



December 18, 2020

Joe Biden
President-Elect
United States of America
1401 Constitution Avenue, NW
Washington, D.C. 20230

Kamala Harris
Vice President-Elect
United States of America
1401 Constitution Avenue, NW
Washington, D.C. 20230

Dear President-Elect Biden and Vice President-Elect Harris:

Congratulations on your election to be the next President and Vice President of the United States. I am writing to recommend that intellectual property (IP) law and policy be priorities in your administration.

IPO is an international trade association representing a “big tent” of diverse companies, law firms, service providers, and individuals in all industries and fields of technology that own, or are interested in, intellectual property (IP) rights. IPO advocates for effective, affordable, and balanced IP rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of intellectual property.

IPO’s mission is to promote high quality and enforceable IP rights and predictable legal systems for all industries and technologies. Our vision is the global acceleration of innovation, creativity, and investment necessary to improve lives. The IP system is fundamental to the nation’s economic growth and job creation and to our global competitiveness. The importance of innovation is clearer than ever at this moment in our nation’s history as we face challenges such as the coronavirus pandemic and related economic instability, the climate crisis, and the need to ensure diverse and inclusive representation of viewpoints.

The development of new ways to fight COVID-19 would not exist absent the IP system enabling companies to continue investing in new medical technologies. The ability to leverage and build upon scientific research conducted over many years, made possible by the IP system, enabled industry to expedite the vaccine development process. Beyond the tremendous impact our IP system has had on our ability to develop a COVID-19 vaccine, it has been instrumental in protecting us from the virus in the interim. Personal protective equipment, such as high-quality respirators, latex gloves, bio-suits, and goggles, offered frontline workers the protection necessary to safely treat patients and save lives. These products, too, were the result of years of investment in innovation. Innovative computer-implemented technologies have allowed us to stay connected for work, school, and socialization while in quarantine. During this unprecedented time that has

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required us as a global community to physically distance from each other, technologies that resulted from a balanced IP regime have allowed us to remain digitally connected.

As IP has proved critical in helping the U.S. in the fight against COVID-19, it is also helping to ensure we protect our planet for future generations. IP is an integral part of developing new global environmental policies aiming for a more sustainable lifestyle based on green technologies. The IP system creates incentives that enable green technology creation, adaptation, and distribution. From the latest clean energy technology to electric vehicles, U.S. companies are finding new ways to innovate while leaving a minimal impact on our planet. Towards that end, we support the Biden Administration's pledge to invest \$400 billion, as one part of a broad mobilization of public investment, in clean energy and innovation. Other forward-looking technologies such as artificial intelligence and quantum computing will only continue to become more important; U.S. leadership in creating an innovation policy that promotes investment in these areas is crucial to our global competitiveness and to national security. Investment in technological progress is the best way forward for our country.

Closing the diversity gap in innovation is also vitally important to our economic growth and global competitiveness. Women, people of color, and other minority groups are vastly underrepresented in the patent system. For example, the USPTO reported that in 2019 women were named as inventors on only about 22% of patents granted. This greatly concerns IPO and has inspired us to evaluate the scope of the problem and how to facilitate more diverse participation in the patent system. In 2019, IPO published a Gender Diversity in Innovation Toolkit, developed by our Women in IP Committee as a resource for companies to assess and improve gender parity. We continue to evaluate measures to increase diversity more broadly.

A 2018 report by The Quality of Opportunity Project indicated that "if women, minorities, and low-income children were to invent patented technology at the same rate as white men from high-income (top 20%) households, the rate of innovation in America would quadruple." Dr. Lisa Cook's scholarship indicates that increasing participation in inventing by underrepresented groups could increase U.S. GDP by as much as 4.4%. It is imperative that the public and private sectors work together to close this gap and harness our country's potential to innovate at greater levels than ever before. We hope that you will join us in prioritizing this critical issue.

We appreciate your attention to these national priorities. We attach for your reference an appendix summarizing intellectual property issues that threaten sound innovation policy in the U.S. and worldwide. Please let us know how we be of help.

Sincerely,

A handwritten signature in blue ink, appearing to read "Daniel J. Staudt". The signature is fluid and cursive, with a prominent initial "D" and a long, sweeping underline.

Daniel J. Staudt
President

APPENDIX: KEY INTELLECTUAL PROPERTY ISSUES

I. Clarifying Patent Subject Matter Eligibility

Since 2010, the U.S. Supreme Court has issued four patent opinions—*Bilski v. Kappos*, *Mayo Collaborative Servs. v. Prometheus Labs.*, *Ass’n for Molecular Pathology v. Myriad Genetics Inc.*, and *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*—that have caused a sea-change in determining what inventions are patent-eligible under 35 U.S.C. § 101. Section 101 is directed to the classes of inventions or discoveries that are the proper subject matter of patents versus other types of IP protection. With this quartet of cases, the Supreme Court crafted a new test for analyzing eligibility. The jurisprudence eliminated some undeserving patents, while also affecting the ability to protect deserving innovation. It has detrimentally affected areas such as precision medicine & artificial intelligence and risks a chilling effect on further developments and investment in these critical technologies.

In 2017, IPO recommended a legislative solution to overturn the Supreme Court’s jurisprudence. In 2018, we merged our thinking with the American Intellectual Property Law Association and adopted a joint legislative proposal that received a good deal of attention in the media and among policymakers. In 2019, we enthusiastically participated in an effort led by Senate IP Subcommittee Chair Thom Tillis and Ranking Member Chris Coons to consider an appropriate legislative fix. We continue to believe that legislative action is needed. To that end, we will continue working during the next session of Congress with Senators Tillis and Coons to find a balanced solution that addresses the diverse interests of our members.

II. Protecting Trade Secrets

Trade secret theft is a large and growing problem. We are increasingly being targeted by sophisticated efforts to steal proprietary information. The threat comes both from company insiders who would take trade secrets and sell them to the highest bidder and from outsiders, including competitors who try to infiltrate company networks and foreign governments using their espionage capabilities against American companies. The rise of sophisticated technology, perpetual connectivity, and globalized supply chains has made it even easier for would-be thieves to access competitively sensitive information. When that information lands in the hands of a rival, the rival can replicate market-leading innovations at a fraction of the cost, bypassing the years of research and development put into those products.

In our global, information-based economy, the U.S.’s most valuable currency is its knowledge. Many countries provide insufficient protection for trade secrets, which presents significant economic risks to American companies seeking to expand operations globally. IPO submitted comments earlier this year to the Office of the United States Trade Representative (USTR) in response to USTR’s request for public comment in preparation for the Special 301 Report. (<https://ipo.org/index.php/ipo-2020-special-301-review-comments/>). We highlighted the problem of trade secret misappropriation overseas and discussed where there are significant gaps in protection around the world.

Inadequate protection of trade secrets abroad harms not only companies whose property is stolen, but also the country where the theft occurs, because companies are then less likely to form joint ventures and make high-value investments in those countries.

III. Ensuring Predictable Legal Systems for all Industries and Technologies

a. USPTO Post-Patent Grant Proceedings to Review Validity

The Leahy-Smith America Invents Act, enacted in 2011, created three new types of adjudicatory proceedings at the USPTO to quickly and inexpensively review the validity of granted patents. Inter partes review proceedings have been particularly popular among patent challengers and have made the USPTO's Patent Trial and Appeal Board (PTAB) a major forum for adjudicating patent validity.

After almost a decade of experience conducting these proceedings, we believe ongoing attention is needed to maintain balance between patent holders and challengers in the rules that govern these proceedings. IPO has made numerous recommendations for rulemaking by the USPTO and reviews the need for legislative action on a regular basis.

b. Venue in Patent Litigation

In 2017, the U.S. Supreme Court's decision in *TC Heartland, LLC v. Kraft Foods Group Brands LLC* restricted venue in patent infringement suits, which was a welcome change for companies concerned about forum-shopping. The Court held that under the patent venue statute, 28 U.S.C. § 1400(b), a domestic corporation resides only in its state of incorporation rather than in any district in which it is subject to personal jurisdiction. Subsequent decisions have incrementally delineated what it means under the statute to have a "regular and established place of business" where the defendant has committed acts of infringement.

IPO has come to believe that the developing jurisprudence concerning venue may necessitate careful consideration of legislative amendment. IPO has recommended amending the 28 U.S.C. § 1400(b) to limit venue to certain jurisdictions based on clearly delineated factors. IPO has also recommended specifying that in declaratory judgment actions, venue should be determined according to 28 U.S.C. § 1391.

Very recently, Federal Circuit case law has highlighted the importance of another legislative amendment concerning venue in cases brought pursuant to the Drug Price Competition and Patent Term Restoration Act ("Hatch-Waxman Act") or the Biologics Price Competition and Innovation Act ("BPCIA"). IPO believes the appropriate solution is an exemption to the patent venue statute, 28 U.S.C. § 1400(b), specifying that venue is proper in patent cases brought under Hatch-Waxman and BPCIA in any judicial district where the defendant is subject to the court's personal jurisdiction with respect to the action. Absent such a legislative change, litigation abuses that upset the careful policy balances of the Hatch-Waxman Act will occur.

IV. Addressing Counterfeiting / Trademark Infringement

Counterfeiting is a global problem that affects more than a brand or brand owner. The

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sale and manufacture of counterfeit goods harms the public, consumers, patients, hospitals, governments, and more. Counterfeiting has well known links to organized crime and money laundering and is a threat to public safety. The COVID-19 pandemic has created an increase in counterfeit personal protective equipment, hand sanitizer, and other products in high demand because of the pandemic. The sale of these products, and especially counterfeit respirators and masks, poses a significant health and safety risk that affects consumers in almost every country.

E-commerce and social media platforms have made it easier for counterfeiters to sell their products. These platforms provide counterfeiters with an opportunity to engage with consumers anonymously with very little effort. Many e-commerce and social media platforms allow counterfeit products to be displayed next to authentic products. In many cases, consumers only realize they purchased a counterfeit product after the product fails. The number of e-commerce platforms increases every year, making it easier for counterfeiters to jump from one platform to another to avoid detection. The Covid-19 epidemic has of course led consumers to make more purchases through these platforms, exacerbating these challenges.

Many brand owners engage with third party vendors to help enforce their brands on e-commerce and social media platforms. Other brand owners cannot afford to do this and must rely on internal resources and the cooperation of the platforms where they find counterfeit products. Some platforms cooperate well with brand owners, while others are more difficult in this regard. More action is needed by e-commerce platforms to prevent the sale of counterfeit goods on their platforms and to provide information on the source of counterfeit goods.

Customs offices throughout the world play a key role in offline enforcement by helping brand owners stop counterfeit products from entering a country. However, some countries do not give their customs officials the ability to seize and destroy counterfeit products, which is a challenge for brand owners. This lack of effective global border enforcement makes it easier for counterfeiters to ship counterfeit products around the world and focus their activities on countries with weak border and IP enforcement.

It is difficult for brand owners to coordinate anti-counterfeiting efforts by customs offices and law enforcement agencies. Because counterfeiters are global, there should be more international cooperation and collaboration between government agencies and law enforcement agencies. In the U.S., brand owners work closely with the U.S. IPR Center. The creation of similar centers around the world would increase the collaboration and cooperation needed to help brand owners and consumers.

We believe additional measures are necessary, such as: (1) improved police and customs enforcement, (2) processes that facilitate quick identification and prosecution of counterfeiters; and (3) improved processes by online marketplaces and social media platforms to detect counterfeit products, block or remove those products from their platforms and prevent relisting. These efforts should be global to limit the risk of egregious offenders relocating to countries and marketplaces where laws against counterfeiting are weak and enforcement is lax.

V. Providing High Quality, Enforceable Rights and Predictable Legal Systems in the United States and Abroad

a. Granting High Quality Patents

Effectively promoting innovation requires that patents are granted only when they fully comply with all statutory requirements and that the patent examination process advances quickly, transparently, and accurately. A patent should not issue if an invention is anticipated or obvious, or if the patent fails to meet disclosure requirements. Improving patent quality will increase the number of patents wherein all claims will be valid.

For more than a decade, IPO has studied and made recommendations—individually and as a participant in groups such as the Industry Trilateral—concerning measures to improve patent quality. Applicants, of course, share the responsibility to improve patent quality. Historically IPO has made numerous recommendations to patent applicants concerning how to prepare high-quality applications.

Patent offices, courts, and third parties also have important roles in improving patent quality. We applaud recent initiatives undertaken by various offices including the USPTO to allow sufficient examination time, align patent examiner responsibilities with the goal of patent quality, automate systems and processes to eliminate the risk of human error, appropriately assign applications to proper technology specialists, increase access to prior art, increase training, and perform random quality assurance checks on examiners' work.

We urge patent offices worldwide, including the USPTO, to prioritize the constant consideration of new measures, such as updated guidance and implementing emerging technologies such as artificial intelligence into the examination process, with a goal of continuously striving to issue high-quality patents that will stand up to validity challenges. Continuous attention must also be paid to ensuring claim clarity and scope. Additionally, ensuring that examiners have access to all relevant prior art will ensure the quality of prior art searches and make issued patents less vulnerable to invalidation down the road. Overall, concerns about downstream issues such as frivolous litigation will be mitigated if all stakeholders are confident that high quality patents are being granted that will withstand validity challenges.

b. Unfounded Assertions That IP Rights Are a Barrier to Innovation to Justify Compulsory Licenses and Forced Technology Transfer

IPO members continue to witness concerted efforts to weaken intellectual property rights in the name of development, access to health, and environmental concerns. Intellectual property rights have been unfairly portrayed as a barrier to technology transfer based on arguments that they limit availability of technologies and make them more expensive to secure. The threat of intellectual property erosion, however, actually increases the cost of technology and slows its adaptation and deployment. Attempts to place limitations and conditions on IP adversely impact the transfer of needed technology and slow innovation growth. Innovators make investments over many decades before new technology can be deployed at a significant scale. IP rights must be reinforced rather than eroded to encourage this investment.

Initiatives that impair incentives to innovate abound worldwide. For example, forced technology transfers are a regular topic of discussion at the World Intellectual Property Organization. The real cost of these policies is less investment in innovation and the chilling of technology diffusion.

We are also concerned that several countries have adopted or considered resolutions, laws, or regulations that promote or provide broad discretion to issue a compulsory license; compulsory licenses have been issued in previous years in several countries. Granting compulsory licenses undercuts the importance of a predictable and reliable patent system. This is particularly an issue for the United States and its companies, which play a critical role in driving innovations that are routinely copied by other countries. IPO strongly opposes compulsory licensing of intellectual property rights with respect to all industries and technologies. Although IPO recognizes that compulsory licenses of IP rights may be legally permissible in limited and rare situations, IPO believes that licensing of IP rights is best accomplished through voluntary efforts.

Weak protection of trade secrets is also, in essence, a purposeful compulsory licensing framework, allowing actors and domestic companies in those jurisdictions to effectively misappropriate the immensely valuable trade secrets of multi-nationals without a meaningful ability to prevent or remedy the misappropriation. Without holding our trading partners responsible for ensuring strong trade secret protections, some industries will be left without recourse against government-backed or supported upstarts that seek to drastically, unfairly, and illegally reduce the time and expense it takes to bring exceptionally complex technologies to market. This is particularly true in industries that heavily rely on constant innovation in manufacturing, process, and supporting technologies that are extremely difficult, if not impossible, to reverse engineer (thus making them impractical to protect with patents, particularly given the absence of meaningful legal discovery outside the U.S.).

c. Backlogs and Other Bars to Securing Intellectual Property

Increasing global competition drives IPO members to innovate faster than ever before, and in many cases product life cycle times are becoming extremely short. In some countries, debilitating application backlogs at patent and trademark offices are at odds with the pace of innovation. The inability to timely secure IP rights discourages entry into foreign markets. In addition to difficulties in clarifying our own rights, extended pendency makes it harder to identify the rights of others. This can necessitate the inefficient redesign of products after they have been introduced or lead to reduced margins from paying to license a patent that could have been designed around.

Our economic future relies on robust and well-functioning IP systems. These systems must supply incentives that enable U.S. and other innovators to invest, collaborate, and tackle difficult problems. These efforts will improve lives all over the world, while supporting growth, exports, and the creation of high paying jobs in the U.S.