

U.S. Senate Judiciary Subcommittee on Intellectual Property Hearing:

Foreign Competitive Threats to American Innovation and Economic Leadership



April 18, 2023

Key Quotes:

Senator Chris Coons (D-DE)

On National Security Threat from China's Efforts to Overtake U.S. on Innovation

"America's leadership on the global stage depends on our ability to foster and protect innovation and creativity both at home and abroad. Our competitors and adversaries recognize this fact. China, for example, has been trying now for decades to unseat America as the world's innovation superpower. To do so, Chinese government and companies collaborate to acquire foreign technology and create domestic innovation industries.

"This isn't a surprise as IP drives economic growth. The USPTO reported that in 2019, IP intensive industries things like computer technology, pharmaceuticals, entertainment, accounted for nearly 50 million American jobs and 7.8 trillion in economic value, representing 40 percent of our GDP. Innovation is a key driver for our competitiveness and our national security.

"China's focus on IP raises national security concerns and questions about how China is manipulating rules based international systems to its own advantage."

On Weaknesses in U.S. Intellectual Property System

"At the same time, our emerging weaknesses in our own IP system have made it more difficult for rights holders to assert their rights, protect themselves, and safeguard their IP from either domestic or foreign threats. Patents are today easier to challenge in the PTAB trials than in district courts. Patent owners who prevail in litigation can no longer rely on securing permanent injunctions to prevent ongoing infringement."

On Concerns About Lack of Clarity In U.S. Patent Eligibility Law

"I also remain concerned about unresolved issues around the scope of eligible subject matter or patentability. More than a decade after the Supreme Court waded into patent eligibility law, confusion reigns about what areas of innovation are still eligible for patent protection. Critical technologies like medical diagnostics, and software have been excluded from protection here, but qualify for patent protection in Europe and China. These and many other challenges have led to the slipping stature of our IP system on the global stage and jeopardize long-term investments in research. I worry that China and other adversaries and competitors will exploit our system for their advantage."

Senator Thom Tillis (R-NC)

On Need for Strong Intellectual Property Right to Incentive American Innovation

“We’ve got to do better. We’ve got to incent innovation, and I believe that the foundation, or the bedrock for our success is making sure that we protect intellectual property rights... I can tell you that the lack of certainty and the risk of having your IP rights stripped has an absolute chilling effect on businesses, it has a chilling effect on innovation.”

Mark Cohen

Asia IP Project Director, Berkeley Center for Law & Technology University of California Berkeley School of Law

On China Overtaking the U.S. in Key Areas of Technology

“During the past 10 years, U.S. competitiveness in key technologies has eroded. Various studies based on such measures as patents, scientific publications, widely cited papers, and technology clusters have shown that China’s capacity to innovate in many areas now exceeds the United States.”

On Importance of Restoring Injunctive Relief in Cases of Patent Infringement

“[I]n China, injunctions are automatic. Injunction rates are 95 percent or higher. And the only reason they’re not 100 percent, is sometimes the patents are no longer in effect by the time the court decision comes down. So, basically, it’s the rare instance where an injunction is not granted for any kind of IP infringement.

“This is a comparative disadvantage for the U.S. because it’s not a certainty that an injunction will be awarded. Our damages are high, but litigation takes time in the U.S. and it’s quite expensive. And in China, your six months first instance, three months appeal. So, nine months and your case is done. In most cases in the U.S., they haven’t initiated discovery at that point. So, you have an injunction and if you have a global litigation scenario, that injunction, if the goods are manufactured or sold in China, can be extremely valuable, not only a compelling a resolution in China, but a global resolution. And this has happened many times.”

On Consequences of Lack of Clarity in U.S. Patent Eligibility Law

“[L]ack of clarity decreases the attractiveness of patents as the basis for investment and capital formation, manufacturing, everything else attended to that. I view lack of clarity is at least as big a problem as the substantive eligibility issues.

“Again, to make the comparison, China generally grandfather prior decisions that are more respectful of property rights. So, they will rarely run into this problem where their court has made a decision that is uncertain and narrows rights, because you’ll generally be grandfathered, at least with respect to the rights you have. But if you have instability, it not only affects you prospectively, but for previously granted rights that could be invalidated.”

Suzanne Harrison
Chair, Patent Public Advisory Committee
San Francisco, CA

On Need for a New IP Narrative That Emphasizes How IP Helps U.S. Compete

“The U.S. needs an effective counter strategy to address this new competitive threat [from the Chinese strategy of ‘innovation warfare’]. IP is the newest tool in our comprehensive defense toolbox, and we must do a better job of utilizing it to keep our country safe and grow our economy...”

“First, create and disseminate a new IP narrative. For the past 17 years, the narrative around IP has focused on optimizing the IP system for one set of industries over another. This ultimately led to the formation and implementation of PTAB at the USPTO. Unfortunately, this also led to a lack of public confidence with the USPTO as this setup of false and damaging narrative that either the USPTO examiners were granting patents that should not have been granted, or that PTAB judges were invalidating patents that were rightfully granted. Redirecting that narrative is necessary to strengthen public perception of IP. Describing how IP can help the nation economically, technologically, and as a vital part of our national security strategy is needed...”

“I think that we should be focusing on our IP system because it increases our GDP first and foremost... The USPTO recently came out with some numbers from Professor Lisa Cooke that said, if we quadruple the number of inventors and we bring those inventions to market, we could increase GDP four and a half percent. That is a very large number. That’s like a trillion dollars. And if we could add that to our economy, that’s a massive engine of growth. So, first and foremost, get our own house in order.”

On Need to Restore Ability of Patents to Exclude

“Two, shore up our IP ecosystem. In the innovation warfare paper, we discuss using patents as technology control positions. The concept of a technology control position only works if patents can actually exclude. Over the past 17 years, the Supreme Court has significantly eroded the ability of a patent to exclude others. Congress needs to restore this fundamental right and reduce ambiguity created by the judiciary across the IP ecosystem in areas such as obviousness, eligibility, claim construction, damages, and more.”



Patrick Kilbride

Senior Vice President, Global Innovation Policy Center (GIPC)

U.S. Chamber of Commerce

On Importance of Protecting Intellectual Property Rights

“The National Science Foundation has found that three quarters of the R&D performed within this ecosystem comes from the private sector; an investment that relies on intellectual property rights backed by the rule of law. The IP is so critical because it enables those investments in long-term, high-capital, high-risk projects, it enables owners to assign a value to their intangible assets, and enables them to engage in exchange of assets with other stakeholders within the ecosystem, on mutually agreed and enforceable terms.”

On Current Threats to Innovation Ecosystem

“And yet this innovation ecosystem is under threat systemically, in a multilateral level, and in piecemeal national level attacks, [taking] the form of online piracy, counterfeiting, trade secret theft, erosion of legal rights, forced technology transfer, political stigmatization of IP, and outright waiver of global IP commitments, creating an environment where American innovation and creativity is vulnerable...”

“I think it’s important that the U.S. government use the tools that are at its disposal. Some of those include imposing costs when bad actors from any source infringe our intellectual property. But I think what’s most important to your initial question is that we get the system right at home. And I think we’re very concerned that there’s been a sort of political shift, and IP has become out of fashion all of a sudden, and that’s very alarming.”

On the Need to Treat Intellectual Property the Same as Any Private Property Right

“I think it’s critical that we restore the foundations of our own IP system, that’s going to do more than anything that we can impose on foreign actors...”

“I will say how important I think it is to afford our intellectual property, the characteristics of a private property right with all of the benefits that accrue to that. And if you want to think about why that’s so important, we need only ask ourselves, how much would any of us pay for a car if we had to leave it on the curb with the keys in it every night? Probably just enough to use of it for a hours and that’s exactly how much American entrepreneurs, and creators will invest in their innovation and creativity, if we allow our intellectual property rights to continue to be eroded.”