November 6, 2019

The Honorable Thom Tillis
United States Senate
185 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Chris Coons
United States Senate
218 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Tillis and Ranking Member Coons:

Thank you for holding the hearing last week in the Senate Committee on the Judiciary, Subcommittee on Intellectual Property entitled "Promoting the Useful Arts: How can Congress prevent the issuance of poor quality patents?" The Innovation Alliance appreciates the opportunity to provide brief views on the issues raised during the hearing.

The Innovation Alliance represents innovators, patent owners and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes. Innovation Alliance member companies, innovate across a wide range of industries, including audio compression, wireless communications, currency counting and counterfeit detection equipment, mobile computing, haptic technology, vehicle transmission and drive train technology, and media content management, among others. What our companies have in common is their commitment to innovation and the belief that strong patents and a strong patent system leads to more innovation, more high-paying U.S. jobs, and a stronger U.S. economy.

Stakeholders throughout the patent system no doubt agree that patent quality is a good thing. Indeed, the Innovation Alliance's commitment to patent quality is memorialized in our logo, which includes the motto "Improving Patent Quality • Promoting Innovation." We support ensuring the U.S. Patent and Trademark Office and its examiners have sufficient resources to perform their exacting work, keeping patent fees from being diverted to other uses, and enacting other reforms that strengthen patents and improve predictability in the patent system.

We agree with University of Pennsylvania Law Professor R. Polk Wagner, however, that the term "poor quality patent" is often used as shorthand to denigrate a patent that may in fact be strong on substance but that stands in the way of someone who wishes to use the invention protected by the patent without taking out a license to do so. In this regard, the Innovation Alliance urges the Subcommittee to be wary of any assertion that there is a "crisis" in patent quality.

Statistics about patents declared invalid in litigation are not instructive. The sample examined for such statistics by definition involves only a specific and unique minority of patents, namely those where there is strong disagreement on the meaning and validity of the patents at issue. Only in such cases would it be rational for the parties to the dispute to be willing to spend millions of dollars either attacking or defending the validity of the patent through to the end of a patent litigation resulting in a court decision. Disputes involving patents that are clearly valid, or clearly invalid, are much more likely be settled before any suit is filed or before final judgment is rendered. Ron Katznelson also points out in his testimony submitted into the record of the hearing that the patent litigation rate has been remarkably steady for nearly a century, at less than two litigations per 1000 patents issued. That does not at all suggest there is a crisis in patent quality that has resulted in a disproportionate number of patents being invalidated.

For over a dozen years now, the Innovation Alliance has fought legal and regulatory proposals purportedly intended to strengthen the patent system but that would in fact make patents harder to obtain, harder to enforce, and cheaper and easier to infringe. While there are no doubt always proposals that can improve patent quality, we share Professor Wagner's concern that some changes may be very effective at improving patent quality while being deeply counterproductive and harmful at the same time. We also share his belief that changes to the patent system that increase the burden on securing a patent could have a disproportionately negative impact on individual inventors, universities, and other smaller and resource-poor actors in the patent system.

Further, we believe that any effort focused on quality in the patent system should seek to ensure not only that the patents issued by the USPTO are robust, but also that the Patent Trial and Appeal Board only invalidates patents that are truly flawed. For this reason, the Innovation Alliance supported USPTO Director Andrei Iancu's decision last year to harmonize the claim construction standard used in PTAB to that used in district court litigation. We support the STRONGER Patents Act because we believe that regulatory change should be made permanent in law, and because that legislation includes additional changes to the PTAB process to ensure fairness and limit repetitive and harassing challenges against inventors.

The Innovation Alliance supports measures to strengthen the U.S. patent system, especially as the United States competes with other countries around the world in innovative areas of strategic importance to U.S. national security. As the Subcommittee is aware, the United States is currently embroiled in a heated trade dispute with China centered primarily around intellectual property. In fact, the March 22, 2018 report of the U.S. Trade Representative upon which the dispute is based is entitled "Report on China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation." The Innovation Alliance applauds U.S. policymakers' attention to ensuring U.S. intellectual property can be enforced overseas. Strong and enforceable patent laws in the United States can help ensure we out-innovate international rivals and protect our national security.

The true crisis in the patent system, mentioned by Chairman Tillis, Ranking Member Coons, and virtually every witness before the Subcommittee, is the dire state of Section 101 jurisprudence, which is creating roiling uncertainty surrounding what inventions are and are not patent eligible. Chairman Tillis noted the "madness in this area of law" by citing the result in the

"Chamberlain Group" case, *Chamberlain v. Techtronic*, in which the Federal Circuit found the invention of a garage door opener to be abstract.

The Chairman could also have cited the recent case *American Axle & Manufacturing Inc. v. Neapco Holdings LLC*, in which the Federal Circuit found a manufacturing process for reducing vibrations in automobile drive shafts to be ineligible under Section 101 for claiming a law of nature. That case prompted House Judiciary Committee Ranking Member Doug Collins to issue a press release excoriating the ruling, calling the decision "unthinkable" and the current state of Section 101 law "clearly flawed." He added that court rulings on Section 101 are "depriv[ing] many innovative products of adequate protection," and that Congress must act on Section 101 to "ensure American inventors aren't at a global disadvantage."

These are just two of the many cases invalidating patents that by all rational measures would seem to be patentable. The courts have so muddled the interpretation of Section 101 that something you can drop on your foot can now be considered an abstract concept ineligible for patenting. To the Innovation Alliance, that suggests the case law is in urgent need of legislative correction. The persistent uncertainty in this critical area of the law is having real negative consequences for the U.S. economy.

In their seminal 2017 paper "Turning Gold to Lead: How Patent Eligibility Doctrine is Undermining U.S. Leadership in Innovation," Professor Adam Mossoff and Kevin Madigan explain how several recent Supreme Court decisions have upended the long-held understanding of Section 101 and injected real uncertainty that is putting the United States at a global disadvantage, exactly as Ranking Member Collins fears. Examining a large set of patent applications filed in the United States, Europe, and China, their research uncovered nearly 1700 patents rejected by the U.S. Patent and Trademark Office that were granted by the European Patent Office, by China, or both. Those patents include inventions in the life sciences and biotech, such as diagnostic cancer treatments, medical devices, and ultrasound imaging that now may be commercialized outside of the United States in an undoubted loss to the U.S. economy.

The recent World Intellectual Property Organization report "World Intellectual Property Indicators 2019" backs up this data. The report documents that the number of patents in the United States has decreased by 1.6 percent from 2017 to 2018, at the same time that the number of patents in China were up 11.6 percent. The report further noted that among leading patent offices, the USPTO was among those that granted the smallest percentage of patent applications – fewer than 35% of all applications processed in 2018 – and the share of rejected applications was among the highest.

The Innovation Alliance submits that the best thing the Subcommittee can do to improve patent quality is to amend Section 101 to provide clear guidance to patentees, patent examiners, the market, and the courts on what is patent eligible subject matter. We sincerely appreciate the time and attention Chairman Tillis, Ranking Member Coons, and other members of the Subcommittee have paid to this issue.

We further submit that clear and strong patent rights and additional resources for basic research in the United States will help U.S. innovators keep up with international competitors

and maintain a strong and healthy U.S. innovation ecosystem. The market failure that has resulted in the lack of a U.S.-based 5G infrastructure supplier, for instance, should be a warning signal to U.S. policymakers to focus on how to encourage greater research and development of innovative technologies in the United States. Strong and reliable patent protection is one means to accomplish this critical goal.

Thank you for considering these views. We look forward to working with you and the Subcommittee on improving patent quality, strengthening patents, and keeping the United States the most innovative economy in the world.

Sincerely,

Brian Pomper
Executive Director
Innovation Alliance

Cc: The Hon. Lindsey Graham
Chairman, Senate Committee on the Judiciary

The Hon. Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary