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Re: USPTO Patent Eligibility Jurisprudence Study (PTO-P-2021-0032-0004)

Dear Acting Director Hirshfeld:

I am writing to thank the United States Patent and Trademark Office ("USPTO") for the opportunity to provide comments in response to the USPTO patent eligibility jurisprudence study set forth in the Federal Register Notice on July 9, 2021 ("Notice").

I am writing to share my view that Congress should urgently act to end the uncertainty concerning patent eligibility, making clear that 35 U.S.C. §101 is the sole measure for patent eligibility. These main points are discussed below:

1. **Congress, not the judiciary, has plenary Constitutional authority to define what subject matter is patent eligible. Congress must exercise this power and authority.**

2. **Congress must exercise its plenary Constitutional authority to define computer software as patent eligible subject matter.**

3. **The test for that which constitutes an "abstract idea" is not able to be articulated, and is therefore vague and indefinite.**

4. **So-called "judicial exceptions" to statutory patent eligibility increase litigation costs for individual inventors and small companies, dissuade settlement in litigation, and further entrench those engaged in unfair competition.** I describe in detail my experience with Amazon's anticompetitive conduct.

5. **So-called "judicial exceptions" to patent eligibility are improperly applied *ex post facto* to patent applications filed before the *Alice* decision was rendered.**

6. **The USPTO is not part of the judicial branch of the federal government and should not be conjuring so-called "judicial exceptions" to statutory patent eligibility.**

7. **Alleged infringers ubiquitously challenge patent validity, including under 35 U.S.C. §101. Allowing this to continue is bad policy that wastes patent term, clogs the courts, wastes judicial resources, and inhibits innovation. Congress must clarify 35 U.S.C. §101 is the sole standard for determining patent eligibility.**

Introduction

My name is Curt Evans, and I own a company called TrackTime, LLC. I have been a patent attorney for over 25 years. I have been involved in over 100 patent infringement trials and hearings, for both plaintiffs and defendants large and small. I am the named inventor on my own patents that I am now asserting against infringers. I wrote my own patent applications and understand patent prosecution and the logistics of patent litigation much better than most and far better than the average inventor. If the patent law system does not work for me, a knowledgeable prosecutor, litigator, litigation consultant, patentee, customer, and advocate, it is not likely to work for any other individual inventor.

I am writing to share my view that Congress should urgently act to end the uncertainty concerning patent eligibility, making clear that 35 U.S.C. §101 is the sole measure for patent eligibility. Uncertainty adversely affects all patent owners, including me, and is bad policy. Current patent eligibility jurisprudence represents a national security risk, putting large swaths of our economy at risk, and Congress should address the problem immediately.

1. **Congress, not the judiciary, has plenary Constitutional authority to define what subject matter is patent eligible. Congress must exercise this power and authority.**

Congress has defined patent eligible subject matter in 35 U.S.C. §101. The judiciary, on the other hand, has usurped the authority of Congress to determine that which is patent eligible by conjuring "judicial exceptions" to patent eligibility found nowhere in statute. It is axiomatic that the judiciary cannot conjure an exception to statute where none exists. The Supreme Court acknowledges the Court "**may not engraft its own exceptions onto the statutory text**" because "we are not at liberty to rewrite the statute passed by Congress and signed by the President." *Henry Schein, Inc. v. Archer & White, Inc.*, 139 S.Ct. 524 (2019). The Supreme Court continued, "Congress designed the Act in a specific way, and it is not our proper role to redesign the statute." *Id.* However, in patent law, conjuring "exceptions" has become commonplace. The *Alice-Mayo* test has wholly usurped the statutory text itself.

To restore this constitutional imbalance, it is incumbent upon Congress to entirely abrogate *Alice* and its progeny. This is urgently needed, especially by independent inventors and small businesses. If Congress intends exceptions to statutory patent eligibility, it can write them

explicitly into statute. If not, Congress should make that clear, too, so the judiciary will not again be tempted to create its own patent policy by legislating from the bench.

2. Congress must exercise its plenary Constitutional authority to define computer software as patent eligible subject matter.

Congress should clarify that computer software is patent eligible. Other sections of the Patent Act are already adequate, and necessary, to ensure novelty, non-obviousness, and enablement. These other sections of the Patent Act have a long history and well-developed case law, making interpretation more predictable. In clarifying that computer software is patent eligible (including graphical user interfaces), Congress should not make the mistake of altering 35 U.S.C. §112 to make software difficult to protect with patents.

The United States leads the world in software innovation. Software development is a large and important part of the national economy. Congress should ensure our patent policy reflects our commitment to reward continued software innovation on our shores, protecting intellectual labors of Inventors for limited times as the Constitution provides. Individual inventors need certain, reliable legal protection against large companies, who often engage in abusive and anticompetitive business practices, as detailed below.

3. The test for that which constitutes an "abstract idea" is not able to be articulated, and is therefore vague and indefinite.

Unpredictability in the law concerning patent eligibility is well documented. See, e.g. Brief as Amici Curiae of Senator Thom Tillis, Honorable Paul R. Michel, Honorable David J. Kappos, March 1, 2021, in support of a Writ of Certiorari in the case *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC*, https://www.supremecourt.gov/DocketPDF/20/20-891/170498/20210315100432417_20210315-100223-95752944-00000328.pdf (cataloging ways in which "the disparate and inconsistent application of the Court's jurisprudence has created an unpredictable and unstable U.S. patent system"). See, e.g., *Interval Licensing LLC v. AOL, Inc*., 896 F.3d 1335, 1348, 1351-54, 1356 (Fed. Cir. 2018) (Plager, J., concurring in part and dissenting in part) (describing the law of patent eligibility as "incoherent," a "real problem," a "conundrum," and concluding "The law . . . renders it near impossible to know with any certainty whether the invention is or is not patent eligible"). So-called "judicial exceptions" are

threatening to swallow all of patent law, opposite the admonition of the Supreme Court to "tread carefully."

The Supreme Court recognizes that "[the] requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment[,]" which "requires the invalidation of laws that are impermissibly vague." *FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012). Congress has its own constitutional obligation to restore "clarity in regulation" concerning patent eligibility because it is "essential to the protections provided by the Due Process Clause."

There is no definition for that which is an "abstract idea" and that which is not. There is no definite test for it. There is no definition for "abstract idea" or "substantially more". The words "abstract idea" are not in 35 USC §101. It is a "judicial exception", at best applied very rarely and very narrowly. It is by mere judicial fiat that an "abstract idea" is defined and then found or not; it is subject to "erratic implementation" by patent examiners and courts alike where the plain language of 35 USC §101 ought to suffice. There is "no guide to when a claim crosses the boundary between unacceptable abstractness and acceptable specificity". *Bascom*, 827 F.3d 1341, 1354 (Fed. Cir. 2016) (Newman, concurring). Accordingly, patent applicants are faced with an extra-statutory, tortured, "abstract idea" "test" that is unconstitutionally vague and indefinite, unsupportable by the Office by substantial evidence, and therefore void.

Federal Circuit Judge Sheldon Jay Plager, Judge Richard Linn, and Judge Alan Laurie are all on record agreeing "there is no single, succinct, usable definition anywhere available" to define what constitutes an "abstract idea". *Interval Licensing LLC v. AOL, Inc.*, 2018 WL 3485608 (Fed. Cir. July 20, 2018)(Concurrence-in part, Dissent-in part, Plager, J.) Therefore, no patent examiner is able to properly apply the undefined "abstract idea" "test" in a way supported by "substantial evidence" as required by the APA. Judge Plager wrote at length in *Interval Licensing* to explain why "The law, as I shall explain, renders it **near impossible to know with any certainty whether the invention is or is not patent eligible**". He says, the "phrase 'abstract ideas' is a definitional morass" and concludes that "The 'abstract ideas' idea, when used for denying a claimed invention's patent eligibility either before or after a patent is issued, **cannot thus function as a valid rule of law**." Judge Plager continues, "In the short expanse available in a court opinion (and in the reader's patience), it is not possible for me to recite all the issues and all the problems with the current law of 'abstract ideas' and its 'inventive concept'

offspring . . . [W]hen two of our leading judges [Linn and Laurie], who have devoted their careers to the practice and explication of patent law, publicly proclaim that there is a real problem, there is a real problem." Judge Plager says, "There is almost universal criticism among commentators and academicians that the 'abstract idea' idea has created havoc in the patent law. The testimonials in the blogs and elsewhere to the current mess regarding our §101 jurisprudence have been legion". It is clear that the attempt to follow an undefined, extra-statutory, tortured "test" for an "abstract idea" does not produce coherent, readily understandable, replicable, or demonstrably just outcomes. Judge Plager continues that the "abstract idea" "test" "does not distinguish good from ill in any coherent sense, and thus does not serve well either patent law or the public. . . [T]here is no need, and indeed no place in today's patent law, for this abstract (and indefinable) doctrine . . ." Indeed, as Judge Plager commented, the Emperor wears no clothes.

Judge Plager says it best in *Interval Licensing* – the "abstract idea" "test" is completely **unworkable and cannot function as a valid rule of law**. The Federal Circuit itself is often split on matters regarding 35 U.S.C. §101, with some judges refusing to hear cases *en banc* without further guidance from Congress, noting that "it's in the details that problems and uncertainties have arisen" and that "§101 requires further authoritative treatment" from Congress, lest the Federal Circuit "dig the hole deeper by further complicating the §101 analysis." *Aatrix Software, Inc. v. Green Shades Software, Inc.,* 882 F.3d 1121 (Fed. Cir. 2018) (Judges Laurie and Newman concurring) ("However, I believe the law needs further clarification by higher authority, perhaps by Congress, to work its way out of what so many in the innovation field consider are §101 problems.") Thus, several judges on the Federal Circuit acknowledge that "problems and uncertainties" exist in applying §101 and that the "abstract idea" "test" cannot even be defined.

If the "test" cannot be defined, no patent applicant can show it has been met, nor can any Office Action provide substantial evidence to satisfy its ill-defined factual burden either.

Without intervention by Congress, Federal Circuit Judge Newman says the court is now acting "contrary to the public's interest in a stable and effective patent incentive." *Yanbin Yu v. Apple Inc.,* 2021 U.S. App. LEXIS 17434 (Fed. Cir. 2021). That should be very concerning to everyone.

4. So-called "judicial exceptions" to statutory patent eligibility increase litigation costs for individual inventors and small companies, dissuade settlement in litigation, and further entrench those engaged in unfair competition.

The patent eligibility problem is even worse once an inventor has earned a patent and seeks to enforce it. I own a company called TrackTime, LLC. I have been a patent attorney for over 25 years. I have been involved in over 100 patent infringement trials and hearings, for both plaintiffs and defendants large and small. I am the named inventor on my own patents that I am now asserting against infringers. I wrote my own patent applications and understand patent prosecution and the logistics of patent litigation much better than most and far better than the average inventor. If the patent law system does not work for me, a knowledgeable prosecutor, litigator, litigation consultant patentee, customer, and advocate, it is not likely to work for any other individual inventor.

Amazon is infringing TrackTime's patents, among others. The patents, filed a decade ago, relate to use of a user interface on a mobile computing device to navigate music using synchronized lyrics and to navigate audiobooks using an associated electronic book. The user can "jump" to a specific part in a song corresponding to a lyric, or to a specific portion of an audiobook corresponding to ebook text, using a gesture. Customers love the feature. Amazon's infringing products are "Amazon Music," a streaming music service available to all "Amazon Prime" subscribers and, separately, to over 55 million "Amazon Music Unlimited" subscribers; and "Whispersync for Voice," an ebook/audiobook combination in the co-functioning Kindle app and Audible app. Amazon has referred to the technology at issue in the patents-in-suit as important, innovative, a "Milestone," and a "key strategic differentiator" in the market.

TrackTime sued Amazon, and its subsidiary Audible.com, in the District Court for the District of Delaware on October 3, 2018 – 3 years ago. CIVIL ACTION NO. 18-cv-1518 (MN). Predictably, Amazon filed a Rule 12(b)(6) motion to dismiss, citing 35 U.S.C. §101, a tactic now commonly employed by efficient infringers to shift the burden at the pleading stage and to force a patent owner to "prove" patent eligibility before the affirmative defense has even been raised. This briefing and oral argument had significant cost and imposed substantial delays. Thankfully, the Court granted leave to amend the complaint, since Amazon had omitted and concealed key facts from the court, including statements of fact and law Amazon made to the USPTO in its own

patent prosecution stating the claimed technology was not well-known, not routine, and not conventional.

TrackTime filed a 125-page First Amended Complaint ("FAC"), attaching a 28-page expert declaration from a Stanford University professor with user interface expertise, and engaged in another round of briefing on patent eligibility. The FAC explained, in excruciating 50-page detail extremely rare at the pleading stage, why Amazon's own statements of fact and law made to the USPTO in their own patent prosecution contradicted Amazon's arguments attempting to invalidate the asserted patents. The burden had been shifted to TrackTime, the patent owner, to "prove" patent validity at the pleading stage, where the statutory presumption of validity should have been sufficient proof that the asserted patents were valid. Defendants have a "clear and convincing evidence" burden to invalidate, yet they are using the legal uncertainty of 101 jurisprudence to shortcut the process, invalidate at the pleading stage, and rob patent owners of their right to trial by jury.

The Court entered Plaintiff TrackTime's First Amended Complaint on January 8, 2020. Thus, Amazon succeeded in purposely imposing 2 years of delay and added cost for TrackTime. Still, Amazon gets more bites at the apple and will undoubtedly raise the patent eligibility issue yet again before trial via a summary judgment motion and again after trial or on appeal, since there is little incentive, other than doing that which is right, for a trillion dollar monopolist to relent.

Importantly, Amazon knew its argument to the court directly contradicted factual and legal assertions made by Amazon to the USPTO in defense of Amazon's own patents on the accused products. In other words, when it suits Amazon (e.g., when it helps Amazon obtain its own patents) the technology at issue is valid and groundbreaking, but when Amazon is asked to pay a reasonable royalty for its use of TrackTime's patented technology, Amazon argues the technology is invalid and not eligible for patent protection.[1]

Amazon's misuse of 101 jurisprudence is not without context. Amazon's bad business conduct is not only of concern to TrackTime, but to the public and to Congress. Congress recently investigated Amazon for anticompetitive business practices and issued a report in

[1] Compare TrackTime's U.S. Pat. Nos. 8,856,638 and 11,017,488 to Amazon's U.S. Pat. No. 9,176,658; FAC ¶¶180-195 (D.I. 35).

October, 2020.[2] Congress recognizes an urgent need to act, protecting the public from Amazon's continued abuses.

Congress conducted a thorough and comprehensive study of Amazon's anticompetitive business practices. Congress concluded, "**On many fronts, Amazon makes inconsistent arguments depending on the forum and issue in support of its attempts to escape liability**," taking whatever position they desire according to the exigency of the moment. Congressional Report, at 281. Worse yet, "During the course of the investigation, Amazon displayed **a lack of candor** to the Subcommittee in response to questions about its business practices" and in bipartisan fashion "the Subcommittee was troubled that some of the 'statements Amazon made to the Committee about the company's business practices **appear to be misleading, and possibly false or perjurious**,'" causing Amazon's claims and representations to be viewed "with a degree of skepticism." *Id*., at 253.

Amazon's "lack of candor", irreconcilably "inconsistent statements", and misleading conduct now extends to the manner in which Amazon seeks to use patent eligibility in attempt to escape liability for infringing TrackTime's patents. Other "Big Tech" companies act similarly, merely trying to leverage *any* patent ineligibility argument to further their anti-competitive business conduct.

Congress also made conclusions concerning Amazon's bullying and misuse of market power. Amazon is huge – a monopolist with durable market size and power, focused on long-term growth in anticompetitive ways, also the subject of an antitrust lawsuit brought by the District of Columbia.[3] Congress concluded Amazon demonstrates "**a dangerous pattern of predatory conduct** that, if left unchecked, risk[s] further concentrating wealth and power." Congressional Report, at p. 377. When questioned about bullying, anticompetitive conduct,

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[2] "Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, House Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary," October 6, 2020, (hereafter "**Congressional Report**") https://judiciary.house.gov/issues/issue/?IssueID=14921; https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf

[3] The District of Columbia sued Amazon May 25, 2021, for antitrust violations. Prime Music is offered to customers of Amazon Prime as one way to "further bind customers to Amazon" via network effects and to misuse monopolistic market share to create a barrier to entry. Amazon is even willing to sustain loses on Prime "in exchange for acquiring substantial market power in the online retail sales market." https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf

"employing strong-arm tactics in negotiations," exploiting "the asymmetry in power," and showing a "willingness to leverage its market power to . . . enhance its dominance in e-book distribution," CEO Jeff Bezos gave Congress "answers [that] were often evasive and non-responsive, raising fresh questions about whether they believe they are beyond the reach of democratic oversight." *Id.*, p. 6, 268.

Amazon does not worry about infringing patents, an inconsequential speed-bump in the "race to capture ecosystems and control interlocking products that funnel data back to the platforms, further reinforcing their dominance." *Id*., at p. 378. Amazon's superior bargaining power is "routinely use[d] to protect and expand their dominance." *Id*., at p. 389. "Without the opportunity to compete fairly, businesses and entrepreneurs are dissuaded from investing and, over the long term, innovation suffers." *Id*., at p. 381. This is at odds with the desire of Congress "to ensure fair competition and to promote innovation online," objectives the reader should share. *Id.*

Amazon's anti-competitive business conduct must stop. Amazon will say virtually anything to avoid liability. For TrackTime, the patent eligibility issue is just one more way Amazon will attempt to abuse its power. Patent eligibility arguments are Amazon's new tool in its "dangerous pattern of predatory conduct."

Congress should act immediately to clarify 35 U.S.C. §101 to ensure continued confusion by the courts cannot be used by Big Tech companies to further harm small businesses, individual inventors, and those fairly availing themselves of the patent law system.

5. So-called "judicial exceptions" to patent eligibility are improperly applied *ex post facto* to patent applications filed before the *Alice* decision was rendered.

Alice was decided June 19, 2014. Many patent applications having a priority date before June 19, 2014 have now issued and are being alleged to be directed to patent ineligible "abstract ideas" under the *Alice* judicial exception. Even if the *Alice* two-step "test" was crystal-clear when the *Alice* decision was rendered, there is no way a patent applicant prior to that date could have amended the specification and claims in a manner certain to comply with the Supreme Court's new "test." (Even years later, the "test" for patent eligibility is nowhere near "certain".) *Alice*, therefore, is an *ex post facto* law for a large number of issued patents, impermissibly retroactively changing the scope of the patent bargain.

No so-called "abstract idea judicial exception" to patent eligibility should be applied to invalidate any patent having a priority date before June 19, 2014.

6. The USPTO is not part of the judicial branch of the federal government and should not be conjuring so-called "judicial exceptions" to statutory patent eligibility.

So-called "judicial exceptions" to patent eligibility are determinations *by a court* that the claims are directed to an "abstract idea" and are not directed to "significantly more." Because there exists "no guide to when a claim crosses the boundary between unacceptable abstractness and acceptable specificity", no patent examiner can be reasonably expected to correctly apply the "test". If Federal Circuit judges admit to there being "erratic implementation" of an "incoherent doctrine", then patent examiners can apply the doctrine no better. Patent examiners are not trained to analyze legal cases to compare one case to another the same way the courts are, nor are they trained to compare claim sets spanning multiple art units. That is not their expertise.

When the USPTO issues formal guidance concerning so-called "judicial exceptions" to statutory patent eligibility, the Federal Circuit says the judiciary can simply ignore the guidance. The USPTO should, therefore, only determine whether a claimed invention is patent eligible under the statute itself. If the judiciary disagrees, the judiciary can so opine. (But, as is the main point here, Congress should clarify it intends no judicial exceptions.)

The MPEP can and should be amended to provide examiners a rationale for a determination of patent eligibility under 35 U.S.C. §101 that fully comports with the Supreme Court's admonition in *Alice* to "tread carefully," an integral part of *Alice* that is too often overlooked. Specifically, the MPEP should be amended to include suggested language for the examiner:

> Section 101 of the Patent Act provides that anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" may obtain a patent. 35 U.S.C. §101, with "Process" being defined in 35 U.S.C §100(b). The language of Section 101 is well-recognized as providing a wide and permissive scope for patent eligibility. *Bilski v. Kappos*, 561 U.S. 593, 601 (2010) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980)) ("In choosing such expansive terms . . . modified by the comprehensive 'any,' Congress plainly contemplated that the patent laws would be given wide scope."). The claimed invention meets the plain requirements of 35 U.S.C. §101. The claimed subject matter does not fall within any judicial exception to patent eligibility, and there exists no substantial evidence to show the claims are directed to any abstract idea. The claimed subject matter is directed to one or more of the following:

(1) a new and useful Process, meaning a process, art or method, and including a new use of a known process, a new use of a known machine, a new use of a known manufacture, a new use of a known composition of matter, or a new use of a known material,
(2) a new and useful machine,
(3) a new and useful manufacture,
(4) a new and useful composition of matter,
(5) any new and useful improvement to a Process,
(6) any new and useful improvement to a machine,
(7) any new and useful improvement to a manufacture, or
(8) any new and useful improvement to a composition of matter.

Moreover, the determination of patent eligibility under 35 USC §101, specifically that the claims are directed to the judicial exception of an "abstract idea", is also often made by the USPTO apart from the requirements of the Administrative Procedure Act.

First, the USPTO is subject to the same Administrative Procedure Act obligations as any other agency, and therefore cannot make factual findings without "substantial evidence" to meet its preponderance of evidence burden. Office Actions are often deficient and lacking "substantial evidence" to meet the Office's preponderance of evidence burden to support a prima facie case of patent ineligibility, especially concerning the *Alice* step two analysis.

Second, there's no carve-out in the APA for factual findings underlying §101 subject matter eligibility rejections. The Supreme Court and Federal Circuit have made clear that the APA governs the USPTO just like any other agency, and "[a]n abuse of discretion occurs where the decision is based on … factual findings that are not supported by substantial evidence." *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); see *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999); *In re Gartside*, 203 F.3d 1305, 1313 (Fed. Cir. 2000). There can be no "substantial evidence" offered in an Office Action to show the claims are directed to an "abstract idea", especially since there is no articulable test for what constitutes an "abstract idea" and what doesn't. There is often no "substantial evidence" offered to show, for each claim considered as a whole, that the claimed subject matter was well-understood, routine, and conventional in the pertinent industry. There is often no "substantial evidence" offered to show the claimed subject matter as a whole is fundamental, long-standing, long-prevalent, or a building block of human ingenuity. There is often no "substantial evidence" offered to show the claims preempt all use of an abstract idea.

The USPTO should not run afoul of the Administrative Procedure Act in order to conjure its own "judicial exceptions."

7. **Alleged infringers ubiquitously challenge patent validity, including under 35 U.S.C. §101. Allowing this to continue is bad policy that wastes patent term, clogs the courts, wastes judicial resources, and inhibits innovation. Congress must clarify 35 U.S.C. §101 is the sole standard for determining patent eligibility.**

Patent policy should favor certainty and predictability, leading free-market participants to engage in free-market licensing transactions where patents are concerned. An alleged infringer should be incentivized to pay a reasonable royalty to license a patent, rather than to pay patent attorneys to attempt to invalidate the asserted patent in nearly every case. Asserting invalidity has become an endemic problem, where nearly 100% of patent infringement litigants allege the asserted patent is invalid. Allowing this to continue is bad patent policy.

Congress should find the following:

"(1) Article 1, Section 8 of the United States Constitution vests in Congress the plenary authority to secure the "exclusive Right" to Inventors to their Discoveries for limited times, this "exclusive Right" being a property right – not a franchise or a public franchise – in order to foster continued innovation in the United States;

(2) Innovation and intellectual property are essential to the national security of the United States and, in order to maintain leadership in the global economy, Congress intends to enact strong and fair intellectual property laws, encouraging innovation by individuals and small businesses and continued democratization of inventorship;

(3) Innovation is intended not for its own sake, but for others to use the inventions and discoveries of Inventors and to create further scientific, technological, and economic discovery and improvements. This furthers the progress of science and the useful arts. Innovation is best nurtured through a strong legal framework that protects ownership of intellectual property, as property. American innovation shall remain democratized, with meaningful legal protections being available and accessible to all Inventors, not only those financially best situated to afford it. American innovation (i) has advanced the art of medicine and technologies for health and wellbeing, (ii) has enhanced the standard of living for all people in the United States and those around the world, and (iii) has generally improved the agricultural, telecommunications, software, biotechnical, educational, pharmaceutical, and electronics industries, among many others;

(4) An issued United States patent carries a strong presumption of validity, rebuttable in any forum only by a "clear and convincing evidence" burden by the patent challenger, however, those charged with patent infringement routinely raise tardy, meritless, serial, unsuccessful, and

unnecessarily burdensome challenges to one or more claims of a valid patent, diminishing the Inventor's "exclusive Right" and the goodwill that ought to be afforded every Inventor and patent owner;

(5) The routine and near ubiquitous assertion of patent invalidity as a defense to patent infringement has created, and continues to create, substantial institutional burdens upon those government institutions charged with administering the patent laws, including the United States Patent and Trademark Office, the Courts, the International Trade Commission, and others, for example:

(i) by errantly calling into disrepute the ability of the United States Patent and Trademark Office to reliably and consistently examine patent applications before they are issued as patents to ensure an invention claimed in a patent application meets all statutory criteria for patentability,

(ii) by forcing upon the judiciary the necessity to adjudicate patent validity, where the judiciary, not Congress, has errantly taken upon itself responsibility for formulating so-called "judicial exceptions" to patent eligibility, despite the intent of Congress that 35 U.S.C. §101 and the use of the word "any" be read broadly, and

(iii) by forcing upon the judiciary the difficult task of determining a reasonable royalty to compensate a patent owner for patent infringement, such process assuming incorrectly the federal government can better determine a reasonable royalty, and achieve payment thereof, than can the free market acting as though a patent is valid when issued and entitled to a strong and meaningful presumption of validity;

(6) The adjudication of patent infringement cases must be timely and cost-effective, particularly since a patent's limited term is always waning. The routine assertion of patent invalidity (including for even the threshold question of whether the subject matter claimed is patent eligible) as a defense to patent infringement has also created a substantial burden on any patent owner seeking timely and cost-effective adjudication of alleged patent infringements. A patent owner must be able to quickly, inexpensively, and reliably exercise his "exclusive Right", given the strong presumption that an issued patent is valid after having been competently, thoroughly, and professionally examined by the Office;

(7) To continue to encourage innovation and disclosure and use of innovative Discoveries, voluntary commercial transactions between patent owner and those desiring to practice patented inventions are preferable to ongoing government intervention and are beneficial to sustaining the United States as the preferred venue for innovation and related investment. It is the intent of Congress to encourage patent licensing, assignments, capital investments, joint ventures, mergers, acquisitions, and other voluntary commercial agreements over lawsuits and administrative agency actions to determine issues of patent validity and infringement;

(8) The Supreme Court in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* has misconstrued an issued United States patent as a particular right – a franchise – rather than a private, personal property right, whereas reiterating clearly and definitively that a patent is a private, personal property right of an Inventor comports with over 200 years of established law

and Congress' intent and exercise of its plenary authority to so determine, including in 35 USC § 261 which already states "patents shall have the attributes of personal property";

(9) There exists a balance between (1) an accused patent infringer having recourse to assert an issued patent is invalid or unenforceable, which recourse must be undertaken in good faith and without unnecessary costs or burdensome delays, and (2) a patent owner having certainty that, for the limited time of the patent term, he is able to freely exercise the "exclusive Right" conferred by the patent (said Right having been acknowledged by Congress acting "by securing" for the Inventor his "exclusive Right" under Article 1, Section 8), for example by voluntarily licensing the technology to be developed by others or by commercializing the technology himself;

(10) An "exclusive Right" of a patent is neither "exclusive" nor "secured" under Article 1, Section 8 of the United States Constitution if, during its entire limited duration, it is subject to being invalidated or found unenforceable. Therefore Congress intends to incentivize the public to invalidate patents issued in error by providing only a time certain in which a patent's validity can be contested, balancing the public's interest in removing errantly issued patents with the Constitutional mandate that Congress act "by securing for limited times" to Inventors a reasonable term with quiet title to the exclusive Right a patent confers;

(11) The "exclusive Right" of a patent is a property right exercisable by the patent owner, which does not require that the patent owner practice the claimed invention. It is a negative right – a right of exclusion – and any unwanted trespass should be prevented by enjoining the trespass, until and unless the patent owner and the patent infringer agree, voluntarily, on commercial licensing terms. A patent owner must be able to enjoin ongoing infringement upon his property right, rather than be forced into a compulsory license, because Congress has provided in the Patent Act no mandate for a compulsory license. If another desires to practice the claimed invention, the effective and efficient promotion of progress in science and the useful arts favors voluntary commercial agreements, as opposed to an infringer forcing continued and unwanted infringement upon the patent owner, in exchange for a governmentally-adjudicated compulsory license fee. Congress notes that the Supreme Court in *Kelo v. City of New London* recognized, "[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation." See, *Kelo v. City of New London*, 545 U.S. 469 (2005);

(12) A patent owner seeking to enforce its "exclusive Right" often incurs extremely burdensome litigation expenses and time delays, diminishing the limited time to which the law otherwise affords an "exclusive Right", making timely and cost effective legal relief all but unattainable for most patent owners and nearly impossible for small businesses and individual inventors;

(13) The burdens upon a patent owner desiring to enforce its "exclusive Right" have given rise to an "efficient infringement" business model whereby patent infringement occurs, often by large companies, or foreign companies, with little or no concern for any significant and meaningful legal or financial consequences. It is the intent of Congress to foster innovation by

protecting strong, reliable, predictable property rights, and to discourage patent infringement of any kind, and in particular willful patent infringement.

Therefore, Congress intends to and does hereby act by clarifying its intent that 35 U.S.C. §101 shall be the sole standard by which patent eligibility is measured, eliminating so-called "judicial exceptions" to patent eligibility and any case law that purports to establish or apply any patent eligibility standard other than that stated in 35 U.S.C. §101."

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