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STATEMENT OF

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BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

"IMPROVING FEDERAL COURT ADJUDICATION OF PATENT CASES"

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I. INTRODUCTION

Mr. Chairman, Ranking Member Berman, and members of the Subcommittee, thank you for the opportunity to testify on the important subject of "Improving Federal Court Adjudication of Patent Cases."

I am a counsel and a registered patent attorney in the Washington, D.C. office of the law firm of Drinker Biddle & Reath LLP. In my work, I perform a range of duties including prosecuting patent applications and consulting Wall Street investors, life-sciences and electronics companies about trends in technology and the law. It is my privilege to testify today, not as a patent litigator, but rather based on my experiences in government and teaching law. During my tenure in government, I worked on patent and judiciary issues for more than decade, first for the U.S. House of Representatives and then at the U.S. Patent and Trademark Office ("USPTO"). In these capacities, I am proud to have worked on a number of oversight and legislative issues that helped improve the federal judiciary and the patent system, including the American Inventors Protection Act (AIPA), expanded patent reexamination, and USPTO Fee Modernization. Today, I

am testifying in my personal capacity. The views I offer are my own and do not necessarily reflect any of the organizations that I represent.

The Subcommittee deserves to be commended on several counts. First, this panel continues to demonstrate an enormous commitment to enhancing the U.S.'s innovation policy and improving the landscape for American inventors. Innovation is at the core of our prosperity as a Nation and our economic vitality. Innovation is also at the core of our identity as a Nation – we are people that enjoy and are proud to solve problems -- sometimes changing the world. Second, the Subcommittee has elevated the subject of patent law to a new level through holding an unprecedented number of responsible and thoughtful hearings this year. Third, this is the courts subcommittee with jurisdiction over the third branch of government. While these issues are often arcane and may be frustrating, these are worthy of your time and effort. Certainly the subject of patent litigation has been at the forefront of the public's attention for several years now. It strikes me that the public debate on issues such as "patent quality" or the scope of patentable subject matter are proxies for the public's frustration concerning the adjudication of patent disputes.[1]

Patent litigation is notoriously known as *"bet the company"* litigation. The stakes are enormously high, beyond multi-million dollar verdicts. During my tenure working for the Subcommittee, it was impressed upon me that patents are not only for inventors, but are an important tool for investors. Venture capital is the life blood for start-up companies, but investors must secure their investment with valid intellectual property assets and a sound legal framework defining the underlying rights. The refrain

that patent litigation costs upwards of a million dollars per year per side is known to all of us. This is particularly onerous for small entities to compete in the marketplace, ranging from small businesses to non-profits, including universities.

Increasingly, business publications such as *The Wall Street Journal* focus on the patent struggles of mature companies and write about their stock price gyrations like reporting a sports play-off series. If mature Fortune 500 companies are subject to this volatility, patent litigation is even more significant for a start-up seeking initial or subsequent venture capital financing. A start-up may only have a single, or a handful, of intellectual property assets as a basis for investor funding. Uncertainty concerning patent litigation can place a cloud over its financing and deter investment in new technologies. Wall Street likes certainty, but the truth is we all like certainty in our lives, especially if our company or job is at stake.

As you are aware, a number of reforms are suggested to improve patent litigation, including the establishment of a special patent trial court, creating blue-ribbon expert juries, expanding the use of special masters, eliminating some of the subjective aspects of patent litigation, and establishing new administrative reviews.

A growing chorus of critics and commentators suggests that the current system of federal patent adjudication is flawed. They cite a variety of reasons and statistics pointing to a number of symptoms -- including problems with the caseload, expense, lengthiness, complexity, inaccuracy, and uncertainty for parties. If their allegations are true, these problems would impact our Nation's ability to innovate, compete internationally, and prosper.

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[1] Over the past decade, the concern and frustration over a variety of U.S. patents have spawned some novel responses including the offer of hefty cash bounties for relevant prior art and the Electronic Frontier

Congress must first determine if these allegations are true and whether the proponents of change have met their burden. The sound of the crisis may merely be the fall-out from the fierce competition over determining patent rights. One factor that fuels this fierce competition is the blunt winner-take-all nature of litigation. By contrast, one of the notable advantages of some of the alternatives under discussion is the ability to amend and narrow the claims of patents. These changes are more likely to alter the dynamics of the legal competition by encouraging settlements and licensing. Recently, the Subcommittee examined an initial factor at the heart of these issues – the work product of the USPTO.

II. THE BULGE IN THE SNAKE

Congress frequently hears testimony that the U.S. litigation system is flawed. Today there is a heightened level of frustration articulated by many in the patent world that the system of patent adjudication is flawed, including by the members of a variety of technology sectors and the public. Before Congress dives into these waters, it must understand these trends – in particular the inevitable growth in patent disputes. My observations and predictions about the volume and complexity of newly issued patents are based on my recent work at the USPTO as its strives to improve productivity and its processes. If there is a storm, the USPTO is in its eye.

The U.S. is frequently criticized as becoming increasingly litigious. One statistic noted by critics of the current adjudication system is the volume of patent litigation currently within the federal system. After reviewing the available data, the volume of patent litigation must be viewed in its proper context; there does not seem to be a federal

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Foundation's "Patent Busting Project," just to name a few.

district patent caseload crisis today. The trend that should concern all of us is the rapidly accelerating growth of patent cases in the federal courts and their complexity.

Critics argue that there are too many patent cases in the courts. In fact, the number of patent cases seems to track the number of valid U.S. patents in force and is a small percentage of that total number. The number of valid U.S. patents in force is approximately 2 million currently and, for example, 2,800 patent cases were filed in 2003. This is a tiny percentage of less than one percent of all valid patents. While this is not troubling on its face, we need to be mindful of two factors: the upward trend of the volume of filed cases and their complexity.

In the past dozen or so years, available data suggests the number of patent cases filed in the district courts has grown substantially, nearly doubling from 1,553 in 1993 (when the USPTO received about 170,000 new patent applications) to more than 2,800 in 2003 (when the USPTO received 331,000 new applications).[2] A tiny percentage of these cases go to trial. In my view, this should not be taken as evidence that we are growing more litigious as a nation. Rather it reflects a natural amount of "friction" surrounding inventive and competitive activity. By reviewing the USPTO's workload statistics, one can see that the growth of filed patent cases tracks the growth in the number of valid U.S. patents granted and in effect is part of our country's inventive activity. The number of these cases is certain to explode as the USPTO becomes more productive and works to reduce its current backlog of approximately 500,000 patent applications. The number of patents granted each year by the USPTO has been approximately 170,000 for about the last five years; while we can disagree about how much it shall increase year to year, this number is certain to climb.

This embarrassment of riches of increasing patent workload will compound any concerns over patent adjudication, as evidenced by the USPTO's own projections. The two trends to watch are the increased number of granted patents and their increased complexity. As the Subcommittee heard last month at the USPTO oversight hearing, it is projected that new patent applications will climb from approximately the 375,000 filed in 2004 to more than 470,000 new filings in 2010.[3]

As the Subcommittee heard in testimony at the USPTO oversight hearing last month, as part of the USPTO's 21st Century Strategic Plan, there are a number of productivity initiatives currently underway, as well as an awareness of the technical complexity of these pending applications. The USPTO Under Secretary and Director testified:

> *The growing importance of IP in recent years has had a direct impact on the USPTO. Patent applications have more than doubled since 1992. . . . Further, over the past twenty years, the number of complex applications as a percentage of overall patent workload has increased from 21% in 1985 to 52% in 2005.* [4]

Ironically, the success of the USPTO's productivity, made possible by the work of Congress and the resources that it provides, will only amplify the sound of any crisis.

One cannot predict the exact number of patents that will be in force at a point in the future or the heights of complexity that will be granted in the years to come because the success of the USPTO's new initiatives cannot be known at this time (e.g., hiring thousands more examiners, improving retention, limiting continuations, and limiting the number of claims). While I am biased due to my service at the USPTO, there is widespread confidence that the USPTO management will be successful in improving the

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[2] *See* attached table I.
[3] *See* attached table II.

agency's productivity. It is clear this will impact the debate over the current litigation climate.

As the "bulge in snake moves," as they say at the USPTO, referring to the disposition of more of its backlog of pending applications, a different set of challenges is presented for the patent system. Parties may disagree about the magnitude of the change. All other factors being equal, the certain increases in patent application filings, issued patents, and their complexity guarantee increases in the number of patent cases filed in the federal courts each year and the percentage that will go to trial. My prediction is that the increases will be considerable, and the volume of new patent cases in the federal courts will double, to more than 5,000 new patent cases per year the next five years, without Congressional intervention.

III. THE CLAIM CONSTRUCTION CONUNDRUM

The uniqueness of patent law arises from several factors: the technical substance of patent law, the technical scientific and engineering issues present, and the unique structure of a national courts of appeals, the Court of Appeals for the Federal Circuit (the Federal Circuit). One of the leading arguments for the case that patent adjudication is flawed today surrounds patent claim construction.

Today, the chorus of criticism seems to be directed at the issues surrounding patent claim construction by the courts. Essentially, the alleged flaw of our system is not the overall structure of the current system, but perhaps lies in the interplay between the trial and appellate systems. This arose approximately a decade ago when the U.S.

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[4] Statement of the Honorable Jon W. Dudas, *USPTO Oversight Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary* 109th Cong., 1st Sess. (2005).

Supreme Court found that patent claim construction was a question of law subject to *de novo* review. This question was settled by the Court's decision in *Markman v. Westview Instruments, Inc.*[5] and the Federal Circuit's decision in *Cybor Corp. v. Fas Technologies Inc.*[6] Certainly the intentions were noble. In *Cybor*, Federal Circuit Judge Jay Plager noted, "Our purpose is to improve the process of patent infringement litigation for the benefit of patentees and their competitors, and ultimately the public. Whether this approach to patent litigation will in the long run prove beneficial remains to be seen."[7]

The results of this change, the *de novo* review of the questions of claim construction, have been mixed. First, it has essentially taken the claim construction issue away from juries. Now that patent claim construction is a question of law, the meaning of claims are decided by judges. Consequently, there is nearly universal agreement that this change has been a positive development in patent law.[8] Many commentators and litigators are very troubled by the allegations that the Federal Circuit is treating the work of the district judges as "rough drafts."[9]

> *Frankly, I don't know why I'm so excited about trying to bring this thing [patent suit] to closure. It goes to the Federal Circuit afterwards. You know, it's hard to deal with things that are ultimately resolved by the people wearing propeller hats. But we'll have to see what happens when we give it to them. I could say that with impunity because they've reversed everything I've ever done, so I expect fully that'll reverse this, too.*[10]

An essential element of a sound federal innovation policy must be that there are effective remedies for the abrogation of one's rights, namely property rights. Inventors

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[5] 517 U.S. 370 (1996) (holding there was no Seventh Amendment right to a jury trial on the issue of patent claim construction).
[6] 138 F.3d 1448 (Fed. Cir. 1998).
[7] *Id.* at 1463. (Plager, C.J., concurring).
[8] While every judge may say publicly that they love juries deciding these cases, the truth is the opposite.
[9] The present system the Federal Circuit's de novo "review of district court claim construction leaves little doubt that the present system of adjudication is flawed." Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?,* 15 HARV. J. LAW & TEC 1, 37 (2001)).

will suffer if the federal adjudication system cannot provide adequate resolution. Professor Moore frames the question perfectly, "Can the patent system flourish if the scope of the patentee's property right is wrongly assessed one-third of the time?"[11]

Critics and commentators argue that the legacy of these cases is a flawed system. They claim that the reversal rate of the district court by the Federal Circuit is 40% or higher. They argue that appeals are increasing and whereas it used to be an appeal over one or two words, we now see multiple appeals -- over numerous words in a claim such as "a", "or", "and". However, it is countered that the number of appeals by the Federal Circuit has been constant at approximately 450 per year for the last twenty years – the same volume as before and after the *Markman* and *Cybor* cases. The lack of comprehensive and granular statistics makes it difficult to say which camp is correct.[12]

The statistics and anecdotes are the premise for the assertion that an all-too high reversal rate means that the system is flawed. This leads to three possibilities, or some mix of all three: (1) the Federal Circuit fails to give sufficient deference to the district court in these cases, (2) there are a large number of cases that are simply difficult close calls and could go either way, and (3) there is a lack of accuracy and technical expertise in the district courts.

In response, there are two principal reforms advanced to fix the alleged flaws of our system: (1) enhancing the accuracy and technical expertise of the district courts through the establishment of a specialized patent trial court and (2) permitting interlocutory appeals to the Federal Circuit for questions of patent claim construction.

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[10] *Id.* at 11 (*quoting* Judge Samuel B. Kent).
[11] *Moore* at 2.
[12] Professor Moore, who may have compiled and reported the most comprehensive empirical data available, acknowledges its limitations. *Id.* at 9.

Congress must require the advocates of any change in the law to prove its necessity. It is unclear whether a problem with the appellate review of district court claim construction really exists and, if it does exists for what reasons. An understanding of the underlying reasons can focus efforts toward a solution. Second, both of the proposed court reforms present their own sets of risks, problems and challenges that need to be clearly understood.

A. It is Premature to Restructure the District Court System

In examining the issues surrounding patent litigation, Congress must understand the trends, identify specific goals, such as improving accuracy and certainty in patent litigation, and then choose the best mechanism to accomplish its goals. The goals will dictate the nature of the reform or the structure of any institutions intended to mitigate current problems. A growing chorus of commentators argues that the federal courts are not providing an efficient method for resolving patent disputes. If this were true it would be especially troubling since all of the available evidence suggests that the number and complexity of patent disputes will climb dramatically in a few short years.

As Congress reviews the problems surrounding patent litigation, there is a very tempting suggestion -- a structural change to today's federal judicial machinery by creating a specialized patent trial court. In fact, one of the other panelists will discuss this proposal in more detail. We know that patent law requires a specialized understanding of the law and of technology, so it seems natural that a specialized court of patent trials might be beneficial.[13] Any recommendation to modify the structure of the

[13] Senator Patrick J. Leahy, an opponent of specialty courts even for complex litigation such as concerning environment and tax laws, supported the establishment of the Federal Circuit. He said, "I believe that patent law stands apart from virtually every other legal discipline both in its extreme focus on science and

federal courts must include a sound and persuasive analysis that is based on discrete and concrete criteria. At this time the argument for Congress structurally altering the federal district courts seems premature.

There are several reasons to oppose the creation of a special patent trial court. The first is the "parade of horribles" argument: it will inevitably set a precedent that could lead to balkanization of the federal judiciary. The creation of any new court will likely be followed by calls for separate trial courts for other specialty, and arguably worthy, areas of the law (e.g., environmental law). The academic literature is full of a variety of reasons against specialty courts on the ground of narrowness, capture, and isolation. Also, the U.S. jurisprudential tradition favors generalist judges and the strong sentiment that generalist judges improve the legal system through the cross-pollinization of ideas.[14]

Additionally, as the Subcommittee is certainly aware, there are always political considerations to confront. Patent litigation is a healthy business and gives rise to local constituencies. An effort to consolidate patent trials to one venue would be opposed by many bar associations and local constituencies.

One danger arising from a separate patent trial court is the possibility that it will decrease uniformity in the law and lead to balkanization. For example, a "patent case" referred to the patent court may have a variety of related federal and state law claims including patent infringement, validity, copyright infringement, trade secrets, and antitrust. One could foresee situations where these non-patent issues are dragged into

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technology and its need for uniformity in decision-making." S. REP. NO. 275, 97th Cong., 1st Sess. (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 39.

[14] Chris J. Katopis, *The Federal Circuit's Forgotten Lessons?: Annealing New Forms of Intellectual Property Through Consolidated Appellate Jurisdiction*, 32 J. MARSHALL L. REV. 581, (1999).

the specialized patent trial court and over time a new variety of case law dictates these subjects. Another danger would arise if patent issues were to be "plucked" from cases in the district courts and referred to the specialized patent court. This would lead to a host of procedural and substantive problems. If the issue is truly about patent expertise, then the proposals for shifting much of this work to the USPTO for further reconsideration makes more sense as it offer the benefit of expertise while avoiding the discussed problems.

While the "uniqueness" of patent law may have won over skeptics of specialty courts during the period when Congress established the Federal Circuit, a national court of appeals, the arguments seem less persuasive for the creation of a patent specialty court. While many commentators have called for the creation of a specialized court of patent trials, or a national patent trial court, my own view is that it will have little benefit, will be futile, and will ultimately cause more harm than good. By contrast, U.S. innovation policy was bolstered by the establishment of a national court of patent appeals. Our system is healthy primarily due to the general federal district courts funneling up to a national appellate court.

B. The Court of Appeals for the Federal Circuit

The Federal Circuit is an example of how Congress overcame important challenges involving the poor state of the patent system and its resulting impact on the U.S. economy, industrial base, and inventive activity. The country was confronted with the economic malaise of the 1970s and a legal climate of uncertainty around patents that made it economically foolish to invest in innovation. The issue was studied in a

bipartisan fashion. Congress itself innovated by establishing a new federal court of appeals. After more than twenty years, the overwhelmingly amount of evidence proves it has been a success.

The Federal Circuit is credited with many important improvements including increasing uniformity, doctrinal stability, enhancing predictability within the bodies of law in its jurisdiction, the reduction of inter-circuit conflicts, reducing waste and costs.[15] While the Federal Circuit is credited with enhancing the U.S.'s innovative climate, a "renaissance" in patent law, today, unfortunately, makes the Federal Circuit an easy target for critics of the patent system. The urban myth is the Federal Circuit is said to be too "pro-patent," as if it rubber-stamps patents it reviews. In my view, the criticism that the Federal Circuit is "pro-patent" is entirely unjustified. For example, in many areas it has scaled back the scope of patent rights by limiting the doctrine of equivalents and revising the law of inequitable conduct.

The Federal Circuit has advanced an important goal by promoting a uniform national patent law and enhancing certainty over the span of two decades. Our system works well with a generalist trial system that funnels up to a national subject matter court of appeals. Today, the proposals for improving the federal adjudication of patent disputes focus on the interaction between the Federal Circuit and the federal district courts.

C. Interlocutory Appeals

In response to the argument that the Federal Circuit's reversal rates in claim construction cases are too high, some commentators have suggested permitting interlocutory appeals of claim construction issues to the Federal Circuit. My own view

is that permitting interlocutory appeal for all claim construction issues is ill-advised, for several reasons, including:

- *It will overburden the Federal Circuit's workload*. Appeals will be frequently used in a growing number of cases since the cost of an appeal is relatively small compared to the initial district court litigation.[16]

- *Flawed Judicial Procedure.* It seems flawed to permit the appeal of an issue when the record is not fully developed, to look at a proceeding in a piecemeal way, and to issue what is essentially an advisory opinion.

- *It Exists Already and Doesn't Seem to Help.* This method of sending a question for review exits *de facto* today and there is no evidence that it is improving the adjudication of patent disputes. Litigators now employ the tactic of moving for summary judgment on an issue (e.g., literal infringement), and then appeal to the Federal Circuit.

Further consideration of this issue requires understanding what underlies the reversal rates before efforts of correcting this alleged flaw are begun.

The balance between accuracy and certainty can best be achieved by limiting, but not eliminating, the *de novo* review standard of claim construction issues. This would accomplish several important goals – increasing confidence in the judicial system through greater affirmance rates, managing caseload by encouraging cases to settle earlier and discouraging appeals, and promoting thoughtful claim construction by the district judges – all of which will hopefully decrease the public's frustration.[17] It would also bring about greater certainty for inventors, investors, and entrepreneurs. Uncertainty in the patent system hurts U.S. innovation policy; it also increases the risks surrounding investment of time and not only financial resources into inventive activity such as

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[15] *Id.* at 599-600.
[16] Professor Moore hypothesizes a 42.5% increase in the number of patent cases appealed if interlocutory appeals are established. *Moore* at 37.
[17] *Moore* at 28.

research and development, our manufacturing base, and job creation. Any increase in certainty in the adjudication promises benefits for the U.S. patent system.

The key problem is whether the district court will be properly construing claims and getting their meaning correct. A balanced solution entails improving certainty in appeals and improving district court accuracy; this requires increasing appellate deference to the trial court, even by a modicum amount. One suggestion is for Congress to enact legislation to tighten the standard of review by the Federal Circuit in claim construction cases to a "*de novo* review based on an issue of fact." Hopefully, this would make adjudication more certain by promoting more deference to the lower courts. As Judge Newman noted in *Cybor*, "By continuing the fiction that there are no facts to be found in claim interpretation, we confound rather than ease the litigation process."[18] While increasing certainty would be advantageous, so would enhancing the technical expertise and accuracy in the district courts.

Greater Deference to the Trial Courts. Any tightening of current *de novo* standard would certainly be an incremental reform, but would be real progress. It poses some advantages over the proposal for permitting interlocutory appeals for all cases, by giving some modicum of deference to the trial court. In truth, the Federal Circuit employs various standards of review for different areas of law, so a new level of review is not wholly foreign. I concede that it raises some constitutional questions. If claim construction is a pure question of law, akin to interpreting a statute, it may be difficult for Congress to limit appellate review by statute.

[18] "By continuing the fiction that there are no facts to be found in claim interpretation, we confound rather than ease the litigation process." *Cybor* at 1480. (Newman, C.J., concurring).

The proposal is worth reviewing since it would squarely address the issue at heart of much of today's frustration. The merit of this proposal is that it would place a greater emphasis on adjudication at the district court. In one of his articles, Mr. Pegram noted, "many district judges 'want no part of patent law.'"[19] This may have several bases, but there is growing evidence that federal district judges feel as if their work is treated like a rough draft and they are wasting their time. Alternatively, perhaps one of the underlying reasons that the Federal Circuit's reversal rate is so high is the district court lacks certain capabilities.

IV. ENHANCING THE DISTRICT COURT'S CAPABILITIES IN PATENT CASES

As Congress reviews whether the statistical evidence truly demonstrates that the federal system for the adjudication of patent disputes is flawed, it can simultaneously devote its attention and effort to enhance the overall system by focusing on the needs of the district courts. There are several ways in which Congress can increase the level of accuracy and technical expertise in the district courts.[20]

Providing Technical Resources. The district courts deserve additional technical resources for patent cases. The range of technology issues that they will confront will exceed the knowledge of any one judge or even a dozen judges (e.g, biotechnology, nanotechnology, electrical engineering, software, etc). Judges need access to a range of

[19] John B. Pegram, *Article: Should the U.S Court of International Trade Be Given Patent Jurisdiction Concurrent with That of the District Courts?,* 32 HOUS. L. REV. 67, 75 (1995).
[20] "It does bother me quite a bit when judges show clearly in decisions that they don't understand technology." *Id*. at 129 n. 449.

resources and tools. Today there are several non-profit and educational organizations that provide such resources for federal judges, for example, the Biojudiciary Project.[21]

The technical expertise of the federal district courts will benefit from the addition of in-house resources and training. Judges employ several law clerks, generally for one or two year terms. The Federal Circuit has model resources that are worthy of emulation by the district courts. First, the judges all employ at least one clerk with some engineering or science background. Second, the Federal Circuit also has a centralized office with permanent staff attorneys. The law clerks and central staff have a range of scientific and engineering backgrounds and thus can consult one another if a technical issue arises beyond their own sphere.

As Congress considers authorizing new pilot projects and judicial resources, it should consider funding a small number of new units of career staff attorneys with technical backgrounds in centralized offices for the various federal district courts. The courts should seek attorneys with technical backgrounds in a variety of fields. Congress should also provide incentives for these attorneys to stay in their positions with the government for a number of years. As you know, one of the concerns recently expressed by the GAO is the difficulty of the USPTO in retaining its career engineers and scientists who serve as patent examiners.

Incentives for Trial Judges. It is said that the carrot is mightier than the stick. There is anecdotal evidence that the majority of judges just do not like patent cases. One can hypothesize several reasons for this apprehension, perhaps patent cases are too time

[21] "The Biojudiciary Project is a 501c(3) non-profit organization with an educational mission to provide judges, lawyers, scientists, reporters, and the general public with knowledge tools necessary to address pressing questions emerging from the intersection of biotechnology and the law." *See* http:\\www.biojudiciary.org.

consuming or technically complex. Some judges are gleeful that they can go decades without ever receiving a patent case. My research into the creation of the Federal Circuit leads me to believe that was only possible because most appellate judges at that time did not want to see patent appeals.[22] It is unworkable to force judges to hear patent cases. One solution may be to increase the weight a patent case gets in the assignment. Another solution may be to reward a district judge who handles a patent case by permitting the judge to have an extra law clerk or some other resource as an incentive.

Special Masters. The technical contribution of court-appointed experts, such as special masters, who make recommendations to a district judges can improve the accuracy of the district courts' opinions. The use of special masters has many benefits, including bringing unique technical expertise to a rare area of technology and substantially shortening the time necessary for claim interpretation.[23] A valuable statistic in this debate is the percentage of the alleged 40% reversal rate that is attributable to the claim construction when either a special master or a federal magistrate was used by the district court.

The Federal Judicial Center of the United States (FJC) and the Administrative Office of the U.S. Courts (AOC) should develop and provide better tools for the district court judges in patent cases. Today there are some resources and training for judges who handle patent cases, but these should be enhanced with an emphasis on the process and rules regarding claim construction.[24] Judges must also have superior tools to locate special masters and training to properly use these court appointed experts. Currently,

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[22] This may be one factor why copyright law was not included in their exclusive jurisdiction.
[23] See Lee A. Hollaar, Ph.D., *The Use of Neutral Experts*, ANALYSIS & PERSPECTIVE 660, 663 (Vol. 4, No. 24) (2004).
[24] H. Schwartz, PATENT LAW AND PRACTICE (FJC 1995).

there exists no centralized database or repository of names of available special masters by technology specialty in existence for use by the courts. While interviewing individuals for this hearing, I heard a telling story. A former special master in a patent case explained the way that a judge had located him. The judge's law clerk performed an Internet search using Google. Surely, the judiciary deserves better and more dedicated resources for this task.

Although there may be hot debate and inconclusive facts about the need for the creation of a specialized patent trial court, there are a variety of resources and tools that can enhance the expertise needed in patent district court trials. In addition, Congress and the Judiciary should continue the dialogue about any alleged flaws and needed solutions.

V. CONCLUSION: IT AIN'T BROKE

In summary, the U.S.'s system of adjudicating patent disputes is very healthy, as evidenced by the enormous and increasing amount of inventive and investment activity seen every day. Yet a growing chorus of complaints, mixed statistical reports, and anecdotal evidence suggest that the system is flawed. While it is premature for Congress to consider radical structural alternatives for the federal judiciary's review of patent cases, there needs to be a healthy public debate on these topics, including the proposal to establish a specialized patent trial court. Unless the critics of the current system satisfactorily make their case, more study is required before action is advisable. Congress should consider working with the FJC and AOC to take the following steps:

- *Generating a comprehensive statistical survey to provide a greater understanding of the patent cases moving from the USPTO, to the federal district courts, and the Federal Circuit. This study should include information about the caseload, complexity, and trends regarding the patent cases in the courts, their disposition,*

including more information about the reversal rates on appeals (i.e., the granular information of whether the district court relied on either a magistrate or special master).

- *Providing more resources and technical expertise to the federal district courts; and,*

- *Commissioning a joint-panel of district and appellate judges to recommend a series of incremental court reforms on a pilot basis. This hearing is an important start for the dialogue between Congress and the courts. Judges must have input in the debate and any proposed solutions. The U.S.'s intellectual property system is the envy of the world. Any changes to our system can have global financial and research ramifications.*

These simple steps can all be initiated before Congress adjourns for the year. The sooner that you act, the sooner that there will be benefits for all involved. Your work in this area promises to pay dividends for generations to come for all – America's inventors, entrepreneurs, and the public who deserve no less.

Again, thank you for the privilege of testifying and I am happy to answer any questions.

Table I
Number of Patent Cases Filed in the U.S. Courts
***(Source: Gauri Prakash-Canels, Ph.D., Trends in Patent Cases, 41 IDEA 285*))**

Year	Number of Cases Filed
1991	1,178
1992	*
1993	1,553
1994	1,617
1995	1,723
1996	1,840
1997	2,112
1998	2,218
1999	2,318
2000	2,484
2001	*
2002	*
2003	2,814

Table II – USPTO Workload Projections
New Utility, Plant, and Reissue Patent Application Filings
(Source: USPTO Annual reports and workload projections.)

1984	109,010
1993	173,619
1994	185,087
2000	291,653
2003	331,729
2004	351,431
2005	371,100
2006	389,200
2007	409,200
2008	429,600
2009	451,100
2010	473,700