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

Hearing on *Abusive Patent Litigation: The Issues Impacting American Competitiveness and Job Creation at the International Trade Commission and Beyond*
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Thank you for the opportunity to testify on these important issues. Today, I offer my perspective as a former Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (USPTO) from 2004 to 2009. Including my two years as Deputy, I spent seven years representing the United States and advocating for our intellectual property system throughout the world. I also spent another six years staffing this Committee and Subcommittee, supporting Members to craft sound intellectual property policies and laws. I can also add a business perspective. For the last year, I have served on the board of directors of MOSAID Technologies Inc., a privately owned company that identifies and maximizes the value of intellectual assets.

Legislative Review Based on Conduct and Not on Labels

In my government role, I was honored to promote the United States' system of intellectual property throughout the world. Nothing has given me more professional satisfaction and pride than to explain our system and its benefits for economic growth to officials from other nations. Is ours a perfect system? Certainly not, but neither is it fundamentally broken, as some have claimed.

Our intellectual property system is the best in the world, and its tremendous value makes it worth your efforts to improve it. This is an important point because in an effort to advance a particular point of view or a particular model, our patent system has come under constant attack. While the licensing of owned assets is a model we celebrate for bringing more efficiency and liquidity to markets, some forms of patent licensing are being particularly misrepresented and vilified.

Many have essentially claimed that the strength and value of an innovation lies not in the invention itself, the idea or the model, but who owns it. There is a growing lexicon of ad hominem names for entities that own intellectual property but do not make products: "troll" and "privateer" are among the most common. This name calling is a distraction that plays no role in addressing the problems facing our system.

Indeed, the very label of a "patent troll" is a red herring. The definition easily shifts depending upon the speaker, the audience, and the attractiveness of the patent holder. Universities, independent inventors, and research and development shops were once solidly in the troll category. As their models became more easily understood and recognized as beneficial, they become either implicitly or explicitly exempted.

However, it turns out that there are many entities that own intellectual property, do not make products and add tremendous value to the system. It is not *who* owns the property that matters but *what* they own and *how* they conduct their ownership. There are certainly individuals or entities that own patents, do not make products and engage in abusive and inappropriate practices. Likewise, there are those who own patents, make products and engage in abusive and inappropriate practices. There are also doctors, lawyers, and bus drivers who engage in abusive and inappropriate practices. The solution will be to address the abusive and inappropriate practices – not in discriminating against certain types of licensing entities, producers, doctors, lawyers or bus drivers.

Importance of Patents and Licensing

As the United States transitions from a manufacturing-based to a knowledge-based economy, the importance and value of intangible assets to U.S. businesses and investors has increased. Some have asserted that currently over half of the value of publicly listed companies stem from their intangible assets. Patents constitute the most important of these intangible assets because of the exclusionary rights they provide to their owners and because of the monetary impact they can have from licensing royalties.

In short, American inventors have built a reserve of intellectual property rights that is every bit as strategic as our domestic energy resources. Yet, in recent years, the American patent system, long one of our greatest institutional strengths, has come under increasing attack, with some advocates urging that this strategic reserve should be devalued and in some cases actively undermining its integrity. Much of this criticism

has been focused on licensing practices and has been voiced by companies who manufacture products outside the US.

Many inventors do not manufacture or market their own inventions. Inventors who are not in a position to develop or market their own inventions should not be deprived of the value of their patents, and treating non-practicing entities (NPEs) differently under the law would do just that. The free trade in patent rights that allows technology developers to combine many different inventions to create products is the DNA of NPEs.

It should also be noted that many operating companies depend on licensing companies to help them generate revenues from their patent portfolios, enabling further reinvestment in R&D.

By creating more demand for patent assets, NPEs increase the monetary value of those assets and makes them more liquid. These characteristics are important to lenders that take patents as collateral in financing arrangements.

Accordingly, as Congress studies how to improve the patent system, please consider viewing the overall picture. Legislation targeting certain patent owners based on their status, rather than on activities that are economically detrimental such as nuisance level suits, could have negative ramifications that we cannot fully anticipate.

Framing the Approach to Legislation

The Committee went through a long and thoughtful process to comprehensively review the entire patent system as a whole in the passage of the “Leahy-Smith America Invents Act.” You recognize it is a long procedure that includes or can include inventing, application, examination, possible reexamination and post-grant review, administrative bodies and the Federal courts. For every step of the process, quality is fundamental. We should support all reasonable efforts to ensure patent quality from the

time an application comes in the office through issuance and beyond. I welcome the opportunity to discuss the great work the women and men of the USPTO do and how we can support them even further.

In addition to giving some direction about patent quality, Congress has done a great deal to address the issues of patent litigation abuse with the passage of the America Invents Act. The AIA created a vigorous post-grant review system, among other things, and enacted new joinder requirements and venue reforms.

The fundamental issue the Committee appears to be grappling with is how to advance modest reforms – notwithstanding the fact that the AIA is only now being implemented – to deal with those whose motivation is simply to profit from the high costs associated with litigation. How do we do this without harming US interests domestically and internationally?

As the Committee considers proposals for potential additional modifications to patent law, I would urge that it consider the following ideas:

- Do No Harm – the solution should not risk causing more harm than the problem
- Do Not Discriminate – the intellectual property is what matters, not who owns it
- Be Conduct Focused – root out bad behavior regardless of the actor, and make sure a proposed change will actually address the targeted conduct
- Respect the role of the Federal Judiciary – recognize that some measure of judicial discretion will be necessary, and that the federal judiciary already has a toolkit

With respect to the Committee's consideration of matters affecting the jurisdiction of the ITC, it is important to consider the ITC mission to safeguard American industries from unfair trade. A domestic industry that is protected by US patents should be safeguarded regardless of whether the patents are owned by or licensed to the industry. Licensing US intellectual property strengthens the US economy and improves our trade

balance. Weakening the ITC's jurisdiction over intellectual property could have an adverse effect on the US economy.

Importers of foreign made products – both US based and foreign companies – have appealed to Congress for several changes to Section 337 that would, in effect, limit access to the ITC or weaken the powers of the ITC to deal with cases of unfair trade practices. Diminishing the ITC's authority over IP could benefit foreign economies, foreign competitors, and other foreign manufacturers to the detriment of the US industries. I would urge the Committee to consider the expertise and resolve the ITC has continued to demonstrate to apply the law and address some of the issues being examined by the Committee.

Business Adapts to Changing IP Landscape

After leaving the USPTO, I continued to stay focused on promoting innovation. I counselled clients on intellectual property matters at Foley & Lardner, and I was president of *FIRST*®, a non-profit that inspires more than 300,000 kids a year to get interested in technology, science and innovation through robotics programs. I also continued to stay interested in the ways markets and business models have been changing to acknowledge and better understand intellectual property as an asset class. About one year ago, I joined MOSAID Technologies, Inc. as a member of the board of directors. MOSAID is a leading company in identifying and maximizing value of high quality and high impact patent portfolios. As a corporate director, I am compensated and have a fiduciary duty to the company. More importantly, I believe in MOSAID's business model. I welcome the opportunity to advance that model and to discuss it with you today.

MOSAID is a compelling company because it has consistently demonstrated both technological leadership and the ability to adapt to changing business conditions. The company was founded in 1975 as a semiconductor design services firm. In the 1980s, MOSAID invented circuit technology that is used in virtually all dynamic random access memory, or DRAM, the main type of data memory still used in computers. It

was also a leader in building test equipment for de-bugging prototype memory chips. By the mid-1990s, MOSAID realized that its DRAM inventions were being widely used in the market without permission. Its innovations were being appropriated. MOSAID responded by adding a licensing program to its business operations, requiring the company to develop expertise in identifying and asserting its patents. Today, the company has about 1,450 patents issued or pending from its own R&D, and has signed patent license agreements with over 60 leading international electronics companies.

MOSAID's R&D now focuses on Flash memory, which is widely used for data storage in computers, cellphones, and other electronics products. MOSAID's HLNAND® Flash memory technology improves the performance of solid state drives that are replacing hard disk drives in many applications, particularly enterprise and data center storage systems that are the backbone of the Internet and "cloud" computing. The company has about 700 patents issued and pending as the direct result of its R&D in this cutting-edge technology. This R&D has been funded for many years from the revenues earned from MOSAID's licensing activities.

Through its R&D, MOSAID developed an extensive portfolio of semiconductor intellectual property. By learning to license its own technology, the company also developed expertise in identifying and valuing high-quality, high-impact patent portfolios. In 2007, this led to MOSAID expanding its licensing model and to begin licensing other companies' patented electronics technologies.

Today, I would characterize MOSAID as a patent management and intellectual property development company. It forms and operates patent licensing partnerships with other patent owners. It acquires patents from other companies and works to improve the quality of those patent portfolios. In 2011, MOSAID attracted international attention when it acquired Core Wireless, which holds a major portfolio of wireless patents and applications originally invented by Nokia. MOSAID now has multiple patent licensing programs and is considered a leader in maximizing intellectual asset value. And the company continues to innovate, develop and promote new technology, such as HLNAND.

MOSAID has also attracted the attention of investors who realize that managing intellectual property assets is an engine for economic and job growth. Sterling Partners, a leading US private equity firm with approximately $5 billion in assets under management and major investments in over 30 companies in the health care, education and the general business sectors, clearly recognized the value of investing in MOSAID as a specialized intellectual property company. In late 2011, Sterling Partners led a $600 million transaction to acquire MOSAID. Since then, MOSAID has grown its employee base by over 25 percent, adding high-paying jobs in the Dallas area and Ottawa, Canada.

Conclusion

One of the greatest things about representing the United States government on intellectual property policy was knowing the world was always watching. Our system has produced massive economic benefits for our nation, and thankfully many nations recognized it and worked closely with the US government to adopt a similar system. However, there are also many countries seeking the benefits associated with adopting improved intellectual property laws and working to undermine those principles to maintain an advantage for their domestic companies. In other words, they are focusing on *who* owns the intellectual property (domestic rather than US or other inventors) rather than the property itself. It is an attempt to discriminate against US inventors and companies. The US is the international leader in intellectual property, and it leads by example. If we make such a distinction in our law, it would harm innovation in the US. I believe it would also become the basis to attempt to justify treating certain entities in their nations differently. Improving the law for the US is the primary focus, but we must be mindful of both its domestic and international effects.

I will close with a story that I find particularly compelling. To me, it is an example of how the US innovation and intellectual property system has proven to be an inspiration to the world, and it is particularly relevant to the current debate. The head of State Intellectual Property Office in China, Tian Lipu, is a brilliant man who understands how strong intellectual property laws will benefit China and any other country.

In a symposium two years ago, Commissioner Tan noted that Chinese manufacturers pay $19.70 in patent royalties for each DVD player they produce. This is 10.2 times their profit, which is only $1.93 for each DVD player. In the year 2007 alone, the patent royalties charged by multi-national companies from Chinese manufacturers amounted to $2.85 billion, Commissioner Tan said.

His point is clear and well understood. It does not matter nearly so much who makes the product but who has the innovation. His nation as the product maker did not benefit nearly as much as did the innovators who had the ideas. This is a fundamental principle of *intellectual* property and one that allows for greater fairness for US companies operating in China. There is much more to be done in China for certain, but it was a great moment to see a leader advocate the point.

In closing, allow me to thank you again for the chance to share my views and answer any questions you may have. Please know that I welcome the opportunity to participate in the process going forward. I am also certain that the company where I serve a corporate director, MOSAID Technologies, would welcome the opportunity to participate as well. We all want to make the greatest economic engine in the world even better.