

March 15, 2019

The Hon. William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Hon. Wilbur Ross
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Attorney General Barr and Secretary Ross:

The undersigned companies, groups, and associations write in strong support of Department of Justice Assistant Attorney General Makan Delrahim's decision to withdraw the Antitrust Division's assent to the 2013 joint DOJ-U.S. Patent and Trademark Office "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments" (the "2013 Joint Policy Statement"). We enthusiastically welcome this long overdue course correction in U.S. policy.

Over the last decade, a series of court decisions and administrative actions have weakened the patent system in a variety of ways, making patents harder to get, harder to enforce, and easier to infringe. Taken together, these decisions have decisively shifted the balance of power away from those who innovate and toward those who use those innovations. As a result of these changes, the United States fell from first to twelfth place in patent system strength as measured by the Global Innovation Policy Center's IP index.

The 2013 Joint Policy Statement was a prime example of a policy change that disadvantaged patent holders. While we believe the U.S. Patent and Trademark Office at the time tried hard with some success to make the statement as pro-innovation as possible, we agree with AAG Delrahim that the 2013 Joint Policy Statement was at best confused on how to maintain the incentive to innovate in a standard-development context.

We applaud the DOJ for revisiting its policy and asking the question "whether we are doing everything we can to preserve the fundamentals that encouraged innovation in the first place." We agree with AAG Delrahim that the policy of the U.S. government across all its agencies should be to encourage innovation. This is especially so as the United States increasingly competes against China and other countries in the race for dominance and influence in 5G, artificial intelligence, and other critical technologies that will dominate the future. Antitrust and patent policy can work together, not at cross purposes, to facilitate technological innovation. It is therefore fitting that the December 7, 2018 speech in which the AAG announced the DOJ decision is entitled "Telegraph Road: Incentivizing Innovation at the Intersection of Patent and Antitrust Law."

The Framers of the U.S. Constitution "secur[ed] for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries[.]" The inability to effectively enforce a patent diminishes the value of the exclusive right the patent bestows and discourages innovation and the investments required to commercialize new inventions. That is true in the technology standards

context if standard development organizations refuse patent holders the right to exclude others who reject a license offered on reasonable terms from using their inventions, effectively creating, in the words of the AAG, a compulsory license. And it is true in the context of “efficient infringement,” where infringers use the cost and expense of litigation and administrative patent challenges to effectively deny patent holders their rights. Diminishing the patent right in these ways decisively shifts negotiating power away from innovators who take risks and invest research and development dollars and toward those who take no such risks and wish to use those innovations as cheaply and freely as possible.

It is therefore no surprise or coincidence that many of the same groups who have argued for years to weaken patent rights in U.S. law have come out in opposition to the DOJ decision. Many of these same groups have criticized USPTO Director Iancu for his admirable efforts to make the patent system more reliable and predictable through harmonizing the claim construction standard at the Patent Trial and Appeal Board with that used in district courts and issuing Section 101 guidance to aid in consistent patent examination and enforcement. Largely due to Director Iancu’s efforts, the U.S. ranking in the 2019 IP index has risen from twelfth to second place.

We the undersigned wholeheartedly welcome and endorse the changes the DOJ and the USPTO are introducing to U.S. policy, which we believe will help the United States remain the most innovative country in the world. We also strongly support the AAG’s intention to work with the USPTO Director to replace the 2013 Joint Policy Statement with a new joint policy statement that will better protect the interests of innovation and U.S. innovators and thereby strengthen the national economy. We urge you to discount the arguments of those who claim that increased innovation and job creation require weaker patents and less of the “exclusive Right” the U.S. Constitution contemplates.

Sincerely,

Alliance of U.S. Startups & Inventors for Jobs (USIJ)
American Conservative Union
Conservatives for Property Rights
Innovation Alliance
Licensing Executives Society (U.S.A. and Canada), Inc.
National Small Business Association
U.S. Business & Industry Council

Cc: Assistant Attorney General Makan Delrahim
Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office Andrei Iancu
The Hon. Jerrold Nadler, Chairman, House Judiciary Committee
The Hon. Doug Collins, Ranking Member, House Judiciary Committee
The Hon. Lindsey Graham, Chairman, Senate Committee on the Judiciary
The Hon. Dianne Feinstein, Ranking Member, Senate Committee on the Judiciary