

## Senator Tillis Questions for the Record – Protecting Real Innovations by Improving Patent Quality

### Ms. Bridget Asay:

1. How would you define or describe a low quality patent?

A low-quality patent is a patent that in whole or in part does not meet the legal standards for patentability and is likely to be invalidated if challenged in litigation or administrative proceedings. *See, e.g.*, Statement of Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, before the Committee on the Judiciary, United States Senate, *Oversight of the U.S. Patent and Trademark Office* (April 18, 2018) (“In general, quality patents are those that are issued in compliance with all the requirements of Title 35 of the United States Code as well as relevant case law at the time of issuance, and survive challenge down the line.”); GAO, Report to the Chairman, Committee on the Judiciary, House of Representatives, *Intellectual Property: Patent Office Should Define Quality, Reassess Incentives, and Improve Clarity* (2016) (“Most stakeholders GAO interviewed said they would define a quality patent as one that would meet the statutory requirements for novelty and clarity, among others, and would be upheld if challenged in a lawsuit or other proceeding.”).

2. What are the biggest problems that you see posed by low quality patents?

In my testimony, I focused on the problem of patent trolling: litigation and threats of litigation by holders of low-quality patents, often called patent-assertion entities. *See, e.g.*, Federal Trade Commission, Patent Assertion Entity Activity (October 2016) (FTC Report), at 1 (“Patent assertion entities (PAEs) are businesses that acquire patents from third parties and seek to generate revenue by asserting them against alleged infringers.”); *id.* at A-2 (“‘Patent assertion entity’ or ‘PAE’ means a firm whose business model primarily focuses on purchasing and asserting patents.”); *cf. Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 109 (2016) (“Trolls, in the patois of the patent community, are entities that hold patents for the primary purpose of enforcing them against alleged infringers, often exacting outsized licensing fees on threat of litigation.”).

Patent litigation is expensive and, for a number of reasons, it is difficult to get meritless infringement claims dismissed at an early stage. Patent-assertion entities can collect low-quality patents and exploit the economics of patent litigation to force favorable settlements even though their infringement claims are weak and would almost certainly fail on the merits. The FTC study observed that what it called “Litigation PAEs” typically sued alleged infringers and then settled for amounts less than \$300,000—an amount that, according to the American Intellectual Property Law Association, “approximate[d] the lower bound of early-stage litigation costs of defending a patent infringement suit.” FTC Report, at 43 & n.165. The FTC observed that “[g]iven the relatively low dollar amounts of the licenses, the behavior of Litigation PAEs is consistent with nuisance litigation.” *Id.*

Paying off these claims, and paying for lawyers to handle them, puts a substantial burden on many businesses, including start ups and small businesses. The FTC found that its “study

suggests that Study PAEs asserted their patents not only against manufacturers of the accused products, but also against firms that were end-users of the products” and cites public comments complaining about demand letters targeting small businesses like bakeries and coffee shops. *Id.* at 6 & n.11. A 2013 White House report cited estimates that PAEs had made between 60,000 and 100,000 litigation threats in 2012 alone. Executive Office of the President, *Patent Assertion and Innovation* (June 2013) (White House Report), at 6; *see also id.* at 10 (“the majority of PAE suits target small and inventor-driven companies”).

The White House report also explains and summarizes the broader economic impacts of PAE litigation, including decreased innovation and the opportunity costs of “economic ‘dead weight loss.’” *Id.* at 12; *see also id.* at 9-10.

3. What initiatives in this area have been particularly successful, in your perspective?

The Leahy-Smith America Invents Act created the inter partes review process. Inter partes review, or IPR, “allows a third party to ask the U.S. Patent and Trademark Office to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable in light of prior art.” *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 265 (2016). IPR has facilitated somewhat quicker and less expensive review and invalidation of low-quality patents. Although the IPR process cannot work properly when the PTAB uses its discretion to deny review of low-quality patents that Congress intended the IPR process to address, Director Vidal’s June 21, 2022 Memorandum provides guidance to the agency to address this issue. Specifically, Director Vidal’s guidance clarifies that to benefit the patent system and the public good, there are certain circumstances under which the PTAB will not deny institution on the basis of the discretionary *Fintiv* factors, including when a petition presents compelling evidence of unpatentability. *See* Katherine Vidal, *Interim Procedure for Discretionary Denials in AIA Post Grant Proceedings with Parallel District Court Litigation*. (June 21, 2022), [https://www.uspto.gov/sites/default/files/documents/interim\\_proc\\_discretionary\\_denials\\_aia\\_parallel\\_district\\_court\\_litigation\\_memo\\_20220621.pdf](https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621.pdf). This guidance is important to ensure that the IPR procedure continues to address low-quality patents. Congress may want to consider codifying it.

The consumer-protection oriented efforts led by state attorneys general and the Federal Trade Commission about a decade ago focused particular attention on litigation threats directed at end users and consumers. Those efforts also prompted state statutes aimed at bad-faith assertions of patent infringement. A North Carolina federal court recently upheld North Carolina’s Abusive Patent Assertions Act. *NAPCO, Inc. v. Landmark Tech. A, LLC*, 555 F. Supp. 3d 189, 212 (M.D.N.C. 2021). That court noted that “[s]ince 2013, over two dozen states have enacted statutes focused on curbing bad faith assertions of patent infringement by so-called ‘patent trolls.’” *Id.* at 206. These statutes provide companies with additional tools to deter baseless patent litigation and recover fees and costs in defending that litigation.

4. How can the USPTO improve collaboration on prior art searching—both domestically (e.g. between USPTO and the FDA) and internationally (e.g. among the IP5)?

This important topic is beyond the scope of my testimony. I note, however, that President Biden’s Executive Order 14036 (Promoting Competition in the American Economy) directed the FDA to engage with the USPTO and that the two agencies have begun that collaborative process. See USPTO, *What are USPTO-FDA Collaboration Initiatives?*, <https://www.uspto.gov/initiatives/fda-collaboration/what-are-uspto-fda-collaboration-initiatives>. In July 2022, the Director of the USPTO wrote to the Director of the FDA and provided a detailed list of potential initiatives, including more training for examiners, more examination time, and collaboration aimed at improving prior art searches.

5. Are there any particular data points or metrics that could help prioritize discussions about improving patent quality? What agencies or other organizations could contribute to collecting such data?

A number of stakeholders have noted the lack of transparency in the ownership of patent-assertion entities. *E.g.*, FTC Report, at 11, 52; NAAG Letter, *infra*, at 2; White House Report, at 4. The FTC recommended amending Fed. R. Civ. P. 7.1 to “expand the reportable relationships” and thus “provide defendants and the judiciary with a better understanding of financial relationships relating to firms that may appear in the courtroom.” FTC Report, at 11. An expanded and updated version of the FTC’s 2016 study would provide critical data about patent assertion entities and patent litigation.

Detailed tracking and analysis of both IPR and litigation outcomes would also provide useful metrics about patent quality. The USPTO provides some data about IPR outcomes. USPTO, Statistics, <https://www.uspto.gov/patents/ptab/statistics>. A more granular analysis of IPR and litigation outcomes could help identify why low-quality patents issue—for example, failure to consider prior art, mistakes in assessing prior art, mistakes in granting patents covering ineligible subject matter under § 101, failure to require full and clear disclosure and claiming under § 112, etc. It would also be helpful to track PAE involvement in IPRs. USPTO Director Vidal recently announced that the USPTO is “in the early stages of discussing a collaboration with the American Intellectual Property Law Association and the Intellectual Property Owners Association to develop a training initiative for patent examiners.” Remarks by USPTO Director Kathi Vidal at PPAC (May 12, 2022), <https://www.uspto.gov/about-us/news-updates/remarks-uspto-director-kathi-vidal-ppac-0>. According to the Director, this “training will focus on how their examination prosecution record is used after a patent is granted — and on techniques to improve the clarity of that record.” Detailed review of the grounds on which issued patents are later canceled could be part of this collaboration.

6. In the hearing, you mentioned the National Association of Attorneys General playing a consumer protection role to combat bad actors asserting low quality patents. Could you please elaborate on that?

State attorneys general bring a consumer-protection focus to the practices of patent assertion entities. They have taken action where these entities have targeted small businesses and

end users in their states. The Washington Attorney General filed suit last year against Landmark Technologies after that entity sent demand letters to small businesses like florists and candy stores and sued five Washington businesses that refused to pay for licenses. *See* Office of the Attorney General, Washington State, *AG Ferguson Files Lawsuit Against “Patent Troll” Targeting Small Businesses*, <https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-against-patent-troll-targeting-small-businesses>; *State of Washington v. Landmark Tech. A LLC*, No. 21-2-06348-5 SEA (Wash. Super. Ct. filed May 13, 2021). In 2013, Vermont sued MPHJ Technologies after it threatened Vermont small businesses and nonprofits with patent-infringement suits. *E.g.*, *Vermont v. MPHJ Tech. Invs., LLC*, 803 F.3d 635, 638 (Fed. Cir. 2015) (describing state’s enforcement action).

In 2014, the Attorneys General of 42 States, through the National Association of Attorneys General (NAAG) sent a letter to this Committee, which began:

We, the Attorneys General of 42 states, write to express our support of your efforts to enact bipartisan patent reform legislation, and to share our concerns with the currently proposed S. 1720 and the recently passed H.R. 3309. So-called patent trolls stifle innovation and harm our economy by making dubious claims of patent infringement and using the threat of expensive litigation to extort money from small businesses and nonprofits. We have received many complaints from these businesses and nonprofits, our constituents, who are desperate for relief from the misuse of the patent system. While these threats were once focused on tech businesses, they are now levied at all manner of businesses, including banks, hospitals, restaurants and hotels.

Letter from J.B. Van Hollen, NAAG President, et al. to Hon. Patrick Leahy, Chairman, et al. (Feb. 24, 2014) (NAAG Letter). The NAAG Letter asked the Committee to consider legislation that would clarify and confirm state enforcement authority in this area.

7. What technological improvements should the USPTO focus on to improve prior art searching?

This important topic is beyond the scope of my testimony. I note, however, that President Biden’s Executive Order 14036 (Promoting Competition in the American Economy) directed the FDA to engage with the USPTO and that the two agencies have begun that collaborative process. *See* USPTO, *What are USPTO-FDA Collaboration Initiatives?*, <https://www.uspto.gov/initiatives/fda-collaboration/what-are-uspto-fda-collaboration-initiatives>. In July 2022, the Director of the USPTO wrote to the Director of the FDA and provided a detailed list of potential initiatives, including more training for examiners, more examination time, and collaboration aimed at improving prior art searches.