

October 29, 2020

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Graham and Ranking Member Jordan,

On behalf of the undersigned free market organizations, we write to express our strong support for the important changes the current leadership of the U.S. Patent & Trademark Office (PTO) has made over the past three years to bolster patent reliability and promote the rule of law. We commend PTO Director Andrei Iancu for his demonstrated commitment to upholding the protections afforded to American inventors as enshrined in the Constitution.

American innovation, just like the industries and economic growth it supports, cannot prosper in an environment of uncertainty. Fortunately, Director Iancu's contributions over the past few years to reforming America's patent system have begun to provide our innovation economy newfound certainty and predictability.

Arguably the most important steps taken by Director Iancu have been in the form of tailored improvements to how the Patent Trial & Appeal Board (PTAB), an administrative adjudicatory body with the power to invalidate issued patents, operates. Namely, PTO's recent changes to the claim-construction standard used in post-issuance proceedings before the PTAB now require the same standard as used in federal court and the U.S. International Trade Commission. In patent claim construction, interpretive consistency across adjudicatory bodies is paramount, and this harmonization provides much-needed reliability in the interpretation of challenged patents. Holistic reforms to provide greater transparency into internal PTAB procedures and other initiatives are but some of the many accomplishments championed by Director Iancu and for which we commend his efforts.

Other recent reforms of PTAB include updating the Trial Practice Guide and publishing two new Standard Operating Procedures. These provide new procedures for judicial assignments and create a Precedential Opinion Panel (POP), bolstering patents' reliability and certainty. Also, PTO has undertaken rulemaking, pursuant to the Supreme Court's ruling in *SAS Institute v. Iancu*, requiring PTAB to institute inter partes review (IPR) proceedings on all challenged patent claims or else to deny an IPR petition. This welcome reform appropriately limits patent infringers' and speculators' ability to game the system and has rendered patents more reliable.

In several recent cases, PTAB has exercised its discretion under 35 U.S. Code §§ 314(a) and 325(d), such as when a challenge against the patent is pending in federal court. The Precedential Opinion Panel's designation of several cases in which PTAB declined to institute administrative proceedings against a patent as "precedential" show appropriate deference of administrative adjudication to Article III judicial proceedings that would resolve common issues. Moreover, they further fairness and due process. Importantly, Supreme Court decisions in *Cuozzo v. Lee* and *Thryv v. Click-to-Call* affirm the broad statutory discretion the PTO director has with respect to determining whether to institute an IPR. Moreover, Director Iancu's leadership and these precedents align with the Office of Management & Budget's (OMB) deregulatory and regulatory fairness, transparency, and due process initiatives.

The importance of promoting and protecting America's patent system is clear — and so too is the need for Congress to defend the many strides the Trump administration has taken to restore balance in the patent system. We urge you to promote, protect, and uphold Director Iancu's reforms, which we firmly believe are integral to American investment in job creation and innovation.

Respectfully,

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Executive Director
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