

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

On behalf of

The

Consumer Federation of America
Advocates for Auto and Highway Safety
Center for Auto Safety
And
Public Citizen

Before the House Judiciary Committee
Hearing on Patent Designs and Auto Replacement Parts

March 22, 2010

Chairman Conyers, Ranking Member Smith, and Members of the Committee, 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, 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.

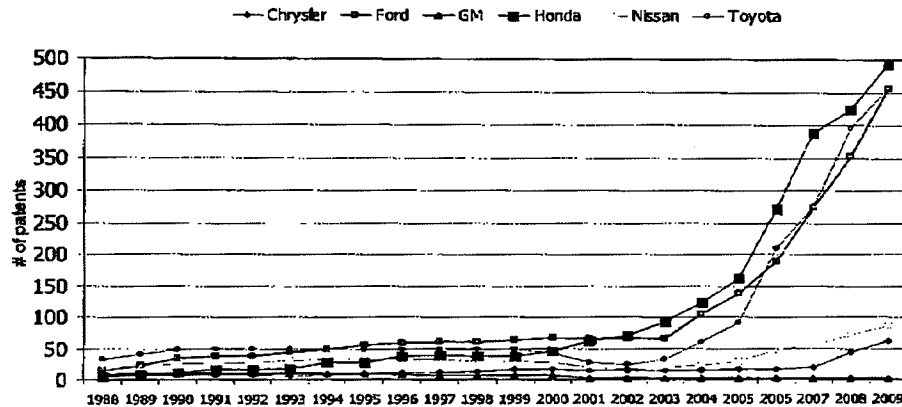
Consider any of the following experiences, which happen each year to thousands of Americans: You back into a pole at a shopping mall; someone in front of you stops suddenly and your bumpers collide, or you inadvertently sideswipe your car in a cramped parking lot. Fortunately, few of these “fender-benders”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

Why are these repair bills so high? One reason, the cost of the parts we need to get 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 have to pay someone \$565 to paint and install the 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 and the reason is simple – “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.

Crash Parts Design Patents Granted



Note 1: The term "crash 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 moldings, tailgates, taillamps, and wheel houses as defined by the Certified Automotive Parts Association at <http://www.capecertified.org/whatparts.asp>.

Note 2: Figures shown are based on the cumulative number of design patents granted through December 31, 2009.

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 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.

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 an 80% market share, competitive suppliers have 15%, and the remaining 5% 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. The victims? 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 have designed them to need lots of expensive parts after a low speed crash.

Eliminating Competition Will Increase Insurance Premiums for Consumers.

¹ Letter from the American Insurance Association, Automotive Aftermarket Industry Association, Automotive Body Parts Association, Coalition for Repair Equity, National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America to Hon. Susan Schwab, U.S. Trade Representative (July 31, 2007). p. 3.

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 our pockets. This will have a disproportionate impact on low and fixed income consumers.

Eliminating Competition in Crash Parts Could Diminish Safety.

On the safety side, tragically, as the cost of needed repair parts rises, many consumers will be forced to forgo or delay needed repairs, leaving them with a vehicle that may not offer needed safety. Delaying or ignoring the replacement of a 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 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 consumer would be profound.

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.**

I applaud Rep. Lofgren for her leadership through the introduction and promotion of HR3059. It is time for congressional leadership to keep the market open to competitively priced, high-quality alternatives to the expensive car company brand parts. Congress must enact an

automotive repair clause like found in HR3059. 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.

The solution to this increasingly unfair, unacceptable, and unnecessary mess is for Congress to adopt a “repair clause” in the design patent law that would preserve 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 laws that specify that the making and use of a matching

exterior auto part to repair an automobile is not an act of infringement, even though the original part is patented. In addition, this past December, the European Parliament approved a similar law that would apply to the entire European Union, and ratification by the Council of Ministers is expected in the first half of this year. American consumers deserve no less.

Consumer Federation of America, the Advocates for Highway and Auto Safety, the Center for Auto Safety, and Public Citizen believe that the competitive crash parts marketplace, which has evolved over the past couple of decades, has served consumers. On behalf of these groups, I strongly urge Congress to adopt a repair clause to the design patent law. 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.