



January 11, 2021

Joseph R. Biden Jr.  
President-elect of the United States  
1401 Constitution Avenue, NW  
Washington, DC 20230

Kamala D. Harris  
Vice President-elect of the United States  
1401 Constitution Avenue, NW  
Washington, DC 20230

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

The Innovation Alliance congratulates you on your recent election and wishes to provide our thoughts and recommendations for your incoming administration with respect to the U.S. patent system and the U.S. Patent and Trademark Office (USPTO).

The Innovation Alliance is a coalition of U.S.-based research and development-based technology companies representing innovators, patent owners, and stakeholders from a diverse range of industries that believes in the critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes. We are committed to strengthening the U.S. patent system to promote innovation, economic growth, and job creation, and we support legislation and policies that help to achieve those goals.

The Innovation Alliance believes the Biden Administration should adopt a strategic approach to the patent system and focus on what is needed for the United States to meet the challenge presented by foreign competitors, China in particular. The United States is engaged in a great power competition with China. That country has made no pretense about its intention to invest in a variety of advanced technology areas to supplant the United States as the pre-eminent economy on Earth. In its “Made in China 2025” plan released in 2015 as well as its developing “China Standards 2035” plan, China makes abundantly clear it intends to dominate the economy of the future by focusing on 5G, artificial intelligence, semiconductors, aerospace, biotechnology, and other critical emerging technological areas.

As an authoritarian command-and-control economy, China is able to direct public and much private investment into these strategic areas without regard to profit and loss. It simply orders that funds flow into those areas, and Chinese state owned enterprises as well as many private companies comply. This strategy has been enormously successful and led to impressive results. It cannot be denied that China is today a technological powerhouse, on the forefront of many developments in 5G and other areas, and during its recent successful unmanned lunar mission, China became the only nation other than the United States to plant a flag on the moon.

If the United States is to meet the formidable challenge posed by China and other competitors, we must have the right policies to encourage long-term private investment into critical emerging technological areas. In the view of the Innovation Alliance, there are few policies more important than those that comprise the patent system. By adding “the fuel of interest to the fire of genius,” in the words of Abraham Lincoln, the U.S. patent system has helped to create the greatest economy in the world. It has given the United States an advantage for generations in the development of new technologies that have boosted the U.S. economy and enhanced national security. The policy of the United States should be to ensure that we maintain and improve the ability of the patent system to do so. If we get it wrong, the ramifications for the future of the U.S. economy and U.S. national security are profound, and the long-term consequences for the United States and the American people are dire indeed.

Current trends are not encouraging. The U.S. patent system is clearly in distress. For the past fifteen years or so, the patent system has been subject to a series of shocks that have resulted in a system that in our view does not create the proper incentive structure to allow us to compete with China effectively. In particular, the Supreme Court’s 2006 decision in *eBay Inc. v. MercExchange, LLC* has been interpreted by lower courts to make it very difficult for many patent holders to secure an injunction order blocking proven, ongoing patent infringement. This has shifted bargaining power decidedly in favor of large incumbent companies accused of infringement, allowing them to continue to infringe while dragging out the litigation and challenging the patent using the post-grant challenge mechanisms created in the America Invents Act in 2011. Many of our country’s largest technology companies have been engaging in this practice of “predatory infringement,” effectively using weakened patent protections to steal innovations and quash their competition. Often, patent owners – in particular small businesses and individual inventors – will simply give up or succumb to an artificially low license fee to avoid the substantial expense of litigating and defending against post grant challenges, especially when fighting against large companies who already hold tremendous power in the U.S. economy.

This degradation of U.S. patent rights is depressing U.S. economic growth and job creation and undermining U.S. competitiveness globally. Many patent holders are now able to obtain better protections for their patent rights overseas than they are in the United States. For instance, German courts issue injunctions as a matter of course following a finding of infringement, and many other European countries—including the Netherlands, France, Italy, Spain, Austria, Sweden, and Switzerland—have similar regimes, as do Asian countries like Thailand, South Korea, and Japan. Even Chinese courts have only limited authority to decline to grant an injunction.

Moreover, a series of Supreme Court decisions have confused the state of the law of patent eligibility under Section 101 of the Patent Act such that inventors have little predictability on what inventions are patentable, resulting in the invalidation of thousands of patents in the fields of information technology, software, and life sciences. In a 2017 paper entitled “Turning Gold to Lead: How Patent Eligibility Doctrine is Undermining U.S. Leadership in Innovation,” two patent researchers explain how Supreme Court decisions during the last decade have put the United States at a global disadvantage. Examining a large set of patent applications filed in the United States, Europe, and China, their research uncovered nearly 1700 patents rejected by the U.S. Patent and Trademark Office that were granted by the European Patent Office, by China, or both. Those patents include inventions in the life sciences and biotech, such as diagnostic cancer

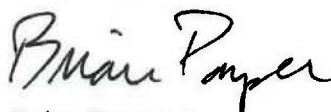
treatments, medical devices, and ultrasound imaging that now may be commercialized outside of the United States in an undoubted loss to the U.S. economy.

The Innovation Alliance encourages the Biden Administration to examine these issues and support a patent system that will strengthen the ability of patents to promote the U.S. economy, enhance U.S. national security, and meet the challenge posed by our geostrategic competitors. In particular, we encourage the Administration to support the STRONGER Patents Act, a bipartisan bill originally developed by Senator Chris Coons that in his words “would restore much needed balance to the U.S. patent system and predictability for American innovators and entrepreneurs.”

Critical to a well-functioning patent system is a well-functioning and well-managed USPTO. Choosing the USPTO Director is therefore an important first step in ensuring the patent system can achieve the above-stated goals. The Innovation Alliance encourages the Biden Administration to choose someone who understands the innovation ecosystem in the United States, and who strives to make that ecosystem work to maximize technological advancement. The USPTO Director should also serve as an advocate for American invention and seek to inspire confidence in the patent system by striving for consistency and predictability throughout that system. In addition to being a good steward of the patent system, it is also very important that the USPTO Director be an experienced manager. The USPTO is a large organization, with nearly 13,000 employees in its Alexandria, Virginia headquarters and its four satellite offices in Denver, Detroit, Dallas, and San Jose. To manage such a large agency, the USPTO Director should have previous experience effectively managing an organization of some size and complexity. Finally, the USPTO Director should be committed to encouraging individuals of all backgrounds to participate in the patent system, especially those from traditionally underrepresented groups, including women and people of color.

Thank you for your attention to our views. We would be happy to discuss them further with the transition team at their convenience.

Sincerely,



Brian Pomper  
Executive Director  
Innovation Alliance