

Questions from Senator Tillis
for Patrick Kilbride
Witness for the Senate Committee on the Judiciary
Subcommittee on Intellectual Property Hearing
“Foreign Competitive Threats to American
Innovation and Economic Leadership”

1. As early stage innovators develop new products for market, to what extent are strong IP protections necessary in raising capital?

Response: Throughout the innovation ecosystem effective control of proprietary knowledge through various forms of intellectual property rights is essential to the ability of the private sector to raise capital for allocation to research and development. IP plays two indispensable roles within this ecosystem: first, acting as a store of the value created by intangible knowledge assets, thus enabling long-term, high-risk, capital intensive investment; and, second, by providing a medium of exchange whereby diverse stakeholders (government, academic, industry, etc.) have a means to assess the value created by each within the ecosystem, and enter into mutually beneficial collaborative partnerships and licensing

agreements. These economic functions of IP have been particularly important to innovation in the United States, with its market-based economy and world-class financial markets.

2. How big of a threat is China's involvement with Standard Essential Patents (SEPs), especially in light of their connection to critical international technical standards such as the 5G telecommunications standard?

Response: China's readiness to intervene in markets at will effectively nullifies the reliability of its otherwise increasingly sophisticated intellectual property policies. In lieu of a rule of law environment, American businesses can expect to encounter "rule by law." Companies exposing their IP to China should adopt a "buyer beware" mentality, and it is reasonable for U.S. policymakers to expect that technology included in ventures with Chinese partners is at large.

3. Approximately 80% of all economic espionage prosecutions brought by the DOJ allege conduct that would benefit the Chinese state and approximately 60% of all trade secret cases involve China.

What steps can and should the DOJ take to further address this critical issue?

Response: The success of the Memorandum of Understanding signed in 2021 between the U.S. Chamber of Commerce and U.S. Customs and Border Protection related to anti-counterfeiting collaboration is a strong testament to the power of public-private partnership in the law enforcement arena. With its emphasis on awareness, information-sharing and capacity building, activities under the MOU have enabled increased seizures of counterfeits at the border and targeted investigations leading to prosecutions. A similar approach to intelligence sharing between key U.S. companies and the U.S. Department of Justice could be a model for similar success.

4. How important are strong IP protections to sustaining U.S. leadership in economically and strategically important industries that are R&D intensive?

Response: Innovation is not inevitable. U.S. innovation success has gone hand-in-hand with strong U.S. IP protection. The U.S. does a number of things better than virtually anyone else: We

enable risk-taking and encourage failure; we provide property rights; we surround those rights with the rule of law; and we make markets. IP rights are the means to put those strengths to work in the knowledge economy, ensuring that value created in knowledge assets can be identified, valued, leveraged and protected just as physical assets.

5. Have changes to U.S. patent law contributed in some way to our nation's inability to keep pace with China? If so, what reforms to our patent system are necessary?

Response: The Chamber has long held that IP rights should be available for innovation and creativity in every industry sector and field of technology. To the degree that U.S. IP rights have been unavailable to innovators in those sectors, inevitably investment is being directed to other markets where such rights are accessible.

Investment in high-risk R&D activities (such as novel drug development where only one in ten candidate medicines entering clinical trials will ultimately reach patients) requires a long time

horizon and a correspondingly high degree of legal certainty. It is essential that the regulatory environment remains stable and philosophically consistent over time, such that investors in competitive capital markets can allocate resources to high-risk sectors with confidence that technological success is able to earn a commensurate return on investment. Otherwise, investment capital will shun those sectors or demand a risk premium that exacerbates the already high costs of developing new technologies.

6. In 2022, the Biden Administration helped lead an effort to waive IP rights on COVID-19 vaccines. After decades of pressing the world to strengthen and respect IP rights, the U.S. is potentially now seen as willing to give away valuable U.S. technologies to foreign competitors. Despite the President signing a bill announcing a formal end to the pandemic, the Administration is considering granting additional waivers – this time for the production and supply of COVID-19 diagnostics and therapeutics and there have been talks to expand waivers to other technology areas.
 - a. Is waiving IP rights the way to solve global problems?

Response: IP rights, which enabled decades of relevant private sector investment in clinical research and development, were foundational to the availability of potential solutions that could be tested against Covid-19. The rapid development and adaptation of those solutions in record time, including through a robust public-private partnership model, was further underpinned by IP rights. As in the innovative ecosystem at large, during the pandemic IP rights were essential to collaboration between diverse stakeholders, such as governments, universities, hospitals, businesses and many others throughout the ecosystem. IP rights provide an important tool for these stakeholders to enter collaborations with a common understanding of the value that each brings to the partnership. To date production of the resulting products has far outstripped the world's capacity to deliver them and administer them where they're needed, demonstrating that whatever shortcomings hampered the global response to Covid, IP was not one of those problems.

b. How do our foreign competitors view this sort of posturing, which comes at the expense of our nation's IP system?

Response: Weakening of IP rights through multilateral measures – and especially U.S. support for those measures – can only be seen as an opportunity by foreign

competitors. Those adversaries and competitors benefit when specific U.S. technologies may be misappropriated as a result of such measures, and they benefit competitively from unilateral U.S. weakening of its core economic advantages related to innovation, namely its massive private sector commitment to R&D, which accounts for three-quarters of all U.S. R&D spending.

- c. What cost does this waiver exact terms of lost jobs, investments made, and capital flowing to other nations?

The U.S. Patent & Trademark Office has found that 63 million American jobs are tied directly or indirectly to IP-intensive industries, accounting for one in three U.S. jobs and 41% of U.S. GDP. What's more these jobs pay a strong premium over wages in non-IP-intensive sectors. This benefit from private sector innovation leadership is threatened when the United States unilaterally tilts the playing field away from the domestic market and towards our competitors.

- d. What are the risks to innovation and to U.S. leadership in these fields if waiving IP protections becomes the norm?

Response: IP waiver proposals are becoming de rigeur in multilateral debates involving any sort of technological component. An initial WTO waiver of IP commitments for Covid vaccines has broadened into a proposed waiver affecting the much broader class of therapeutics and diagnostics, and continues to broaden to include measures such as forced technology transfer in World Health Organization talks toward a Pandemic Policy Accord. Beyond health innovation, the U.N. Secretary General and others in the multilateral system have already voiced their support for IP waivers related to green energy and climate technology, and those proposals have found fertile ground within the U.N. Framework Convention on Climate Change discussions.

7. Malicious foreign actors sometimes use the U.S.' system and culture of openness as a weapon against us. The Global Intellectual Property Center found that online piracy costs the U.S. economy at least \$29.2 billion in lost revenue annually. Other democracies, such as the U.K. and Australia, have developed what some consider more effective means to enforce their rights online than we have here in the U.S.

What can Congress do to address this purported gap and what can the U.S. government do to ensure that the

U.S. supports progress towards more effective online enforcement?

Response: Ideally, IP enforcement policy melds a range of tactics into a cohesive and strategic whole: statutory authority and mandates to take-down website hosting illegal activity; criminal and civil penalties, including statutory damages; criminal investigative and prosecutorial authority, mandates and resources; and, voluntary industry standards. Additionally, public-private partnership is a key source of data-sharing that can inform and support enforcement activity from both the public and private sector.

8. Which countries besides China should U.S. foreign policy focus on, and what are the best tools at our disposal to monitor and combat their behavior?

Response: U.S. Chamber research ([Measuring the Magnitude of Global Counterfeiting \(2016\)](#)) has demonstrated that 86% of counterfeits entering the U.S. originate from either China or Hong Kong. Across the board, better information-sharing between and among federal agencies, law enforcement, and industry would leverage the data

that is increasingly available to trace supply chains and identify producers, sellers, and distributors of counterfeit goods (as well as operators of pirate sites and corporate spies and hackers).

The U.S. Chamber's public-private partnership with U.S. Customs and Border Protection (CBP) is a case in point: Proceeding under a 2021 MOU, Chamber member companies in vulnerable industries are sharing foreign seizure data with CBP and the U.S. National IPR Coordination Center to identify criminal counterfeiters and facilitate seizures, investigations, and prosecutions. We believe this model can be applied in additional spaces, such as online piracy, and are exploring additional agency partnerships.

9. What should the U.S. government be doing with its allies in the Indo-Pacific region to ensure that the U.S. does not forfeit its leadership in IP to competitors like China?

Response: As initially negotiated by the United States, the Trans-Pacific Partnership included some of the strongest IP standards in any global trade agreement. Barring U.S. re-entry into an Asia-Pacific trade

agreement, the next best thing would be to include IP capacity building into regional measures such as the Indo-Pacific Economic Framework. More than 25 years after the TRIPS Agreement entered into force, the WTO debate over the waiver of IP commitments has shown that many political leaders globally still do not understand the role of IP in facilitating innovation and creativity. As a result, global acceptance of strong IP standards remains distressingly low.

10. Huawei cannot build products with advanced semiconductors and their sales in the U.S. and elsewhere are severely restricted due to national security reasons. However, Huawei continues to accumulate U.S. patents and enforce patents in U.S. Courts.

No Response

- a. In light of this, is Huawei becoming a patent assertion entity?
- b. Does this seem like a deliberate strategy by Huawei to manipulate the U.S. patent system for their own advantage?
- c. Are there any other conclusions that we can draw from this?

11. Huawei has sued U.S. companies in Germany for their use of standardized WiFi technology. These companies are now at risk of injunctions that would block sale of their products there.

How can we work together with our allies to assure that Huawei does not weaponize the international patent system against U.S. industry?

No Response

12. In recent years, there has been growing concern about the involvement of foreign interests – and particularly of foreign sovereign wealth funds – in funding U.S. patent litigation. This potentially creates a serious risk is that litigation will be manipulated to the benefit of foreign competitors or with the intent of harming the competitiveness or technological leadership of U.S. industry. This risk is particularly concerning with respect to patent litigation because it often involves sensitive or emerging technologies.

Do you agree that the involvement of foreign governments in funding domestic patent litigation raises significant concerns with respect to U.S. national and economic security? If so, what can be done to adequately address this?

Response: The Chamber is a [vocal advocate](#) for greater transparency in litigation funding, including by foreign governments. A 2022 report by the U.S. Chamber Institute for Legal Reform makes the case that third-party litigation funding poses significant national and economic security risks.

The report outlines a series of comprehensive legislative and legal reforms, including:

- Requiring disclosure of third party litigation funding agreements in funded cases and ultimately of the significant foreign investors of the funds being employed.
- Requiring litigation funders that receive foreign government funding to report this information to a relevant U.S. government agency.
- Requiring agents of foreign governments funding litigation against U.S. companies to disclose their association with that foreign government.

13. TikTok has a history of undermining artists and their intellectual property rights around the globe. In Australia, TikTok has used hit music to drive up the popularity of its platform, but has restricted user access to the copyrighted music, hurting artists and fans in an attempt to devalue IP globally. TikTok is not a

trustworthy partner when it comes to protecting U.S. IP, creative industries, and user privacy.

What steps can and should the Congress and/or the U.S. government take to address this?

No Response

14. America's copyright sector exported \$230 billion in 2021. The core copyright industries account for more than 52% of the digital economy and 48% of the digital economy's employment. These initiatives that the Administration is negotiating – Indo-Pacific Economic Framework (IPEF), U.S.-Taiwan Initiative, Americas Partnership for Economic Prosperity (APEP) – include digital trade chapters.

Do you agree that it's imperative for these digital chapters to include obligations to provide meaningful enforcement and that U.S. Trade Representative Tai should not miss this opportunity to take action?

Response: U.S. global economic initiatives such as the Indo-Pacific Economic Framework, APEC, and others, should include significant attention to IP capacity building in order to build the domestic case for stronger IP standards at the national level.

It has become increasingly clear that countries acceding to the WTO committed only grudgingly to IP standards in the TRIPS Agreement, in order to secure market access to the U.S. and other wealthy markets. The hard work of building political and administrative capacity for leveraging IP in those markets to increase domestic innovation and creativity, and participate in IP-licensing ecosystems, has never been adequately completed. Until that is done, the U.S. will continue to fight an uphill battle to protect its IP and enhance global norms.