

Remarks of Jack Gillis, Director of Public Affairs,
Consumer Federation of America¹

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Town Hall Meeting on the Protection of Industrial Designs
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Members of the U.S. Patent and Trademark Office, my name is Jack Gillis, and I am Director of Public Affairs for the Consumer Federation of America. My testimony today is based on recent testimony I gave before the U.S. House of Representatives on behalf of the Consumer Federation of America, Advocates for Highway and Auto Safety, the Center for Auto Safety, Consumers Union, and Public Citizen supporting what would become H.B 5638. I am grateful for the opportunity to appear today on an issue of tremendous importance to the American consumer – 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 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 our cars repaired. For example, Ford charges the same price for a fender as Dell charges for a high speed computer and flat screen monitor. I noted that in earlier testimony Mr. Gilbert of Ford Motor Company considers his company to be a “benevolent monopolist.” I’m not sure consumers appreciate such “benevolence.” A Sears two-door, refrigerator/freezer with an icemaker is the same price as an unpainted door skin from Chrysler. And, by the way, the Sears refrigerator comes with two doors, already painted and installed. The fact is, computers and refrigerators, are less expensive and better today than five years ago for one reason – “competition”. In fact, when competitive crash parts entered the market, the car company brand crash parts got better.

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. Automakers are essentially hijacking design patent laws to create a parts monopoly. The victims? The hundreds of thousands of Americans who experience low speed collisions each year.

Recently, Ford filed a case at the ITC for alleged infringement on design patents on parts for the Ford F-150 pick-up truck. While a number of the patents Ford presented were simply dismissed as invalid, seven were held valid and the ITC banned their importation. As a result,

¹ Jack Gillis was the last speaker at the hearing. These remarks include his reaction to some of the previous speakers.

there are hundreds of thousands of Americans who own F-150 pickups who have no choice, other than Ford, when it comes to replacing a headlight or any of the six other parts. Ford can now charge consumers whatever they want for these F-150 parts. Interestingly, I noted that Mr. Gilbert, representing Ford earlier at this hearing, indicated that Ford “wanted consumers to have a choice.” The problem is that Ford’s recent ITC action means that his F-150 customers, at least in the U.S., don’t have a choice. Ironically, Ford’s Canadian customers still do have a choice.

This type of design patent enforcement action seems to be a new business strategy for automakers. As the U.S. PTO well knows, over the past several years, there has been an enormous spike in the number of design patents on crash parts given to companies like Honda, Toyota, and Ford.

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

Earlier in the hearing, Mr. Saidman indicated that competing companies often make minor design changes in order to circumvent design patents. In the case of competitive crash repair parts, that option is simply not available. The repair parts must be designed to be the same.

Finally, Mr. Markow, of Black and Decker, scared the daylight out of me when he talked about requiring me to use his drill bits and batteries when I buy his products. To me, that is chilling evidence of using patents to take consumer choice out of the market.

So What Does This Mean for Consumers?

First of all, there’s the cost. High cost repair parts will lead to more vehicles being “totaled” by insurance companies because the price of repair exceeds the value of the vehicle. Consumers who owe more on the car than it is worth will be left with debt payments on a non-existent car. However 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.

Eliminating Competition Will Increase Insurance Premiums for Consumers

High repair costs will also lead to higher insurance premiums as insurers will have no choice but to pass cost increases on to policy holders. Ironically, as more consumers opt for higher deductibles to cope with these rising rates, more of these exorbitant crash repair costs will come out of our pockets. Mr. Saidman and others alluded to HR 5638 being of benefit to insurance companies. While insurers have joined consumers in the fight for competition, should the battle be lost, insurers will simply pass on the high cost of parts to consumers in the form of the higher premiums required to cover those costs.

Eliminating Competition in Crash Parts Could Diminish Safety

On the safety side, as the cost of needed repair parts rises, many consumers will be forced to forgo or delay replacing a head light, side mirror, or brake light, leaving them with a vehicle that may not offer needed safety. Mr. Porcari of Ford said earlier that this was not a safety issue. It is important to note that he agrees that many of these crash parts are not safety related, in spite of earlier claims by the car companies that they do have safety ramifications. On the other hand, lights, mirrors and other items, contrary to Mr. Porcari's pronouncement, are important safety items.

Eliminating Competition Will Cost Consumers Millions

I am not surprised to hear the car companies come before you today and say they don't want competition. The elimination of competition from independent brand crash repair parts would add an estimated \$1 billion a year² to their coffers – and guess who'll be paying that \$1 billion? Today, the mere presence of competition reduces the price of car company brand replacement crash parts by 34% - 83%³.

In spite of the claim by Ford's Mr. Porcari indicating that this effort will only save consumers a "couple of bucks," right now, companies like Ford are striking pay-dirt when it comes to high priced parts. Take the Ford Fusion—in recent low speed bumper tests conducted by the Insurance Institute for Highway Safety, the Fusion sustained over \$5,000 worth of damage. Their own 1981 Ford Escort, when put through the very same tests, only sustained \$469 worth of damage. Not only is Ford charging far more than it should for the parts consumers need, but they are re-designing their cars to require us to buy more of these overpriced parts. And Ford's not alone. GM designed its Pontiac G6 to require us to pay a whopping \$8,919 to get it fixed and Chrysler has designed its popular Dodge Caravan to require \$5,495 in repairs after low speed tests. Keep in mind that the 3 mph speed at which some of these tests are conducted is about the speed at which we walk! And these repair prices are based on the limited parts competition that currently exists, imagine what will happen when they misuse patent laws to totally control the market for the parts we need to repair our cars. And let me emphasize that these are OUR cars; they are not owned by the car companies.

Are Competitive Repair Parts Responsible for Increased Imports?

We've heard much from the 'Big Three' about protecting their parts from foreign competition. But consider two popular cars, Ford's Taurus and GM's Buick Enclave: according to Auto News, half the major suppliers chosen by Ford (52%) and GM (47%), for these popular "all American" vehicles, are foreign companies.⁴

² 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. 4.

³ *Id* at p.3.

⁴ Ford source: Automotive News Week of March 3, 2008, p24B; Buick source: Automotive News Week of February 18, 2008, p30; Supplier location source: Automotive News Top 150 Global Suppliers (April 30, 2007) or company websites

In 2002, 73.5% of the vehicles sold in the U.S. were made in the U.S.⁵ Today, that number has dropped to 68.6%. During this time 6 out of the 8 foreign manufacturers INCREASED the percentage of vehicles they made in the U.S by 6%. On the other hand, each of the U.S. ‘Big Three’; Ford, GM and Chrysler; DECREASED the percentage of vehicles they made in the U.S by 11%. Ford had the most precipitous drop. In 2002, 94.2% of Ford’s sales were made in the U.S. In 2007, that percentage plummeted to 79.3%. The dollar value of the vehicles imported by GM, Ford, and Chrysler in 2007 is estimated to be over \$47 billion.⁶ Clearly, the U.S. car companies are far more responsible for the influx of “foreign competition” than the few imported crash parts that keep American cars reparable.

US PTO Should Support HB 5638 Which Adopts a “Repair Clause” in the Design Patent Law to Preserve Access to Affordable, Competitive and Quality Crash Parts

There is a solution that respects both industrial design patents and consumer’s right to repair their vehicles. U.S. Representative Lofgren has introduced HB 5638 in order to protect consumer’s right to repair their vehicles at fair prices. Representative Lofgren’s bill keeps the market open to competition by providing a “repair clause” in the design Patent Law and we trust that the US PTO will support this effort.

Representative Lofgren’s repair clause would establish a narrow, practical, exception to the design patent law so that if a car company receives a design patent on a part, independent companies could still make competing parts for the sole purpose of repairing the vehicle. Such an 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. By supporting this fair, simple and workable approach and American consumers will thank the U.S. PTO for ensuring a competitive market, while respecting important design protection laws.

We understand that 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 of indenture to the car companies to buy their parts.

Other markets have successfully addressed and solved this problem. Nine European countries, the European Parliament and Australia have enacted laws that specify that making a matching exterior auto part to repair an automobile is not an act of infringement, even though the original part is patented. American consumers deserve no less and we hope you will agree.

Thank you for providing me the opportunity to discuss this important issue with you today.

⁵ For the purpose of this report we used data from Automotive News to compare total annual sales with total annual U.S. production.

⁶ Number of imported GM, Ford, Chrysler vehicles (1,956,044) x Average retail price per car (Fourth quarter 2007, Auto Affordability Index Comerica Bank, \$29,200) less 15% markup (\$4,380) = \$47,742,632,941