

Improving Access and Inclusivity in the Patent System: Unleashing America's Economic Engine

Testimony Submitted to the Senate Judiciary Subcommittee on Intellectual Property

Lateef Mtima

Howard University School of Law

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Thank you Chairman Leahy, Ranking Member Tillis, and Members of the Intellectual Property Subcommittee for holding this important hearing on Improving Access and Inclusivity in the Patent System. My name is Lateef Mtima and I am a Professor of Law at the Howard University School of Law and the Director of the Institute for Intellectual Property and Social Justice.¹ I appreciate your invitation to testify today in connection with this subject that is critical to the national interest.

When America makes full use of her vast reservoir of the most diverse pool of human innovative and creative capability on the planet, there is no challenge we cannot meet, no achievement we cannot attain. When in 1961 President John F. Kennedy set forth the challenge of placing an American on the moon within a decade, by harvesting American capability without regard to race or gender, we not only met the challenge we surpassed it.²

Unfortunately making full use of American capability is not always the case for our patent system or our intellectual property ecosystem as a whole; too much of America's intellectual potential, from Marion, Virginia to Greencastle, Indiana, to Compton, California, is too often undeveloped and untapped. To paraphrase blues great Robert Cray, like food left out all night, it's talent gone to waste. Systemic inequities relating to race, gender, socio-economic class, and even geographic situs, as well as structural imperfections in the IP system³ buttressed by a philosophical indifference toward the social justice obligations and opportunities of IP protection, have at times stunted the social efficacy of our IP system.⁴

¹ The Institute for Intellectual Property and Social Justice is a non-profit organization established to promote social justice in the field of intellectual property law and practice. Advocating for core principles of socially equitable access, inclusion, and empowerment throughout the IP ecosystem, IIP SJ's work includes scholarly examination of IP law from a social justice perspective; advocacy for social justice in the shaping and implementation of IP law and policy; initiatives to increase the diversity of the IP bar; and programs which promote greater awareness and understanding of IP protection, particularly among historically and currently disadvantaged and underserved groups.

² MARGOT LEE SHETTERLY, *HIDDEN FIGURES: THE AMERICAN DREAM AND THE UNTOLD STORY OF THE BLACK WOMEN WHO HELPED WIN THE SPACE RACE* (HARPER COLLINS 2016); CHARLES FISHMAN, *ONE GIANT LEAP: THE IMPOSSIBLE MISSION THAT FLEW US TO THE MOON* (SIMON & SCHUSTER 2019).

³ See e.g. Matthew Bultman, *For Black Inventors, Road to Owning Patents Paved with Barriers*, Bloomberg Law: I.P. Law News, (July 14, 2020); Miriam Marcowitz-Bitton and Emily Michiko Morris, *The Distributive Effects of IP Registration*, 23 Stan. Tech. L. Rev. 306, 315-17 (2020) (proposing anonymous patent application procedures and implicit bias training for patent examiners); W. Michael Schuster, R. Evan Davis, Kourtney Schley, and Julie Ravenscraft, *An Empirical Study of Patent Grant Rates as A Function of Race and Gender*, 57 Am. Bus. L. J. 281 (2020); Robert Brauneis & Dotan Oliar, *An Empirical Study of the Race, Ethnicity, Gender and Age of Copyright Registrants*, 86 GEO. WASH. L. REV. 46 (2018). Jessica Milli, Emma Williams-Baron, Meika Berlan, Jenny Xia, and Barbara Gault, *Equity in Innovation: Women Inventors and Patents*, [C448-Equity-in-Innovation.pdf \(iwpr.org\)](#)

⁴ See e.g., Kara Swanson, *Race and Selective legal Memory: Reflections on "Invention of a Slave"*, 120 Columbia Law Review 1077 (2020); Brian L. Frye, *Invention of a Slave*, 68 Syracuse L. Rev. 181 (2018); Shontavia Jackson Johnson, *The Colorblind*



Whether due to a lack of the necessary knowledge of and opportunity to participate in IP endeavor, or the result of exploitative traditions perpetuated in some IP industries, through circumstance and choice, some Americans languish outside the IP ecosystem.⁵ Whatever the causes, it is critical that we appreciate that whatever the opportunity loss to individual innovators and creators, the greatest loss is to our nation as a whole. Systemic impediments to broad participation in IP enterprise sap the vitality of our IP ecosystem. They undermine the social function of intellectual property protection of *maximizing* IP participation and the beneficial qualitative and quantitative contributions essential to our technological development, cultural advancement, and economic welfare.⁶

Improving Access and Exclusivity in the Patent System: A Social Justice⁷ Perspective Towards the IP Ecosystem

For these reasons, today I would like to applaud the present initiative of the Judiciary Subcommittee to Improve Access and Inclusivity in the Patent System and thereby Unleash America’s Economic Engine. I believe this initiative reflects a social justice-oriented perspective towards our innovation ecosystem, and places the aspirational principles of equitable access, inclusion, and empowerment at the center of our intellectual property regime.

The social justice perspective of intellectual property law contemplates an *innate and interdependent relationship* between the social utility function of IP protection and the social justice obligations and effects of that regime: In order to fulfill its purpose of promoting socially beneficent intellectual activity, the intellectual property system must be structured and administered so as to promote the most widespread and socially equitable participation therein.⁸

Patent System and Black Inventors, Landslide Vol. 11 No. 4, (American Bar Association 2019), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/colorblind-patent-system-black-inventors/; K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 Am. U. J. Gender Soc. Pol’y & L. 365 (2008); Sean O’Connor, *The Lead Sheet Problem in Music Copyright*, THE CAMBRIDGE HANDBOOK ON IP AND SOCIAL JUSTICE (forthcoming 2021).

⁵See James Kenar, *Giants of The Past: Percy Lavon Julian* (1899-1975), <https://www.ars.usda.gov/research/publications/publication/?seqNo115=215771>.

⁶ See Schuster, Davis, et. al. at 311-14 (“[I]nvention [is] “an established driver of long-term economic growth.” That goal is undermined where significant portions of the population are disincentivized from pursuing careers in innovation or undertaking acts of invention....First, society loses would-be great inventors where large groups are disenfranchised from participating in invention. Second, the quality of invention diminishes in the face of largely homogeneous inventors....Bell et al. describe the misallocation of potentially talented inventors into other professions where their natural gifts are squandered. This concept--dubbed “Lost Einsteins”--relies on career-allocation mechanisms unrelated to intelligence or aptitude for invention....[and] deprives society of a *quantum* of new inventors, and...improved *quality* of invention....Diverse groups of inventors...explore a wider scope of solutions and are more likely to arrive at an efficient resolution relative to a homogenous group.”); Lisa D. Cook, *Racism Impoverishes the Whole Economy*, N.Y. Times, November 18, 2020.

⁷ While the term “social justice” is best defined in the context of a specific issue, social justice is commonly understood to mean “fair treatment of all people in a society, including respect for the rights of minorities and equitable distribution of resources among members of a community”) <https://www.dictionary.com/browse/social-justice>. See also <https://www.investopedia.com/terms/s/social-justice.asp> (“Social justice is a political and philosophical theory which asserts that there are dimensions to the concept of justice beyond those embodied in the principles of civil or criminal law, economic supply and demand, or traditional moral frameworks....Historically...the idea of social justice is that all people should have equal access to wealth, health, well-being, justice, privileges, and opportunity regardless of their legal, political, economic, or other circumstances.”)

⁸ See LATEEF MTIMA, INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE (EDWARD ELGAR 2015); Margaret Chon, *Intellectual Property and the Development Divide*, 27 Cardozo L. Rev. 2821 (2006); Peter Menell, *Property, Intellectual Property*,



An intellectual property system designed to guarantee socially equitable access to its apparatus and to its benefits irrespective of wealth, class, race, ethnicity, or geographic situs, ensures that the widest possible network of minds and hearts will find the inspiration to conceive, invent, express, share, and experience intellectual accomplishment. The socially just construction, application, and enforcement of intellectual property rights assures the equitable inclusion of all citizens, including marginalized members of society, and preserves everyone's secular incentives to not only undertake IP endeavor but to disseminate widely the fruits of their intellectual labors. And socially balanced exploitation of intellectual property product helps to equalize health and education standards, promotes socio-economic empowerment and self-uplift, and ultimately fosters universal respect for the intellectual property system overall.

And lest there be any needless misapprehension as to whether the social justice perspective of intellectual property protection can accommodate economic considerations, it should be understood that commercial enterprise is an essential element of the IP Social Justice perspective. While human instinct provides natural and powerful motivation to create and invent, secular incentives and opportunities can augment the innate drive to achieve. Accordingly, the intellectual property regime properly employs economic as well as non-secular incentives to promote engagement in intellectual endeavor.⁹ Perhaps even more germane to the Subcommittee's present initiative, economic participation incentives can be especially critical to those whose socio-economic circumstances and options are such that dedication to innovative and creative pursuits demands great personal and communal sacrifice.¹⁰

Specific Recommendations for Improving Access and Inclusivity in the Patent System

In support of the Subcommittee's efforts to devise a strategy to address these issues, I would respectfully offer the following recommendations:

i) A National Grassroots Community IP Education Program

For many Americans, the phrase "intellectual property" is intimidating and mysterious. Many inventors and artists are wholly unfamiliar with intellectual property terms, laws, and administrative procedures. In fact, some innovators and creators view the IP system with trepidation and suspicion, more as an obstacle to their entrepreneurial dreams than a system for protecting the fruits their intellectual labors.¹¹ Through "grassroots"

and Social Justice: Mapping the Next Frontier, 5 Prop. Rights Con. J. 147 (2016); MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE (2012).

⁹Lateef Mtima, *IP Social Justice Theory: Access, Inclusion, and Empowerment*, 55 Gonz. L. Rev. 401, 417 (2019/2020) ("Human beings often direct their intellectual energies toward creative and inventive endeavor as a matter of innate curiosity, aesthetic inspiration, or utilitarian needs. The human drive toward self-expression and useful innovation has been manifest since the first cave paintings and the invention of the wheel. Nonetheless, material incentives to undertake specific kinds of intellectual endeavor can further stimulate such activity.")

¹⁰ See e.g. Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016); MTIMA, INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE at xvii ("To gain control over your intellectual property – the products of your mind, talent, and cultural traditions – is to gain control over resources that can give you the leverage to do business in the national and global marketplace on a level playing field.")

¹¹ Indeed, inventor and entrepreneur mistrust often extends to patent attorneys and professionals. Accounts of the predatory exploitation of unsuspecting inventors and creators run the gamut. In addition to the familiar, sham "patent acquisition" companies which entice inexperienced inventors with baseless promises to obtain patents on their behalf, one recent client of the Howard Law School IP Clinic recounted how one firm had previously offered to secure a "patent" to protect her fiction novel, for a fee of \$30,000.



community IP education programs, government IP public outreach personnel can recruit and collaborate with private sector IP attorneys and experts who have relationships with IP-underserved communities, to conduct basic IP awareness and information seminars in local venues of social, civic, and communal congregation. These programs could also provide the added benefit of connecting local entrepreneurs with IP attorneys familiar with their relevant background experiences, unique interests, and special concerns.¹²

ii) A Low-Income Inventor “Pre-prosecution Patentability Assessment” Pilot Program

While compliance with the administrative and legal prerequisites to patent protection can be daunting, there is little doubt that the sheer cost of obtaining a patent can present an absolute bar to patent acquisition.¹³ Even for those small to medium inventors who can manage to pull together the funds needed to pursue patent prosecution, the process may nonetheless appear to present an all-or-nothing gambit, weighing the risk of financial exhaustion against the possible prize of a patent grant. In some situations, a preliminary confirmation of patent viability could signal an opportunity “to get in on the ground floor” and induce venture capitalists and others to underwrite the expense of patent prosecution. The development of a pilot initiative in the U.S. Patent Office, through which inventors with limited financial resources could obtain minimal/no fee “pre-prosecution patentability assessments”, would enable such inventors and interested investors to identify promising applications which warrant the expense of patent prosecution, while concomitantly avoiding the expenditure of precious resources on applications unlikely to prove successful.

iii) A Study on IP and K-12 Education

While American grade school students are routinely exposed to the wonders of science and art, the relationship between these subjects and intellectual property is rarely if ever explored. Little wonder then, that many young scientists, technologists, and artists misperceive intellectual property rights as the concern of those who pursue intellectual pursuits solely for selfish, commercial gain. Grade school and undergraduate students should be taught how the products of scientific and artistic study benefit society through the broad dissemination attendant to commercialization. The commission of a study as to how intellectual property concepts can be appropriately introduced into K through 12 and undergraduate arts and sciences education, can help to close the pedagogical divide between these complementary disciplines.

Conclusion

Equipped with knowledge of and genuine access to the patent system and the IP ecosystem as a whole, everyday Americans can harvest their inventive and creative potential to empower themselves and benefit their communities through entrepreneurial enterprise and civic engagement. Our nation can no longer afford fallow tracts of human potential. Contribution to America’s scientific, technological, and cultural advancement is both the privilege and the responsibility of every citizen, and promoting the widest participation in this enterprise

¹² Rita S. Heimes, *Lawyers and Innovation*, INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE at 119.

¹³ Gene Quinn, *The Cost of Obtaining A Patent in the US*, <https://www.ipwatchdog.com/2015/04/04/the-cost-of-obtaining-a-patent-in-the-us/id=56485/>; [https://krajec.com/patent-prosecution-costs/#:~:text=Patent%20prosecution%20costs%20will%20average,and%20the%20patent%20is%20granted](https://krajec.com/patent-prosecution-costs/#:~:text=Patent%20prosecution%20costs%20will%20average,and%20the%20patent%20is%20granted;); *How Much Does a Patent Cost?*, <https://blueironip.com/how-much-does-a-patent-cost/>.



serves our national interests. By implementing the social justice aspirations of equitable access, inclusion, and empowerment in the administration of our intellectual property system, we can fulfill the best and highest function of IP protection: to foster human nourishing, flourishing, and actualization by promoting beneficent intellectual endeavor.