U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property

"The State of Patent Eligibility in America: Part III"

Testimony of Sean Reilly
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Chairman Tillis, Ranking Member Coons, and members of the subcommittee. My name is Sean Reilly and I am Senior Vice President and Associate General Counsel of The Clearing House Payments Company, where I direct intellectual property matters. I am a registered patent attorney whose principal responsibilities include advising members of The Clearing House's senior business team on vital cybersecurity, intellectual property and technology law issues and transactions. In my role with The Clearing House, I coordinate with industry executives and senior lawyers from the nation's leading banks on technology law issues and initiatives of concern to the financial services industry. Before joining The Clearing House, I was in private practice and worked at the United States Patent and Trademark Office as a patent examiner.

The Clearing House is a payments company owned by the largest commercial banks and dates back to 1853. Since its founding, The Clearing House has delivered safe and reliable payments systems, facilitated bank-led payments innovation, and provided thought leadership on strategic payments issues. Today, The Clearing House is the only private-sector ACH and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. It continues to leverage its unique capabilities to support bank-led innovation, including launching the RTP® network, a real-time payment platform that modernizes core payments capabilities for all U.S. financial institutions.

In addition, The Clearing House's wholly-owned subsidiary, Askeladden L.L.C., is an education, information and advocacy organization which, through its Patent Quality Initiative ("PQI"), is dedicated to improving the understanding, use, and reliability of patents in financial services and elsewhere. Through the PQI, Askeladden strives to improve patent quality and to address questionable patent holder behaviors. Askeladden files amicus briefs that highlight issues critical to patent quality and petitions the U.S. Patent and Trademark Office to take a second look at patents under *inter partes* review (IPR) that it believes are invalid. In addition, Askeladden works to strengthen and support the patent examination process by coordinating educational briefings on the evolution of technology in financial services.

Given the numerous and varied stakeholders, patent reform is by nature a complex and difficult task. I commend Chairman Tillis and Ranking Member Coons for their leadership and their fostering open dialogue on this important topic.

I. The Interest of the Financial Services Industry with Respect to Section 101

As innovators, product and service providers, and financiers of innovation, the collective members of the financial services industry have a strong interest in ensuring that the U.S. patent system provides robust protection for meaningful innovations while also ensuring that low quality patents do not issue or are not otherwise available for use in abusive litigation. 35 U.S.C. § 101 ("Section 101") plays an important role with respect to patent quality by blocking the issuance of overly broad, abstract patent claims and by providing a tool for defendants in litigation to efficiently address such claims that previously issued.

The financial services sector is currently experiencing explosive growth, large-scale investment, and accelerated innovation. Financial services companies are heavily investing in developing technologies related to fraud detection, blockchain, advanced authentication, faster payments, and big data analytics, to name a few. Moreover, financial services companies have increasingly sought to protect such innovation through the patent system. For example, in 2018 a sample of ten major financial services companies obtained more than eight times the number of U.S. patents that those same companies obtained in 2008.[1] Quality patents are instrumental for protecting financial services innovation.

The financial services industry is also the primary source of capital for start-ups of every kind. Based on the most recent data from the Small Business Administration, as of June 2016 there were $614 billion in small business loans outstanding.[2] Traditional banks also help fund millions of businesses every year and have a strong interest in seeing those entities achieve returns on their innovations. As lenders, therefore, it is essential that the intellectual property that serves as collateral be of high quality.

Patent quality is also important for driving efficiencies with respect to patent infringement litigation. Minimizing the issuance of low quality patents means fewer frivolous lawsuits based on such patents. Moreover, reasonable assertions[3] of high quality patents will often lead to pre-litigation licensing arrangements or earlier settlements in the event lawsuits are filed. Where lawsuits are based on low quality

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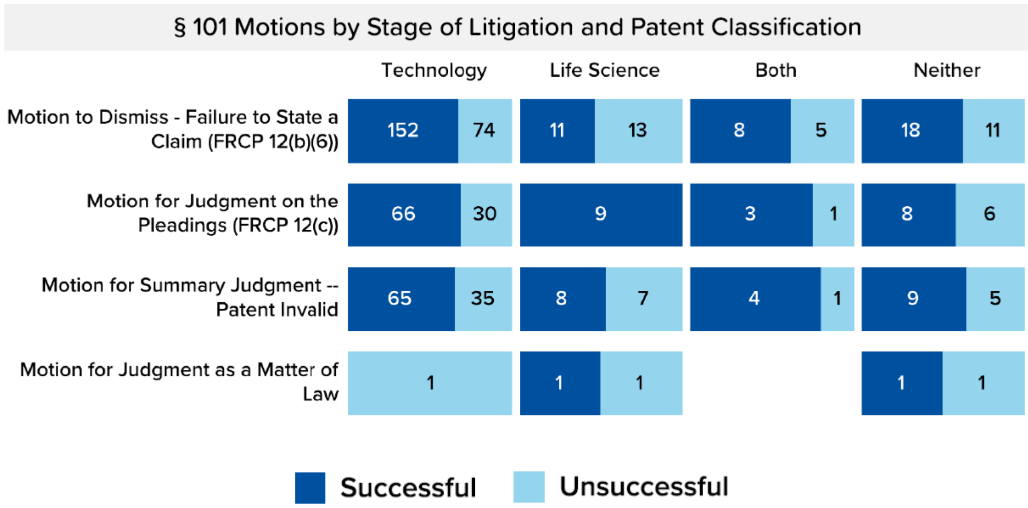
[1] The sample of financial services companies consists of Visa, MasterCard, American Express, State Farm, Allstate, AIG, Bank of America, Capital One, JPMorgan Chase, and USAA.
[2] https://www.sba.gov/advocacy/small-business-lending-united-states-2016
[3] Assertions that avoid overbroad and/or tortured readings of claims in an effort to improperly expand claim scope so that it applies to another party's products or services.

patents, Section 101 has played an important role in leveling the playing field by permitting defendant companies in many cases to employ Section 101 to efficiently address abstract patent claims in early motion practice. *See* chart below.[4]



Furthermore, the early availability of Section 101 has helped drive down settlement amounts in these cases.[5] Every dollar not spent on meritless patent suits is one more dollar that can be deployed to develop innovative financial products and services, or further investments in our nation's communities.

II. Legislative Amendment of Section 101 as Proposed Creates Significant Risk that Should be Addressed by Substantive and Procedural Safeguards

The development of Section 101 jurisprudence combined with the availability of administrative reviews of patents under the America Invents Act (AIA) as an efficient alternative to expensive litigation has contributed to a decline in lawsuits based on dubious patents and a decline in the ability of plaintiffs to extract high dollar settlements in such suits due to the high cost of litigation. While progress has been made on this front—and despite suggestions to the contrary—only a sliver of the total number of low quality patents have been invalidated and more are issuing regularly. Any substantive amendment of Section 101 carries with it the risk of undoing the progress described above along with additional potential unforeseen results.

The dispute over patent eligibility under Section 101 is not new. During the nearly eight years it took for Congress to pass major patent reform legislation in

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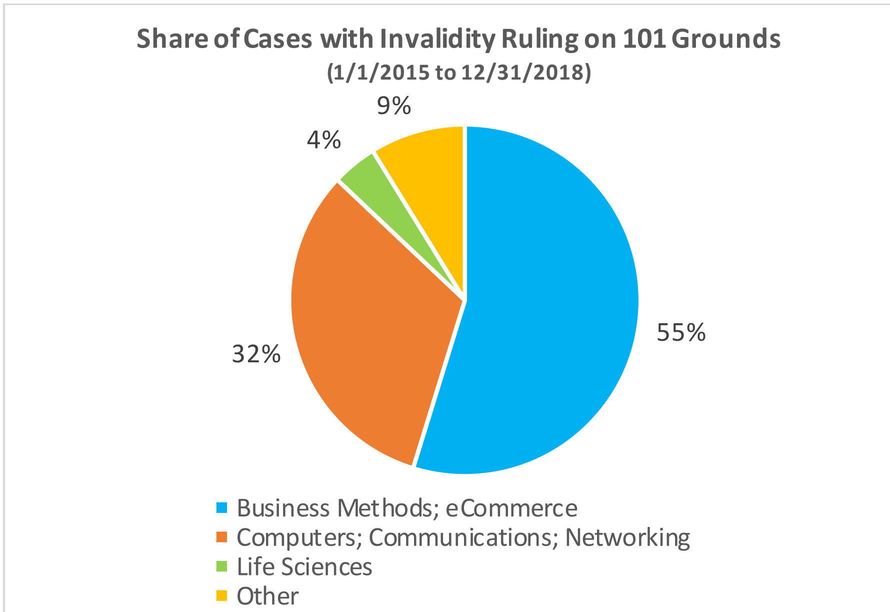
[4] Source: Docket Navigator (Report: "*Alice* Through the Looking Glass").

[5] Given the high cost of patent litigation, financial services companies are heavily incentivized to settle and license—often for less than the cost of litigation—rather than litigate. The availability of Section 101 to address certain low quality patent claims has lowered the cost of litigation and, as a result, the settlement amounts in such cases.

2012, few issues were more hotly debated. While many sectors and large companies complain of the negative impact of the current state of Section 101 jurisprudence, in reality it is business method and e-commerce patents that are most often invalidated under Section 101 in litigation—55% of all such cases—as shown in chart below. We do recognize, however, that there are very real and valid concerns related to Section 101 in certain specific sectors (e.g. medical diagnostics).



The Supreme Court has further tailored subject matter eligibility in both *Bilski* and *Alice* in an effort to ensure the basis for patent eligibility is focused on true innovation and not abstract ideas or basic principles. Abrogating the *Alice* and *Bilski* decisions and tilting Section 101 decidedly in favor of eligibility is a broad approach and runs the risk of a return to the days of clogged courts, increased frivolous patent litigation, and higher settlement costs due to the rise in overall cost of litigation.

In addition to the risks discussed above, substantially amending longstanding statutory provisions risks introducing unintended, unforeseen, and far-reaching consequences. Often such consequences will include new ambiguities with respect to the statute that will be leveraged in creative arguments by clever lawyers and will ultimately require intervention by the appellate courts to settle the law.

Given the risks associated with broadly amending Section 101 along the lines of the draft legislation, Congress should keep in mind the overall balance of the patent system and approach any patent reform holistically. In the event that Section 101 is broadly amended—as opposed to narrowly amended to address specific concerns (e.g. medical diagnostics)—so that it is no longer useful to efficiently address abstract patent claims early in litigation, then Congress should consider what steps it should take to provide this ability through alternative means to allow defendants to avoid wasting resources on dubious litigation. These alternative means could be any number of solutions including separate statutory provisions regarding abstract claims amenable to motion practice early in litigation and available as grounds of invalidity in post-grant reviews.

Recognizing that the draft legislation is in its early stages and that substantial work remains, the draft legislation in its current form appears to acknowledge—through its proposed revisions to Section 112(f)—the risks of effectively eliminating Section 101 as a tool to address poor quality patents relating to business methods and e-commerce. However, Section 112, even beyond 112(f), is an inadequate alternative to Section 101 for dealing with abstract claims. Section 112 analysis focuses only on the precision of the claim language and whether it is adequately supported by the rest of a patent. Section 112 cannot, by contrast, invalidate patents on mental processes or basic principles, like the invalid patents on hedging and escrow in *Bilski* and *Alice*. These types of patents, that Section 101 has historically addressed but that even the new Section 112 cannot, have caused significant harm in the past. The proposed legislative text heightens the risk that these patents will again proliferate. As a result, incentives to assert low quality patents that were significantly neutralized by Section 101 will likely reappear.

We look forward to continuing to work with the Subcommittee to identify and address the various risks raised by potential amendments to Section 101, and supporting the Subcommittee's patent reform efforts.

Conclusion

In conclusion, I again commend Chairman Tillis and Ranking Member Coons for their leadership on this issue and their commitment to patent quality, balanced reform, and open dialogue on these issues. In the event that Congress should decide to loosen Section 101 patent eligibility standards, we agree that it is highly important to take a comprehensive approach that maintains the delicate balance in the patent system.