**House Judiciary Committee**

**September 20, 2019**

**Submitted Testimony of Representative Steve Stivers (OH-15)**

Chairman Nadler, Ranking Member Collins, and members of the Committee, thank you for the opportunity to testify before the committee today.

I am here today to urge the committee to consider intellectual property legislation that will enable our country to continue to lead as an innovator and protect the work that powers our economic engine.

Over the history of our nation, our patent system was considered the "gold standard'. Our founding fathers knew that the key to our economic power and progress as a country would rest on the ability to incentivize and reward the hard work of American ideas and innovators. The principle of protecting innovators and their works, "*for the promotion of science and the useful arts"*, helped establish our nation as a global industrial and innovative super power.

Unfortunately, in recent years, changes in our laws and judicial decisions have threatened our stability as the leader in innovation and fractured the confidence in our patent system. Congress passed the America Invents Act, which promised a *faster, fairer, and Cheaper* method of challenging the validity of patents that have been granted by the PTO. I voted for this law myself, in the hope that we were improving the quality of patents and end unfair and frivolous practices in using patents as legal leverage rather than bringing ideas to the public benefit.

The AIA created the Patent Trial and Appeal Board (PTAB) to hear challenges on patents that the PTO had already granted. Let me be clear in my testimony today; I want the PTAB to do its job, and to do its job well. Poorly designed or improperly granted patents have no place in our intellectual property system. Patents that are used purely for the purpose of threatening lawsuits or anti-competitive behavior are not productive in our economy or to our national interest.

However, what we have seen in the years since the AIA is an environment that has tipped the scales too far in favor of those with the deepest pockets and the greatest resources. The largest companies can continue to conduct research and develop new products while also having access to cheaper challenges and quicker methods of invalidating their competitors. I do not wish to deny the market powers that established incumbents enjoy in a free market. Inventors and innovators have always thrived in trying to take down the goliath of the day with a new slingshot of their making. That sort of risk-taking and disruptive behavior has led to the greatest advances in every industry from the lightbulb to the iPhone.

Sadly, the environment that has developed under the AIA has deprived our startups the ability to protect their next great slingshot, and instead have provided avenues for the goliaths to make repeated and unfair attacks against the startup challenging their rule. As a result, startups and individual inventors are forced to spend precious resources fighting challenges instead of going to market, and are forced to play by a rulebook that seems to be stacked against their favor.

This environment is something that should concern every member of this committee if we are hoping to remain competitive and lead in a global economy. U.S innovators face threats from nations who subsidize their own companies or facilitate the outright theft of I.P. in order to undercut our own work in areas such as 5G telecommunication, personalized medicine and diagnostics, artificial intelligence, and quantum

computing. The only way to protect the next great idea, is to ensure our patent system properly protects and rewards those ideas from infringement and unfair competition.

The US Chamber of Commerce, in which the U.S. was consistently the leader in a global economy, last year ranked the U.S. at its lowest rank ever at twelfth in the world. The latest Bloomberg Innovation Index, has us listed at 8th. While the U.S. chamber promoted the U.S. back second earlier this year, following a string of reforms implemented by the current PTO Director Andrea Iancu. However even in second place, we are still tied with eleven other countries. This is not leadership, this is not where America should settle. Simply put, the patent system today, is preventing our country from meeting the potential of American innovation and other global leaders have taken notice.

Investment in venture capital is also heading abroad because of this weakened system. Instead of fostering more innovations in the U.S., American dollars and ideas are leaving our shores as the U.S. share of global venture fell to 40% in 2018, while China's rose to 38%. To contrast in 2010, before Congress passed the America Invents Act, the U.S. share of global venture was over 66%. Other countries are strengthening their patent systems to encourage the type of innovation that led to our dominance. Europe and China are strengthening their domestic patent systems to protect inventions and are happily accepting international products and innovation within their borders. Why should we continue to allow the U.S. to move in the opposite direction?

**STRONGER PATENTS ACT**

Earlier this Congress, I reintroduced, along with Representative Bill Foster of Illinois, Tom McClintock of California, and Nydia Velazquez of New York, (H.R. 3666) **The STRONGER Patents Act**. This legislation seeks to ensure Congress keeps its original promise made when it passed the America Invents Acts, and provides a truly cheaper, faster, and fairer process at the PTAB. What the AIA lacked in procedural and structural limitations for the new PTAB, the STRONGER Patents Act helps correct.

This bill ensures that the PTAB uses the same standards for claim construction that as has always been used in the Federal Circuit. Patent owners are often challenged through *inter partes review* at the PTAB while still awaiting decisions from District Courts in cases of infringement. While the District Court in many times upholds the patent based on their higher standard for claim construction upon review, the PTAB instead invalidates the same patent using a broad standard. These contradictory decisions deny patent owners the proper defense owed to an already granted U.S. patent and undercuts any defense of that patent in the one venue which should always remain available for a final decision; the district court.

This change in claim construction is just one of the actions that Director Iancu has already implemented through a rule at the PTO since he was confirmed. Despite opposition to this rule change, the PTAB has not been crippled. In fact, the stated reason for the US Chamber's promotion of the U.S. on their patent system score from 12th to 2nd was a result of these rules issued by Director Iancu. Congress should move to codify this improvement.

This legislation also helps address the current practice of a patent owner facing repeated challenges against a single patent or claim by the same or multiple parties. One of the oft repeated defenses of the AIA was to end harassing and repetitive filings of nuisance suits and demand letter behavior by so called "Patent Trolls". Why then should we permit the same type of harassing behavior within our PTO and call that an administrative process?

Our bill also allows for greater discovery of real parties in interest for those that file petitions against a single patent owner. If we want the AIA to live up to its name, we must eliminate gamesmanship of the system. Those who have the most resources can dedicate more than one challenge and overwhelm a small patent owner. If our patent system is supposed to support ideas getting to market and the benefit of the public, we want to ensure patent owners are not constantly driven into administrative procedures by unnecessary and repetitive challenges. Anyone that challenges a patent should do so in good faith and make their first effort, their best effort.

Perhaps the largest decay in our patent system over the last few years, has been the decline of injunctive relief for infringed patents. In all other areas of property law, the property owner has a right to an injunction. If someone wishes to cross my front yard and build their new driveway, I can stop them until we settle the dispute in court and allow the facts to speak for themselves. Instead, over the past few years, our patent system has told intellectual property owners that they must allow someone to continue to dig up their front yard, pour the concrete, and park their car on that property; all before a final decision can be rendered. We must restore balance to ensure intellectual property rights are respected, while ensuring that those protections are not used abused. The granting of a patent is the granting of a right to exclude. In recent years this right has been rendered moot, as owners have lost their partner in the courts in providing the one tool that can exclude; an injunction.

I welcome the opportunity to debate these issues and learn from others on how we can improve our patent system. The reform of the practices at the PTO is one immediate action that can be taken by this committee to help ensure American leadership continues. We can accomplish this reform without throwing out the benefits that the AIA has provided, and we can keep our promises to American inventors by supporting a system that respects the rights of all participants in our patent system regardless of their size and resources. At the PTO, ideas should matter more than resources.

**PATENT ELIGIBILITY**

I also believe that a worthy cause that this Committee can and should take up is the debate over what reforms are needed to our patent eligibility laws. Congress has not updated the patent eligibility statute since 1952. Since that time, we have witnessed the advance of jet engines, microprocessors, mobile computing, worldwide connected communications, artificial intelligence, mapping the human genome, and hundreds of innovations that were merely science fiction back in 1952.

In order to keep pace with this cycle our courts have produced decisions and provided guidance to innovators and attorneys alike, and unfortunately, we find ourselves in an environment in which cutting edge innovations are being questioned and denied as eligible for the gold standard of a U.S. patent. Worst of all, Congress has been left out of this balance of power in exercising our role to update the law to match our national priorities and the modern age. If we want to promote the discovery of the next cure for rare diseases, or the realization of true artificial intelligence, then we must ensure we are incentivizing and protecting the research and investment that is needed to take us into the future.

I was privileged enough to participate in a roundtable and exploratory process earlier this year convened by Senators Thom Tillis, and Chris Coons, the bipartisan leaders of the Senate's Subcommittee on Intellectual Property. I was joined by Ranking Member Doug Collins and Chairman of the House Judiciary Subcommittee on Intellectual Property, Hank Johnson in lending true bicameral and bipartisan support for this effort. These roundtables and stakeholder sessions explored many of the questions and policy discussions on how we

should update our patent eligibility laws. I am encouraged by the work that Senators Tillis and Coons are continuing in the Senate, and I am here to urge this committee to take up a process of their own to ensure this remains a bicameral effort worthy of Congress full attention. We should echo the efforts in the Senate as the need to provide clarity on patent eligibility is more critical than ever, if we want to see the providence in fields such as diagnostics and genetic therapies. In order for any true update of the law, both Chambers of Congress must have a voice and a process.

This year, the Senate Judiciary Committee has held one hearing on the STRONGER Patents Act and has held three hearings on the issue of subject matter eligibility reforms. The USPTO Director has testified in both Chambers that our eligibility laws need to be updated, and a myriad of court opinions have urged Congress to act on the uncertainty that past decisions have created. The House Judiciary Committee has a vital role to ensure the U.S. does not fall behind. We have not had is an opportunity to address these concerns, in open debate and in collaboration with stakeholders from every industry. In order to do this, the committee must have a process and dedicate its resources.

Intellectual Property protections are not a partisan issue. The STRONGER Patents Act enjoys bicameral and bipartisan support, and the efforts to explore patent eligibility reforms remain a bipartisan endeavor. This committee has an opportunity to debate not only the problems that exist for patent holders and practitioners, but in the case of The STRONGER Patents Act; this committee can debate concrete ideas on how to fix them. Americans need to hear from ideas on both sides of the issue, and I welcome both criticisms and constructive thoughts on how to improve them.

This committee defends and ensures our patent laws remain accessible and encouraging to the innovation needed to drive our economy. I urge the Committee to take up these issues and work with me, and advocates on all side of the debate, in creating solutions that keep America in the lead.

I want to thank the committee for this opportunity today, and I remain available to answer any questions members have. My staff and I will assist this committee in carrying out its oversight and role in advancing our intellectual property laws and await the opportunity to do so.

Thank you.