Supplemental Statement of Christopher A. Mohr

Vice President for Intellectual Property and General Counsel
Software and Information Industry Association

Before the
House Committee on Small Business

"Innovation Nation: How Small Businesses in the Digital Technology Industry Use Intellectual Property"

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Mr. Chairman, Ranking Member Velasquez, and members of the Committee, thank you for this opportunity to provide supplemental testimony on the hearing, "Innovation Nation: How Small Businesses in the Digital Technology Industry Use Intellectual Property."

SIIA values the protection of intellectual property and is well aware of the important incentives that the patent system creates for innovation. Many of our members have built large and valuable patent portfolios to protect their ground-breaking innovations, based on billions invested in research and development. But our members also have experienced first-hand how invalid patents harm innovation by generating wasteful litigation and unwarranted licensing fees. This is a particularly significant issue in the software industry, where the threatened enforcement of poor-quality patents by non-practicing entities are widely-acknowledged problems.

We wish to supplement the record regarding one issue of critical importance to our members: the health of the patent system. During the hearing, all of the witnesses were unanimous in their belief that IP is not only central to the current economy, but the economy of the future. The policy decisions that Congress makes in this area will have enormous consequences, and it is essential that Congress's decisions be based on sound data that can be verified.

As our initial statement discussed, the patent system is flourishing. The operation of the America Invents Act's inter partes review provisions is essential to protecting small businesses and the public from patents that do not meet the law's requirements for protection. It allows the U.S. Patent and Trademark Office to re-examine patents that should not have been granted in the first place.

The verifiable, PTO-supplied data on the operation of IPR demonstrates that it is operating fairly and well. It is significant that patentees lose before the PTAB on validity issues less often than they do in federal court. According to the PTO's own statistics, as of October 31, 2017, the Board had rendered decisions on the merits of petitions by denying institution or issuing a final written decision in 3662 cases. Of those, it denied institution in 1845 cases (50.3%) and rendered a final written decision in 1817 cases. In only 1181 cases, or 32.3% of the time, did the Board find that all

challenged claims were unpatentable.[1] On appeal, the Federal Circuit fully affirmed 78% of decisions.[2] In contrast, patentees lose on validity when decided in federal court 42% of the time.[3] Far from indicating that IPRs make it too easy to invalidate patents, the statistics indicate the need for careful scrutiny of the underlying quality problems in asserted patents.

We were therefore gravely concerned over the repeated citation by one witness and some members of the US Chamber of Commerce's Global Intellectual Property Center's (GIPC) Innovation Index—at least insofar as it mentioned the health of the patent system. The GIPC study claims (without citation) that "A third-party analysis of PTAB data suggests that only about 5-15% of cases end with all claims being patentable."[4] It is on that basis that the United States lost a half a point in the global rankings, dropping from its first-place position on patents (though still remaining first overall in global innovation).

Unfortunately, the GIPC study relied on fiction. This so-called "analysis" is based on false premises that apparently originated in a blog post.[5] According to the PTO's own data, thirty-

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[1] USPTO, Patent Trial and Appeal Board Statistics, 10/31/2017, slide 12, *available at* https://www.uspto.gov/sites/default/files/documents/trial_statistics_october_2017.pdf.

[2] David C. Seastrunk et al, Federal Circuit PTAB Appeal Statistics – April 1, 2017, AIABlog (April 17, 2017), available at http://www.aiablog.com/cafc-appeals/federal-circuit-ptab-appeal-statistics-april-1-2017/.

[3] John R. Allison et al, *Our Divided Patent System*, 82 U. of Chicago L.R. 1100, 1073-1154 (2015) (an evaluation of all court decisions made between 2009 and 2013 on patent cases filed in 2008 and 2009).

[4] U.S. Chamber Int'l IP Index, 157 (2018).

[5] http://www.ipwatchdog.com/2017/10/30/ptab-patent-trolls-bad-patents-wakeup-aia-apologists/id=89609/. Nonetheless, the same patent system that this inventor decries has allowed his invention to generate $125 million per year in sales. https://www.wsj.com/articles/battle-of-the-water-balloons-points-up-patent-predicaments-1510750802. On May 30, 2018, the Federal Circuit affirmed the patent's validity. http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-1726.Opinion.5-29-2018.1.pdf (reversing PTAB judgment of indefiniteness).

seven percent of petitions to the board are never instituted at all.[6] Thus, the study's claim is mathematically impossible.[7]

But it gets worse. When one examines the actual decisions of the IPR proceedings on the merits—defined as when the PTO either (1) declines to institute a proceeding, because there's no reasonable grounds to think that the patent is invalid, or (2) when it issues a final written decision on the validity of the challenged claims—the PTO upholds the entire patent nearly 60 percent of the time.[8] And even more remarkably, countries like the Philippines and Saudi Arabia scored higher than the U.S. in the study's "opposition" category, *despite the fact that no data on either patent system's opposition process is available.*[9] Were these errors corrected, SIIA suspects that the GIPC's data would show that the United States' patent system leads the world—just as it always has.

The Alliance for US Startups Inventors and Jobs' (ASSIJ) testimony has even worse problems. In its data sources (the National Venture Capital Association's) own words:

> "the first half of 2018 embodied the high level of capital availability throughout the US venture industry. $57.5 billion was invested across 4,000 deals, pacing the year to surpass 2017's decade-high total for capital invested by the end of next quarter. Never since the dot-com era has so much capital flowed into every stage."[10]

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[6] *See* Patent Trial and Appeal Board, "Trial Statistics: IPR, PGR, CBM, (2018), (page 11) available at https://www.uspto.gov/sites/default/files/documents/trial_statistics_20180630.pdf.

[7] For a more thorough analysis of the problems with the GIPC's claim, see https://www.patentprogress.org/2017/11/14/ccia-submits-letter-record-house-judiciary-subcommittee-ip/

[8] "Trial Statistics: IPR, PGR, CBM." Patent Trial and Appeal Board (2018), available at https://www.uspto.gov/sites/default/files/documents/trial_statistics_20180531.pdf.

[9] *See IP Index showing decline in the US patent system lacks credibility, claims Unified COO,* available at https://www.lexology.com/library/detail.aspx?g=9d6be2f4-c1b3-446f-ba5d-cdeaff5c9453.

[10] Pitchbook, 2Q 2018 PitchBook Venture Monitor, July 9, 2018, https://pitchbook.com/news/reports/2q-2018-pitchbook-nvca-venture-

How, then, did ASSIJ form the conclusion that there is "systematic weakening" of the patent system? Furthermore, the two technology organizations that testified represented over 5,000 companies from all sides of the technology industry. Why is it that a coalition of only thirty companies sees what they do not?

The answer is bad data. For example, slide 14 of the ASSIJ study claims that drug discovery is in a decline, by focusing on the rate of investment. There are two problems with this assertion. First, when the graph is compared to what is actually in the primary source, it matches the graph for *drug delivery.*[11] These kinds of elementary (and, as of yet uncorrected) errors do not engender confidence. And the slide deck's focus on a rate of decline is meaningless without showing that rate in the context of the investment picture. The total amount available for drug delivery has more than doubled—from $151 to 354 billion.[12] Other problems abound—such as the claims that "B2C" software investment has dropped—but there is no source data for this particular category.[13]

ASSIJ's data is unreliable, and reliance on it and the Chamber study to roll back litigation reforms will result in harm to innovation. Federal courts routinely toss exactly this kind of junk science out of court in cases with far smaller stakes than twenty-plus percent of the national economy.[14]

Congress should demand no less.

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monitor. See also Healthcare VC InvestingCould Hit a Record High in 2018, available at https://www.forbes.com/sites/arleneweintraub/2018/07/12/healthcare-vc-investing-could-hit-a-record-high-in-2018/#1100be7665d2.

[11] See Patent Progress, https://www.patentprogress.org/2018/07/13/ip-witness-gives-incorrect-testimony-to-house-small-business-committee/

[12] *Id.*

[13] *Id.*

[14] *See, e.g.,* Lilly v. Harris–Teeter Supermarket, 720 F.2d 326, 337 (4th Cir.1983) ("The first problem with this data, however, is that its scope—covering the stores and warehouse for only 1976 and only the stores for 1975—is insufficient to prove discrimination from 1974 *469 through 1978.") *see also* EEOC v. Am. Nat'l Bank, 652 F.2d 1176, 1195 (4th Cir.1981) (deeming expert evidence unreliable where it drew conclusions about seven-year period from only one of those seven years).