

ANTITRUST MODERNIZATION COMMISSION

Hearings

New Economy Study Group

Panel II: Patent Law Reform

8 November 2005

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Written Testimony of Peter Detkin, Managing Director, Intellectual Ventures, LLC

Contact Information:
Peter Harter
Vice President, Public Affairs
Intellectual Ventures, LLC
peterh@intven.com
1756 114th Avenue SE
Suite 110
Bellevue, WA 98004
www.intellectualventures.com

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Summary

The patent system is the foundation of America's technological competitiveness. Patents are the legal construct that breathes economic life into inventions by giving their inventors a property interest in them. I am honored by this opportunity to present my perspective to the Antitrust Modernization Commission.

On behalf of individual inventors, scientists, and entrepreneurs I applaud the Commission for choosing to focus on the intersection of innovation, intellectual property, and technological change. Both patent law and antitrust doctrine are complex subjects that are often misunderstood. As we examine the reports on the patent system by the National Academies and by the Federal Trade Commission in the context of the ongoing work by Congress on patent reform legislation I urge all involved to focus on consensus issues that benefit all users of the patent system.

My first and primary concern is the protection of the rights of small inventors, including universities, small businesses and individuals. It is important that we keep the playing field level for all inventors, because America's strength is in the diversity of its inventive talent. I hope that this Commission agrees that this priority is essential for competition in the marketplace, especially in light of challenges from overseas. If there is one thing that the Commission can do it is to apply rigorous economic analysis based on objective data to the issues in the patent reform debate. Antitrust analysis depends on facts, not anecdotes. The same should be true for producing the best public policy for the patent system.

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Ms. Chairperson and Members of the Commission, my name is Peter Detkin. I am pleased to have been asked to share my views on the patent system with the Commission. My personal history is relevant to my remarks today, so I will begin by introducing myself.

Background

I was educated as an electrical engineer and then as a lawyer, and began my legal career in 1985 as a patent attorney in New York City. Two years later I moved to Silicon Valley, where I was the first patent lawyer hired by Wilson, Sonsini, Goodrich and Rosati in Palo Alto, California, and where I eventually became a partner. While at Wilson Sonsini I was a litigator with lead or second chair responsibility for many high-profile intellectual property litigation matters. Perhaps the most important case I worked on was the trial and appeal in the seminal copyright case of *Lotus v. Borland*, in which the US Supreme Court affirmed the First Circuit's ruling that the Lotus 1-2-3 menu command hierarchy was not copyrightable subject matter.

In 1994 I joined Intel Corporation in Santa Clara, CA, where I spent over eight years as Vice President and Assistant General Counsel with responsibility for managing the patent, litigation and licensing departments (including all aspects of prosecution and claims management) and the competition policy department. As part of my responsibilities with Intel I was the lead attorney responsible for managing the defense of, and ultimately the settlement of, the antitrust action by the U.S. government against Intel (via an administrative antitrust action brought by the FTC). This case dealt with issues at the cutting edge of the intellectual property / antitrust interface, as the FTC alleged that Intel engaged in illegal monopolistic behavior by refusing to license its intellectual property to three customers in order to coerce them into surrendering certain intellectual property rights. After a year of litigation Intel and the FTC negotiated a resolution – in a weeklong series of meetings between myself and Bill Baer, then Director of Competition Policy at the FTC – which protected Intel's right to determine who would receive a

license to its patents. The legal issues at the heart of this matter were also the basis of a private civil litigation between Intel and Intergraph, which was ultimately resolved in Intel's favor (See *Intel v. Intergraph*, 195 F.3d 1346 (Fed. Cir. 1999)).

My responsibilities at Intel also included the management of Intel's patent portfolio (comprising several thousand patents) and the Intel patent licensing department. While at Intel I personally negotiated patent licenses worth hundreds of millions of dollars, and oversaw the negotiations of licenses worth ten times that amount.

I was also responsible for all intellectual property litigation at Intel, and in that time I began to observe particular trends concerning the rising number of patent claims being brought by entities which were asserting patents of dubious value and seeking nuisance value settlements, often threatening injunctions along the way. In a number of speeches at the time (including testimony during the joint DOJ-FTC hearings of 2002 on competition and intellectual property) I gave a colorful name to these entities as a way to garner attention: patent trolls.

A few years ago I joined Intellectual Ventures as partner and Managing Director. Intellectual Ventures is a company founded by two ex-Microsoft engineers, and our mission is to "invent, and invest in invention." Since the company is young, small and privately owned we are only just beginning to publicly convey our story of invention and intellectual property.

Thus, my career has spanned every aspect of the patent spectrum: I am registered to prosecute patents (and have prosecuted patents) before the PTO, I have had lead responsibility for litigating and licensing scores of patents (both as licensee and licensor) and I am now a principal in an entity whose primary asset is its patent portfolio. Fellow panelist Carl Shapiro once stated (in a personal inscription to me in a copy of his book *Information Rules*) that I am someone who "lives and breathes these issues every day." While this is more than a bit of an exaggeration, the fact is that my entire career has been devoted to all aspects of patent law and policy.

In the past few years the phrase "patent trolls" has taken on a life of its own, and was even the focus of a conference in Washington, DC ("Patent 'Trolls' and Patent Property Rights," sponsored by the Intellectual Property Owners Association, 14 March 2005). The phrase now seems to be used as a placeholder for all the ills perceived in the patent system. This overuse and ever-broadening definition has not gone unnoticed; at a recent Senate hearing Senator Hatch asked the witnesses if they had ever seen a patent troll. The audience giggled, and the witnesses for Amgen and GE openly admitted that, under current definitions, they themselves were patent trolls. Similarly, the prolific inventor Dean Kamen, the creator of the patented dynamic stabilization technology at the heart of the Segway Human Transporter and a member of the PTO's Patent Public Advisory Committee, acknowledges that, under current definitions, he is a patent troll (See comments made during Q&A in the 25 April 2005 Senate Intellectual Property Subcommittee hearing and at the 9 June 2005 "Conference on Patent Reform" sponsored by the National Academies, the AIPLA and the FTC).

I hope my testimony helps the community reconsider hyperbolic topics like patent trolls and explore problems such as “patent squatters” which have largely been ignored in the patent reform debate. From this perspective I will comment on the four specific questions presented to me by the Commission’s staff on 20 October 2005 (*i.e.*, ANTITRUST MODERNIZATION COMMISSION, REQUEST FOR PUBLIC COMMENT, New Economy, (Comments Requested by July 15, 2005), pages 1-2 (a revised version of the 4 May 2005 New Economy Study Plan memorandum)) regarding the reports by the National Academies and the FTC.

Question C.1. Do the reports fully capture the role of patents and developments in patent-related activity (e.g., applications, grants, licensing, and litigation) over the past 25 years?

Looking 25 years into the past takes us to an interesting time in the history of our country with respect to the role of intellectual property, innovation and competition, as it was 25 years ago this December that the Bayh-Dole Act unlocked technology transfer from universities to the private sector. Before that, inconsistent regulations and practices meant that inventions funded by taxpayer dollars never reached the marketplace. Licensing was impeded by bureaucratic red tape. Fortunately the Bayh-Dole Act changed that landscape, and the licensing of inventions from universities now flourishes. The biotechnology industry is a well known and widely appreciated example of the positive outcome of this landmark intellectual property legislation.

Interestingly, the Bayh-Dole experience helps to debunk the myth of the worthless patent. Many people like to complain that there are too many patents and that it is too easy to get a patent, and often cite one or two humorous examples. (A recent favorite is the patent on a new method for making a peanut butter and jelly sandwich, US patent number 6,004,596.) However, during the life of Bayh-Dole patents by universities have increased from fewer than 250 issued in 1980 to nearly 4,000 issued in 2003. In 1980 few university patents were commercialized; in 2003 some 500 new products came to market and over 350 companies were formed, part of a total of 4,100 companies created by Bayh-Dole. (See Association of University Technical Managers FY 2003 Licensing Survey: <http://www.autm.net/surveys/dsp.surveyDetail.cfm?pid=16>.) It is hard, in the face of this data, to argue that – as a whole – patents are becoming increasingly worthless.

In fact, Bayh-Dole allowed private sector start-ups to take languishing dusty government patents and turn them into profits, job creation, and further innovations. Bayh-Dole breathed life into patents which were slowly dying, unnoticed. At Intellectual Ventures we have embarked on a similar path. We invent and file for patents, but we also gather issued patents, and through our patent portfolio we are seeking to set up profitable spin-off companies, create new jobs, and step up the innovation cycle, benefiting consumers. In many ways, this free market process is what has enabled America to maintain its world technological leadership. We believe in its success and have invested our talents in maximizing its potential. As part of our efforts, Intellectual Ventures has licensed

university patents to several large companies, returning hundreds of thousand dollars to universities to be put back into their research. We continue to invest directly in research in all its forms, and hope that we can continue to bring great university generated inventions to businesses. Bayh-Dole gave universities the right to profit from their inventions; Intellectual Ventures is working to give them the means.

Looking forward, I believe it is critical for this Commission to look beyond the snapshot of the National Academies and FTC reports to examine where America will be 25 years from now based upon the strengths of the patent system today.

While it is important that we consider the problems identified in those reports with respect to issues at the PTO and perceived lawsuit abuses, it is also important that we keep sight of the issue of theft of property. I am concerned that there are many anecdotal complaints today about our patent system, and those anecdotes are driving the clamor for reform. It must be recognized, though, that – on balance – our system is the finest in the world and the engine for our economy. We should only tinker with those aspects of the system where there is real data showing that there is a problem to be solved.

One example that illustrates the need for data is the controversial proposal on Capitol Hill to change a patentee's right to injunctive relief. A primary justification advanced for the injunction proposal is that successful and innovative companies need this legislation to beat back a rising tide of nuisance lawsuits originating from greedy trial lawyers and unscrupulous patent holders. It is these very concerns that lead to my speaking out about "patent trolls" while at Intel.

However, those complaining about rampant abuses of the patent litigation system wholly fail to make any efforts to demonstrate the size of this problem, relying instead upon anecdotes. For example, during the September 15, 2005 hearing by the House Intellectual Property Subcommittee on patent reform the lead witness for changing injunctive relief, Emery Simon, Counsel, the Business Software Alliance, testified:

[T]he problem of excessive litigation continues to spiral out of control in our industry. If I may, let me just read to you the first sentence of an article in yesterday's *Wall Street Journal* by Bill Buckley. He writes: "In one of Douglas Fuey's early business ventures he provided phony new vehicle titles for stolen cars. His partner Larry Day is a one-time Blackjack dealer in Las Vegas. Together, the two men have found a more active line of work suing cell phone companies for patent infringement. Earlier this year their company got \$128 million in damages from Boston Communications." That's an example of what I think we are confronting that is going to become more and more of a problem.

Mr. Simon's testimony highlights the patent owners' colorful background, misdirecting the listener from a far more important fact – that the defendant in that case was found to have willfully infringed someone else's valid patent rights after having worked in collusion with a manufacturer to use the patentee's technology, a holding that was

affirmed on appeal. This is hardly an abuse of the system, and sympathy for the defendant in this case should be limited.

Though it is true that there are abuses of the system that need to be addressed, we should not be significantly reducing property rights here in the US at a time when we need to be promoting stronger laws and more vigorous enforcement. Though some in the high-technology industry complain “patent trolls” take away money from R&D, profits, products and innovations, there is a crying need for real data on this point, not hyperbole. At the time I spoke out about patent trolls my primary concern was that a district court would issue an injunction immediately, before any appeal could be heard. Since then district courts have routinely issued stays of injunction pending appeal, thereby removing much of the asymmetry of risk that existed in a trial, and giving the defendant a chance to have its arguments fully heard. For example, in the two most prominent cases in the news today (MercExchange’s case against eBay, NTP’s case against RIM) the defendant has been allowed to operate without interruption throughout the appeals process despite a finding of infringement by the district court years ago. This development has significantly changed the landscape.

In sharp contrast to the anecdotal arguments about patent trolls, real data shows that “patent squatters” are an actual and growing problem. A person who moves into a house or apartment without the permission of the owner is called a squatter and is not tolerated. Similarly, we have little compassion for a builder who, coming across an unoccupied parcel of land, simply starts to build without thoroughly performing a survey and title check.

Yet this is precisely what happens in the intellectual property world. Witnesses for high-tech companies freely admit that they do not perform any patent clearance studies before releasing their products. It is those same companies that are coming to Congress complaining that the patent laws are too draconian. It is as if Home Depot were to build a store wherever it pleased without bothering with a title search, and then complaining about the property laws when brought to justice. In response, some argue that a full product clearance is not possible, either because (a) the products are too complex and there are too many patents possibly at issue, or (b) so many patents issue later (or the applications are later published). While these are valid criticisms, they do not excuse a complete lack of effort. The current “head in the sand” approach that is current standard operating procedure should not be viewed as acceptable to anyone.

Companies that market products without patent clearance routinely ignore the valid patent property rights of others, demanding that an inventor go to litigation rather than provide fair compensation for the invention short of litigation. It cannot be that every lawsuit is frivolous, especially when a court ruling is upheld on appeal. Put another way, while it may be true that a company which is routinely sued may be subject to a few frivolous lawsuits, it is highly doubtful that all such suits are without merit.

As another example, I am frequently asked to speak to gatherings of high-tech attorneys and executives on the topic of patent reform. (I would estimate that I have given eight

such speeches over the past 18 months.) Each time I start the speech by asking how many companies have ever actually been enjoined by a patent troll. To date, not a single hand has been raised. It is hard to conclude, in the face of this evidence, that reform of the injunctive relief provision is needed, and that trolls are such a concern that a major overhaul of litigation practices is required.

Moreover, the proposal to eliminate injunctive relief for a class of patent owners as a means to reduce litigation is fundamentally flawed. In fact, such a proposal would dramatically increase the number of patent lawsuits, as well as their complexity and cost. Ironically, this proposal, which is often described as being yet another much needed and important reform against the excesses of trial lawyers, is in fact the trial lawyers' full employment act.

Approximately 97% of patent lawsuits settle prior to a trial. The entire viability of the court system depends on this high settlement rate. Even a small change would overwhelm the courts with vastly more trials. If injunctive relief is removed large companies will have no reason to settle. Their principal motive in settling a patent suit before trial is to avoid the possibility of an injunction should the company be found to be infringing, and to avoid enhanced damages should their unauthorized use of property be found to be willful. Without these threats, companies being sued will adopt the best strategy for their shareholders: refuse to settle and use the advantage of their deep pockets to drag lawsuits out to the bitter end, secure in the knowledge that no injunction will issue. All notions of design-around or settlement will be tossed out the window.

Some critics of the system ask "why aren't monetary damages enough? Why are injunctions needed?" There are several answers. Corporations fear injunctions, and that's what brings them to the settlement table. Determining commercial use and setting license fees will greatly complicate the litigation process. But perhaps the most important reason is that a proposal that leads to compulsory licensing will inject court-mandated control over future licensing rather than allowing the parties to work out a market-oriented solution. This is antithetical to the way our system has historically been run, and to all notions of property rights in a capitalist system. Just as the public has reacted with dismay to the notion that a local municipality can take real property rights for commercial purposes under the guise of eminent domain (in the wake of the *Kelo* decision (125 S.Ct. 2655 (2005))), so too should the economic community react to the possibility that intellectual property rights could so easily be diverted.

Fortunately this controversial injunction proposal is not currently a part of the patent bill being discussed in the House Intellectual Property Subcommittee. However, the economic and political interests of its supporters are such that it will likely return in another form, in another legislative vehicle.

"Patent squatters" are those who did not win the race to invent, did not obtain the reward for winning the race, did little or no investigation to confirm whether a race to invent had occurred. They build a company or business relying on the rights that have been awarded to someone else and then complain when the owner of those rights knocks on their door

to demand that they either pay rent or move out. I challenge supporters of weakening a patentee's rights, including injunctive relief, to provide data that shows patent trolls are a larger problem than patent squatters.

If we allow patent squatters in the US to take and keep the property of another, subject only to a compulsory license, then what is to stop a technology pirate abroad from doing the same? Under such a system investors are less likely to risk capital on scientists, ideas and inventions in areas that are easily taken by incumbents or in markets where the government does not protect property. As the creator of the "patent troll" term and as an investor in the creation of inventions, I strongly urge the Commission to consider this challenge to property protection as a cultural issue that may be poisoning the patent reform debate. If we don't have a culture to respect patents, then "troll" becomes synonymous with plaintiff.

Based on my previous experience as a litigator, and especially from my days at Intel, I clearly understand why defendants hate the thought that they cannot file a countersuit against a licensing organization that does not have products. But it is perfectly honorable to invent without making products, as practiced, for example, by universities, individuals, pre-product companies, and companies inventing outside their product areas. Even Thomas Edison made his career by inventing and licensing his patents, not productizing. We must remember that the US patent system protects inventions, NOT products. Do we really want to deter the next Thomas Edison?

Question C.2. Are the concerns or problems regarding the operation of the patent system identified in the two reports well-founded?

The National Academies and FTC reports largely focused on perceived problems with the U.S. Patent & Trademark Office and patent quality generally. In contrast, though, many of the proposals regarding patent reform on Capitol Hill have been aimed at addressing perceived litigation abuses. Again, I believe it is important that cooler heads prevail and that those looking to legislate ensure that they are acting on real data, and not hyperbolic anecdotes. While I understand the frustration of my colleagues in large technology companies, the reality is that the impact of these lawsuits is exaggerated. Some horror stories exist, but they are rare. The magnitude of the supposed problem is not borne out by the statistics.

Perhaps most importantly, all data indicates that patent litigation is slowing down in general. According to a recent IP Law Bulletin (20 October 2005), patent litigation has dropped 12.9% in the past year alone (<http://iplb.portfoliomedia.com/cgi-bin/absolutenm/anmviewer.asp?a=4324&z=18>). More generally, data from the federal court system shows that patent litigation has been the slowest growing area of IP litigation overall, and has the fewest number of litigations filed overall. Perhaps most importantly, patent litigation on a per-patent basis (*i.e.*, per protectable invention) has been steadily declining since 1997. The data clearly shows that the system is not out of control.

Moreover, suits by non-practicing entities are not the problem they are portrayed to be. We recently did a study counting the total number of lawsuits filed against technology companies by entities that do not produce products. Preliminary results indicate that the total of all these lawsuits over the last five years was just over 2% of all patent lawsuits. Furthermore, fully half of those lawsuits are from one very litigious company. We also counted the number of patent lawsuits in which a large technology company was the plaintiff – the result is 1.6%. Thus, large technology companies generate nearly as many lawsuits as the entities that have no products. And, if you take one litigious company out of the mix, the number of suits filed by large companies exceeds the number filed by non-practicing entities.

These numbers put some perspective on the problem. On one hand, by significantly overhauling the system we have the potential to harm tens of thousands of small inventors. On the other hand we have the supposed benefit – to reduce the total number of lawsuits by perhaps one percent. It seems clear that the cure is far worse than the disease.

Some of the proposals made in the National Academies and FTC reports address legitimate concerns with the patent system (as opposed to the litigation system). I address those below.

Question C.3. Which, if any, of the recommendations for changes to the patent system made in those two reports should be adopted?

Adequate Funding of the PTO is a Sine Qua Non of Realistic Reform

The one recommendation for change that must be implemented before any other proposal has any hope of success is ensuring that the PTO has adequate resources to carry out the important job with which it is tasked. Any comprehensive report on America's patent system should include an unequivocal recommendation that the PTO receive adequate funding to carry out its critical mission. (As Mark Twain famously observed, a country without a good patent system “is like a crab that can’t travel any way but sideways or backwards.”) Implicit in this recommendation, of course, is the notion that Congress cease its practice of diverting PTO fees -- paid exclusively by patent and trademark applicants -- to other areas of the federal government. Without appropriate funding for the PTO, any hope of implementing meaningful improvements to its operations is unrealistic.

Both reports stress the need for adequate PTO funding. Moreover, each report supports investing additional resources in patent examination procedures as a strategy to increase patent quality, resulting in a significant cost savings at the back end. Without question, this is the right approach – improved patent quality will clearly solve many of the ills that are inherent in the system.

Post-Grant Opposition

Many of improvements proposed by the National Academies and FTC reports and discussed here today (and in the halls of Congress) encompass proposed changes to the PTO, its structure, and its examination process. But even in a perfect world, the PTO is likely to issue a few patents of dubious quality. That is part of the reason many in industry -- and the PTO for that matter in its Strategic Plan -- have suggested the need to create a post-grant review system. This will provide a cost-effective and timely forum through which to resolve patent disputes.

The value of post-grant opposition is that it gives the marketplace the opportunity to be heard and to help the Patent Office. However, this is appropriate only if done for a limited time after issuance, with a strict time limit on the opposition proceedings, and with conditions that would prevent it from being used to manipulate the system. Otherwise this would become yet another protracted and expensive dispute mechanism that would disadvantage small inventors. Much of the patent reform debate on Capitol Hill has focused on a nine month limit from time of patent issuance. This is a reasonable compromise.

However, it is important to note that any post-grant opposition of this sort greatly increases the workload of the PTO. It does not seem rational to ask the PTO to take on additional duties knowing that they lack the necessary financial resources to carry them out. Again, to reinforce what I have said earlier -- no patent reform proposal will work unless fee diversion is ended and the PTO can operate with all the funding it requires to perform its existing duties. It is odd that we are seeking to remedy complaints about patent quality by asking the PTO to take on yet more responsibility, without providing additional resources to carry out the task!

Some in the patent reform debate on Capitol Hill are asking for a second window for additional post-grant opposition proceedings after the notice of infringement. This proposal creates an open-ended vehicle for ongoing challenges to a valid patent that is simply not fair to the patent-holder. A second window would be especially hard on independent inventors, small businesses and universities who lack the litigation resources enjoyed by large companies.

Both reports echo the PTO's 21st Century Strategic Plan on the subject of post-grant review. A fairly constructed and minimalist post-grant system can increase patent quality without clogging the court system with expensive litigation. Dubious patents could be challenged immediately after issue in the agency of expertise. By design, this would result in improved quality and enhanced public confidence while avoiding excessive monetary and social costs. But care must be taken to protect the patent owners from undue harassment. This protection should include a limited window for opposition coupled with well-placed and well-crafted estoppels designed to encourage post-grant filings but prevent multiple attacks under the same validity question.

Question C.4. Are there other issues regarding the operation of the patent system not addressed in either report that should be considered by the Antitrust Modernization Commission? Please be specific in identifying any issue and the reasons for its importance.

Gaming the System: The US PTO as the “13th Juror”

Congress created re-examination proceedings as a less expensive alternative to litigation. Increasingly, though, adjudicated infringers are using this procedure as an attempt to invalidate patents already found valid by a court as a litigation tactic. This litigation tactic is essentially a “second bite at the apple” by defendants – having lost once at trial, they are trying their hand again in the PTO. This issue came up in a recent PTO oversight hearing in the House Intellectual Property Subcommittee, in which Ranking Member Howard Berman asked PTO Director Jon Dudas why people game the litigation system this way. Dudas simply replied that they do because that is what the law allows.

This Commission should examine the anticompetitive impact of this conduct by patent squatters, infringers, and deep-pocketed defendants. In turn, we are prepared to offer language to rectify this situation which we believe should be included in the current patent reform legislation under consideration.

Patent Court

There already exists a single court for all appeals of patent litigations and, without question, since its inception in 1982 the Court of Appeals for the Federal Circuit (CAFC) has improved the quality and consistency of patent law rulings. A similar system should be considered at the District Court level as well.

One of the biggest problems with our patent system today is that the decision-makers in litigation are often asked to make highly complex, technical calls in areas far removed from their expertise. Most federal district judges rarely hear more than one or two patent cases every few years. The varying procedures and training of the jurists assigned to patent cases leads to the uncertainties inherent in litigation, and leads to inconsistent results. The CAFC was created under this premise. Nearly 25 years later, we should consider establishing a specialized patent trial court system to cure the ills not remedied by the CAFC.

The proposed "Patent Court" would comprise Article I judges strategically located in jurisdictions around the country where the bulk of patent cases are filed. Essentially, these judgeships would be analogous to Bankruptcy judges. Such a specialized court could conduct patent suits more effectively and efficiently than under the existing system. Judges on the patent court should be technically trained (ideally a member of the patent bar) with experience in patent litigation. A patent court would permit the opportunity for real reform for currently perceived patent litigation woes, and nuisance lawsuits based on dubious patents could be disposed of more effectively.

Although the past several months have focused on the much-debated Patent Reform bill, the creation of a patent court system is beginning to receive serious consideration. On October 6 Chairman Smith held a hearing in the House Intellectual Property Subcommittee aimed at "Improving Federal Court Adjudication of Patent Cases". Even more recently, the Financial Times reported that a group of Europe's most senior judges is advocating the creation of a unified European patent court to resolve the often confusing decisions and inefficient operation of a fractured bench. The fact that 24 IP judges from 10 countries have made the rare move to unite and campaign speaks volumes.

I note that a similar functioning body already exists in US, and has been operating successfully for years, namely the International Trade Commission (ITC). Under section 337 of the Tariff Act of 1930 (19 USC1337), the ITC carries out investigations that are, in reality, full-blown patent cases. Essentially, a patent owner files a complaint alleging that defendants are importing goods into the U.S. that infringe the patent at issue and requests the ITC to order Customs to prevent the infringing products from entering the country. From there, a customarily complex, but extremely expedited, patent litigation ensues.

Currently, there are four Administrative Law Judges at the ITC, each of whom carries a docket of approximately 15 patent cases at any one time and oversees 2-3 trials each year. As a result of this experience the ALJs quickly become patent experts and are able to conduct trials in a highly efficient manner. Absent is the need to educate them on Markman hearings, obviousness standards and other arcane areas of patent law. Moreover, the ALJs are often very familiar with the technology at issue or have the educational background to pick it up quickly.

By statute, all decisions in the ITC must be rendered in 12 months -- including preparation time for decision. Therefore, trials are routinely held within 7-9 months after a complaint is filed and all aspects of the case are streamlined. The ITC's experience indicates that a small number of highly-trained judges can, in fact, accommodate a large, complex docket both efficiently and effectively. Learning from this experience, and knowing our economy becomes more rooted in intellectual property assets each year, I believe the time has come to create a Patent Court to benefit our nation's thriving technology sector and help ease the patent litigation woes being experienced by all parties. I have talked with many others in the industry, including some of the industry's biggest players, and believe that they would support me on this proposal as well.

Conclusion

Patent rights around the world are generally under attack. Opponents of patents rely on conspiracy theories of Armageddon resulting from a patent owner's assertion of rights. Though this is most prominent in debates over patent rights in business processes or software, it also exists in other areas as well (*e.g.*, the recent attack on Qualcomm's patent rights in Europe). This trend appears to be part of the cultural issue I discuss:

asserting patents is bad, and a plaintiff = troll. If people look at the other side of the issue they quickly realize that, in many cases, the issue is really about companies squatting on the property of others.

Only by closely looking at the data, and not at unfounded anecdotes, can an informed debate be had. I ask the Commission to join me in the call for more data and analysis on the topics we are discussing here.