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October 16, 2015

Mr. Daniel Marti
Office of the Intellectual Property Enforcement Coordinator
Executive Office of the President
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Washington, DC 20503

Submitted via: www.regulations.gov

Re: Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement. 80 Fed. Reg. 169 (September 1, 2015)

Dear Mr. Marti:

Intellectual Property Owners Association (IPO) appreciates the opportunity to provide comments to the Office of the U.S. Intellectual Property Enforcement Coordinator in response to the Federal Register notice published September 1, 2015, requesting public input and participation on its third Joint Strategic Plan on Intellectual Property Enforcement.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association, through corporate and other classes of membership.

Our members contribute vitally to America's economic success by developing the advances that drive exports and create jobs. Innovation is not without risk, and we rely on intellectual property assets in the U.S. and abroad to protect our investments in new technology. With much of the world's purchasing power outside U.S. borders American innovators must craft solutions that address local needs, realities, and desires to stay competitive. They must do so faster than foreign counterparts in order to penetrate those markets, where they are guests and often lesser known entities.

To give their own firms a competitive edge, some trading partners have sought to weaken the global IP framework, either directly or under the veil of other policies. The Joint Strategic Plan should focus on firmly pushing back on such efforts to ensure a level playing field for all innovators. Along these lines, below we recommend several focus areas for the third Joint Strategic Plan.

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Strengthening Border Enforcement of Intellectual Property Rights

IPO believes that IPEC should continue to focus on policies that strengthen the effectiveness of border enforcement of intellectual property rights, including the U.S. International Trade Commission's (ITC) remedial orders designed to halt unfair imports. Imports of products that infringe or violate U.S. intellectual property rights, including particularly patents, trademarks, and trade secrets, continue to cause significant harm to U.S. industry, U.S. employment, and U.S. intellectual property rights. The ITC and Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, remain principal bulwarks against the rising tide of infringing imports.

IPO strongly encourages IPEC to focus much needed attention and resources on strengthening the ITC exclusion order process. As IPEC recognized in its 2013 Joint Strategic Plan on Intellectual Property Enforcement (2013 Joint Strategic Plan), ITC exclusion orders barring infringing imports are enforced by Customs and Border Protection (CBP) and the ITC. The 2013 Joint Strategic Plan announced that IPEC would "chair a new interagency effort directed at strengthening the processes that CBP uses with regard to enforcement of ITC exclusion orders pertaining to intellectual property." 2013 Joint Strategic Plan at 17. The 2013 Joint Strategic Plan provided that the interagency group would comprise representatives of the ITC, Departments of Commerce, Homeland Security, Justice, and Treasury, as well as other federal agencies, and that the group would review existing procedures for evaluating the scope of exclusion orders. *Id.* IPEC noted that "one focus of the interagency review will be on ensuring that CBP uses transparent and accurate procedures for determining whether an article is covered by the ITC exclusion order." *Id.*

Following IPEC's announcement of the interagency review, in June 2013 IPEC published a notice in the *Federal Register* seeking public input on potential improvements to such processes. 78 Fed. Reg. 37242 (June 20, 3013). In response, numerous bar groups, corporations, and other interested parties submitted comments. Docket ID: OMB-2013-0003; http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=OMB-2013-0003. Among the numerous suggestions made in those comments was that CPB should be more transparent in issuing field instructions to the ports of entry concerning enforcement of ITC exclusion orders. Another recommendation was that CBP revise its current regulations for interpreting ITC exclusion orders and create an *inter partes* procedure for such interpretation that would promote transparency. *E.g.*, Comments of the U.S. ITC Trial Lawyers Ass'n at 5 (July 22, 2013) ("Customs should create an *inter partes* procedures for use in resolving situations involving significant disputed issues"). The 2013 Joint Strategic Plan indicated that the interagency working group would prepare recommendations within six months of the issuance of the 2013 Joint Strategic Plan. However, to date, such recommendations have not been publicly announced.[1]

[1] In February 2015 the ITC announced a new pilot program for expediting rulings on whether or not redesigned or new products are covered by outstanding exclusion orders. http://www.usitc.gov/press room/featured news/pilot_program_will_test_expedited_procedures. Although this new pilot program is only in its early stages and has not yet been tested, the IPO wishes to commend the ITC for

IPO urges IPEC to continue to focus on improving the effectiveness and transparency of procedures for enforcement of ITC exclusion orders. In a promising development, IPO understands that CPB has for some time been working on a Notice of Proposed Rulemaking that would create a new, *inter partes* procedure for interpretation and enforcement of ITC exclusion orders under Customs regulations, 19 C.F.R. § 177. Although IPO reserves the right to comment on the specific details once the notice issues, IPO encourages IPEC to expedite development of procedures for enforcement of ITC exclusion orders that promote transparency, fairness, and effectiveness and to seek public comment on such new, proposed procedures.

Pushing back on pursuits of weaker IP regimes that undermine U.S. competitiveness

IPO members are witnessing concerted efforts to weaken IP rights, originating from a growing number of sources, both within international bodies and from some of America's trading partners. While on the surface these policies appear aimed to increase access to technology, in reality they create significant uncertainty for investors. Ultimately this raises the cost of investment, diverts capital towards more predictable undertakings, and slows down technology diffusion. On the other hand, robust IP rights provide much needed support to bear the risks associated with innovation, enabling the commercial partnerships and global value chains necessary to export technology around the world.[2]

Despite the incentives created by strong IP rights, calls to weaken them abound. At the World Intellectual Property Organization, an organization whose very mission is to enable innovation, pressure to create exceptions and limitations to patent rights continues to intensify. Demands to erode or even extinguish IP rights are also commonplace within negotiations at the World Health Organization, the UN Framework Convention on Climate Change, the World Trade Organization, and the Post-2015 Development Agenda. Proposals range from explicit exclusions from patentability and compulsory licensing to more subtle, but no less dangerous appeals for the removal of "IPR barriers" and concessional licensing. The U.S. must remain vigilant and the IPEC Joint Strategic Plan should reflect an insistence on evidence-based policymaking to ensure U.S. innovators can continue to develop solutions to the world's most pressing challenges.

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introducing this new program that is designed to improve and streamline enforcement of exclusion orders.

[2] *See, e.g.,* Kristina M. Lybecker and Sebastian Lohse, *Innovation and Diffusion of Green Technologies: The Role of Intellectual Property and Other Enabling Factors*, Global Challenges Report, WIPO: Geneva (2015); U.N. Conference on Trade and Development, *Foreign Direct Investment, the Transfer and Diffusion of Technology, and Sustainable Development* (2011), available at http://unctad.org/en/docs/ciiem2d2_en.pdf;);Walter G. Park & Douglas C. Lippoldt, *Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries*, (OECD Trade Committee, Policy Working Paper No. 62) (2008);

The push to "rebalance" IP regimes is also unfolding at the national level. Some countries actively encourage compulsory licensing. Examples include working requirements and applications for compulsory or mandatory licenses growing at alarming rates. Such tools should be used sparingly, if at all, and not as a means to promote industrial policy, especially considering their great cost to global innovation. Other efforts to erode IP rights are less overt, such as unconditional requirements to license IP relating to essential facilities, interference with technology transfer agreements, sanctions against those who attempt to enforce their IP rights, or obligations to license patents that relate to standards without the innovator participating in the process. In addition to scaring off investors, these efforts chill critically important technology diffusion.

IPO members are also finding some pathways to protect innovation blocked with greater frequency. Heightened utility standards, requirements to demonstrate enhanced efficacy, dual examination and the ban of patents on second uses are examples of the escalating roadblocks innovators confront when attempting to safeguarding incremental improvements. Proponents of such policies often underestimate the commitment it takes to translate technical breakthroughs into commercially viable offerings. The process is both resource and time intensive and is often only possible within a supportive IP regime. The IPEC Joint Strategic Plan should include working with trading partners to maintain incentives to develop and disseminate technology.

Upgrade trade secret protection at home and across our borders

While efforts to impair registered rights are on the rise, IPO members also are increasingly finding themselves targets of sophisticated and often successful efforts to steal their proprietary information. In an environment in which knowledge may be today's most valuable currency, the protection of trade secrets is of utmost importance. Our competitive advantage depends on much of the resulting knowledge remaining confidential. The 2013 Joint Strategic Plan identified the theft and transfer of trade secrets as a priority focus. This should continue to be a high priority in the next Joint Strategic Plan.

IPO members are encouraged by recent developments with the potential to improve this underdeveloped area of law. U.S. legislative efforts are underway to modernize existing protections. Passage of the Defend Trade Secrets Act of 2015 would provide a much needed federal civil cause of action for trade secret misappropriation and to protect trade secrets from domestic and foreign theft. Aligning trade secret protection with 21st century innovation models is also critical and the Joint Strategic Plan should ensure that upgrading trade secret regimes around the world continue to be incorporated into our trade agreements.

Protecting knowledge-intensive industries is vital to U.S. competitiveness and the timing could not be more critical. IPO members continue to struggle with fragmented and frequently ineffective trade secret protection. Once a breach is discovered there may be little to no recourse. If relief is available, a trade secret owner may face seemingly insurmountable burdens of proof or limitations on recovery absent irreparable injury. This

leaves IPO members with an impossible choice – keep confidential details close to the vest, which slows open innovation, or collaborate and risk destroying their competitive edge.

While managing these threats, IPO members must also contend with government sanctioned efforts to strip away the advantages that result from our innovation. For example, mandatory disclosure of confidential information is often a condition of market access, for purposes of evaluating safety or environmental impact as mentioned in the 2013 Joint Strategic Plan. Often the furnished details are not held in confidence, but rather are provided to third parties upon request. Forced localization or cooperation with local partners can lead to similar results. In essence, these policies enable others to profit from U.S. innovation without the required investments to develop the technology. Often localization and cross-border collaboration make good sense, but these decisions should be freely made on the basis of mutual agreement and trust between private parties, not by Government requirement. The Joint Strategic Plan should focus on developing high standards for trade secret protection, together with U.S. trading partners that include protection for confidential information provided to regulatory authorities.

Increasing backlogs and other impediments to securing IP protection

In many jurisdictions, IPO members face moderate to crushing backlogs when pursuing IP protection. Lengthy delays hurt innovators by complicating investment decisions, often impair access to critical funding, and make it harder to enter the local market. This injures potential IP owners and their competitors alike, adding to uncertainty in the market and increasing development costs. With growing numbers of both patent and trademark applications in most countries, the related challenges are likely to continue into the foreseeable future. U.S. trading partners should be encouraged to take steps necessary to reduce their backlogs while maintaining quality, for example through improving digital infrastructure, engaging in work sharing, and streamlining examination.

IPO members encounter other challenges to securing IP protection. Several examples include administratively complex and costly proposed inventor remuneration schemes, antiquated requirements to provide notification regarding prosecution in counterpart and related patent applications, the mandatory hiring of local patent agencies, and trademark opposition procedures that increase difficulty in challenging bad-faith registrants. Before U.S. innovators can enforce IP, they must be able to secure its protection. The Joint Strategic Plan should also seek to help tackle these impediments to protecting US innovation.

Conclusion

America's future prosperity depends on innovation. As home to many of the greatest innovators in the world, the potential to expand the U.S. economy is tremendous. But to grow, the U.S. must seize on its ideas and transform them into the goods and services that will address the needs and be the envy of all. With many of the world's consumers living

outside our borders, encouraging innovation alone is not enough. It is imperative that innovations can be effectively protected against theft by competitors, and that U.S. innovations are welcomed in markets across the globe.

The Joint Strategic Plan should improve the ability for intellectual property rights to be reliably enforced by their owners in the U.S. and abroad, and ensure their value is retained despite pressure to erode. In particular, the Joint Strategic plan should:

- Strengthen border enforcement of U.S. intellectual property rights, and in particular improve the ITC exclusion order process;
- Push back on pursuits of weaker IP regimes in international fora and national laws of U.S. trading partners and insist on evidence-based policymaking to ensure U.S. innovators maintain incentives to innovate and disseminate technology;
- Enhance the protection of confidential business information and know-how, a key source of competitive advantage today by creating a U.S. federal civil cause of action for misappropriation to protect trade secrets from domestic and foreign theft, and by continuing to encourage U.S. trading partners to upgrade their own regimes including the protection of information provided to regulatory authorities by developing best practices and obtaining appropriate commitments in trade agreements; and
- Work with U.S. trading partners to decrease backlogs and other impediments to securing IP protection.

We again thank you for this opportunity to comment on the third Joint Strategic Plan and its potential to preserve and improve the tools that allow innovators to capitalize on the ingenuity that continues to sustain and grow the U.S. economy.

Respectfully submitted,



Philip S. Johnson
President