

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

on behalf of

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

Before the House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property

Hearing on Design Law –
Are Special Provisions Needed to Protect Unique Industries?

February 14, 2008

Chairman Berman, Ranking Member Coble, 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, and Public Citizen. We are grateful for your invitation to appear today on an issue of tremendous importance to the safety and budgets of millions of American families – the maintenance and repair of automobiles.

Consider any of the following experiences which happen thousands of times nearly every hour of every day: You accidentally 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. These types of crashes happen every day to hundreds of thousands of Americans. Fortunately, few of these “fender-benders” result in injuries, but they often result in costly damages to your car. Most of us, after experiencing these common crashes are totally shocked at the resulting repair bill.

For example, Ford charges the same price for a fender as Dell charges for a high speed computer, flat screen monitor and color printer. A simple grill for your Toyota costs the same as a combination flat screen TV and DVD player. 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. General Motors charges the same price for a flimsy rubber bumper cover as Garmin charges for a full color, audio, GPS system, programmed with directions and maps to anywhere in the United States. The fact is, computers, TVs, refrigerators, and GPS systems are cheaper and more advanced 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 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. This lack of competition will seriously harm consumers who will end up paying excessive and exorbitant prices. This is money better spent on health care, food, clothing, and education instead of minor repairs at major costs.

The lack of competition for repair parts will result in several problems for consumers. For example, high repair costs will lead to more vehicles being “totaled” because the price of repairing the damage exceeds the value of the vehicle. High repair costs will lead to higher insurance premiums. Furthermore, when faced with expensive repairs and a limited budget, consumers may forego important car repairs such as replacing a head light or a broken side mirror, items essential for safe driving. 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.

It is time for congressional leadership to keep the market open to competitively priced, high-quality alternatives to the expensive car company brand parts that consumers need to get

cars repaired at affordable prices. 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.

Automakers are Obtaining Design Patents on Crash Parts: A Disturbing New Trend Which Eliminates Competition, Drives Up the Cost of Auto Repairs and Harms Consumers.

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 attached chart.) 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.

In December 2005, Ford filed a “Section 337” case at the International Trade Commission (ITC) against suppliers of competitive crash parts for allegedly infringing design patents held by Ford on various crash parts for the Ford F-150 pick-up truck. While a number of the patents were held invalid, seven were held valid and on August 6, 2007, the ITC banned the importation of those parts. As a result, the consumer’s right to competitive choices for these seven needed repair parts has been eliminated. In fact, there are hundreds of thousands of Americans who own F-150 pickups for which there is no alternative, 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 in the absence of competition.

This type of design patent enforcement action seems to be a new business strategy for automakers. Given how the automakers have significantly ramped-up their design patents on crash parts in the past 5 years, the possibility of many additional design patent enforcement actions being brought at the ITC (or federal courts) is 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 or lose 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.

Consumer Groups Strongly Support Competition in the Crash Parts Market to Bring Prices Down and Reduce Costly Repairs.

For over 25 years, consumers have benefited from the limited competition between car company brand replacement parts and independently branded parts. Moreover, many such competitive parts have lifetime warranties, something the car company parts lack.

Competition between car company brand crash parts and independent brand parts has produced high quality, fairly price alternatives, and given consumers a choice. Today, car companies still have an 80% market share, competitive suppliers have 15%, and the remaining 5% comes from salvage. Without congressional intervention this barely competitive marketplace for collision repair parts will result in automakers capturing nearly the entire market and consumers will pay the price.

It's no surprise the car companies don't want competition. The mere presence of competition in the market reduces the price of car company brand replacement crash parts. Competitive replacement crash parts are, on average, 34% - 83%¹ less expensive than the car company brand parts, and often the price difference is much greater. Right now, the elimination of competition from independent brand crash repair parts would cost automobile owners more than \$1billion a year.²

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.

² *Id* at p.4.

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

While the average price difference between car company brand parts and quality independent parts is significant, these cost savings do not tell the full story. 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.

Eliminating Competition Will Result in More “Totals” and Put Consumers at Greater Risk of Becoming “Upside Down” on Auto Loans.

Higher repair costs due to less competition among the parts needed to repair our cars will likely force insurers to “total” more vehicles because the cost of repairing otherwise repairable vehicles no longer makes economic sense. Consumers typically lose when a vehicle is totaled. First of all, those consumers who may 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, not only do total losses hurt the body shop industry by providing fewer vehicles to repair, but a needlessly ‘totaled’ vehicle can harm the environment. And the most tragic irony is what I call the automakers “double whammy.” Not only does 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 out and buy another one of their products. If automakers succeed in eliminating competition, the cost to the consumer would be profound.

Eliminating Competition in Crash Parts Could Affect 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 which may not offer needed safety. Delaying or ignoring the need to replace a head light, a side mirror, or a 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.

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

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.

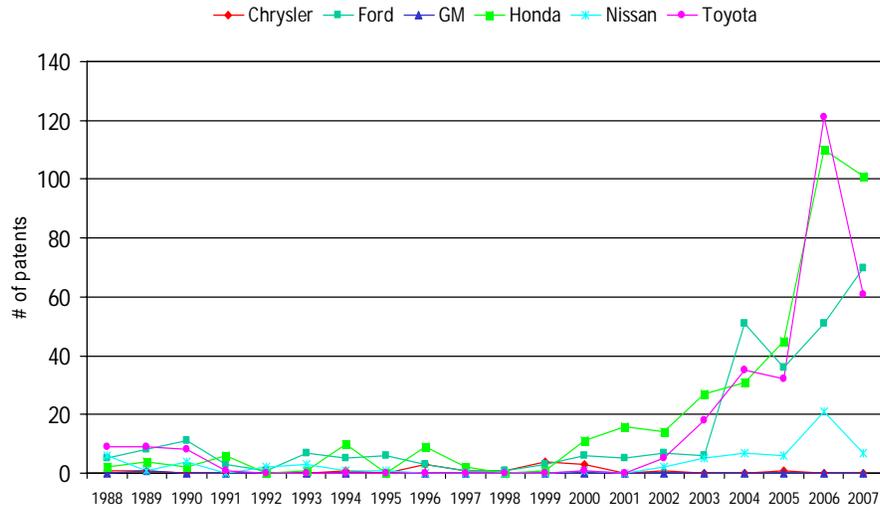
Design plays an important role in consumers’ original choice of a car. After the purchase, however, consumers need the flexibility to repair and maintain their vehicles with the maximum number of choices possible that will “fit” and “match” the other parts. It is simply not fair for consumers to be forced 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 which 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 which 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, Consumers Union 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.

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 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 for 2007 are annualized based on the number of design patents granted through September 30, 2007.