic times like today, these kinds of added costs hurt consumers that much more, especially as autos age and depreciate.

The PARTS Act carefully balances the car companies' intellectual property rights with the need to protect consumers by preserving competition. It would change from 14 to two and a half years the monopoly period during which car companies could block competitors from selling alternative collision repair parts.

We recognize that the overall design of a car plays a significant role in a consumer's choice when buying a new car, and in the very competitive for new auto sales, car companies invest a lot in the overall design of a vehicle, that unique owning and driving experience that we all see advertised on television.

The PARTS Act would not deter car companies from obtaining and enforcing design patents on their collision parts against other car companies. 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 car companies in intellectual property, 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 manufacture and for the overall design of the car. American consumers should not be surprised and forced to pay a monopoly price on a collision part whenever it has been damaged in an unexpected accident and needs repair.

The PARTS Act addresses the problem in a properly balanced manner similar to how Europe and Australia have confronted iden-

tical concerns regarding the preservation and competition of things like collision repair parts.

The cost of car ownership is already significant, and Americans are increasingly dollar conscious in these tough economic times. The PARTS Act does not mandate the use of alternative collision parts, nor does it have government facilitating new entry into the marketplace. Rather, the legislation would simply preserve the traditional competition in the sale repair part. That is what consumers deserve.

Again, thank you for the opportunity to speak here today, and I look forward to answering any questions that you may have.

[The prepared statement of Mr. Menefee follows:]

Testimony of
W. Neal Menefee
President and CEO of Rockingham Group

on behalf of
National Association of Mutual Insurance Companies (NAMIC)
and
Property Casualty Insurers Association of America (PCI)
and
Quality Parts Coalition (QPC)

House Judiciary Subcommittee on Intellectual Property
Hearing on
H.R. 3889, the "Promoting Automotive Repair, Trade, and Sales Act"

August 1, 2012

Introduction:

Chairman Goodlatte, Ranking Member Watt, and other esteemed Subcommittee members, I am Neal Menefee, the President and CEO of the Rockingham Group of insurance companies, whose home office is in Harrisonburg, Virginia. The parent company of the group is Rockingham Mutual Insurance Company, whose oldest predecessor company has been in business since 1869. The group currently underwrites and markets property and casualty insurance products, including auto, in Virginia and Pennsylvania with annual revenues in excess of $40 million.

Our company is proud to be a member of both the National Association of Mutual Insurance Companies (NAMIC) and the Property Casualty Insurers Association of America (PCI), and I am pleased to be here to testify on their behalf.

The National Association of Mutual Insurance Companies (NAMIC), is the largest and most diverse national property/casualty insurance trade and political advocacy association in the United States. Its 1,400 member companies write all lines of property/casualty insurance business and include small, single-state, regional, and national carriers accounting for 50 percent of the automobile/ homeowners market and 31 percent of the business insurance market.

PCI is composed of more than 1,000 member companies, representing a broad cross-section of insurers. PCI members write over $175 billion in annual premium and 37.4 percent of the nation's property casualty insurance. PCI represents 43.5 percent of the US automobile insurance market, 30.6 percent of the homeowners market, 35.3 percent of the commercial property and liability market, and 41.8 percent of the private workers compensation market.

NAMIC and PCI are both 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 strong support of H.R. 3889, the Promoting Automotive Repair, Trade, and Sales Act, the PARTS Act. Also, we applaud Representatives Issa and Lofgren for their bipartisan leadership in sponsoring the PARTS Act.

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

By way of background, I would start by asking you to consider whether you or a family member has ever been in an auto accident, perhaps a fender bender? Most of us have been and while I hate to see anyone experience an auto accident, if you have then whether you knew it or not, you benefitted from competition in the collision repair parts marketplace; competition that has existed for decades between car companies and alternative suppliers of such parts.

To be clear, we are talking about collision repair parts, which are the cosmetic, exterior parts of an automobile that typically can be damaged in fender bender types of auto accidents. This might include fenders, quarter panels, bumper covers, grilles, and other similar parts. 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.[1]

It is worth noting that the car companies already have captured two-thirds of the market for collision repair parts, while alternative suppliers have about fourteen 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. But even if a more expensive car company part is used, the existence of competition has been shown to cause car companies to lower their collision part 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] to $2.4 billion[5] per year. It's a great example of the free market at work for the benefit of consumers.

Design Patents Are Being Used to Eliminate Competition:

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[1] "Status Report," Insurance Institute for Highway Safety, Vol. 35, No. 2, Feb. 19, 2000. See also, Insurance Instutute 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.

[2] Recycled parts comprise the remainder of the market.

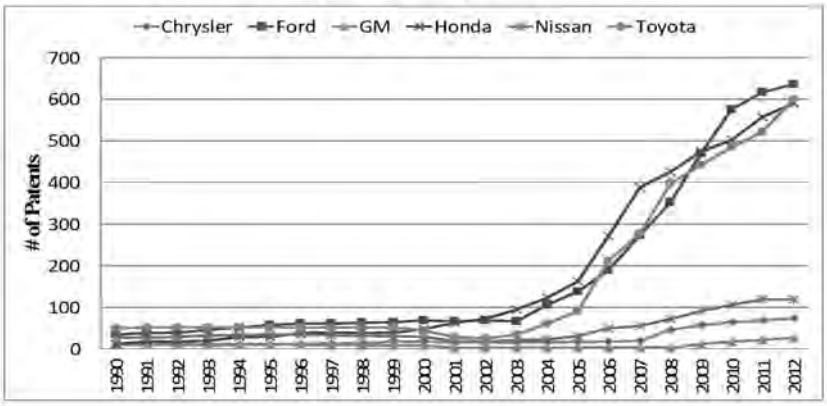
[3] Consumer Benefits from a Competitive Aftermarket for Crash Parts., R.W. Boulton, MiCRA Consulting & Research Associates, Inc., 2008.

[4] Id.

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

Clearly, consumers benefit from the lower costs created by the competition provided by alternative suppliers of collision repair parts. However, some car companies appear to have formulated a new 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 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 interchangeable component collision parts. Below is a chart on 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 such 14-year design patents on a wide variety of collision parts.

Cumulative Numbers of Collision Repair Part Design Patents Owned By 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. For 2012, those figures have been "annualized" and are based on the number of design patents granted through July 20, 2012.

In December 2005, Ford Global Technologies (Ford) took the unprecedented action of filing a Section 337 case at the International Trade Commission (ITC) against companies in the alternative parts industry for allegedly infringing design patents held by Ford on fourteen exterior component parts for the Ford F-150 (model years 2004-2007). On December 4, 2006, the Administrative Law Judge held that seven of the design patents were valid, judged them to have been infringed, and issued an exclusion order on those parts.[6] The exclusion order went into place on August 6, 2007, and – until a legal settlement was reached in April of 2009 – competition was effectively eliminated in the United States for seven Ford F-150 exterior collision repair parts. Therefore, for almost 2 years, the car company was the one and only source for the purchase of those seven parts.

We would point out that the purpose of such parts is only to restore the vehicle's original, pre-accident appearance. Naturally, that is what consumers demand 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, many 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 are in the untenable position of complying with state law and meeting consumer demand while, simultaneously, facing allegations of design patent infringement by the 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.

In addition, on May 2, 2008, Ford filed yet another Section 337 complaint at the ITC, alleging design patent infringement for eight parts for the Ford Mustang (model year 2005). Not insignificantly, the legal defense costs for alternative suppliers in both the F-150 and Mustang cases were enormous and mounting. While the ITC's decision in the Ford F-150 case was pending on appeal at the Federal Circuit, and the ITC ALJ hearings were about to commence in the Ford Mustang case, Ford reached a settlement with one alternative supplier.

While many of the settlement's details remain confidential, publicly available information suggests that the settlement is very limited in nature. It's only between Ford and one alternative parts distributor, and it only lasts until March 2015. As such, nothing in the settlement prevents any of the other car companies from filing a complaint at the ITC today and continuing to eliminate competition. Nothing in the settlement prevents Ford from marching right back to the ITC as soon as the settlement expires in 2015 and continuing its effort to eliminate competition. Therefore, despite the temporary settlement between Ford and one alternative supplier, we cannot sit and simply cross our fingers that the car companies will simply ignore future opportunities to exploit new design patents on component parts and wipe out competition. Faced with these realities, Congress must act now, before it is too late.

The Harmful Effects of Eliminating Competition on Collision Repair Parts:

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 $2.4 billion would

[6] Lower bumper valance (2WD), lower bumper valance (4WD), side view mirror (LH/RH), honey comb grille, head lamp (LH/RH), tail lamp styleside ((LH/RH), and tail lamp flareside (LH/RH).

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.[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 means 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.

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

In February of this year, Representatives Issa and Lofgren[8] introduced the PARTS Act 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.

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 2.5 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

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

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

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 Europe 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. 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 traditional place in the market for competition in the sale of collision repair parts. Consumers deserve it.

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 borne 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. We want to thank you again for holding this important hearing and thank Representatives Issa and Lofgren for their continued leadership on the PARTS Act.

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Mr. GOODLATTE. Thank you, Mr. Menefee.
Ms. Burris, welcome.

TESTIMONY OF KELLY K. BURRIS, SHAREHOLDER AND CHAIR, GREEN TECHNOLOGY PRACTICE GROUP, BRINKS, HOFER, GILSON & LIONE

Ms. BURRIS. Chairman Goodlatte, Ranking Member Watt, and distinguished Members of the Subcommittee, thank you for the opportunity to be here today. It really is my pleasure, and it feels like an honor.

I am here today in opposition to the bill from a very high level because I am afraid that this type of legislation could set a very dangerous precedent and put us on the slippery slope.

If we carve out an exception for component parts for motor vehicles—it is not just automotive, and I will get to that. If we carve out this exception, who will be next? What industry will come to you next alleging that the parts are too expensive, my computer is too expensive, and asking for their exception to infringement as well? So that is my very high-level legal concern, as is many of the people in the room today.

Secondly, and I think more importantly, as a design engineer myself, I think legislation of this nature really does stifle the innovation process. The patent system is there, as Mr. Issa, you have recognized and, Ranking Member Watt, you have recognized, to provide an incentive to us to be creative and to be innovative. That is the quid pro quo. As Abraham Lincoln put it, it is the fuel of interest that feeds the fire of ingenuity. When you remove that incentive, how can we expect the creativity and the innovation to continue?

Along the lines of that innovation and creativity, if we look at some of the facts, we have in the United States there are 21 design centers, often called studios, where just the outside of the car is being designed. Those design studios are in the States of California, actually many in California, in Ohio, and there are studios in Michigan as well.

These studios, in my written testimony we had 30,000 jobs, but some recent numbers just came in from GM. There are over 40,000 good paying white-collar jobs for these automotive designers, industrial designers, working on just the appearance of the car. So I think legislation of this nature has a tendency to devalue what it is they are doing, and especially on the heels of the America Invents Act that was just put into law less than a year ago to help promote innovation in our country. To have legislation of this nature come on the heels of the AIA I think is going in the opposite direction.

I would also like to mention that you really cannot look at design patents in a vacuum or in a bubble. As Mr. Issa, you have recognized, there is also trademark or trade dress protection in product configurations. As long as the consumer can associate that look and feel with the source of the goods. There is also utility patent protection on these parts as well. Oftentimes now they are fastened to the inner body. So in order for this bill to really work, you are going to have to look at possibly making changes to the Lanham Act and also utility patent infringement.

Now turning to the language of the bill itself, it does not say automobiles. It says "motor vehicles." Motor vehicles are defined under Title 49 as any vehicle that is driven or drawn by mechan-

ical power, manufactured for use on our streets, roads, and highways. So that means it is not just automobiles. It is motorcycles. It is scooters. It is mopeds. It is farming equipment. It is tractors. It is trailers.

Looking at motorcycles alone, Harley-Davidson owns 151 design patents on the components of their motorcycles. I do not know about you guys, but I would not want the biker community coming after me on this one. [Laughter.]

And there is even a—are we good, John? There is a gentleman here from Caterpillar that is here for the same reason, because they have new vehicles that they are protecting with design patents that they feel are threatened by this legislation.

The 30-month period that is in the legislation as well is not 30 months from the issue date of the patent. It is 30 months from the date of the offer for sale. You never have a design patent the day you offer it for sale. Pendency of design patents at the Patent Office is over 1 year, so at best you are talking about maybe a 1-year term for design patent holders.

Let us see. I am running out of time, but I would also like to say that this bill is retroactive. So if you had a design patent 5 years ago, 10 years ago, guess what? It is done. It is gone. You do not have it anymore. So it reaches back.

And I also think there are alternatives for consumers. There are originally equipment manufactured parts that have been refurbished that are available. There are parts that do not look exactly the same, but are interchangeable. And these parts can be repaired, and I look forward to that discussion here today.

Thank you for the time.

[The prepared statement of Ms. Burris follows:]

WRITTEN STATEMENT OF KELLY K. BURRIS
Brinks Hofer Gilson & Lione

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

Hearing on: H.R. 3889, the "Promoting Automotive Repair, Trade, and Sales Act" ("PARTS Act")

Wednesday, August 1, 2012 – 2:30 p.m.
2141 Rayburn House Office Building

BRINKS
HOFER
GILSON
&LIONE

Chairman Goodlatte, Ranking Member Watt, and members of the Subcommittee, thank you for the opportunity to be here. My name is Kelly Burris, and I am a patent attorney in private practice with Brinks Hofer Gilson & Lione, 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. 3889, the Promoting Automotive Repair, Trade and Sales Act (PARTS Act).

While I have tried to focus my testimony on issues that were not previously considered and discussed in the 2010 hearing on design patents, I want to be clear that I share the concerns expressed then 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 all too familiar with the significant time and expense involved in new product development. Years of development 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 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 $18-20 billion a year. Design protection encourages innovation and creates jobs in the United States. In fact, fourteen 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 one of the few bright spots in the economy.

First, design patents are only one form of patents, and patents are only one form of intellectual property under our 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 change 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.

And on the topic of trademarks or trade dress, non-OEM parts will likely be lower quality and present 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

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

designed." [2] And when I asked my students about this proposed legislation, that was one of the first responses, that their personal experience involved inferior replacement parts, and that they know now to ask for OEM parts.

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 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.

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

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

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. 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 motorcycles, mopeds, and motor scooters, among others. Harley Davidson alone currently holds 151 design patents for various features of its motorcycles. 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 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.

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 design patent laws. However, the aerodynamic contour and/or the lateral steps may not be enough to overcome the "non-obviousness"

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 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?

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;

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

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

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 our environmental initiatives.

And under the administration's proposed National Network for Manufacturing Innovation (NNMI)[6], additive manufacturing is a newer technology that is receiving 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, 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 *is* making a comeback, due in great part to the innovative and award-winning designs coming out of the OEMs. As one of my students put it, this legislation is like "a punch in the gut" at this time in our recovery.

Abraham Lincoln elegantly said: "The patent system added the fuel of interest to the fire of genius." And as my late grandfather, a tool and die maker for the Fords, would have said: "The insurance industry – do they pack their lunch or walk to work?"

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

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[6] http://www.manufacturing.gov/amp/nnmi.html

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

Mr. GOODLATTE. Thank you, Ms. Burris.

Mr. Gillis, welcome.

TESTIMONY OF JACK GILLIS, DIRECTOR OF PUBLIC AFFAIRS, CONSUMER FEDERATION OF AMERICA (CFA)

Mr. GILLIS. Chairman Goodlatte, Ranking Member Watt, and Members of the Committee——

Mr. GOODLATTE. You have the same affliction. Turn that microphone on.

Mr. GILLIS. Thank you very much for the opportunity. I am here today in addition to being a representative of the Consumer Federation of America, also 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. And we particularly appreciate the invitation to be here today.

What I would like the Committee to consider is any one of these experiences. You back into a pole. You sideswipe your car. You suddenly have someone stop in front of you, and you hit them. Hopefully this will not result in injuries. What it will result in is thousands of dollars of costs in terms of repairing your car.

Why do these fender benders cost so much? One reason is because the parts are so expensive. Ford charges the same amount for a fender as Dell charges for a computer and a flat screen TV. You can get a two-door refrigerator from Sears for the same price as a grill from Toyota. And guess what? That two-door refrigerator, those doors are already painted and installed. You would have to pay someone to install the part on your car.

And what is really significant is that these products, because of competition, have not only improved in quality, but they have also been reduced in price. Remember that in the early 1990's, the car companies came to you and asked for special design copyright protection on these replacement parts, and you emphatically said no.

They have ignored your admonition, and there has been an enormous spike in the number of design patents by companies like Honda, Toyota, and Ford. Now unless there is something special about a fender on a Ford for 2009 that was not special on that same Ford in 2002, I think you would agree that this is not some newfound design patent protection issue, but a newfound business strategy.

For Ford, Honda, and Toyota, and GM to come before you today and say that suddenly these parts are patentable when for years and years they were not is at the very least disingenuous and at the most extraordinarily costly for the American consumer. This is a business strategy, not a legitimate use of our important U.S. patent laws.

The competition these car companies are trying to kill lowers prices, provides choice, and improves quality. If the automakers succeed in using design patents to eliminate competition, it will not only result in higher repair costs, but higher auto insurance premiums.

On the safety side, not only was Congresswoman Lofgren correct in our concern about consumers not repairing parts of the car because they are so expensive, but let us talk about the safety of the parts themselves. I would like to refer to the very organization

mentioned in one of the testimonies submitted by the car companies. This is from the Insurance Institute for Highway Safety. "IIHS did address the issue of safety and determined that both in low speed damage tests and high speed safety crash tests that alternative parts are certified to be the same, in fact performed nearly identically." And I would like to submit for the record a copy of the IHS status report, which describes these findings.

The most tragic irony of the lack of competition is what I call the auto makers' double whammy. Not only can they 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 is that if auto makers succeed in eliminating competition, the cost to consumers will be enormous.

We applaud Representative Issa and Lofgren for introducing 3889. It is important to note that this is not a perfect solution. Representative Lofgren, as she mentioned, 2 years ago proposed a truly elegant solution: allow the car companies to patent their parts and keep their designs from being copied by other car companies, but allow the independent production of those parts when used solely to repair a car. At that time, powerful car company and manufacturing lobbyists crushed her efforts to protect consumers.

In the fact of this intense lobbying to protect the use of design patents to prevent competition, H.R. 3889 represents a compromise. It is a step forward in helping us prevent us from being forced to pay unfair prices for the cars we need.

Probably the most telling testimony submitted by the car companies was their suggestion that when one headlight or taillight gets damaged, consumers should be encouraged to buy both. Of course the car companies want us to replace perfectly good parts with their replacements. They would make millions. This is also why they are using the patent laws to thwart competition. Everyone is entitled to make a fair profit, but the car companies suggesting that we replace perfectly good and very expensive parts is way over the top.

So CFA, the Advocates for Highway and Auto Safety, the Center for Auto Safety, Consumers Union, and Public Citizen believe that consumers need competitive crash parts. On behalf of these groups, I strongly urge Congress to adopt a repair clause to the design patent laws in order to ensure a competitive market with fairly-priced alternatives to expensive car company brand parts.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Gillis follows:]

Prepared Statement of Jack Gillis, Director of Public Affairs, Consumer Federation of America (CFA)

Chairman Goodlatte, Ranking Member Watt, 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.

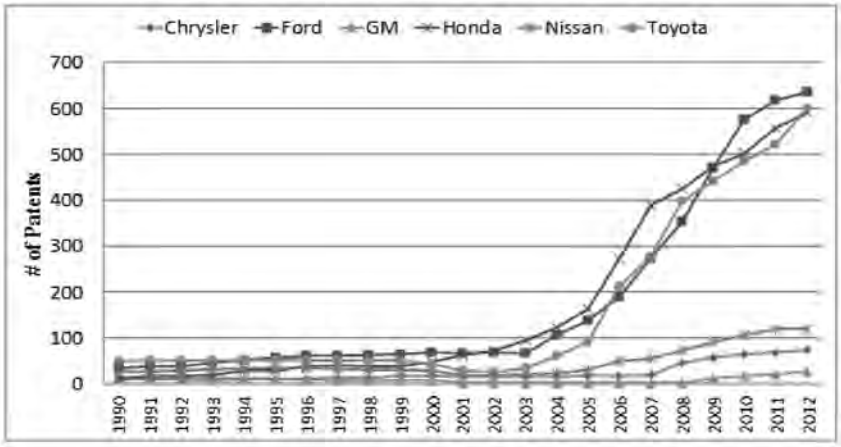
Why are these repair bills so high? One reason is the cost of the parts for the needed repairs. For example, Ford charges the same price for a fender as Dell charges for a high speed computer and flat screen monitor. A simple grill for your car costs the same as a combination flat screen TV/DVD player. An unpainted door from Toyota costs the same as a Sears refrigerator. And, the refrigerator comes with *two* doors, already painted and installed! You'll typically have to pay someone over $500 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 get patents on the individual replacement crash parts.

DISTURBING TREND: AUTO 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 www.capacertified.org **Note 2:** Figures shown are cumulative. For 2012, those figures have been ''annualized'' and are based on the number of design patents granted through July 20, 2012.

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 comes at further detriment to the consumer, who will shoulder the added cost of the royalty in the increased prices of parts. This settlement is limited and temporary in nature between one car company and one distributor leaving consumers open to whims and exploits of the car companies.

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 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 TANTAMOUNT 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.

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 this barely competitive marketplace for collision repair parts will allow automakers to hijack design patent laws to capture the entire 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. Not only does the mere presence of competition reduce the price of car company brand replacement crash parts, but competitive replacement crash parts are typically 34%—83% [1] less expensive.

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 will 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 policy holders in the form of higher rates. In addition, in the face of already 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.

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

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 head light, 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 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 the consumers will be enormous.

Unless Congress addresses the automakers' use of design patents on their crash parts, the American public 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 3889 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 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 crushed Representative Lofgren's efforts to protect consumers from car companies' monopolies on replacement repair parts. In the face of this intense lobbying to protect the use of design patents to prevent competition, HR3889 represents a compromise. We appreciate the efforts of Representatives Issa and Lofgren for introducing HR3889 as a step forward in 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 congressional leadership to embrace HR3889 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 protecting an open and competitive market, while enabling the car companies to retain the design patent protection on the overall vehicle.

HR3889 is an important step in the 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 maximum number of repair choices possible. 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. On behalf of these groups, I strongly urge Congress to adopt a repair clause to the design patent law and pass HR 3889. American consumers will thank you for ensuring a competitive market resulting in high quality, fairly priced alternatives to expensive car company brand parts. Again, thank you for providing me the opportunity to discuss this important issue with you today.

Mr. GOODLATTE. Thank you, Mr. Gillis. I will recognize myself to begin the questions. And my first question I will direct to all three of you.

Nine European countries and Australia, as has been noted by the gentlewoman from California, exempt crash parts from design law infringement. Have these laws worked well or not, Mr. Menefee?

Mr. MENEFEE. From our understanding, they have worked well in terms of allowing the competition for after-market parts to function in an appropriate fashion as outlined in what this bill would provide.

Mr. GOODLATTE. Thank you. Ms. Burris?

Ms. BURRIS. I think you will find in my written statement that I did obtain a report from one of my associates in Australia. A study was conducted, albeit shortly after the enactment of that law, that found that it had no impact on the insurance premiums. So I think in that case, it was really too early to tell. I do not know if there is a more recent report, but I would encourage us to keep our eye on what is happening over there.

I have also found out that in Europe, although the current law in the European community design itself is that you cannot get a design patent on a repair part, they are currently discussing that issue and trying to decide what parts and for how long they can have protection. So the European community is looking at that.

Each individual country has its own laws, but when you get a European registration, there is one law that applies to all of those. And there are many countries that do allow design protection just like we do. Thank you.

Mr. GOODLATTE. Mr. Gillis?

Mr. GILLIS. Mr. Chairman, as I said in my comments, this is an elegant solution to the problem. It is fair. It is reasonable. And not only that, it has done nothing to——

Mr. GOODLATTE. Well, tell us about what you know about what is going on in these other countries.

Mr. GILLIS. Okay. What is going on in the other countries is basically the manufacturer of an independent part is allowed to produce that part, even if there is a design patent on it, if that part is only being used to repair the car. In other words, you cannot make a whole bunch of these parts and replicate the vehicle. But

if a consumer wants to buy an alternative part, then that gives the——

Mr. GOODLATTE. I gotcha. Let me ask Ms. Burris a question. You expressed a concern about the precedent that we might be taking here with regard to patent law, and I certainly respect that concern. But I also see a trend here. Why is that for decades, car manufacturers for the most part did not try to use design patents to patent these parts in this very competitive marketplace and crash repair has developed? What is the reason for that trend? That trend concerns me as well.

Ms. BURRIS. Yeah, I have seen the trend myself. I think there are a number of things that contribute to that. I think one of them is the car companies had realized that their parts were being copied.

When you sit down with your client and you have a new product that is being launched, you get in a meeting and you sit down and you go, okay, what is patentable, what is not, what do we want to protect? And one of the questions that you always ask is, okay, which parts are replacement parts that someone is going to try to copy on our design? And you decide then, okay, these are the parts that——

Mr. GOODLATTE. All right, but this is not new.

Ms. BURRIS. I understand that.

Mr. GOODLATTE. People have been backing their cars into poles or colliding with somebody else on the highway for 100 years. And companies have been engaged in manufacturing parts that will fit to replace that when the vehicles are damaged that are not the manufacturer of the original part for a long time. I do not know how far back it goes.

And yet now we seem to have a trend, and I understand that not all car manufacturers are doing it. Some are and some are not. Some are doing it more than others. So I would really like to have an explanation other than protectionism, if you will——

Ms. BURRIS. Okay, sure.

Mr. GOODLATTE [continuing]. Why this trend is occurring.

Ms. BURRIS. Okay. There are a couple more things for you to consider, okay? First of all, the copying of the designs has become more widespread, and it is very easy to copy a design now versus about 10 years ago. There are digital scanners you are probably familiar with. There are a lot of ways to do it with lasers, optical sensors that you can run along, literally photocopy a part, feed that digital information into your computer design system, into your CAD tube. That information then gets directly sent to the manufacturing equipment, and, voila, a mold is made within literally a day of scanning that part.

So the technology now makes it very easy to copy these parts. I think——

Mr. GOODLATTE. But are you saying that this is a new industry that has developed because of the ease with which you can copy the parts, or is this aftermarket parts industry that has existed for a long time has established a place in the market, and they are feeling threatened by this new trend to use design patents to exclude them from the market?

Ms. BURRIS. Yeah. My understanding from discussions with the folks at GM and at Ford, albeit limited, and I am happy to go back and talk to the other manufacturers as well, is that they are chasing a problem. They are chasing people, pulling their parts, digitally scanning them, and then copying them.

Mr. GOODLATTE. Well, obviously they have been copying them for years. If you are going to make a part——

Ms. BURRIS. Not to this level.

Mr. GOODLATTE. You have got to fit on the car that was damaged. And so they had to make something that was a close facsimile of what was originally damaged. And I do not believe this is new.

Mr. Menefee, can you tell us from your experience, in paying for these repairs, is this a new trend that we are seeing a more vibrant aftermarket industry, or has the industry been operating for a long time making parts for almost any vehicle that is damaged?

Mr. MENEFEE. Mr. Chairman, the aftermarket parts industry has been active for a number of years, decades, as you have mentioned. And we have been utilizing aftermarket parts in terms of repairs through the insurance for that period of time. And I certainly have no specific knowledge of significant change other than development of technology, which applies to manufacturers, whether it is the car manufacturers themselves or aftermarket suppliers. Certainly the nature of manufacturing has changed considerably in recent years, so there may be a factor there that, in fact, makes them more efficient.

I also think the statements suggest that the quality of this is quite good because of the development of that technology. In terms of I would say today our ability to buy aftermarket parts that are high quality and meet the test of like, kind, and quality and form, fit, and function is probably today than it has ever been.

Mr. GOODLATTE. Is that a relatively new development or is it something that has been evolving over a long period of time?

Mr. MENEFEE. It is something that has been evolving over a good number of years.

Mr. GOODLATTE. Mr. Gillis?

Mr. GILLIS. Mr. Chairman, these parts have been in the market for at least 40 years. They have been very successful, not as successful as we would like to see them because still today the car companies have a monopoly on about 70 percent of the parts that we need to get our cars repaired. But they have been around for a long, long time. And it is clear that as the car companies make less and less money selling cars, they need to find other places to get their income from, and they are getting it from these parts.

As I said, imagine paying $400 for a simple piece of stamped sheet metal. That is outrageous. There are headlights that cost $1,500. There are bumpers that cost $900. Why? Because there is no competition, and that is hurting us as consumers.

Mr. GOODLATTE. Ms. Burris, I will give you an opportunity to respond to both of their critics there, if you would like, and then my time has expired.

Ms. BURRIS. Yeah. I think the other point I wanted to make earlier was that I think that part of that uptick that you see, and I think we have all recognized that automotive design, especially in

recent years, has really taken off. There are some outstanding designs coming out of not just the big three in Detroit, but out of Honda and Toyota. I mean, the outward appearance of a car—I mean, look at the Ford Flex, for example, and the Toyota Prius. We are away from—I am going to do it. Chrysler is not here. Away from the day of the K car. There has been this——

Mr. GOODLATTE. But we are also well away from those big——

Mr. ISSA. Where is the '57 Chevy when you need it?

Mr. GOODLATTE. That is what I was looking for.

Ms. BURRIS. Yeah. Hey, there you go.

Mr. GOODLATTE. Those big fins on the backs of cars. But I take your point.

Ms. BURRIS. Yeah. But regarding the cost of the parts, I think that, you know, being an engineer, I know what it takes to design these parts, and I know what it takes to do the materials testing, and to survive. I think the refrigerator and computer examples really are not fair. Those are not designed to be outside in 120 degree temperatures in the ice and in the snow and not rust. They are not designed to hit a wall at 65 miles an hour without the condiments flying out either. That is an unfair comparison.

Mr. GOODLATTE. But think of those magnets that people attach to them.

The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I am not taking sides on the question you asked. But the comments I have gotten from a number of people is that these suits picked up when foreign manufacturers of after parts, mostly in Taiwan, started copying the components verbatim.

And so anyway, I am not on one side or the other of this. I am just trying to figure out where I should come down.

Mr. Chairman, I ask unanimous consent to submit for the record a letter that is addressed to me and you dated today's date from Alliance of Automobile Manufacturers and various and sundry other organizations that they would like to have put in the record.

Mr. GOODLATTE. Without objection, it will be made a part of the record.

[The information referred to follows:]

July 31, 2012

The Honorable Robert Goodlatte
Chairman
Subcommittee on Intellectual Property,
Competition, and the Internet
B-352 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

The Honorable Mel Watt
Ranking Member
Subcommittee on Intellectual Property,
Competition, and the Internet
B-352 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Watt:

The undersigned coalition of original equipment manufacturers (OEMs), labor unions, intellectual property organizations and broad-based business associations respectfully write to register our strong opposition to H.R. 3889, the Promoting Automotive Repair, Trade and Sales (PARTS) Act, which would exempt the creation, sales and/or importation of certain copycat component automobile repair parts from infringing U.S. design patents.

As you know, design protection encourages innovation and creates jobs. In fact, virtually all major OEMs – regardless of where they are headquartered globally – maintain design centers in the U.S. that employ highly skilled workers to create vehicles that will appeal to American consumers. We are at a loss to understand why Congress would endanger these jobs by effectively devaluing the design process in this country.

Design patents protect the designer against unfair competition from people or companies who copy without investing in the process or making an effort to innovate. Removing design protection promotes unfair copying 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 and potential employment of workers needed. Not only does the PARTS Act deny businesses the ability to rightfully protect their intellectual property (IP), it promotes piracy among all global industries.

The logic of design protection applies to visible parts as it does to the entire motor vehicle. While the above mentioned "free riders" typically focus on only a limited number of vehicle parts, those parts tend to be highly visible exterior body parts such as bumpers, radiator grilles, doors and lights. The design of these parts makes a vital contribution to the safety, identity and appearance of the vehicle that is so important for its commercial success. In addition, the appearance of these parts is the culmination of significant effort of the particular

inventor(s)/designer(s) in creating a vehicle design that resonates in the market place. OEMs invest billions each year to develop and patent these current designs, so to retroactively reduce patent protection to a just few years upends the business decisions supporting this important segment of the U.S. economy. As a result, the PARTS Act would put American consumers, dealers, distributors, manufacturers, and suppliers at risk.

Manufacturers of unlicensed automobile parts have to meet only one basic threshold, to produce a copy that passes 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. 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 and how their use will impact the quality and integrity of the original product. Automotive collision repairers are very concerned about the quality of replacement crash parts. Permitting this intellectual property infringement also exposes consumers to significant safety, performance or durability risks without their knowledge.

Finally, the underlying premise for the PARTS Act is that competition requires copying. It doesn't. It's common for aftermarket companies to produce an interchangeable part that doesn't copy the exterior appearance of the OEM article. In fact, the U.S. aftermarket is replete with headlights, taillights, grilles, and bumpers that don't copy OEM designs but are interchangeable. Generic designs are a form of fair competition. They employ designers that create original designs, they provide consumers with greater repair choices, and they protect the public from mistakenly buying a generic part when they intended the purchase of an OEM replacement. The PARTS Act is a solution in search of a problem.

For these reasons, the U.S. Supreme Court repeatedly has denied attempts to overturn these important IP rights. Legislatively denying these rights would not only overturn decades of judicial precedent, it would also violate IP rights that are protected under the World Trade Organization agreement on Trade-Related Aspects of Intellectual Property Rights. At a time when the U.S. should be seeking enhanced consumer safety through stronger enforcement of our IP laws, Congress should not enact legislation that would eliminate or weaken IP protections.

IP rights are explicitly recognized in the U.S. Constitution, by the U.S. Supreme Court, in our international trade agreements, and by our trading partners. The PARTS Act would overturn U.S. legal precedent, endangering American consumers, and threatening U.S. jobs and investment.

We strongly oppose H.R. 3889 and urge you to do so as well.

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

Mr. WATT. Mr. Gillis, Mr. Menefee—well, all of you, let me first say I think all of you made exceptionally good witnesses. And this is a difficult issue it seems to me. Usually I know where I am leaning, and I do not know where I am leaning here. I mean, my sympathies are with the consumer.

But let me put myself in the position of the consumer. I buy a new car. I drive it off the lot, and somebody bashes it a block from the dealership. Why should I not be able to get my insurance company or anybody to replace that automobile with an original part from the manufacturer?

I understand the cost considerations, and I am the owner. But I want my car to look and be up to the specifications just like I bought it. Why is that not a reasonable request? And why is it a legitimate argument counter to that to say, well, somebody else can make the same part when somebody has a design patent on that part? Those two questions I guess are the opposite sides of the same coin. Am I missing something here?

Mr. Menefee, Mr. Gillis, you can address it from the insurance company side. I know the insurance company would like for me to go and buy the cheapest part available. It reduces their costs, but am I not as a consumer, as a customer entitled to have my brand new motorcycle be a brand new motorcycle? What do you say about that?

Mr. MENEFEE. Yes, sir, Congressman. Several questions there. I will try to answer each of them as I go.

Your first question in terms of what do we owe to you as an insurance customer under most of our contracts——

Mr. WATT. Okay, I gotcha. Okay.

Mr. MENEFEE. We owe you a return——

Mr. WATT. You owe me something that appears to be the same.

Mr. MENEFEE. Yes, sir, that is what our contract says, and then we charge accordingly.

Mr. WATT. Okay. All right, but that is under the contract. Maybe Mr. Gillis is in a better position to argue this because he does have a financial interest in it. The insurance companies always have a financial interest in it.

Mr. MENEFEE. Well, Congressman, if I could just follow up to say our financial interest is our consumer. They are our customers and ultimately our——

Mr. WATT. But if your customer wants an identical car to the one he just drove off the lot, is your customer's interest not in conflict with your financial interest?

Mr. MENEFEE. No, sir. Our interest and our customers' interests are very much aligned. We want our customer to be safe and happy, and in that case we think the contract provides for that. The contract says we can——

Mr. WATT. Go ahead, Mr. Gillis.

Mr. GILLIS. Well, first of all, Representative Watt, we do not really see this exactly as an insurance issue. It is much more of a consumer issue from the perspective of giving me——

Mr. WATT. Okay. That is why I put myself in the consumer's position.

Mr. GILLIS. Right, the consumer. For example, you drive down the street and you decide you need a new muffler. Well, you can

go to Chrysler and pay $900 for that muffler or you can do to Midas and get one for $189. That is a great choice. Now if you really want that Chrysler muffler and you want to pay $900, you have got that choice.

With a fender, it is the same thing. You may not want to pay $400 for a fender. You may want an alternative choice that is maybe a third the price. And all we are saying is let us let that choice exist. Let us give me that choice.

Now if I want to buy an insurance policy——

Mr. WATT. Even if somebody has got a patent on it, you are saying—I mean, you know. We could extend that analysis to just about any product, I would think.

Mr. GILLIS. Well, we have a great deal of respect for patent law. Patent law is very, very important. But it is not being used in a legitimate fashion. As Chairman Goodlatte said, why all of a sudden are——

Mr. WATT. Okay, but you say legitimate fashion. Is it legitimate for somebody to scan my patented part and reproduce it the very next day? I mean, we do not allow that under our patent laws.

Mr. GILLIS. Right now that would be illegal, and that is what we hope this piece of legislation would allow. So solely for the purposes of——

Mr. WATT. Well, if you want to facilitate somebody being able to scan that part and produce it the very next day after it is driven off the lot?

Mr. GILLIS. Solely for the purposes of making a repairable part choice available to me, but not for the purposes of allowing General Motors to copy Ford's design or Ford to copy Honda's design.

Mr. WATT. So if you are not an automobile dealer, you can copy somebody's design, but if you are Ford or General Motors, you cannot copy each other's design.

Mr. GILLIS. That is right. If you were copying these parts to reproduce the General Motors car, that should be, and we respect the fact that that should not be allowed. But if the sole purpose is to give me a choice as a consumer, to have some choices in the market, like I do in a drug store when I can choose, you know, CVS brand aspirin, or like I do in a repair shop, or I can get a DieHard battery.

Mr. WATT. But you cannot go into a drug store and buy a CVS brand aspirin while somebody else has the patent on that aspirin?

Mr. GILLIS. Right, and we can have a whole——

Mr. WATT. You know, there are limits to this.

Mr. GILLIS. Well, we could have a whole hearing on the drug companies' use of patents and potential abuse of patents. But the bottom line is, Representative Watt, car companies really need to acknowledge the fact that, as the Chairman said, why are they suddenly doing this? Why is this car patented today?

The representative from the car company said, you know, there are outstanding designs on the market today. Well, those parts have been around for 40 years, and they are not preventing outstanding designs.

Mr. WATT. All right. I guess hearings have very important purposes. They either clarify the situation or they confuse you more. And this one——

Mr. GILLIS. Sorry.

Mr. WATT. This one has left me extremely confused, you know, because it is very difficult to know which side of this issue to be on. I understand exactly what you are saying, but as the Intellectual Property Subcommittee person, I do not know how exactly we put this into our current framework. And the fact that somebody made a high quality knockoff does not seem to me to be a sufficient justification for allowing them to market that knockoff if it is a patented item. You know, that is what I am having trouble with.

Mr. Chairman, I am sure we will debate this and hear a lot more about it. So I will yield back my time.

Mr. GOODLATTE. I thank the gentleman.

The gentleman from Nevada, Mr. Amodei, is recognized for 5 minutes.

Mr. AMODEI. Thanks, Mr. Chairman. In the testimony here, we have heard talk about crash parts. What percent of the market is crash parts? I am assuming we are talking about new vehicles here, which means there is not a lot of folks restoring them. So I am guessing if I have a 3-year-old vehicle and need a fender, it is because it is subject to a crash. Anybody want to tell me what percent of the market is crash parts, exterior only? Nobody wants to?

Mr. MENEFEE. Congressman, the industry data that we have would suggest 15 to 20 percent of the collision repair parts come through the aftermarket at the present time.

Mr. AMODEI. No, I mean crash parts generally. We had heard talked about an elegant solution from Mr. Gillis that would say crash parts only. I am assuming that is a large chunk of the market if it was crash parts only.

Mr. GILLIS. Well, there are two types of parts on the market. There are——

Mr. AMODEI. I understand that. The question is what percentage if you know. It is okay to say you do not.

Mr. GILLIS. It is about a $16 billion market.

Mr. AMODEI. Okay. So we do not know what percent of the market we are talking about. That is something if somebody could get that later on, I would appreciate it.

Mr. GILLIS. Sure.

Mr. AMODEI. Second, Ms. Burris, Mr.—sorry. I probably should not be driving. Mr. Menefee indicated that when somebody buys a car from one of your clients, that they had been compensated for all their R&D, all that other sort of stuff that you kind of intimated. What is your response to that? Do manufacturers have any interest in any R&D after I pay $35,000 to whatever company for my car?

Ms. BURRIS. I do not think that they have been fully compensated for their R&D when they sell that car.

Mr. AMODEI. Well, if they have not been, then would this bill encourage them to increase the price so they are getting—I mean, if you no longer have a back end on the parts, I would assume that everybody is going to be affected equally in the manufacturing and that they are going to increase the price of their cars if they do not get something on the parts. Is that a bogus statement? How do you get compensated for R&D generally?

Ms. BURRIS. Yeah. If it is okay, I would like to go back to GM, Chrysler, and Ford and ask them. I can get the information back.

Mr. AMODEI. That would be great.

Ms. BURRIS. I am the patent attorney. I do not work at the automotive companies.

Mr. AMODEI. Okay.

Ms. BURRIS. But I would be happy to get that information and put it back in the record.

Mr. AMODEI. That is fine. Mr. Menefee, if this bill passes, are auto premiums going down for all of Mr. Gillis' consumers?

Mr. MENEFEE. Well, I think the position we have laid out is a concern about premiums going up.

Mr. AMODEI. So is the answer to my question no?

Mr. MENEFEE. I would not expect premiums to go down as a result. We are preserving the competitive environment we have historically had, which I think would suggest that premiums would, in terms of the result here, would be to keep that part of the premium relatively the same as compared to——

Mr. AMODEI. Mr. Gillis, how does that work for consumers? Is that a good answer for your consumers, auto insurance premiums?

Mr. GILLIS. It is not a great answer, no.

Mr. AMODEI. Okay. Thank you. I appreciate that.

Mr. GILLIS. But let me just say this. There are choices that consumers can make both in terms of parts and in terms of auto premiums. Some consumers actually choose insurance premiums that give them only car company brand parts. Now those tend to be more expensive.

Mr. AMODEI. Yep.

Mr. GILLIS. But those consumers are willing to pay that. Most consumers are shopping around for the least expensive insurance they can get, and this is one of the ways that insurance companies can reduce costs.

Mr. AMODEI. And I appreciate that. Finally, there was testimony about launch period, best guess, some relief for consumers. If I might, I think it was you, Mr. Menefee, that talked about launch period and best guess. Can you put a little more meat on that framework in terms of why 30 months works as opposed to 14 years or no period?

Mr. MENEFEE. Well, I think the evolution of the bill as proposed has resulted in a 30-month number being a relative compromise, that that is reasonable to all parties concerned, at least in terms of the discussion and the debate so far.

I am sure you could argue on either side of whether—and I would also indicate it is not inconsistent with what at least what our company's practice has been, has generally been to use OEM parts during the first 2 years that a new vehicle is owned by the consumer. And I think all things considered, 30 months is a reasonable compromise.

Mr. AMODEI. And I appreciate that. But to tell you why I asked the question, because I get the consumer part, and I get the cost of insurance. And I also get the R&D part. So what I am looking for, and it is like, well, good luck finding that because you are the only one looking for it, maybe is, though, is what is the investment in R&D? What is reasonable how to treat that in the context of pro-

viding consumers choice and also keeping their insurance premiums as low as possible?

So when I hear terms like "best guess" or "launch period," it is like, "well, okay, what is the basis of that statement?" And I am sure there is some. So if anybody can follow that up later on, that would be great.

With that, I want to thank the panel for your candor, and yield back, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman. The gentlewoman from California is recognized for 5 minutes, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I am sorry that Mr. Watt had to leave, although I certainly respect that all of us have many things to do at once, so I am not critical of that. But I think it is important to go back to the Constitution, as Congressman Issa has, and to reflect on what the Congress is asked to do. We are asked to promote the progress of science in the useful arts by securing for limited times the exclusive right.

Now when the Constitution was adopted, the Congress chose 14 years as a patent terms. It is entirely up to us to decide what is the appropriate time of protection to promote the useful arts. And that is not in any way adverse to our obligations or even our history as a country. And I just think it is important to reiterate that point.

Now in terms of safety, there has been some concern expressed by Ms. Burris, the parts that were not provided by the original manufacturer would be less safe. Mr. Menefee, you are actually, as I understand it, a member of the board of the Insurance Institute for Highway Safety. I think is that not the group that gave us the crash dummies? Can you address the issue of safety directly as to these non-original manufacturing parts? How can we know that they would be safe?

Mr. MENEFEE. Yes, ma'am. Congresswoman, first of all, I am an engineer. I started out my career in heavy manufacturing doing product design and product manufacturing. I have a good appreciation for what is involved with that. I also have a good appreciation for what is related to being able to do that and manufacture parts that are of high quality and meet the standards that they need to meet.

And as a board member of the Insurance Institute for Highway Safety, I have been around these questions of quality a lot. This is not a new issue. The Insurance Institute has addressed it over, I believe, the past decade or more in terms of the question to do aftermarket parts meet the test when it comes to quality and safety.

IIHS has conducted tests and concluded that the source of a car's cosmetic car parts is irrelevant to crash worthiness and safety. And I would make the distinction there in terms of cosmetic parts as compared to the structural parts.

And, in fact, there is very substantial information and the issue has been well vetted that safety with aftermarket parts is not an issue. That is, I think, very well established.

Ms. LOFGREN. Now I am interested, and, you know, we all are impacted by our own personal experience. So I will tell a story on my daughter, who came a couple of years ago and borrowed my car,

and unfortunately had a small accident with my car. And it did not look that badly damaged, but the insurance company said, no, just total it because it will cost more to fix it than it is worth. And I am just sort of replicating that because it was totally fixable, and I would be happy to have had it fixed. I did not want to go out and buy a new car.

I am interested in the impact that something like this bill might have on the number of vehicles that are simply totaled that could otherwise be repaired and are totally usable. Do you have any idea what that might be, Mr. Menefee?

Mr. MENEFEE. I would not hazard a guess as to exactly what the percentage would be, but certainly it would have an impact. In most cases, auto insurers look at damages approaching 75 to 80 percent as being something that we could consider a total loss and then replace the vehicle or settle up with you to replace the vehicle as compared to trying to repair it.

Certainly the elimination or diminution of aftermarket auto parts would raise the repair costs, which then would suggest a higher percentage of vehicles being put into that category. And just generally, that is a concern not just for insured customers, but for non-insured customers as well, of which there are many who have to pay for those repairs out of their pocket as compared to relying on the insurer to do so.

Ms. LOFGREN. Well, I certainly understand that this is a new concept for some. To me, certainly we want to make sure that we have a vibrant and successful auto industry sector in this country. I voted and I was happy to vote on the so-called auto bailout, and I was glad that the auto companies came through, and they are on their feet, and they are competing. It is great.

But right now, when a consumer goes out and buys a car, they are not just buying a car, they are buying indentured servitude to the manufacturer for the life of the car. And most people do not realize that. I mean, you are buying the design and the performance and everything else, but if the patent term is 19 years and the car usually lasts 10, I mean, you really are stuck in a way that most consumers do not intend.

And my belief is that the competition that the auto companies have is performance and design among other new vehicles. It is not to get their claws into the consumer if they have an accident 15 years later. And I think Mr. Issa's bill helps create the competition that will save money, preserve safety, and I think also help create a more vibrant aftermarket industry in the United States.

And with that, I would yield back, Mr. Chairman.

Mr. GOODLATTE. The time of the gentlewoman has expired, and the gentleman from California, Mr. Issa, is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman. Ms. Burris, you said a few things that I think I, no surprise, might take a little exception to.

Now you are a patent attorney, so the quality of these parts, the NRE, the non-recurring expenses, those are not areas of your expertise, are they?

Ms. BURRIS. My expertise, no. As a consumer, of my concern, yes.

Mr. ISSA. So as a consumer, you would ask how it is that the auto companies can make a million Toyota Camrys on a dye, and

then when they have to make a million and one to sell it as an aftermarket part, they cannot compete with somebody who had to make a brand new dye just to make aftermarket parts. Is it not true that from a standpoint of cost, the tooling cost to just make aftermarket parts actually puts the repair parts person behind, not in front? Well, let me rephrase that. I already said you do not know about the cost of these things, so let us go on to something else.

You know about patent law. Okay. Do I own the patented product when I buy it? Do I own that fender, that front right fender, on my Lexus?

Ms. BURRIS. Absolutely. Subject to any terms and conditions of the purchase of a patented product, you own that patented product. You can repair it. You can——

Mr. ISSA. Okay. Well, the patent law is the patent law. The terms and conditions do not modify the patent law. You cannot add to the patent law by having an implied contract. I know people have tried to do it.

So let us go through this a little bit. Mr. Gillis' car, his Lexus, gets ruined, but the front right fender is okay, and it is in a junkyard. Is it okay for me to take it off that and put it on my car? His patented front right fender survived the crash, right? So I could buy that. Okay.

Ms. BURRIS. Sure.

Mr. ISSA. For sale doctrine, right? It is the patent transferor. He can sell it. I can buy it. I put it on my car. Okay. And I can take that fender that got crunched, and I can bend it back out, and I can make it exactly the same as it was, and I have not violated the patent because I own that, right?

Okay. Now if I simply fabricate a fender myself to do the job that the first fender did, did I violate the patent law?

Ms. BURRIS. Yes.

Mr. ISSA. Oh, okay. So you are saying that, in fact, even though I have this fender that I am going to scrap, I do not have the ability to duplicate a replacement part.

Ms. BURRIS. You do not, but the practical matter is the car company is not concerned with the mom and pop shops. They make their own——

Mr. ISSA. Right, they are just concerned about making this profit by having this exclusive. So let us go through this. I own this right, and you are telling me—and Mr. Watt, if he were still here, maybe this would make him less confused. I own this right. I own this part. But if the part is dinged, I can cut out the dinged part and I can weld in a new part. I can unbend it. I can move it back into the shape it was. That is all okay.

I can take 80 percent, 50 percent, 60 percent, 90 percent of the metal, cut it away, and weld in new metal. I am okay, right? Can I take 99 percent and just take the little spot where the screw fit into the part and the rest of it? And can I fabricate it back on to that one part?

Ms. BURRIS. Sure, you can.

Mr. ISSA. Okay. So what you are really saying is this about the money the auto companies want by having it exclusive, and that is all well and good. But what they are really saying is even though I bought and paid for this part, they do not want me to do it.

Well, let us go through this whole point. I am trying to make a form, fit, and function replacement part from scratch. The design patent is limited to ornamental, correct?

Ms. BURRIS. Correct.

Mr. ISSA. So I am entitled to make a part which has form, fit, and function perfectly, and I have not violated the patent because the patent is limited to ornamental, right?

Ms. BURRIS. Yeah. The design patent covers the ornamental features of the part, correct.

Mr. ISSA. Okay. So what you are saying is the ornamental feature is the only part that I am taking. So it is a crease. It is a line. It is something of no value for form, fit, and function, right?

Ms. BURRIS. I am not sure I followed you. It is the overall design that is protected. It is not——

Mr. ISSA. No, it is not the overall design. A design patent on a particular fender is limited to its ornamental value. It cannot be form, fit, or function. Otherwise, that would be a utility patent, right?

Ms. BURRIS. That is correct in terms of its coverage.

Mr. ISSA. Okay. So, Mr. Menefee, you mentioned something I think that I was a little confusing before, and I want to make sure I get it clear. The reason you said that it would not necessarily result in lower costs is because so far this practice of patenting, and suing, and stopping the importation or manufacture of parts is not widespread. Is that not true?

Mr. MENEFEE. Yes, sir.

Mr. ISSA. So it is actually something that did not go on for the first 100 plus year of the auto manufacturing business that is beginning to go on that is driving up the price of these and making aftermarket products not available.

Mr. MENEFEE. That is correct. Our concern is that the current time and a prospective basis.

Mr. ISSA. Okay. Well, quickly, I would like to ask unanimous consent that the Coalition for Auto Repair Equity, the CARE statement of July 27, 2012 be placed in the record.

Mr. GOODLATTE. Without objection, so ordered.

[The information referred to follows:]

VIA EMAIL

July 27, 2012

THE COALITION FOR AUTO REPAIR EQUALITY (CARE)
105 Oronoco Street, Suite 115, Alexandria, Virginia 22314

The Honorable Bob Goodlatte, Chairman

The Honorable Melvin Watt, Ranking Minority Member

Distinguished Members of the Subcommittee on Intellectual Property, Competition and the Internet

Washington, D.C. 20515

RE: PLEASE SUPPORT PARTS ACT

Distinguished Members:

The Coalition for Auto Repair Equality (CARE) is a national, nonprofit organization that represents nationally recognized companies in the automotive aftermarket (independent repair industry), among them: **NAPA, CARQUEST, AutoZone, Advance Auto Parts, O'Reilly Auto Parts and Bridgestone-Firestone Retail Operations. <u>There are nearly FIVE MILLION people nationwide who are employed in the automotive aftermarket in nearly 500,000 Businesses, large and small.</u>**

As CARE's Executive Director, I am writing on behalf of its member companies in **SUPPORT** of HR 3889, the PARTS Act, sponsored by Representatives Darrell Issa (R-CA) and Zoe Lofgren (D-CA).

The aftermarket encompasses businesses that sell parts and accessories to neighborhood garages that diagnose and repair vehicles. A large segment of the aftermarket is comprised of the Collision Industry. These are the paint and body shops that rely on aftermarket manufacturers for parts like bumpers and hoods, also known as collision parts.

The aftermarket offers motoring consumers affordable choices for repairs and replacement parts, essential in today's economy. **A January 3, 2012, *CONSUMER REPORTS (CR)* poll found approximately 40 percent of car owners are POSTPONING having major repairs or maintenance on their primary vehicles. Among those surveyed, the types of Non-Warranty work most commonly postponed were minor manufacturer-recommended scheduled service (22 percent) followed by 'wear' items (17 percent) and body or other EXTERIOR damage (15 percent). The respondents stated that a major repair bill costing an average of about $2,000 would become a serious financial burden.**

An August 3, 2011, AMERICAN AUTOMOBILE ASSOCIATION (AAA) phone survey of 1,009 motorists found ONE-IN-FOUR vehicle owners could NOT pay for a car repair of $2,000 and that ONE-IN-EIGHT would be UNABLE to pay for a repair bill of $1,000. The AAA survey stated that 'It stands to reason that this same group could no more afford a $1,000 insurance deductible.'

Car companies have been getting 14-year design patents on EXTERIOR replacement parts for items such as bumpers. For such parts, the PARTS Act would reduce the design patent to 2 ½ years, after which "alternative" suppliers could sell the parts **WITHOUT infringing.** Also, during the 2 ½ year period, "alternative" suppliers could manufacture, test, market and distribute parts pre-sale WITHOUT INFRINGING. **IMPORTANTLY, THE PARTS Act WOULD STILL PERMIT THE CAR COMPANIES TO ENFORCE THEIR DESIGN PATENTS ON PARTS FOR 14 YEARS AGAINST OTHER CAR COMPANIES TO ENSURE THAT COMPETING CAR COMPANIES DO NOT COPY ONE ANOTHER'S DESIGNS IN THE MARKET FOR NEW CAR SALES.**

In addition, the PARTS Act will allow for the American tradition of competition while balancing Intellectual Property. **Consumers always benefit from competition, which ensures fair and competitive pricing, quality products and CONSUMER CHOICE.**

CARE respectfully requests your support of the PARTS Act. Thank you for your consideration.

Sincerely,

Sandy Bass-Cors, Executive Director

Sandy@careauto.org

703-519-7555

Mr. ISSA. And I would like to just note for the record for those who may not go back quite as far as an old guy like me does that Carol Shelby, died May 10, 2012, was born in 1923. Roy Wishowski, who was a friend and customer of mine, was born in 1915, died in 1997. In the 1970's, early 70's, I was buying from a well-established Casey Whitney catalogue. Repair parts for Kaiser Willeys and for so many parts, particularly from automobile companies who were no longer making these parts, including Volkswagen of America that would not make parts.

This industry has been well-established for my entire life, and I think the important part is that, in fact, we are talking about a narrow bill to prevent a new expansion that endangers the consumer's ability to afford repair parts. And I yield back.

Mr. GOODLATTE. The gentleman's time has expired. The gentleman from Texas, Mr. Poe, is recognized for 5 minutes.

Mr. POE. Thank you, Mr. Chairman. I am one who actually has been a customer of a junkyard. I am not sure you have ever been to a junkyard, Mr. Issa, but maybe you have been. If you have, that is great.

Mr. ISSA. I will show you the picture of my 1963 VW bus, and it is all junkyard parts, my friend.

Mr. POE. I frequent the place in southeast Texas for several reasons, and I do not know that on my '98 Wrangler I have an original part on it. And many of them have come from replacement parts that have been found at a junkyard.

But be that as it may, I would like to start with the insurance first. Having been dropped by most insurance companies in Texas at least once over the years—— [Laughter.]

Driving that '98 Jeep Wrangler with the six-inch lift. I want to ask you some questions. The manufacturer sets a price on a bumper. First of all, I would like to ask the lady that represents the manufacturers, why do these bumpers or parts cost so much? Mr. Gillis says his folks can sell them for a third of the price and still make a profit. You sell them for, you know, 3 times that. Why are they so much? Are you gouging the consumer?

Ms. BURRIS. Are they really that much? I mean, I think that it is a relative look. I mean, once someone comes along and copies a part, they do not have to do any R&D——

Mr. POE. No, just answer my question. Wait a minute.

Ms. BURRIS. I do not know that they are——

Mr. POE. Just a minute. I reclaim my time. First of all, the original manufactured part is more generally, is it not, than the replacement part that his guys sell?

Ms. BURRIS. Yes.

Mr. POE. Okay. Why is it so expensive? The lady from California, Ms. Lofgren said, just replace the part. The insurance guy says, hey, that is too much money. We will just get you a new car. Why do the parts seem to be so expensive from the manufacturer? That is my question.

Ms. BURRIS. Yeah. It is a valid question. I think in a lot of cases, the parts that you are buying from the original equipment manufacturer are higher quality. They are better materials. They are going to last longer.

I asked my students this question in class last week. I showed them the bill. I did not tell them how I felt about it. How do guys feel about this? And one of the students said, well, he goes, I just put a new bumper on my F-150. He goes, and within a year it rusted, and I went back and said, hey, why is it rusting? And I found out it is a non-OEM part. Now I know to ask for OEM parts.

Now I am not saying that is the case every single time. There may be a part that has the same materials, same structural characteristics. But I think there is concern that these parts—I mean, if we are going to do this, you want to make sure those parts are the same parts, and they have the same materials, the same durability out in the environment, the same structural integrity.

Mr. POE. Excuse me, I just have a little bit of time. Mr. Gillis says it is generally the same part. We are not talking about a part

that is not the same part. We are talking about a part that is made an aftermarket part. It is the same general part made out of the same material, maybe made in Taiwan instead of Pittsburgh.

Ms. BURRIS. I am a jeep person myself. I was like, hey, you are my kind of guy. I have a jeep, and the front radiator had to be repaired. I did not know it was a non-OEM part. Paint chipped off of that thing in 2 years, and it looked like crap. And I went, hey, what is wrong with this radiator? Well, it was cheaper. We got you the cheaper part.

Mr. POE. All right. You have your patent law over a set number of years. How long do you keep parts? So I have got a new jeep. Let us say I bought a new jeep, which would not happen. But let us say I bought a new one. How long does Jeep keep the parts for that vehicle?

Ms. BURRIS. I personally do not know that, and I will have to go back and ask.

Mr. POE. Or Toyota or GM? Do you know any of them?

Ms. BURRIS. I do not, but I am happy to gather that.

Mr. POE. I mean, a long time ago they had to keep parts for 20 years, and that was done away with by Congress, I understand. So there is no requirement that you keep a stock of parts for a certain vehicle.

Ms. BURRIS. I am sure each manufacturer has some kind of guidelines they use, and I am happy to go gather that information and bring it back. But I do not know that right now.

Mr. POE. All right. And, Mr. Menefee, on the insurance angle, people can buy any kind of insurance they want. They can get replacement parts that come from the manufacturer. They can get insurance that just says it is a replacement part. It does not have to come from the manufacturer. I mean, people can do that, though, through their insurance that they buy. Is that correct?

Mr. MENEFEE. There is some flexibility, Congressman. However, we are a highly regulated industry, so the policy provisions are pretty much dictated by the State insurance departments in terms of what we do or do not offer in that regard. And, in fact, in most States, the requirement—the repairs are like, kind, and quality of form, fit, and function. And that is what we honor.

Mr. POE. So if I showed up with the jeep wanting to get it repaired, I would be allowed to get a part that is equal to the original part on that vehicle.

Mr. MENEFEE. Yes, sir. And, in fact, in our experience, we are very careful, and I think in industry this is typically the case, we are required to disclose to the customer what type of parts are being used to repair that vehicle. And we do get questions sometimes about OEM versus aftermarket parts. And as soon as we explain the manufacturing and quality control process that most of us in the business use to control those aftermarket parts, the customer is very satisfied and, in fact, is usually focused on the cost effectiveness. They want a good repair at a fair price.

Mr. POE. Last question, if I may, Mr. Chairman.

Mr. GOODLATTE. Without objection, the gentleman is recognized for one additional minute.

Mr. POE. Safety. I would like to hear what you all three think about aftermarket parts—not the junkyard part, but aftermarket

parts and original parts, whether generally if you get the same part, it is going to be just as safe or not. Just each one of your answers. It is either is or it is not, in your opinion. Mr. Menefee, let us start with the insurance.

Mr. MENEFEE. If the aftermarket part has been manufactured under the quality control and certification conditions that we would say it should be, there is no doubt in my mind in terms of my background as an engineer and my experience with the Insurance Institute, that aftermarket parts are equally safe and equivalent to original equipment parts.

Mr. POE. Ms. Burris?

Ms. BURRIS. As an engineer as well, I would agree with that, that if they are designed to the same specifications, the same materials, that they are going to have the same safety, same quality.

It is not just on a part basis alone, though. You know, those parts interact with one another. It is a vehicle system. So one part triggers a reaction in another part. And so it is not just the part itself. It is how it interacts with the parts around it.

But, you know, if it is designed to the same specs, sure, it is going to perform the same.

Mr. POE. Mr. Gillis?

Mr. GILLIS. There are programs available that actually confirm the fact that these parts are virtually identical. And many insurance companies take advantage of those programs to protect consumers from two things: poor quality parts and overpriced parts. The real question is the quality of car company brand parts. That is something that the Committee may also want to look at because, let us face it, in 2010, there were more cars recalled by the car companies for quality and safety problems than there were even sold. So they do not have a lock on quality, and it is important to remember. Let us not use that as an excuse not to use competitive parts.

Mr. POE. And then, Ms. Burris, if you would get the Committee that information regarding how long generally a manufacturer keeps in stock or available parts for a specific model, we would appreciate that.

I yield back.

Mr. GOODLATTE. I thank the gentleman. The gentleman from North Carolina, Mr. Coble, is recognized for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman. I was here earlier and had to leave due to another meeting.

Mr. Menefee, if this bill is enacted, would it result in a reduction of insurance premium rates? And if so, when would the consumer embrace that or be aware of it?

Mr. MENEFEE. No, sir, Congressman, we have taken a position and communicated that the intention here is to preserve the competition that currently exists in the marketplace so that we are working to pass the bill to avoid a significant increase in the cost of parts and insurance premiums.

Mr. COBLE. Well, would there conversely be a reduction in premium rates?

Mr. MENEFEE. Our expectation is if the bill is passed, we will maintain the current competitive environment we have, and as a

result, there would be no appreciable change in insurance premiums.

Mr. COBLE. Anybody else want to weigh in on that?

Mr. GILLIS. Well, I think that is a good point, Representative. I think the issue here is insurance premiums are based on what is in the market now. If the car companies are successful in keeping that competition out of the marketplace, it is inevitable that if an insurance company has to buy five $400 parts to repair a car, they are going to charge me more for that insurance.

Mr. COBLE. Thank you, sir. Ms. Burris, in your testimony, you alluded to motorcycles and other types of motor vehicles. Elaborate on that again for me.

Ms. BURRIS. Sure. The language of the bill calls for component parts used in motor vehicles. And under our Title 49, the definition of motor vehicles says any vehicle that is driven or drawn by mechanical power, manufactured for use on our public streets, roads, and highways. So that is more than automobiles. That is a whole lot. I mean, it is motorcycles. It is mopeds, motor scooters, farming equipment, trailers. It is not just driven by, it is drawn by.

Mr. COBLE. Lawn mowers maybe?

Ms. BURRIS. If it is for use on public streets, and roads, and highways. Plows. It is wider and broader than just automobiles.

Mr. COBLE. All right, thank you. Thank you all for being with us. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman. I want to thank all the Members of the panel for a very—I am sorry. We now have two new Members who have arrived. So we are going to continue on, and we will next recognize the gentlewoman from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman. I am sorry I was delayed and unable to be here. But I wanted very much to be here for a number of reasons. I appreciate the hearing today as an opportunity to hear from the various stakeholders regarding the Promoting Automotive Repair, Trade, and Sales Act. Indeed, this issue is of great importance to many of my constituents as it concerns the maintenance and repair of automobiles where dealers contend that the legislation would unduly deprive them of their intellectual property rights, which will lead to revenue and job losses given the economic challenges that many auto dealers continue to face, under declining sales and limited access to credit. The PARTS Act would prove devastating to a single fragile industry.

Indeed, the PARTS Act raises a fundamental public policy question as it would reduce auto companies' patent protections from 14 years to 30 months. The auto companies are also concerned about the quality of replacement crash parts.

Let me ask this. One of the things I have focused on in looking at these challenges that continue to arise about these issues is what kind of investment and maintenance resources go into protection of the intellectual property rights that is being challenged? I do not know. Ms. Burris, let me just ask you.

Ms. BURRIS. Sure, I would be happy to answer that.

Ms. WATERS. Yes.

Ms. BURRIS. There are thousands and thousands of dollars spent on patent applications. There is the time that the attorney spends

preparing the specification, the claims. And in this case for design patents, the claim is the drawing, so there are professional drawings prepared to show the article manufacture from a number of different views. You pay your filing fees with the USPTO.

Design patents are a little unique in that once you pay your issue fee when it is ready to be issued, you do not have to pay maintenance after that, like utility patents.

So the investment per design patent for an applicant is on the order of, it is thousands of dollars, $3,000 to $4,000 per patent. And, again, you were not here earlier when we talked about this bill. The language of the bill is retroactive, so if you got your patent 5, 6, 7 years ago and you paid all that money, you have nothing to show for it.

And also the language of the bill, it is not 30 months from the issue date of the design patent. The current term for a design patent is 14 years from the issue date. The language of the bill does not say 30 months from the issue date. It says 30 months from the date of the offer for sale.

So what happens, the reality is when we work with our clients, they are getting ready to go to a big auto show or to go see a customer. A design has been refined all the way up until that date. I have been there, done that, 11 at night changing designs right before launch. And so you file your patent application the night before you offer it for sale. Well, it takes over a year for you to get your patent through the Patent Office because—it just takes a while to get it. The delay is over a year.

So really it is not 30 months of patent term. It is closer to a year or a year and a half at best of a patent term.

Ms. WATERS. Well, Mr. Chairman, I thank you for allowing me a few minutes here having come in late. I just have to say that probably some of my consumer activist friends, and I am known as a consumer person, but I am old-fashioned in that I believe that if you discover and develop that you have a right to reap the benefits from it for a reasonable period of time. And you can always develop a better mousetrap, but do not take mine.

Mr. Gillis is trying to get my attention.

Mr. GILLIS. Congresswoman Waters, our dear friend.

Ms. WATERS. Yes.

Mr. GILLIS. Think about what you just heard. It costs $3,000 to $4,000 to file a patent that allows the manufacturer to force me to pay $400 for a particular part for 14 years. All they have to do is sell 5 parts, and they have covered the cost of their patent as you just heard. And then they protected themselves from me being able to go out into the marketplace and have a choice.

That is what this is about, and we need your help, and we need you to stand up for consumers and support this effort.

Ms. WATERS. Well, I do not want to repeat myself, but I stand firm in my belief. And it sounds a little bit unusual for me, but the fact of the matter is whether you are a small company, or a big company, or an individual, if you are smart enough and if you are inventive enough to, you know, come up with something that you can patent, I want you to enjoy the benefits of it.

And one good thing about it is, like I said, the next person can invent a better mousetrap, or they can go for whatever they can

produce. But I just do not like the idea of investing in a patent, and then all of a sudden it is not yours after a short period of time. It just does not seem right to me. So you can keep talking to me, Mr. Gillis, but that is where I am right now. Thank you.

Mr. GOODLATTE. I thank the gentlewoman. The gentlewoman from Texas, Ms. Jackson Lee, is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I know that this bill has changed in the hearing on the underlying bill, and it had some changes to it. And I think, however, the basic premise is one that we should look at very, very closely. And I think all the witnesses will know that what you hear from many of your constituents is costing as it relates to fixing cars, whether they are of recent vintage or older vintage. And I assume it is partly because of that famous word "parts."

So let me just start and go across the board and ask each—and if you could have succinct answers. If you do not know, you do not know. And thank you all for being witnesses here today.

Will the auto industry support this bill in any form? Could I start with Mr. Menefee and go on to Mr. Burris, and then Mr. Gillis. Mr. Menefee?

Mr. MENEFEE. I am sorry, Congresswoman. So the question is?

Ms. JACKSON LEE. Will the auto industry support this bill in any form if it would be modified. And I know you are opposing the premise, I guess, of dealing with parts and ignoring the patents and the design issues.

Mr. MENEFEE. Well, my response there would be we respect intellectual property and patent rights. Clearly we do believe that this bill strikes a compromise in terms of the protection that should be offered there and still affords consumers what they deserve in terms of competition in the aftermarket parts area in terms of collision repairs on their vehicles. So we support the bill because of that.

Ms. JACKSON LEE. And if we modified it more with respect to concerns that will be raised by consumers, your view would be you would have to look at it. If we did more for consumers.

Mr. MENEFEE. Well, we think the bill does quite a bit for consumers as it is currently structured.

Ms. JACKSON LEE. All right. Ms. Burris?

Ms. BURRIS. I will give you a real succinct answer, and that would be a negative, Ghost Rider. We would not support this bill. The design patent laws provide for 14 years, and that is what we should have. So we do not support this bill in any form.

Ms. JACKSON LEE. I appreciate that. And, of course, Mr. Gillis?

Mr. GILLIS. There is clearly way, way too much money at stake for the car companies for them to ever support the consumer-oriented bill that is before them today.

Ms. JACKSON LEE. And why do we not pursue that a little bit more, Mr. Gillis, on this question of money and juxtaposed against what benefits come to the consumers because of the approach that we are looking at.

Mr. GILLIS. Well, there are two things. First and foremost, most of us are in pretty desperate financial condition. And I would like to set the record straight that Representative Issa called me a Lexus person. I have got 4 kids, so I am more of a Hyundai person.

And most of us are scrimping and saving as much as we possibly can.

When it comes to backing into a pole and having it cost us $2,000 or $3,000 to get our car fixed, our fear is, one, consumers are simply not going to be able to afford to have that car fixed. It will degrade the value of the car driving around with an accident. And worse, maybe they will not replace some of the important safety features.

So there are a lot of problems associated with the lack of competition and the fact that that lack of competition dramatically increases the cost of repair.

Ms. JACKSON LEE. And I am glad you mentioned the Hyundai or other import thereof. And the concept is that the $2,000 to $3,000 comes from buying the part that comes from or is allegedly necessary for that vehicle. And is that part made in the United States or overseas? And I know there are some plants here. And there is a question of whether or not we are promoting domestic production by this legislation or are we just furthering the move of manufacturing overseas.

Mr. GILLIS. I appreciate that question, and I am glad you raised it because there is this constant undercurrent by the car companies that this is somehow trashing American business and hurting American production. I would like to submit for the record the fact that two of the most popular built American cars—the Ford Focus 2012 and the Chevy Cruze, the 2011 version of the Cruze—63 percent of the suppliers that Ford has chosen for the Ford Focus are foreign manufacturers. Fifty percent of the suppliers that Chevy has chosen for the Chevy Cruze are foreign suppliers.

So this is not a foreign versus domestic issue. This is a fairness issue, and consumers have the right to choice in the marketplace. And that is what this bill would give them.

Ms. JACKSON LEE. How would you answer Ms. Burris' question about the 14 years and her inability to support this legislation based on the patent design issue?

Mr. GILLIS. Well, quite frankly, we believe that this bill here is a compromise. And we originally supported Congresswoman Lofgren's very, very elegant solution because these patents are being used not to protect legitimate work or legitimate designs of individual small parts. But these patents, as you can see by their dramatic increase over the last 3 or 4 years, are being used as a competitive tool.

It is great to have patents. It is great to have design protection. But it is really unfair to consumers if that is being used solely to protect markets. And that is why the Consumer Federation of America, Consumers Union, Public Citizen, the Advocates for Highway and Auto Safety, who are here today, are against this bill. I mean, excuse me, for this bill, against the 14-year practice.

Ms. JACKSON LEE. We have been there before. Mr. Chairman, I just want to put on the record one statement—I thank the Ranking Member—and that is to express my dismay having helped bail out the auto industry about a year or two ago for a 50 percent utilization of foreign parts versus domestic parts, which could enhance the manufacturing sector in the United States. And I know that we

are not the Trade Committee, but maybe we can begin to understand that more and enhance legislation accordingly.

With that, Mr. Chairman, I would be happy to yield back.

Ms. WATERS. Mr. Chairman?

Mr. GOODLATTE. I thank the gentlewoman. The gentlewoman from California?

Ms. WATERS. Could I get unanimous consent for 30 seconds to just raise a question, and I will talk with my husband about it a little bit tonight. But he tells me that the labor costs——

Mr. GOODLATTE. Without objection, the gentlewoman is recognized for 1 minute.

Ms. WATERS. Thank you. That the labor costs and the repair of these automobiles is much higher than the parts. Is that true?

Mr. GILLIS. No, I do not think so. It is about a 50/50 percent. About 50 percent of the costs of the repair goes into labor, and about 50 percent of the costs of the repair goes into the parts.

Ms. WATERS. Okay. I am going to go back and check all of my repair bills——

Mr. GILLIS. Yes.

Ms. WATERS [continuing]. And compare the costs for the parts and the costs for the labor. Yield back the balance of my time.

Mr. GOODLATTE. I want to again thank all of the witnesses for their excellent testimony and for a very lively discussion.

And before I adjourn the hearing, I want to recognize the gentleman from North Carolina for another unanimous consent request.

Mr. WATT. I ask unanimous consent to put the letter of the Intellectual Property Owners Association, dated July 31, 2012, addressed to me and you into the record.

Mr. GOODLATTE. Without objection, so ordered.

[The information referred to follows:]

President
Richard F. Phillips
Exxon Mobil Corp.

Vice President
Philip S. Johnson
Johnson & Johnson

Treasurer
Carl B. Horton
General Electric Co.

Directors
Russell W. Bibb, Jr.
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Bart Eppenauer
Microsoft Corp.
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Scott McDonald
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Steven W. Miller
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Douglas K. Norman
Eli Lilly and Co.
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Covidien
Tom O'Brien
United Technologies Corp.
Dana Rao
Adobe Systems Inc.
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3M Innovative Properties Co.
Mark L. Rodgers
Air Products & Chemicals, Inc.
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Matthew Sobocinski
Dresser-Rand, Inc.
Nancy Schecter
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Steven Shapiro
Pitney Bowes Inc.
Dennis C. Skarnes
Caterpillar Inc.
Russ Stifler
Micron Technology, Inc.
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Brian C. Stonecash
Carrier/Hilliard
Thierry Suzor
Air Liquide
James J. Trussell
BP America, Inc.
Cheryl Tubesh
J.M. Huber Corp.
Ray Weidman
Pfizer, Inc.
Michael Weiler
DuPont
BJ Widness
Apple Inc.
Stuart Watt
Amgen, Inc.
Paul D. Yeager
Auburn Instruments

Counsel to Council
Michael D. Nolan
Roberts, Tunney, Hadley & McCarty, LLP

Executive Director
Herbert C. Wamsley

July 31, 2012

The Honorable Robert Goodlatte
Chairman
Subcommittee on Intellectual Property, Competition, and the Internet
B-352 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

The Honorable Mel Watt
Ranking Member
Subcommittee on Intellectual Property, Competition, and the Internet
B-352 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Watt:

Intellectual Property Owners Association (IPO) writes to express its strong opposition to H.R. 3889, the "Promoting Automotive Repair, Trade, and Sales Act," or "PARTS Act," introduced on February 2, 2012.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own, or are interested in intellectual property rights. IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members.

IPO opposes H.R. 3889 for two primary reasons. First, it would virtually eliminate design patent protection for the automobile industry (cars, trucks, and other motor vehicles), weakening incentives for innovation and eliminating U.S. manufacturing jobs. Second, the bill would set a harmful precedent for all U.S. intellectual property rights.

H.R. 3889 would allow anyone to make, test, offer to sell, advertise, or import any article of manufacture that was similar in appearance to the component part of an original equipment manufacturer (OEM) even if such activity would infringe a design patent, as long as the purpose was to restore a vehicle to its original appearance. With regard to use or sale of motor vehicle component parts, the bill would reduce design patent owners' period of exclusivity from 14 years to 30 months or less. This means that design patent owners who invested time and resources in design would be unlikely to recoup their investment costs before others could use or sell their motor vehicle component parts to restore a vehicle to its original appearance.

It is beyond dispute that fresh, creative styling serves as a huge inducement to consumers to buy automobiles and other motor vehicles. The development of a successful motor vehicle design is difficult and expensive. It is a multi-step process that includes creating, testing, marketing, and selling an original design. The patent system was designed to reward such creativity and risk taking. Copying existing designs, on the

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T: 202-507-4500 • F: 202-507-4501 • E: info@ipo.org • W: www.ipo.org

other hand, is neither difficult nor expensive. Copying in industries is occurring today. Virtual 3-D scanning and replicating equipment, for example, has made it very simple to clone OEM parts. A 2011 U.S. Department of Commerce report stated that "[c]ounterfeiting continues to be a major issue for the automotive parts industry, particularly for the aftermarket sector." [1] The report cited a Frost & Sullivan estimate that "auto suppliers will lose an estimated $45 billion worldwide in 2011 to counterfeiting."[2] H.R. 3889 would benefit the copiers: a group that does not invest in creating new designs, but merely copies the work of design patent owners at low cost.

Investment in innovation creates U.S. jobs. According to a 2012 U.S. Department of Commerce Report, "[i]n total, 40.0 million jobs, or 27.7 percent of all jobs, were directly or indirectly attributable to the most IP-intensive industries."[3] The study also found that "IP-intensive industries accounted for about $5.06 trillion in value added, or 34.8 percent of U.S. gross domestic product (GDP), in 2010."[4] The 2011 U.S. Department of Commerce study, specific to the automotive industry, stressed that "[t]he U.S. auto industry is a key component of the nation's manufacturing base. In a typical year, it accounts for five percent of GDP…and about 674,000 U.S. employees in 2010…."[5] H.R. 3889 would retard growth and decrease U.S. jobs in the industry by exempting copies from design patent liability.

Moreover, H.R. 3889 would set a bad precedent for all intellectual property rights by exempting a particular industry or class of patentable designs from protection. IPO believes the law should attempt to treat intellectual property rights in all industries the same. Many industries produce products that are subject to repair and replacement, including: razors and razor blades, pens and pen refills, drills and drill bits, printers and ink cartridges, cell phones and batteries, computers, cables and peripheral devices, and medical equipment and supplies. H.R. 3889 would encourage copiers in every industry to seek their own exceptions, slowly eroding U.S. patent laws. If a patent is unenforceable, the inventor is left with less incentive to innovate and no incentive to file future patents. Patents disclose inventions to the public at an early date and encourage others to create improvements and alternatives. Design patents, like other patents, are granted only for works that are new and not obvious, and less likely to be created in the absence of patent incentives.

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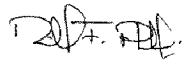
[1] U.S. Department of Commerce, On the Road: U.S. Automotive Parts Industry Annual Assessment (2011), *available at* http://trade.gov/static/2011Parts.pdf.
[2] *Id.*
[3] U.S. Department of Commerce, Intellectual Property in the U.S. Economy: Industries in Focus (2012), *available at* http://www.esa.doc.gov/sites/default/files/reports/documents/ipandtheuseconomyindustriesinfocus.pdf.
[4] *Id.*
[5] U.S. Department of Commerce, On the Road: U.S. Automotive Parts Industry Annual Assessment (2011), *available at* http://trade.gov/static/2011Parts.pdf.

INTELLECTUAL PROPERTY OWNERS ASSOCIATION

The studies cited above demonstrate that innovation and patents are critically important to the U.S. economy. This bill would upset long-standing intellectual property rights, telling the world it is all right to copy American products. Such a signal will harm U.S. economic growth and the future of U.S. innovation.

Thank you for considering our comments. We request that they be made a part of the record for the August 1, 2012 hearing on H.R. 3889. IPO stands ready to assist the Committee in any way it can.

Sincerely,



Richard F. Phillips
President

cc: House Judiciary Committee Members

Mr. GOODLATTE. And without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to as promptly as they can so that their answers may be made a part of the record.

And without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, I thank the witnesses and declare this hearing to be adjourned.

[Whereupon, at 4:19 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response to Questions for the Record from Kelly K. Burris, Shareholder and Chair, Green Technology Practice Group, Brinks, Hofer, Gilson & Lione

KELLY K. BURRIS
RESPONSE TO QUESTIONS FOR THE RECORD

SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION, AND THE INTERNET
JUDICIARY COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON THE PROMOTING AUTOMOTIVE REPAIR, TRADE, AND SALES ACT
("PARTS ACT")
HELD AUGUST **1, 2012**

By Representative Mike Pence:

1) Does the current language of the PARTS Act sufficiently limit its application only to collision repairs, as intended by the bill's sponsors?

RESPONSE:

No. The language of the PARTS Act includes "an article of manufacture" "for the repair of a motor vehicle so as to restore such vehicle to its appearance as originally manufactured." In fact, the word "collision" is entirely void from the language of the PARTS Act. With the "repair of a motor vehicle" language, circumstances other than a collision could be applied in order to create the exemption. For example, if a part has become worn or spent over time due to its extended use, this would be captured by the language of the PARTS Act. An example here might be a door handle or a retractable spoiler that becomes inoperative or broken over time due to extended use. Another scenario would include a circumstance in which the part has corroded or rusted and lost its original appearance. Yet another scenario would include the originally glossy shine of a part fading over time due to overexposure to sunlight. The possibilities are numerous, and thus the current language of the PARTS Act does not sufficiently limit its application only to collision repairs.

2) In your testimony, you mention that the definition of motor vehicles could be interpreted broadly beyond just automobiles. Could the legislation be interpreted to also include heavy duty and/or commercial vehicles?

RESPONSE:

Yes. The definition of "motor vehicles" under 49 U.S.C. 30102(a)(6) "means 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." This broad language would obviously include heavy duty and/or commercial vehicles, if they are used on public streets, roads, and highways.

3) Do you feel that passage of the PARTS Act could lead to other industry groups seeking additional IP exemptions?

RESPONSE:

Yes. This is the most significant problem with the proposed PARTS Act, because if an exception is made for design patents for automotive collision repair parts, the door is now open for other industries to ask for their exemption as well. Not only for design patents, but for other forms of patents, and even more significantly, other forms of intellectual property. How far are we willing to go until our patent system is eroded to the point where we have removed the incentive to be creative?

Letter from Jack Gillis, Director of Public Affairs, the Consumer Federation of America (CFA)

Consumer Federation of America

1620 I Street, N.W., Suite 200 * Washington, DC 20006

August 21, 2012

The Honorable Mark Amodei
U.S. House of Representatives
125 Cannon House Office Building
Washington, D.C.

Dear Mr. Amodei,

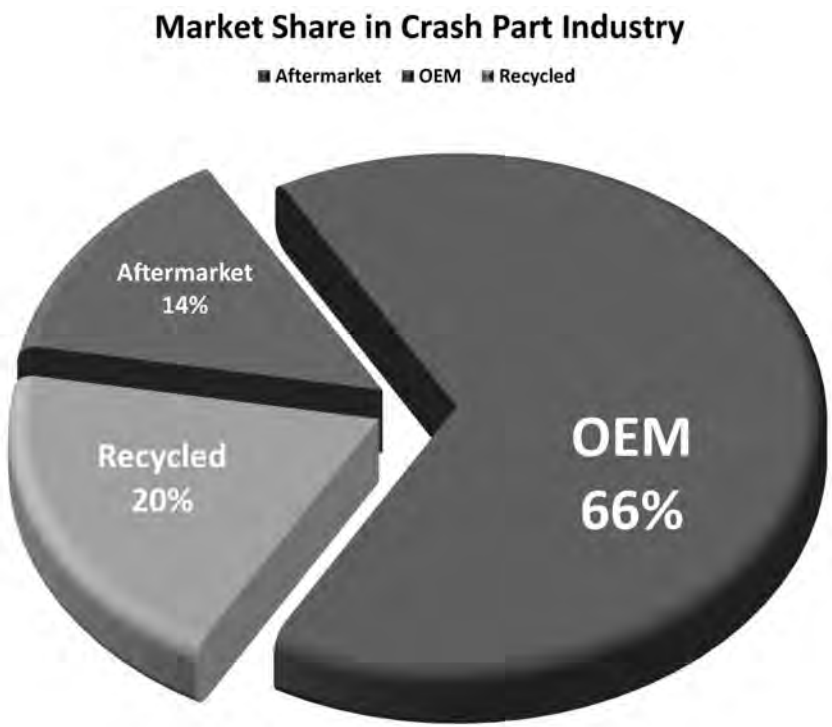
On August 1, 2012, I appeared before the House Judiciary, Subcommittee on Intellectual Property, Competition and Internet to express the views of Consumer Federation of America, Advocates for Auto and Highway Safety, Center for Auto Safety and Consumers Union, and Public Citizen on H.R. 3889, the "Promoting Automotive Repair, Trade, and Sales Act." Following my testimony you asked me what percentage of the market is crash parts? I did not have the most up-to-date percentage figures for you and agreed to supply them for the record.

Enclosed is a chart entitled the Market Share in Crash Part Industry. I hope this addresses your question adequately.

Sincerely,

Jack Gillis
Director of Public Affairs

Attaachment



Source: Mitchell Industry Trends Report Q4 2010

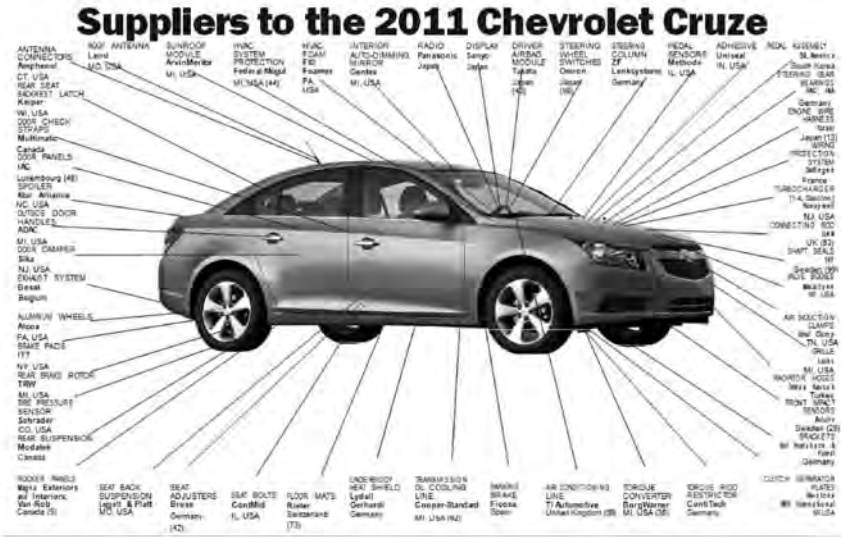
Material submitted by Jack Gillis, Director of Public Affairs, the Consumer Federation of America (CFA)

Who's Shipping Jobs Offshore? A Look at Ford and GM's Auto Production

Who makes the parts for two "all-American" cars?

Recent reports in Automotive News list the major part suppliers for two popular "American-made" vehicles, the Ford Focus, Ford's second highest selling car and Chevrolet's top selling car, the Cruze. The following diagrams identify these suppliers and their location. As the tables indicate, more than half of the suppliers chosen by Ford (63%) and half chosen by GM (50%), for these popular "all-American" vehicles, are foreign.

Ford Focus Suppliers		
Suppliers' Country	**Number**	**%**
US	**18**	**37**
Foreign	**31**	**63**
Germany	14	30
Japan	3	6
Canada	3	6
Sweden	2	4
Switzerland	2	4
Spain	2	4
France	2	4
China	1	2
South Korea	1	2
UK	1	2



Chevrolet Cruze Suppliers		
Suppliers' Country	**Number**	**%**
US	**25**	**50**
Foreign	**25**	**50**
Germany	6	12
Japan	5	10
Canada	3	6
UK	2	4
Sweden	2	2
France	1	2
Turkey	1	2
Luxembourg	1	2
South Korea	1	2
Belgium	1	2
Spain	1	2
Switzerland	1	2

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STATUS REPORT
INSURANCE INSTITUTE FOR HIGHWAY SAFETY
Vol. 45, No. 11, Nov. 3, 2010

ARE AFTERMARKET PARTS AS SAFE AS ORIGINAL EQUIPMENT?

That's the question many consumers ask at the collision repair shop. Aftermarket parts are easier on the wallet, but debate has swirled for years over whether these third-party components are comparable to ones straight from automakers. For things like fenders, grilles, and bumper covers, the issues are mainly cosmetic — fit, finish, and wear. These parts don't affect vehicle strength in a collision and are irrelevant to crash safety, as the Institute

demonstrated in crash tests as long ago as 1987 (see *Status Report*, Nov. 21, 1987; on the web at iihs.org). Some parts, like bumpers, do provide structural strength. Neglecting to build them to the same specifications as original equipment could affect how much damage occurs in a crash or how well occupants are protected. New Institute tests point to the need for these repair parts to be certified as good copies of the originals, so consumers can buy with confidence.

The Certified Automotive Parts Association (CAPA) has been working on the issue and has just released a certification standard, CAPA 501, for aftermarket bumpers. The aim is to ensure that aftermarket copies match the dimensions, material, and construction of automaker-supplied parts. Until now, CAPA has focused on setting quality standards for cosmetic aftermarket parts, lights, and hoods. Prompted by requests from its members, including many insurers, the association is extending its certification program to include structural parts.

The Institute agreed to help demonstrate CAPA's new standard by testing 3 vehicles fitted with aftermarket bumper beams. A beam that conforms to CAPA's requirements performed the same as original equipment, while 2 other aftermarket bumpers had somewhat different outcomes.

Dodge Ram results: Engineers crash tested a 2008 Dodge Ram 1500 pickup fitted with an aftermarket bumper that meets the material, dimensional, strength, and vehicle fit requirements of CAPA's standard in a 5 mph full frontal test, plus a 40 mph offset frontal test, and then compared the performance with the same model fitted with a Dodge bumper. Results for both of the pickups were nearly identical. The low-speed damage estimate came to $1,120 for each pickup. Likewise, in the high-speed test both models had similar crashworthiness measures.

"This is what we expected," says Adrian Lund, the Institute's president. "It shows that aftermarket parts can be reverse-engineered without compromising safety. An aftermarket bumper that meets CAPA's new standard should perform as well as the original."

The Institute also crash tested 2 vehicles fitted with front bumper beams that don't meet CAPA's standard. A 2009 Toyota Camry with an aftermarket bumper that CAPA tests showed to be stronger than the original had similar estimated repair costs in the low-speed test as a Camry with a Toyota bumper ($804 vs. $792). But the failure modes were quite different. The Toyota bumper buckled at its center, resulting in damage to the bumper cover as the outboard edges of the bumper pivoted forward during the test. The aftermarket bumper didn't buckle, and as a result crushed the ends of the bumper support structure.

"The aftermarket bumper bar is thicker and heavier than the original," Lund observes. "That's not a good thing from a safety standpoint. Aftermarket bumpers need to perform *(continues on p. 6)*

2008 Dodge Ram 1500 with aftermarket bumper

2008 Dodge Ram 1500 with Dodge bumper

BUMPERS CAN MATCH ORIGINAL EQUIPMENT BUT SOME MISS MARK

Aftermarket bumpers may look the same out of the box as ones supplied by automakers, but tests show not all perform the same as original equipment. The Institute crash tested a 2008 Dodge Ram 1500 outfitted with an aftermarket bumper that meets CAPA's requirements in a 40 mph offset frontal test, then compared it with a Ram with a Dodge bumper. Both pickups had similar crashworthiness measures and damage patterns, showing that aftermarket parts can be reverse-engineered without affecting safety. On the other hand, in 5 mph tests comparing an aftermarket bumper that doesn't meet CAPA's requirements on a Toyota Camry with a Toyota-made bumper on another Camry, there were clear differences. The center of the Toyota bumper buckled. The stronger aftermarket bumper didn't buckle, and as a result the bumper frame ends crushed. Small changes in design can skew airbag sensors and alter vehicle damage patterns.

2009 Toyota Camry with aftermarket bumper

2009 Toyota Camry with Toyota bumper

4 *Status Report*, Vol. 45, No. 11, Nov. 3, 2010

INDIANA CITY TAKES ROUNDABOUT PATH TO SAFER ROADS

Carmel, Indiana, is a rapidly growing, prosperous community outside Indianapolis known for good schools, abundant shopping, and a vibrant arts scene. But one basic element of urban infrastructure is scarce in the city: traffic lights.

This is no accident. If Mayor James Brainard could rid Carmel completely of the darned things, he probably would. His preferred type of intersection is a roundabout, and he says Carmel has more of them than any other US city.

Brainard credits roundabouts with keeping the number of traffic injuries from growing along with the city's road network. In 2003, there were 252 crashes causing injury on 220 miles of roads, according to Carmel officials. By 2008, the city had 395 road miles, but injury crashes went down slightly to 223. More than 2 dozen roundabouts opened in Carmel in the intervening years. By the end of 2010, the number of city-built roundabouts is expected to reach 55, including 6 roundabout-style interchanges just completed in September along the busy Keystone Parkway. Approximately a dozen more have been built by developers of residential neighborhoods. In contrast, traffic lights number a mere 41.

Carmel will get a chance to show off its roundabouts in May, when it hosts the Transportation Research Board's International Roundabout Conference.

"There are a huge number of roundabouts to see, and they come in different configurations," says the research board's transportation safety coordinator, Richard F. Pain, explaining the group's choice of Carmel to host the conference. "They're very, very clever in some of the designs. They take the concept of the roundabout, and they make it fit."

Roundabouts, which were developed in the 1960s in the United Kingdom and are common in much of Europe, used to be rare in the United States. However, the advantages they hold in terms of safety, congestion mitigation, monetary savings, and aesthetics are making them increasingly popular here. Much smaller than traffic circles, or rotaries, they force drivers to slow down to negotiate tight curves. Vehicles entering a roundabout are required to yield to traffic already in the circle (see *Status Report*, Nov. 19, 2005; on the web at iihs.org).

Roundabouts essentially eliminate the potential for the most dangerous types of crashes — right-angle, left-turn, and head-on collisions — because traffic moves in

KEYSTONE PROJECT MELDS TWO TRAFFIC ENGINEERING STRATEGIES

Carmel's success with roundabouts, including one at Main Street and 4th Avenue in Old Town (right), emboldened the city to take on the ambitious Keystone Parkway project. Unsatisfied with the state's plan to add lanes to ease roadway congestion, Carmel reached an agreement with the Indiana Department of Transportation to assume ownership of the road. The city's modifications involved lowering Keystone and building roundabout interchanges connecting the exit lanes and the cross streets. The interchanges are shaped like double teardrops (above) rather than circles. City officials believe the grade separation combined with the roundabout interchanges will improve safety and shorten commute times.

a single direction. Compared with traffic signals, they also reduce the likelihood of rear-end crashes because no one speeds up to make a yellow or green light or abruptly stops because a signal turned red.

The crashes that do occur at roundabouts generally are not severe because vehicles move more slowly than they do at conventional intersections. A 2001 Institute study of 23 intersections in the United States found that converting intersections from traffic signals or stop signs to roundabouts reduced injury crashes by 80 percent and all crashes by 40 percent.

Beginning in the 1990s, Carmel's rapid population growth — from 25,000 in 1990 to about 70,000 today — forced the city to convert many of its 4-way stops to something better at managing high traffic volumes. The obvious answer would have been stop lights, but Brainard, who had spent time in England years before, asked the city's engineering consultants to design a roundabout.

"They didn't want to do that because they were confusing modern roundabouts with the old rotaries," which are generally considered confusing and don't have the same safety benefits, the mayor recalls. So he went to Purdue University's engineering library and brought back journal articles on roundabouts to the engineers. They agreed to give it a try, and Carmel's first roundabout opened in 1997.

Carmel has learned a lot since those early days. Back then, the US Department of Transportation didn't have any specifications for roundabouts.

"We used the Australian roundabout specifications, just flipping them over," since Australians drive on the left side of the road, Brainard recalls. "It really wasn't what we needed."

This year, 2 of Carmel's early roundabouts were rebuilt according to the city's current standards. Drivers now enter the roundabouts at sharper angles, forcing them to slow even more. The slower speeds are not only safer, they also create bigger gaps between vehicles for other vehicles to enter, thus improving the traffic flow.

Brainard says that in the city's experience roundabouts are invariably cheaper to build than intersections with signals. There's no initial purchase of signal equipment and no need to inspect and calibrate it as the years go by.

"We've landscaped the middle of our roundabouts in most cases, and it helps property values in the area," Brainard adds. "It's better to have a beautiful flower urn out there in the middle of a circle than blinking lights outside your bedroom window."

If there was skepticism on the part of drivers at first, Carmel's residents today are largely pleased with their roundabouts, Brainard says.

"Change is scary to people," says Mo Merhoff, president of the Carmel Chamber of Commerce. But roundabouts have won support by reducing travel times during rush hour, she says. "I'm one of those people who actually plan my route based on where I can utilize roundabouts."

(continued from p. 2) exactly the same as original bumpers in a crash. Even small changes in design can skew airbag sensors and alter vehicle damage patterns."

A low-speed test of a 2005 Ford F-150 with an aftermarket bumper that doesn't meet CAPA's standard had lower estimated repair costs than a test with the stronger dealer replacement bumper ($1,777 vs. $1,900). That's because fog lamp recesses in the aftermarket bumper were wider than the original and shielded the lights from damage in the test.

LOW-SPEED BUMPER TEST

Estimated repair costs for a Ford F-150 with an aftermarket bumper (above) that doesn't meet CAPA's requirements were lower than for an F-150 with a Ford-supplied bumper (top) in the 5 mph barrier test. That may seem like a positive outcome, but it isn't. Manufacturers of aftermarket structural parts should reverse-engineer bumper beams to match original equipment and not attempt to make them better or worse.

Lower repair costs don't mean the aftermarket bumper is preferable.

"There's a difference between reverse-engineering an aftermarket part to the original specifications and re-engineering one," Lund explains. "You don't want to make it better or worse. You want to make it the same."

Why parts integrity matters: How structural parts are designed and produced can affect crashworthiness because these parts make up the front-end crush zone and safety cage. The crush zone absorbs crash energy, and the safety cage helps protect occupants by limiting intrusion.

Automakers typically use high-strength steel when building the passenger compartment and bumpers. On the other hand, aftermarket suppliers can cut costs by using weaker grade steel or substituting polystyrene foam for the high-impact polypropylene foam automakers use.

In turn, the collision market is a hodgepodge of domestic and overseas suppliers who build structural parts to their own internal guidelines, so there's no guarantee the parts are equivalent to original equipment in terms of quality and safety. This has long concerned some repair shops and consumer advocates, but the issue hasn't gotten much attention outside the industry.

Igniting debate: The tipping point came late last year when Toby Chess, a national director with the Society of Collision Repair Specialists, took a reciprocating saw to a copycat bumper beam and easily cut through the steel during a trade show. Earlier he'd unsuccessfully tried to cut an original equipment beam. The industry took notice, with many insiders sounding the call for tests and certification of aftermarket structural parts.

Ford fanned the debate this summer when it shared results of internal evaluations of aftermarket structural parts. The findings, covered in *Consumer Reports*, raised questions about the performance of bumper beams, isolators, brackets, and radiator supports on the Focus, Mustang, and F-150. Ford's computer-simulated crash tests revealed potential problems with airbag timing in Mustangs and F-150s that were fitted with aftermarket components.

Consumer Reports warned owners against giving repair shops the green light to replace structural parts with aftermarket ones.

Consumers are right to be cautious, Lund says, because it's clear that structural aftermarket parts must be exactly copied to be sure they'll work properly in a crash.

"Aftermarket structural parts shouldn't change how a vehicle performs in a crash test," he says. "CAPA's new bumper standard is a step in the right direction, and we hope the group's work will quickly extend to other vehicle parts."

The use of aftermarket parts is growing, though parts from original-equipment manufacturers still predominate. In dollar terms per appraisal, aftermarket use rose from 11 percent in the 4th quarter of 2007 to 13 percent in this year's 2nd quarter, according to Mitchell Collision Repair Industry data.

Role of cosmetic parts: Often called crash parts, cosmetic parts include fenders, quarter panels, door skins, bumper covers, and the like. 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.

This was proved in a series of crash tests by the Institute and United Kingdom-based Thatcham (see *Status Report*, Feb. 19, 2000; on the web at iihs.org). An Institute test in 2000 involved a 1997 Toyota Camry without its front bumper cover, fenders, front door skins, and other cosmetic parts but with an aftermarket hood. In a test into a deformable barrier at 40 mph, the Camry had the same structural performance and dummy measures as a Camry with original-equipment parts. In 1987, an Institute 30 mph rigid barrier test of a 1987 Ford Escort with an aftermarket hood and without cosmetic parts showed the Escort met all US crash standards. Thatcham had similar results in 1995 in a 30 mph front-into-rigid-barrier test of a 1995 Vauxhall Astra without cosmetic parts.

CRASH DEATHS CONTINUE TO DECLINE IN US AMID RECESSION

Traffic deaths have fallen to their lowest levels since 1950, according to recently released federal data, but it's unclear how much of the drop is a temporary effect of the down economy and how much is the result of lasting safety improvements.

The data from the National Highway Traffic Safety Administration show fatalities fell nearly 10 percent to 33,808 in 2009. The estimated number of injured people fell by more than 5 percent to 2.2 million. Total police-reported crashes also were down 5 percent from 2008.

Early projections indicate the trend has continued. The agency estimates that fatalities fell another 9 percent during the first half of this year to 14,996.

"Vehicles today are better than ever at protecting occupants in a crash, and electronic stability control, which can avert a crash altogether, is no longer a rarity," says Anne McCartt, Institute senior vice president for research. "At the same time, we don't know how big a role the current economic downturn is playing or what will happen with the numbers after the economy picks up again."

The number of miles driven in the United States in 2009 is estimated to have inched up 0.2 percent compared with 2008, when it fell for the first time since 1980. But that statistic doesn't take into account what kind of trips people took or who was doing the driving. For example, driving to and from a restaurant in the evening — something people do less often in a recession — might be more dangerous than the daily commute. And teenagers, who are more likely than adults to crash, may be spending less time behind the wheel if they can't find jobs.

The 2009 data from the Fatality Analysis Reporting System and the early estimate of January to June 2010 fatalities are available online at nhtsa.gov.

OTHER 2009 HIGHLIGHTS

- **Motorcycle fatalities dropped 16 percent, following 11 straight years of increases.**
- **Large-truck occupants experienced the biggest decline in deaths — 26 percent.**
- **Deaths involving alcohol-impaired driving decreased 7 percent to 10,839.**
- **Passenger vehicle occupant deaths fell 8 percent to 23,437.**
- **Overall fatalities fell in 41 states and DC.**

LARGE 15-PASSENGER VANS ARE SUBJECT OF SAFETY ADVISORY

Two deadly crashes involving 15-passenger vans have prompted federal officials to remind drivers of the safety considerations that go with operating these large vehicles.

The National Highway Traffic Safety Administration warns operators to check tire wear and pressure before every trip. Owners should make sure drivers are trained to operate these large vans, which churches and other nonprofit groups often use. All occupants should use safety belts.

Four people died and 15 others were injured in October when a church van, a 1987 Dodge Ram Wagon, blew a tire and rolled over on a Georgia highway. In September, 6 members of a Bronx church died and 8 were injured in a single-vehicle rollover crash on the New York State Thruway when their 1997 Ford Econoline van's rear tire ruptured.

Fifteen-passenger vans have high centers of gravity, so they're less stable than cars and harder to maneuver. These vans become increasingly difficult to handle and less stable the more people and cargo they carry.

STATUS REPORT

INSURANCE INSTITUTE FOR HIGHWAY SAFETY

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Vol. 45, No. 11, Nov. 3, 2010

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Roundabouts are reducing crashes in Carmel, Indiana, where they outnumber intersections with signals 4

Traffic deaths fell almost 10 percent in 2009, the lowest level since the '50s 7

15-passenger vans are subject of federal highway safety advisory 7

NOW PLAYING ON YOUTUBE: INSTITUTE CRASH TESTS

The Institute's YouTube channel features more than 500 crash tests and 50-plus videos on research and consumer education topics at www.youtube.com/iihs. Playlists organized by subject and topic make it easy to find the latest *TOP SAFETY PICK* news.

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Letter from Aaron M. Lowe, Vice President, Government Affairs, the Automotive Aftermarket Industry Association (AAIA)

AAIA Automotive Aftermarket Industry Association

August 1, 2012

The Honorable Robert Goodlatte
Chairman, Subcommittee on Intellectual Property, Competition, and the Internet
House Judiciary Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte:

I am writing on behalf of the 23,000 members and affiliates of the Automotive Aftermarket Industry Association to urge support by your Subcommittee for the "Promoting Automotive Repair, Trade, and Sales Act" ("PARTS Act") (HR 3889)which is the subject of a hearing being held by your subcommittee on August 1st. AAIA is a national trade association representing the manufacturers, distributors, retailers and installers of automotive parts, products, accessories and services. While many of our members produce components for the vehicle manufacturers, the focus of our association is the aftermarket. The aftermarket covers a broad spectrum of vehicle services, but in short it is everything that happens to a vehicle once it leaves the showroom floor.

The aftermarket is an important force in the U.S. economy with over $297.5 billion in sales and employing over 3.8 million people. The companies in our industry run from small family owned businesses to fortune 500 firms and everything in between. With the cost of gasoline escalating and new car dealers disappearing, car owners continue to have access to the most affordable and convenient vehicle service industry in the world thanks largely to the thousands of independent vehicle service facilities and a wide array of choices in replacement components. There are very few other products that boast such a strong market for the service of that product and many motorists take for granted the fact that they can take their car anywhere they want for service and purchase replacement parts that meets their price and quality needs.

While changes to vehicle technology are impacting these choices, a major threat in the collision repair business is coming not from market forces, but from the extensive number of design patents that are being submitted and approved by the United State Patent and Trademark Office. These design patents are not being used to improve the competitive advantage of a car company in the sale of their vehicles, but to capture a monopoly in the sale of the replacement parts necessary to repair the vehicles following a collision.

I want to emphasize that AAIA strongly supports protections for a company's intellectual property. Clearly, any company that develops unique vehicle designs deserves protection that will prevent a vehicle manufacturer from copying that design and thus competing with the car company for the first sale of that car. We further support patents being granted for any car company or parts manufacturers that develops a new process that could help improve the functioning of that vehicles. Clearly, that patent must be respected. However, providing protections for the ornamental design of a part, whether it is on the outside or inside of the vehicle, will only serve to provide the car companies with a monopoly in the aftermarket, making them the sole source for replacement parts and thus raise repair prices for consumers.

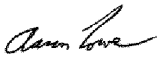
Importantly, none of these cost increases will result in any incentive for the vehicle manufacturers to be more innovative in the design of their components. The main driver of vehicle cosmetic parts design is the design of the entire vehicle. This drive to innovate is based on competition in the first sale of the vehicle. Chrysler competes with Ford and General Motors and Toyota to develop vehicle designs that will capture the hearts and pocketbooks of the car owner. Car companies do not design vehicles or the crash parts to better compete with each other in the aftermarket. That competition operates in a totally separate market and is based on price and quality since the design of the part is dictated solely by the original design of the vehicle.

HR 3889 would amend title 35 of current U.S. design patent law, reducing from 14 to 2.5 years the period during which car companies can enforce their design patents on collision repair parts against alternative suppliers. The period for such enforcement would begin upon the first offer for sale of the car model containing the design patented part in any country. Following the protection period, consumers would have access to a competitive market for collision parts. Australia and a number of European countries have already passed similar repair clause laws.

AAIA believes that this is a reasonable compromise that seeks to protect the intellectual property of the vehicle manufacturers while still ensuring that car owners have access to a competitive vehicle repair aftermarket. We commend both Representatives Darrell Issa and Zoe Lofgren for their authorship of this legislation and urge that the Subcommittee pass it as soon as possible to ensure that consumers are protected from a monopoly in this area.

I want to thank you for holding a hearing on this important issue and we look forward to working with the committee to ensure its passage in the very near future.

Sincerely,



Aaron M. Lowe
Vice President
Government Affairs

Letter from Kathy R. Van Kleeck, Sr. Vice President, Government Relations, Motorcycle Industry Council

July 31, 2012

The Honorable Robert Goodlatte
Chairman
Subcommittee on Intellectual Property,
Competition, and the Internet
B-352 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

The Honorable Mel Watt
Ranking Member
Subcommittee on Intellectual Property,
Competition, and the Internet
B-352 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Watt:

The Motorcycle Industry Council (MIC) is a not-for-profit, national trade association representing manufacturers and distributors of motorcycles, motorcycle and ATV parts and accessories and members of allied trades.

On behalf of our member companies, MIC opposes H.R. 3889, which would exempt creation, sale or importation of certain copied motor vehicle component repair parts from design patent infringement.

Current patent law is intended to protect design and in turn, encourage innovation. Design patents protect designers against unfair competition from individuals or companies who would copy designs rather than make the investment in the design process, including the jobs supported by such. By eliminating this design protection, H.R. 3889 promotes unfair competition by allowing the copying of original designs to the detriment of U.S.-based designers, manufacturers, distributors, suppliers, dealers and all other American employees involved in the process. Further, by denying companies the ability to protect their intellectual property (IP), it condones piracy.

Allowing anyone to copy certain repair parts removes any incentive for business investment and risk taken to design innovative products. This is simply not something that should be permitted, yet alone encouraged, in America.

Motor vehicle parts design is not only integral to a vehicle's appearance and brand identity, but most importantly from a consumer standpoint, to the safety of the vehicle. The design and appearance of these components is the result of enormous investment by motor vehicle and motor vehicle parts manufacturers in the invention/design process over many years. Current patent law serves to protect this investment. H.R. 3889, by retroactively reducing design patent protection to 30 months, nullifies the purpose of our entire patent law system.

This bill gives manufacturers of copied motor vehicle parts free reign to produce a component part similar or the same in appearance to the component part that is claimed in a design patent if the purpose is for the repair of a motor vehicle to restore such vehicle to its appearance as originally manufactured. They incur no costs attributable to original design, research and development and most importantly, product safety testing. Manufacturers of the original product for which these copied replacement parts are produced do not know how these parts will perform when integrated into or added onto the motor vehicle and how their use will impact the quality and integrity of the original product.

Motorcycle parts and accessories manufacturers manufacture aftermarket parts for use as replacement components for original manufacturer parts. The aftermarket is a thriving segment of the motorcycle industry. Aftermarket manufacturers produce interchangeable parts for use on motorcycles without relying on copied/stolen designs. These parts and their design represent fair and healthy competition and

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give consumers choice. As do original equipment manufacturers, aftermarket parts manufacturers employ designers that develop original designs, provide consumers with more repair options and contribute jobs to the economy.

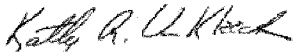
Attempts to overturn these intellectual property rights have been denied repeatedly by the United States Supreme Court. Further, they are explicitly recognized in the U.S. Constitution and are protected under the World Trade Organization agreement on Trade-Related Aspects of Intellectual Property Rights. Congress should not statutorily negate intellectual property rights which by doing so would not only overturn decades of judicial precedent, but would undermine vital IP rights and protections.

In addition to the grave issue of violating IP rights, we believe there are significant concerns regarding safety, performance and durability that would result from allowing this patent infringement, both from a product manufacturer and consumer standpoint. At a time when Congress has sought to enhance consumer safety, as evidenced by passage of the sweeping Consumer Product Safety Improvement Act of 2008, Congress should support stronger enforcement of existing IP laws, rather than consider legislation that would eliminate or diminish IP protections. Passage of H.R. 3889 would not only have a detrimental effect on consumers, but threatens jobs and investment in our industry.

We urge you to oppose H.R. 3889.

Thank you for your consideration of these comments.

Respectfully submitted:



Kathy R. Van Kleeck
Sr. Vice President, Government Relations

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