



November 6, 2019

Dear Members of the Subcommittee on Intellectual Property of the Senate Judiciary Committee,

As a non-profit research and advocacy organization that supports high-growth, high-tech startups, we appreciate your interest in ensuring patent law fosters innovation, and specifically thank the Subcommittee for holding the October 30, 2019, hearing to consider what Congress can do to prevent the issuance of low-quality patents. We agree that everyone benefits from high-quality patents, and hope that Congress will continue to prioritize patent quality, including exploring the specific and promising suggestions that were discussed at the hearing.

Patent quality is essential to the state of innovation. Startups appreciate the role patents play in protecting inventions, but also know first-hand the devastating impact that low-quality patents and abusive litigation can have.<sup>1</sup> Increasing patent quality will both increase confidence in the entire U.S. patent system and make it harder for bad actors to weaponize patents to the detriment of innovation.

Low-quality patents comprise those that do not meet the statutory requirements for patentability—those that claim things that are already known or disclosed in the prior art, those with claims directed to mere abstract ideas, or those that are written in vague or overbroad terms that are difficult to understand. One study concluded that approximately 28% of patents would be found anticipated or obvious (i.e., invalid under 35 U.S.C. §§ 102 or 103). For patents covering software or business methods, that estimated rate of prior-art-related invalidity increases to 39% and 56% respectively.<sup>2</sup> That study did not count patents that would be invalid for failing the written description and enablement requirements—if those patents were included, the estimated number of invalid patents would be even higher. Because these low-quality patents do not satisfy the statutory standards, they should not have issued in the first place.

There are at least two reasons why efforts to improve patent quality help startups and promote innovation. First, low-quality patents open the door to abuse of the system. They are the type of patents which bad actors assert, or threaten to assert, against startups, even though they are

---

<sup>1</sup> See, e.g., *Patent Quality is Essential to the State of Innovation*, YouTube, (Nov. 9, 2018), [https://www.youtube.com/watch?time\\_continue=1&v=63NYSYcV5kc](https://www.youtube.com/watch?time_continue=1&v=63NYSYcV5kc).

<sup>2</sup> Shawn P. Miller, *Where's the Innovation: An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents*, 18 Va. J. L. & Tech. 1, 6-7 (2013).

patents which should not have issued in the first place. These abusive patent assertions are (at best) a distraction, forcing startups to divert time and resources to litigation defense, when that energy could instead be spent on product development, engineer salaries, etc.

This reality also means that accused infringers must bear the cost of resolving the problem of low-quality patents—either by challenging patent validity in court or before the PTAB, or by paying a license or settlement fee. The opportunity for abuse is exacerbated because it costs at least hundreds of thousands—and in many cases millions—of dollars to invalidate even a low-quality patent.<sup>3</sup> Because of that, owners of low-quality patents can use the leverage of expensive litigation and the risk of injunctions to force startups to settle even frivolous cases. Indeed, because startups have relatively fewer resources, and are therefore more likely to settle than go to court, startups are frequent targets of abusive litigation.<sup>4</sup>

Second, low-quality patents can pose problems for patent owners. Many startups obtain patents, which can allow them to protect their innovations, attract funding, etc. And the process of obtaining patents takes time and money. It is frustrating for a company to learn that, after spending that time and money, its patent is easily invalidated; if the applicant knew about prior art or disclosure problems sooner, it could have amended its patent during prosecution, resulting in a higher-quality patent that truly passes statutory muster at the end. Similarly, startups benefit from certainty, and benefit from knowing that their patents are actually high-quality assets. The answer to the problem of low-quality patents cannot be to make those low-quality patents (which, again, do not satisfy the statutory requirements and should not have issued in the first place) more enforceable or harder to challenge. To reiterate, those low-quality patents are the ones that are already subject to abuse, and even though they are of dubious validity, are asserted in ways that can slow innovation and harm competition.

Congress is correct to turn its focus to patent quality. Improving patent quality will increase confidence in the U.S. system, ensure that the front end investments in patent prosecution are worth it, reduce the number of low-quality patents that have to be invalidated later at the expense of private parties, and reduce the number of patents that are easily weaponized by bad actors.

The witnesses at the October 30 hearing offered several promising suggestions, ranging from giving the USPTO and its examiners the resources they need to fully evaluate patent quality (including relevant prior art and time to analyze it) to identifying and correcting incentives for

---

<sup>3</sup> E.g., Malathi Nayak, *Cost of Patent Infringement Litigation Falling Sharply*, Bloomberg BNA (Aug. 11, 2017), <https://biglawbusiness.com/cost-of-patent-infringement-litigation-falling-sharply>.

<sup>4</sup> See, e.g., Nathaniel Borenstein, *More Patent Trolls Are Targeting Startups. Here's What You Can Do.*, Entrepreneur (Apr. 10, 2018), <https://www.entrepreneur.com/article/310648>.

the issuance of low-quality patents.<sup>5</sup> We hope the Subcommittee will thoroughly explore those and other suggestions to make improvements in the process.

Likewise, promoting patent quality must also include meaningful opportunities to challenge patents after they issue. The reality is that a number of low-quality patents have already issued, and that regardless of improvements to the system some will continue to issue in the future. Therefore, while increased patent quality on the front end might reduce demand for post-issuance challenges, affordable and efficient opportunities to challenge patents, like IPR, still need to be available.

Engine appreciates the opportunity to provide these comments, and appreciates the Subcommittee's demonstrated interest in improving patent quality. We look forward to the Subcommittee's further efforts on this topic, and remain committed to engaging with Members on proposed changes to the patent system and how they would affect the startup community.

---

<sup>5</sup> Testimony available at:  
<https://www.judiciary.senate.gov/meetings/promoting-the-useful-arts-how-can-congress-prevent-the-issuance-of-poor-quality-patents>.