Summary of the Senate Judiciary Committee's IP Day Hearing

April 25, 2017

Tom Stoll, ABA-IPL Section Legislative Consultant

Today, I attended the Senate Judiciary Committee Hearing titled, “Intellectual Property – Driver of Innovation: Making Our Lives Healthier, Safer, and more Productive.” The witnesses were: Matthew C. Allen, the Acting Assistant Director of the IPR Center; Kary Eron, General Manager Health & Life Science, Data Center Group with Intel; Dr. Ashifi Gogo, PhD and CEO of Sproxil; Conor F. Madigan, Ph.D., Co-Founder of Kateeva, and Dr. Neal Gutterson, Ph.D., Vice President, Research & Development with DuPont Pioneer Hi-Bred International.

The hearing was the Senate Judiciary Committee’s nod to World IP Day (tomorrow). It was a mostly pro-IP hearing. In his opening statement, Chairman Grassley announced that he and Senator Coons were the Senate co-chairs of the Congressional Trademark Caucus and that they had just relaunched the caucus yesterday. Citing the U.S. Chamber’s recent IP report, Senator Grassley noted that IP-intensive industries employ over 40 million Americans and account for 34.8% of total U.S. gross domestic product. He also announced that he, joined by Senator Leahy, reintroduced “The Patents for Humanity Program Improvement Act, S.927,” which would make transferable the certificates to expedite certain examination that the PTO awards to those who show they have taken certain humanitarian action with their patented technology. The previous version of this bill passed the Senate in the last Congress. Senator Coons described the need for a strong IP system, noting that a recent Dept. of Commerce report stated that IP intensive industries contributed $6.6 trillion in value added to our GDP, and that ownership of IP increased the likelihood that a startup will secure investment capital by 50 percent. But he is concerned that we have weakened our patent system terribly, noting that the U.S. Chamber ranks the U.S. 10th in the world in patent system strength (all previous years the U.S. was ranked first) and that America is no longer the number one country to invest in R&D. He pointed to weakening of the patent system by cases that cast doubt on the enforceability of patents, cast doubt on whether patents to medical diagnostics and software related inventions should issue at all, and the harm done to patents by uncertainties cause by PTAB post-grant proceedings which undermines confidence in startups.
Mr. Allen of the IPR Center focused on the threat to health and safety posed by counterfeits, like exploding car air bags or the widespread use of the mail system to import counterfeit drugs into the U.S. He also testified that China is still the source of the vast majority of counterfeits. Dr. Ashifi Gogo, of Sproxil, a company that protects consumers from counterfeits through the use of a mobile app that allows consumers to enter a unique code and verify whether a drug or other item is authentic, spoke of the importance of a strong IP to consumers and his company. He spoke of the effectiveness of the U.S.-based International Anti-Counterfeiting Coalition (IACC) decision to suspend Alibaba from the anticounterfeiting alliance and how Alibaba quickly undertook a very effective effort to crack down on counterfeits. Conor Madigan of Kateeva described the huge investment in time and money needed to develop his inventions and get his company to where it is today and how important IP has been to his company, which designed a flexible paper thin Organic Light Emitting Diode (OLED) display and manufacturing process. He testified that Kateeva’s IP allowed it to secure investments of $200 million to conduct research and grow as a company, without fear of being copied. Neal Gutterson of DuPont, the large pro-IP company in the room, spoke of the massive investment DuPont makes in research and development in seed innovations that help protect farmers from crop loss, noting that such genetic hybrids can protect crops from insects, disease, and other threats. In 2015, DuPont invested $91.6 million to develop just 140 new lines of corn seed. In recent years, DuPont worked with law enforcement to help convict a Chinese national for the theft of trade secrets embodied in experimental seeds dug out of fields in Iowa.

It seems you can’t celebrate IP without someone complaining about patent trolls. Patent-hating Intel was the one company that did just that at this hearing. Although admittedly not an IP person, their witness seemed particularly prepped to talk about little else than “bad” or “low quality” patents and the need for mechanisms for removing bad patents—an obvious reference to the current PTAB and its statutory mandate to invalidate issued patents. She also spoke of the need to address the problem of patent venue.

Senator Klobuchar, while noting that she has strong patent companies like 3M (who has more patents than employees) and Medtronic in her state, observed that in Intel’s written statement Intel complains about bad patents and asked the witness what should be done to deal with low quality patents and patent trolls. While admitting to not being an expert on the issue, the Intel witness testified that she understands (was told) that patent trolls take away money that could be used by Intel to invest in R&D. Asked by Senator Kennedy how would they change IP laws, while Mr. Allen of the IPR Center said he that he would advocated for improved consumer awareness of counterfeits, the Intel witness said that the biggest problem was “the venue” and that to her it was “strange that 40% of the patent laws are filed in one court.” It was clear to everyone in the room that her answers were entirely scripted and that she was not speaking with her own words, in fact Senator Kennedy had to ask her to clarify. It’s unfortunate that even in celebrating IP Day we have to listen to attacks on the patent system. Thanks patent trolls!

Senator Durban responded to all of this by arguing that it was unfair to characterize anyone filing a patent case in court as a “troll,” because another person sees that inventor
as legitimately asserting their patent rights to protect their invention from a giant company who wilfully infringes. Neal Gutterson of DuPont argued that actions to curb litigation abuses should not be allowed to impinge on legitimate patent rights that should be defended, and should not lead to legitimate patents being invalidated. Conor Madigan of Kateeva agreed that his company relied on its patents to secure the investment they needed to grow, and that any changes in the patent laws should not prevent a little guy from defending his rights against a big guy. Senator Tillis ended the Q&A session seeming torn between having a strong patent system, which he said is enormously important for high tech manufacturing and needed for long term protections of the large investment in R&D and protecting biotech ($136 million) and pharmaceutical inventions, but also noted that patent trolls were exploiting certain industries and that we still need to make sure we address the problem of patent trolls.

Please let me know if you have any questions.

Tom

Thomas L. Stoll
Legislative Consultant, IP Law
Governmental Affairs Office
American Bar Association
thomas.stoll@americanbar.org