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CROSSING THE FINISH LINE ON PATENT REFORM: WHAT CAN AND SHOULD BE DONE

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CROSSING THE FINISH LINE ON PATENT REFORM: WHAT CAN AND SHOULD BE DONE

FRIDAY, FEBRUARY 11, 2011

House of Representatives,
 Subcommittee on Intellectual Property,
 Competition, and the Internet,
 Committee on the Judiciary,
 Washington, DC.

The Subcommittee met, pursuant to call, at 10:30 a.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Smith, Coble, Chabot, Pence, Poe, Jordan, Chaffetz, Reed, Griffin, Marino, Adams, Quayle, Watt, Conyers, Chu, Deutch, Wasserman Schultz, Nadler, Lofgren, Jackson Lee, and Waters.

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

Mr. Goodlatte. The Subcommittee will come to order, and I will recognize myself for an opening statement.

Nearly 60 years ago, Congress tackled the challenge of how to structure our patent laws for what was then the modern economy. Over those decades, we have gone from room-size computers with vacuum tubes to hand-held tablets, and black and white television to 3-D TV, and from wax cylinders and record players to digital downloads and streaming. Our patent laws have served us well, but as our industries have changed and new areas of the economy have emerged, our patent laws are beginning to show their age. That doesn't mean that we need to start from scratch, but there are areas where we need to make some reforms.

Modernizing our patent system is necessary to meet the needs of our 21st century economy and necessary to create jobs and economic growth. When an inventor or startup is able to take their idea from the garage or the lab to the Patent Office, it gives them the exclusive right to make use of that invention. This right then enables them to raise capital and get their business off the ground.

When improving our patent system, we need to take into consideration the work the Federal Government has done in addressing patent reform. Since we began debating comprehensive patent reform over a half decade ago, the Federal courts have issued numerous opinions that have touched on some of the very reforms we have been working on, including injunctions, willfulness, damages, and others. We need to assess those decisions carefully and factor them into any legislation we move.

I hope that in today's hearing we will talk more about what can and should be done to achieve the meaningful patent reform legislation that has eluded prior Congresses. Reform means

putting forward commonsense ideas and not simply blanket opposition. Our goal is a patent system that allows for increased certainty, higher quality patents being issued, and reducing frivolous litigation.

In the past few years, frivolous lawsuits against high-technology companies have doubled, costing on average \$5 million to defeat each one of these questionable suits. These costs take money away from worthwhile R&D that leads directly to job creation. These costs discourage entrepreneurs from even taking that first plunge toward establishing a business. And, inevitably, these costs discourage overall innovation, hindering our Nation's progress and future economic prosperity.

Some may say that this is just the cost of doing business. If that is the case, then the cost of inaction is way too high. Congress has a constitutional duty here to ensure that we have an effective patent system.

We also need to make sure that the PTO has the resources it needs to accomplish the tasks we will ask of it. Fee aversion is an unacceptable tax on our Nation's innovators, and it diverts funds the PTO needs to other unrelated government programs. We must address this issue.

I look forward to hearing from our distinguished panel today. They represent a variety of perspectives and industries. And I look forward to working with my fellow colleagues in the House and Senate and the stakeholder community to take the steps necessary to ensure that meaningful patent reform is completed during this Congress.

It is now my pleasure to recognize our Ranking Member, the gentleman from North Carolina, Mr. Watt.

Mr. Watt. Thank you, Mr. Chairman; and thank you for convening this hearing on patent reform.

The patent reform debate has percolated through Congress for several sessions now. We have seen several iterations of a patent reform bill in both Chambers, most recently S. 23, which passed out of the Senate Judiciary Committee last week.

At the core of the debate lay at least two truths: one, discovery and innovation is the engine of economic growth and development domestically and throughout the world; and, two, the U.S. Patent and Trade Office, this Nation's primary mode of encouraging inventors and protecting their intellectual property, is overburdened and in need of adequate resources to perform its functions.

The interplay between innovation, economic competitiveness and recovery and job creation has never been more widely acknowledged and supported than it is today. In fact, our very first hearing on the oversight of the PTO focused on the connection between job creation and innovation and showcased the increasingly important role of ideas in the global economy.

The President's State of the Union address later that same evening reemphasized the Administration's commitment to encouraging and protecting innovators and their intellectual property.

And just this week the Administration issued an executive order implementing provisions of the PRO-IP Act, the Conyers-Smith--also co-sponsored by Goodlatte-Watt--bill, signaling to the world and the community of innovators that intellectual property stimulation and protection are at the top of the Nation's agenda.

Against this backdrop of consensus on the need to shore up the PTO and provide robust incentives and protections to our innovators, however, is the ongoing talk of deep, across-the-board budget cuts. I hope that we will all step back and make rational decisions about how the taxpayers' money should be spent in a way that continues, rather than retards, our course of economic recovery.

Let me just say a word or two about our witnesses. I am pleased that we have a panel of witnesses who have been active participants in this debate over the years. These stakeholders possess intimate knowledge of where we have been and have informed perspectives on where we should be going. The 21st Century Coalition and the Coalition for Patent Reform both represent members that have skin in the game, while Judge Michel comes from a vantage point of adjudicating patent cases for decades. Each witness provides useful knowledge as we consider how best to fashion policy choices for intellectual-property-driven industries consistent with the needs of the country.

I know that I speak for both myself and Chairman Goodlatte when I say that the importance of developing a complete record reflecting a full scope of views is at the heart of the panel assembled today and necessary for our Committee's work. Indeed, some of the laws and practices that prompted the effort to take on patent reform in earnest several years ago have changed. Hearing from these witnesses about what changes are adequate or inadequate, how they have affected their prior positions and current outlook is essential for us to understand the current landscape and to resist the urge to simply hold firm to positions that may no longer be constructive.

Mr. Chairman, that is my prepared statement. I want to go off the reservation here a little bit. I don't get this opportunity to have industry people that I can send a shot over the bow very often. And I am new here, so I am going to take the luxury here, I think.

I have been kind of assessing this against a backdrop where I come from focusing most of my attention in the financial services industry. I watched the financial services industry fail to do some things, fail to come together on some things until we were in an absolute chaotic disaster. And only then could our Committee, the Financial Services Committee, and Congress really take steps that were really necessary.

I think we are approaching in this situation not the kind of crisis that we faced in the financial industry, but we are approaching something that is very serious. Because we have been holding the PTO and its funding hostage to this whole discussion about patent reform. And nobody has been willing to kind of run over the industries because they are too powerful, just like in the financial services industry, and because we really think the industries ought to get together.

I am kind of sending the shot over the bow that it is really time, after 6 or 8 years, for the industries to get together and sit down and work out their differences on these issues so that we can move patent reform forward, so that we can move PTO funding forward and not hold those two things hostage to each other before we get to a crisis situation. We are approaching that in the backlog of patent applications we have at the PTO. And so I am earnestly suggesting to the industries that they come back to the table and try to roll up their sleeves and find common ground on a patent reform bill so that we can move this process forward.

I know that is gratuitous. It wasn't in my prepared statements, but I hope it is taken constructively.

Thank you, Mr. Chairman. I yield back.

Mr. Goodlatte. I thank the gentleman. I know it will be.

It is now my pleasure to recognize the Chairman of the full Committee, someone who has worked long and diligently on this issue, the gentleman from Texas, Mr. Smith.

Mr. Smith. Thank you, Mr. Chairman.

Mr. Chairman, let me say at the outset that I think this is one of the most important Subcommittee hearings that the full Judiciary Committee will have this year, and I am particularly pleased with the Members who serve on this Subcommittee because they are all knowledgeable, they are all interested, and many of them have district interests as well that will be important as we move forward in the process.

And I would only say to the Ranking Member, whose comments I appreciated, that I am not sure this is a shot across the bow, because I don't think that warning is necessarily needed. I think everybody, as the gentleman concluded, is eager to move forward in a bipartisan process and try to accomplish the task so that we don't end up with a situation as we did with some of the financial regulatory reform as well. So I thought his comments were very appropriate, and I think that we all would agree with what the gentleman said. And it is nice to have him as Ranking Member.

Mr. Chairman, the foresight of the Founders to create an intellectual property system demonstrates their understanding of how patent rights ultimately benefit the American people. In January, our Subcommittee touched on this theme when we conducted our first hearing of the year on the importance of the Patent and Trademark Office. We learned that the technological innovation derived from our intellectual property is linked to three-quarters of America's post-World War II economic growth.

A recent study valued U.S. intellectual property at approximately \$5 trillion, or about half of the U.S. gross domestic product. American IP industries now account for over half of all U.S. exports and represent 40 percent of our economic growth.

Just a digression here, these companies, the intellectual property companies--many of whom are high-tech companies--actually represent about 5 percent of all the companies in America, and yet they account for 40 percent of our economic growth. So if we are going to have a healthy economy, we are going to have to have a healthy high-tech sector, intellectual property sector as well. These industries provide millions of Americans with well-paying jobs.

By any set of metrics, intellectual property is a driver in our national economy, one that creates wealth and jobs. And our patent laws, which provide a time-limited monopoly to inventors in exchange for their creative talents, are the key to perpetuating this prosperity. The original Patent Act was written in 1790 and has been amended multiple times over the past 220 years, and it is time for further change. We can't act like disinterested spectators as frivolous lawsuits that typically cost \$5 million each to defend prevent true inventors and industrious companies from creating amazing products and generating high-paying jobs. So we need to update our patent laws.

We must work with the Senate to enact a bill that enhances patent quality, discourages frivolous litigation, harmonizes international patent principles, and enforces core rights.

Our Committee undertook this initiative more than 5 years ago because patent changes are necessary to bolster the American economy and our Nation's global competitiveness. Every industry directly or indirectly affected by patents, including finance, automotive, manufacturing, high tech and pharmaceuticals will benefit if we do our job correctly.

The purpose of today's hearing is not to recycle and recite each argument made by every stakeholder who participated in the debate. We don't have time for this. Instead, we must identify common ground and establish priorities. That is why today's hearing will focus on the doable, the practical, and ultimately achievable patent reform.

We have all followed the recent developments in the Senate Judiciary Committee which reported their bill on February 3; and I am pleased that Chairman Leahy, Ranking Member Grassley, and other interested Senators are working to develop further revisions in advance of floor consideration. I met at some length with Senator Leahy a couple of weeks ago, and I am absolutely convinced that we are going to be able to find

common ground.

We have been developing a bill on the House side for our Committee as well. While the Senate vehicle is a good start, I am hoping we can work together with the other body to make additional improvements. We need a few more tweaks to inhibit the abuses that gave rise to the project back in 2005.

Politics is the art of the possible. I supported stronger language on such issues as apportionment of damages, willful infringement, and venue, but we have reached a point where no one member, industry, company, trade association, or advocacy group is going to be completely happy with the outcome, though I do hope they will be, say, 60 or 65 percent happy.

All of us should maintain a holistic perspective as we develop a bipartisan, bicameral bill; and we must keep our common goal in mind: Better patents increase productivity and lead to economic prosperity. A modernized patent system will rev the engine of American competitiveness, put inventors and innovators in gear, and drive economic growth and job creation.

I look forward to hearing from our witnesses today, Mr. Chairman, and once again appreciate the Subcommittee having a hearing on this subject. I yield back.

Mr. Goodlatte. I thank the Chairman.

Now it is my pleasure to recognize the Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. Conyers. Thank you, Mr. Chairman and Members.

I just wanted to particularly thank former Judge Michel for being with us today. He has a distinguished background. I welcome all our witnesses, but Judge Michel's commitment to public service is extraordinary to me, and I am glad he is here.

The only thing I would like to say with this opportunity that comes to me is that somewhere in the appropriations process the funds that are paid into the Patent and Trademark Office never get back to the Patent and Trademark Office. I think this is something that this distinguished Committee ought to look at and see what we can do about right away, because they are hurting.

I know that there are conservative Members in the body in the 112th Congress that want to cut \$100 billion from the budget, and then some want to cut \$32 billion from the budget, and then now I think the figure has gone up to \$64 billion in the budget, so I am glad that we are going out this afternoon. I will be holding my breath when we come back on Monday.

But this doesn't involve those kind of breath-taking reductions from the Federal budget. This involves giving the Patent and Trademark Office funds that they have already collected. They go into the mysterious Byzantine process of the Appropriations Committee behind closed doors; and, lo and behold, they never get the funds they have already raised. This is creating a serious negative impact on the whole concept of patents and trademarks; and, to me, that is the number one issue that this Committee and these distinguished witnesses can assist us in trying to resolve.

Thank you for your generosity, Mr. Chairman.

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

It is now my pleasure to introduce the very distinguished panel of witnesses we have today. Each of the witnesses' written statements will be entered into the record in its entirety, and I ask that each witness summarize his 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.

Before I introduce the witnesses, I would like to ask them to stand and be sworn in.
[Witnesses sworn.]

Mr. Goodlatte. Thank you, and you may be seated.

Our first witness is David Simon, Intel Corporation's Associate General Counsel for Intellectual Property Policy. He will be testifying on behalf of the Coalition for Patent Fairness.

Prior to joining Intel in 1997, David was in private practice in Los Angeles for 15 years and specialized in intellectual property matters, including licensing and high-technology law. He has been a featured speaker at a number of intellectual property seminars. He holds a B.S. in electrical engineering from MIT and a J.D. from Georgetown University.

Mr. Simon has testified before the House and Senate IP Committees on the need for patent reform and has been an active participant in the industry and bar group negotiations to arrive at a compromised bill. He currently is a member of the Board of Directors of the Intellectual Property Owners Association and the Coalition for Patent Fairness.

Our next witness is Carl Horton, Chief IP Counsel for General Electric. He will be testifying on behalf of the Coalition for 21st Century Patent Reform.

Earlier in his career, Mr. Horton served as the lead IP counsel for GE's health care business, its electrical distribution and control business, and its industrial systems business. He has also worked as an IP counsel for several of GE's plastic and advanced materials divisions.

Prior to joining GE, Mr. Horton worked at the IP law firm of Burns, Doane, Swecker, & Mathis in Alexandria, Virginia. He received a chemical engineering degree with honors from the University of Utah and a J.D. Cum laude from George Washington University.

Our final witness is Paul Michel, who was appointed to the

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