United States Senate Committee on the Judiciary
Subcommittee on Intellectual Property

Testimony of Michael Blankstein
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June 11, 2019

Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee:

Thank you for the opportunity to testify at today's hearing and share my and my company's observations about the draft patent reform legislation. We at Scientific Games (SG) appreciate the committee's time, energy, and resources you have dedicated to improving our system of patent protection to encourage innovation and economic growth.

SG is the largest American-owned global leader in the regulated lottery, gaming, and interactive industries, offering a range of products, technologies, and services to more than 300 customers on six continents for the last 40 years. Our casino and lottery games run on a wide variety of regulated land-based and online technology platforms. We are headquartered in Las Vegas with major operations in Chicago, IL, and Alpharetta, GA, employing nearly 10,000 personnel worldwide, including nearly 5,000 personnel in the United States.

SG welcomes the opportunity to engage with the Committee to enact much needed reforms to our current patent eligibility law which has negatively impacted our business and so many others in the U.S. economy. We rely heavily upon patents to drive investment in game development resources, grow our business, and gain an advantage when competing to deploy our products in the limited floor space of casinos both in the United States and abroad.

Before *Alice*, we could obtain patents for inventive games and offered an outlet for independent inventors to commercialize their patented games when they lacked the wherewithal to do so themselves. These small business entrepreneurs were rewarded by SG for taking the risk of developing games. While there was certainly no guarantee they would ever monetize their idea, our former patent eligibility system created the incentive for risk taking by enabling companies like SG to identify the best innovators and reward them for their work. In fact, patents drove the tremendous success of SG casino games Let It Ride and Caribbean Stud. On the defensive side, a third party game patent that we wanted to avoid essentially led to our creation of a vibrant land-based, video slot machine business and eventually a thriving online gaming business as well—both of which resulted in the creation of thousands of new American jobs.

Since *Alice*, Section 101 has limited our ability to obtain game patents, with the number of U.S. patents in 2018 being less than 20% of the number of patents granted in the year before *Alice*. If, for example, we try to patent a breakthrough game implemented on a computer, the claimed invention might be found patent **ineligible** depending upon the examiner and despite the absence of any 102, 103, or 112 issues. To reach this conclusion, the invention is artificially dissected into two parts—(i) the game software and (ii) the computer—and then each part is given no weight in favor of eligibility. The breakthrough game software is ignored under the guise that it is somehow abstract. The computer is ignored under the guise that it is generic or conventional.

To remedy this erroneous result, the draft contains very sensible provisions requiring that the eligibility determination (i) consider a claimed invention as a whole and (ii) without regard to considerations

relating to 102, 103, and 112. The bill would support good patents on breakthrough computer-implemented games but weed out bad patents on mere computerization of well-known business practices.

Without a robust patent system to protect novel games, bad actors have stepped in to attempt to clone our games. This practice inhibits R&D investment and results in stale products and business loss. Similarly, we've received far fewer game submissions from independent inventors that are worth licensing or purchasing. How can we justify compensating an independent inventor for a game which our competitors can thereafter clone for free? And if we can't compensate these small businesses, how do we incentivize the free market to continue to innovate new games?

The status quo on patent eligibility is unacceptable because it adversely impacts our ability to protect games, leads to unpredictable outcomes, and improperly conflates eligibility under Section 101 with considerations that should be relegated to other sections of the Patent Act. The legislative history indicates Congress intended patent eligible subject matter to include "anything under the sun that is made by man."[1]

With respect to the use of the term "technology" in the draft bill, we recommend a more open-ended approach that is industry neutral. The term "technology" has wide-ranging definitions in dictionaries[2] and even a patent regulation.[3] As pointed out by Senator Hirono last week, the Federal Circuit in *In re Bilski* commented that the terms "technological arts" and "technology" are both ambiguous and ever-changing.[4] A witness from a prior panel suggested that "technology" be defined in accordance with Article 52 of the European Patent Convention which limits patent eligible inventions to those in "all fields of technology." I respectfully urge the Committee to avoid this because (i) Article 52 excludes "methods for playing games or doing business, and programs for computers" from "technology,"[5] and (ii) Europe assesses eligible subject matter using the very sort of artificial dissection analysis that the draft bill is intended to negate. Because of Article 52's discrimination against game patents, competitors in Europe clone our games and capitalize on our U.S.-based R&D investments.

SG believes any invention that provides practical and specific utility through human intervention should be eligible, regardless of industry or purpose. Patents drive R&D investment in making great games, and great games support our industry's impact on the economy. In 2017, for example, the American Gaming

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[1] *Diamond v. Diehr*, 450 U.S. 175 (1981), *citing* S.Rep. No.1979, 82d Cong., 2d Sess., 5 (1952); H.R.Rep. No.1923, 82d Cong., 2d Sess., 6 (1952)

[2] Merriam-Webster's online dictionary defines the term "technology" as (1) the practical application of knowledge especially in a particular area, or (2) a capability given by the practical application of knowledge, or (3) a manner of accomplishing a task especially using technical processes, methods, or knowledge, or (4) the specialized aspects of a particular field of endeavor. While definitions 1, 2, and 4 are consistent with both the Constitutional grant to Congress in Article 1, Section 8, and with the concept that an invention should have specific and practical utility, definition 3 not only narrows what may be characterized as "technology" but also introduces the further, undefined requirement of technical processes, methods or knowledge.

[3] 37 CFR 42.301(b) of the CBM review regulations introduces yet another definition that defines "technological invention" as "...whether the claimed subject matter as a whole recites a technological feature that is novel and unobvious over the prior art, and solves a technical problem using a technical solution."

[4] *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008)

[5] Article 52 Patentable inventions

(1) European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application.

(2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:
(a) discoveries, scientific theories and mathematical methods;
(b) aesthetic creations;
(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
(d) presentations of information.

(3) Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

Association found the gaming industry alone contributed $261 billion to the U.S. economy, supported nearly 1.8 million jobs, and generated $40.8 billion in federal, state, and local tax revenues much of which went to education, social, and other government programs.[6]

Mr. Chairman and Ranking Member Coons, I again want to thank you and the members of this committee for inviting me to testify at today's very important hearing. I hope my presentation has provided helpful insights on some key elements of a sensible patent system that stimulates economic growth by protecting American innovation. I look forward to the opportunity to answer your and your colleagues' questions.

[6] *See* "Economic Impact of the US Gaming Industry," American Gaming Association | Oxford Economics, June 2018