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Officers of the Patent System

It has been an honor and a privilege to serve as your executive director for 32 years. It's been a great run.

I want to congratulate my successor, Mark Lauroesch. He's an outstanding selection. I know him well as a former member of the IPO board, and I can tell you that under Mark's leadership, IPO will thrive.

I've loved every minute of working with the IPO members and the staff. Almost every minute. The people are the best part of the job. You are a wonderful group of people. I could spend my entire time today thanking everyone for the incredible help they have given me over the years.

You should know that the IPO officers, in particular, have always had an uncanny ability to promote the IPO brand. To prove the point, they hired Donald Trump to make remarks at the IPO annual meeting in New York City back in 2007. People who attended that meeting may not remember much about the meeting, but they remember Trump.

Today I've agreed to try to say something meaningful about the U.S. patent system, past, present, and future. As the first Chief Judge of the Federal Circuit, Howard Markey, used to say, "For the next 20 minutes I have a job and you have a job. My job is to talk and your job is to listen. If you finish your job before I finish mine, that's all right." So, here we go.

EARLY REPAIR OF THE SYSTEM

Justice Holmes said reviewing history is not a duty – it's a necessity. On the afternoon of August 22, 1787, inventor John Fitch took a group of delegates at the constitutional convention in Philadelphia for a ride on his steamboat. He might have been the first patent lobbyist. The drafters of the constitution inserted the elegant Article 1, section 8, clause 8:

Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

¹ Unless stated otherwise, the views expressed are those of the author and not necessarily those of IPO.

The U.S. patent system has a rich history, but it has run off the track several times during its life. Congress passed the first patent law in 1790, two hundred twenty-five years ago. It was administered by a patent board led by the first Secretary of State, Thomas Jefferson. Patent grants were signed by Jefferson, Attorney General Edmund Randolph, Secretary of War Henry Knox, and sometimes by President George Washington.

Jefferson examined patent applications for only three years. He had other things to do, and the United States experienced its first patent backlog problem. So in 1793 Jefferson and Congress almost drove the U.S. patent system over the cliff when they changed the law to provide that patents would be granted without examination. A registration system!

The era of the registration system was colorful and chaotic. The Patent Office was headed from 1802 to 1828 by the influential Dr. William Thornton, who was also the first designer of the Capitol Building and raised race horses on his farm in Maryland. He is said to have spent a lot of time at his farm. It was the first Patent Office work-at-home program.

Thornton granted several patents to himself and added himself as co-inventor on others. During the war of 1812, Thornton was eloquent in pleading with the British soldiers not to burn the Patent Office, the only government building in Washington they spared. But the registration system was a failure.

In 1836 U.S. Senator John Ruggles of Maine, also an inventor, issued a Senate report saying the patent registration system had spawned many frivolous lawsuits by unscrupulous people who copied earlier patents and obtained patents themselves on the same thing. These were the first patent trolls.

Congress then passed the landmark patent act of 1836, which required an examination of applications. Patent litigation subsided. Senator Ruggles was granted patent number 1 under the new numbering sequence that we still use today. Political influence at work in the patent system.

The mid to late 19th century may have been the heyday of the patent system. The Old Patent Office Building at 8th and F Streets in Washington became a major attraction for tourists who came to view the patent models. Architect Philip Johnson, a different Philip Johnson than the one here today, called the Patent Office “the most beautiful building in the world.” It will be the site of the IPO Education Foundation Awards Dinner on December 8 this year.

MORE REPAIRS AND IPO’S FOUNDING

The U.S. patent system unquestionably has incentivized a tremendous amount of innovation. It’s the innovation cornerstone of our free market economy. However, in

the 179 years since patent examination was reinstated in 1836, the system has had to be repaired several more times.

Patents experienced a terribly difficult period starting before World War II and continuing through the 1970s. Government antitrust policies and judicial hostility toward patents reduced the value of patents and restricted the ability to license.

That was why IPO was started 43 years ago, 11 years before I came to IPO. To combat the anti-patent climate of the 1970s, seven companies founded IPO in Washington, DC in 1972. Two of the founding companies, 3M and Monsanto, are still members of the board today. GE and others soon joined. In its early years, IPO ran a public education campaign to teach the public and policy makers that patents were not harmful monopolies.

The era of antitrust and judicial hostility faded with changes in Justice Department policy and creation of the Federal Circuit in 1982, which IPO supported. IPO was honored that two of its most active board members – Polly Newman and Alan Lourie -- were among the first appointees to the court.

In its early years IPO was a much smaller association than today. A majority of its corporate members were chemical and pharmaceutical companies. The first two presidents were Bill Schuyler and Don Banner, who had been heads of the USPTO. Around 1990 IBM Corp. joined and after that HP and Microsoft and later many other diverse companies. Thus, IPO became an association of companies with many different business models.

In 1992 Roger Smith of IBM became the first elected IPO President under the reorganized governance scheme by which we elect a chief IP counsel of a company to serve a single 2 year term as IPO president. Smith and other early presidents including Gary Griswold, Marc Adler and Jeff Hawley who are here today advocated broad IPO membership and more international involvement. Bob Armitage, also here today, was a board member at that time who had a strong interest in international issues. Globalization of IPO is still a work in progress.

In 1990 IPO formed a temporary foundation that raised \$2 million to publicize the bicentennial of American patent and copyright law. A thousand people attended a week-long celebration of 200 years of success in promoting innovation and creativity, and the future of patents, and copyrights, looked bright.

In 1994, the United States signed the TRIPS agreement, the most important IP agreement of the century. The chief U.S. negotiator for TRIPS was Mike Kirk, my former colleague at the USPTO who is in the audience. Without him TRIPS would never have happened.

In the 1990s, however, the patent system's reputation was damaged by "submarine" patents. Applicants kept their applications submerged in the PTO for decades by using

continuing applications until manufacturers had invested heavily in new products. Jerome Lemelson, the most famous submariner, was obtaining and licensing patents with broad claims for bar code and machine vision technology for which he claimed priority dates of 1954 and 1956. Ultimately judicial decisions and the change to a patent term expiring 20 years after the earliest filing date curbed the submarine plague.

After 2000, the system ran off the track briefly with a flurry of false patent marking suits. The AIA put a stop to that crisis. Patent system problems can be repaired.

CHALLENGES TODAY

Where is the U.S. patent system today?

It may still be the best system in the world, but I think it's being dragged down by uncertainty over what inventions are eligible for patenting, too much litigation, and questions about patent quality. More repairs are needed.

The 2014 opinion of the Supreme Court in *Alice Corp. v. CLS Bank*, by a court that doesn't like to draw bright lines, left everyone confused about what subject matter is eligible for patenting. The court didn't even define "abstract idea." Recently it was reported that business method patent filings are down 52 percent in one class. IPO biotech and pharma members are worried about protecting their R&D investments. The PTO is making more section 101 rejections and struggling to clarify its eligibility guidelines. IPO and other associations are beginning to talk about legislation to clarify patent eligibility, but that will be a really long-term project.

Abusive patent litigation and threats of litigation by so-called patent trolls are still a problem awaiting a solution. Opinions differ on the magnitude of the problem, but nearly everyone agrees it has been a problem. The term "patent troll" was coined by folks at Intel Corp. IPO got into the issue early by sponsoring a pair of conferences titled Trolls and Trolls II. After the conferences, then-IPO President Jeff Hawley of Eastman Kodak Co. said the only agreed-on definition of a troll was that a troll is someone you don't like.

IPO is trying to help bring together the varied interests that support and oppose the current patent litigation reform bills in Congress. We have IPO association positions supporting selected portions of the bills. For instance, we support in principle the House bill's presumptive award of attorney fees to the prevailing party. At the same time, we support changes in PTAB proceedings to use district-court claim construction law in IPR and PGR proceedings. A successful patent reform bill should solve the patent troll problem and preserve the ability of patent owners to enforce their patents.

The U.S. Supreme Court said in 1966 in *Graham v. John Deere Co.*:

. . . it must be remembered that the primary responsibility for sifting out unpatentable material lies in the Patent Office. To await litigation is – for all practical purposes – to debilitate the patent system.

You can't make widespread improvements in the quality of the 300,000 or so patents granted each year by changing district court litigation or the PTAB. The number of patents challenged in a year in court or at the PTAB is about 2 percent of the number of patents granted in a year.

USPTO Director Michelle Lee and Deputy Director Russ Slifer, both former members of the IPO Board of Directors, I'm proud to say, deserve credit for their Enhanced Patent Quality Initiative now underway. The USPTO has to infuse a strong culture of quality into the USPTO patent examining corps. It can be done.

MORE STORM CLOUDS

So repair work is underway. But I believe other storm clouds demonstrate the need for the guardians of the patent system to become more active.

- Patent filings apparently are down in the USPTO's fiscal year 2015, which ends tomorrow. This is the first year-to-year decline since 2009, and no one seems sure why there is a decline. The USPTO is thinking of proposing an increase in fees to offset the revenue loss. This could cause a downward spiral.
- Theft of USPTO user fees for unrelated government programs could happen again this fall. Congress has diverted or sequestered more than \$1 billion since 1992, including more than \$140 million just three years ago. More patent fee theft would halt progress in cutting backlogs of patent applications and ex parte appeals -- backlogs that are causing uncertainty in patent rights.
- We are seeing more and more attacks on the patent system in the general media. The recent article in *The Economist*, followed by a me-too article in *Fortune*, was an outrage. An assault on the system with no credible supporting evidence. These articles strengthen the hand of deadbeats who just don't want to pay to use patented inventions. Very dangerous.
- Some people are saying companies are no longer willing to invest in the next big thing. Marshall Phelps, former head of IP policy and strategy at IBM and later at Microsoft, wrote in *Forbes* last month that now companies want to buy their technology by buying startups. They don't want to invent it themselves. IBM invested \$40 billion, in current dollars, in developing the breakthrough 360 computer. No one is doing that now.
- Independent inventors and universities are being criticized as patent litigation abusers who don't make any important inventions anyway. But the evidence doesn't support it. The search committee for the IPO Education Foundation

Inventor of the Year award finds the best inventions often come from independent inventors and universities. Dean Kamen is not a troll. He's a national resource.

CALL TO ACTION: OFFICERS OF THE PATENT SYSTEM

The guardians of the patent system have their work cut out for them. Who are the guardians of the patent system?

They are us! Look at history.

Patent owners, patent attorneys and inventors always have been the ones who have had the long term passion, and the economic incentive, to make sure the system is preserved and promotes innovation. Politicians come and go. Patent offices can be under the thumb of politicians. Scholars often are not in touch with the real world of innovation and they are more inclined to advocate change than to protect what has worked.

I submit that the guardians of the patent system must become Officers of the Patent System. The Officer of the Patent System job is not just for lawyers, but it is a concept comes from the tradition that lawyers are officers of the court, or officers of the legal system, who have a duty to preserve and protect the justice system in addition to the duty to zealously represent clients. By analogy, an Officer of the Patent System is an individual who serves personal, employer or client interests but also takes responsibility for preserving the patent system as an innovation tool.

Most actions that can be taken by Officers of the Patent System to support the system involve no conflict of interest. Everyone should work on public education, for instance. Some actions to support the patent system could conflict with the perceived short term interest of your employer or client who wants to take the easiest road. As an Officer of the Patent System, you should speak up for taking a road that preserves the longer term benefits of the patent system.

The patent system has fallen into disrepair before, and you and your predecessors have pulled it back. It has been saved by individuals and by IP professional and trade associations.

Ensuring a robust, workable patent system for the future is not going to be easy. There are more people who want something for free than people who have the desire and ability to innovate.

Dr. Ben Carson in the first Republican president debate said America became a great nation early on because it was flooded with people who understood the value of personal responsibility, hard work, creativity, and innovation. The Officers of the Patent System need to get every candidate of both parties talking that way about innovation and the patent system.

By organizing the Officers of the Patent System, we can preserve the system and make it better. IPO and the others associations can help the Officers march together.

I hope you will enlist in the Officers corps if you aren't in it already. Your attendance here at the IPO annual meeting is a great step. We have a challenging journey ahead, but based on history and my confidence in the people in this room and beyond – I believe we can right the ship once again.

Thank you.