October 15, 2021

Mr. Andrew Hirschfield
Commissioner for Patents
Department of Commerce
Patent and Trademark Office

Re: Comments of the U.S. Chamber of Commerce; Patent Eligibility Jurisprudence Study; Docket No. PTO-P-2021-0032; 86 FR 49521

Dear Mr. Hirschfield:

The U.S. Chamber of Commerce appreciates the opportunity to provide comments on the Department of Commerce Notice of the Patent Eligibility Jurisprudence Study, Docket No. PTO-P-2021-0032. We share the interest of Senators Thom Tillis, Mazie Hirono, Tom Cotton, and Chris Coons in ensuring the effectiveness of the U.S. patent system and the role of patent eligibility standards in that system. This study by the Patent and Trademark Office is both timely and important.

Part I – Overview

Patents underlie innovation and competitiveness. As former President Obama has commented, "[W]e're going to assertively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity of the American people."[1]

The latest data from the Commerce Department confirms:

> The last century recorded unprecedented improvements in the health, economic well-being, and overall quality of life for the entire U.S. population. As the world leader in innovation, U.S. companies have relied on intellectual property (IP) as one of the leading tools with which such advances were promoted and realized.[2]

The report provides tangible data that supports this statement, including the importance of IP-intensive industries to workers. For example, those industries directly accounted for 27.9 million jobs and indirectly supported another 17.6 million. On average, the private wage and salary workers in IP-intensive industries earn 46% more than wages in non-IP-intensive industries.

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[1] https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf

[2] *Intellectual Property and the U.S. Economy: 2016 Update*, available at https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf.

These findings are consistent with and reinforced by the U.S. Chamber's International IP Index, which has consistently found "economies with stronger national IP environments have higher levels of innovation capacity and produce more innovation in the form of new products and technologies."[3]

Despite this long history of success, our system is not without challenges. As the Patent and Trademark Office (PTO) federal register notice acknowledges, a series of Supreme Court decisions generated significant uncertainty about the proper analysis and scope of patentability under U.S. law. Such uncertainty is counter-productive to our patent system as it deters, rather than encourages, investment in new innovation.

Over the past few years, the PTO has utilized its administrative authority to take some important steps to address uncertainty and bolster our patent system. These include guidance on patent eligibility provided by then-Director Iancu and the careful wisdom Acting Director Hirschfeld has shown in his restrained approach to the review of Patent Trials and Appeals Board cases authorized by the recent Supreme Court decision in *United States v. Arthrex*. The Chamber appreciates these efforts by PTO, as well as its continuing work to improve our national patent system.

Along with the need for clarity in patent eligibility standards for issuance of patents at the PTO, there is the need for reliability of patent rights in the courts. Confusion in jurisprudence is creating uncertainty around eligibility that is impeding the ability of parties to enforce their rights. It is critical to restore predictability of eligibility in the courts.

The U.S. Chamber also strongly supports the PTO's efforts to broaden participation in the patent system. A recent brief from the Institute for Women's Policy Research identifies a variety of factors that contribute to gender and racial gap in participation in the patent system. This includes a lack of representation in STEM education, greater conflicts from work/life commitments, feeling unwelcome, a variety of forms of bias, lack of education/knowledge of the patenting process, as well as the time, expense, and complexity of the patenting process, and greater difficulties obtaining informal education, networks, and mentors.[4] The Chamber's Global Innovation Policy Center is making programmatic efforts to encourage and support broader diversity in patent applicants. The Chamber applauds similar efforts by the PTO and looks forward to continued collaboration on this important matter.

Part II – Responses to Specific Questions

The Chamber offers the following responses to the questions posed in Section II of the PTO federal register notice.

10. Please identify how the current state of patent eligibility jurisprudence in the United States impacts the global strength of U.S. intellectual property.

[3] https://www.valueingenuity.com/wp-content/uploads/2021/03/GIPC_IPIndex2021_FullReport.pdf at p. 26.
[4] https://iwpr.org/wp-content/uploads/2021/07/Tackling-the-Gender-and-Racial-Patenting-Gap_FINAL38.pdf

The Chamber's *International IP Index* has for nearly a decade measured the strength of the U.S. intellectual property system alongside a wide range of other national systems. In the 2017 and 2018 reports, the uncertainty and inconsistency in the courts' application of patent eligibility standard resulted in progressive lowering of the U.S. score. As a result, the U.S. score in that area dropped below that of some of our trading partners such as Australia, France, and even China.

Innovative industries took notice as well. The increased uncertainty about patentability standards in the U.S. and the corresponding risk that patents would not be enforced here resulted in some American companies increasing their use of foreign patent systems. The administrative guidance from PTO discussed above helped and the U.S. score rebounded as a result. However, the Chamber and its members are keenly aware that administrative guidance does not bind the courts, giving the current situation a degree of fragility.

Any assessment of the global strength of U.S. intellectual property must also consider the extent to which American IP holders can rely on the protection and enforcement of their rights abroad. The PTO's role in negotiating and enforcing international IP obligations is an important part of that calculus. Of course, when the United States itself falls short, it undercuts the ability of our negotiators to influence improvements abroad. Thus, weaknesses in our domestic system reverberate into weaknesses in other markets, as well.

11. Please identify how the current state of subject matter eligibility jurisprudence in the United States impacts the U.S. economy as a whole.

As noted above, the patent system is a critical lynchpin in the innovative economy that supports over 45 million American jobs, accounts for over 38% of U.S. gross domestic product, and contributes over $840 billion in positive balance of trade from merchandise exports from IP-intensive industries.

When the patent system that undergirds much of this innovation is weakened, it places the future of these important aspects of our economic strength at increased risk.

13. Please identify how the current state of subject matter eligibility jurisprudence in the United States affects the public.

Innovative industries require up-front investment, which necessarily entails risk that the research will not yield fruit, or that the resulting product is not popular in the marketplace. When uncertainty in the patent system is added to the mix, it increases the possibility that even successful research that generates a popular product will not return as much as it could on the initial investment. This is because competitors cannot be prevented from free-riding. Naturally, this deters investment into innovative technology.

Unfortunately, the Administration has added uncertainty in the patent system at the worst possible time, by publicly embracing foreign government proposals to "waive" globally accepted norms for the protection of intellectual property. Everyone wants to bring an end to the COVID pandemic as soon as possible. This can be most effectively achieved by addressing vaccine

hesitancy, improving global supply chains, and reducing foreign barriers to trade. There are already an unprecedented number of agreements for vaccine production around the world, with industry estimates of over 10 billion doses being produced by the end of the year. Waiver proposals are misguided, overbroad, and will not only be ineffective, but will detract attention from problems we should be solving.

For at least five consecutive decades, U.S. administrations of both parties have consistently supported a strong and effective global patent system. This Administration's break with that consensus has increased uncertainty in the U.S. patent system. We do not yet know the fate of these waiver proposals, as the negotiations seem destined to be lengthy. Even as those negotiations continue, potential breakthroughs are placed in doubt because of uncertainty about whether the United States will support patent rights here or abroad.

American investors are not celebrating the partnerships and innovation infrastructure that generated remarkably effective vaccines in mere months. Instead, they are having second thoughts about whether future research and development in innovative health care will be undercut by policies arising from political expediency.

Conclusion

The Chamber appreciates this continued focus on the need for improved consistency and certainty in patent eligibility standards. Our patent system is a pivotal part of our broader IP system, which supports an innovative and creative economy to the benefit of businesses, workers, and consumers at home and around the world. The Chamber stands ready to work with PTO to promote the American innovation economy.