

UNITED *for* PATENT REFORM

July 13, 2018

The Honorable Chuck Grassley
United States Senate
135 Hart Senate Office Building
Washington, DC, 20510

The Honorable Robert Goodlatte
United States House of Representatives
2309 Rayburn House Office Building
Washington, DC, 20515

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC, 20510

The Honorable Jerrold Nadler
United States House of Representatives
2109 Rayburn House Office Building
Washington, DC, 20515

Dear Chairmen Grassley and Goodlatte and Ranking Members Feinstein and Nadler:

United for Patent Reform, a coalition of many of America's most innovative companies and job creators spanning a broad range of industries, writes to express our deep concern with the U.S. Chamber of Commerce 2018 International IP Index's portrayal of the United States patent system and the way it has misinformed the debate of important patent issues.

The Chamber's 2018 IP Index ranks the United States as having the top intellectual property regime in the world. Most of the focus in the media and elsewhere, however, has been on the Index's ranking of the U.S. patent system as twelfth in the world. Indeed, this ranking has been highlighted as a cause for concern by Members of Congress, Federal judges, and current and past Directors of the U.S. Patent and Trademark Office. Unfortunately, the Index bases its conclusions on incorrect data and an incomplete, one-sided narrative.

The Index cites the operation of the inter partes review (IPR) process created by the 2011 America Invents Act as a "problem" that arbitrarily justifies lowering the U.S. "Patents, Related Rights, and Limitations" ranking from first to twelfth. The Index asserts that IPR "has led to a disproportionately high rate of trials and rejections." As evidence for this assertion, the Index cites only "a[n unnamed] third-party analysis of PTAB data in 2017" which "suggests that only about 5-15% of cases end with all claims being considered *patentable*."¹

¹ U.S. Chamber of Commerce. "Create: U.S. Chamber international IP index, sixth edition." Global Intellectual Property Center (2018):157. Available at http://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC_IP_Index_2018.pdf.

It is a serious flaw of the Index to base its scoring of the U.S. patent system on the inaccurate data of an unnamed third party when the U.S. Patent and Trademark Office provides comprehensive, authoritative data on the operation of the IPR procedure, updated on a monthly basis, that comes to a very different conclusion.²

The PTO data shows that of the petitions filed over the life of the IPR program, only 16% of cases have ended with all claims being considered *unpatentable*—the exact opposite of the Chamber’s unsourced claim. In 2017, 37% of IPR petitions were not even instituted, meaning that upon its initial review, the PTO let the challenged patent fully stand. Obviously, if 37% of *initial* decisions end with all claims standing, it is misleading to state that only 5-15% of cases make that finding. The authoritative, factual data from the USPTO cannot be reconciled with the unsourced statistics on which the Chamber based its conclusions about the operation of the IPR procedure.

The Index also asserts that the IPR procedure creates a lack of predictability for patent owners compared to other patent opposition systems, but it cites no data in support of this claim. A careful analysis shows that the rate at which patents are upheld in IPR through decisions on the merits are better than those of other fora in which patent validity can be challenged.

Looking only at IPR decisions on the merits, the USPTO upheld all claims of a patent 59% of the time.³ In U.S. district courts, when a patent is challenged and a court renders a decision, the patent survives about 57% of the time.⁴ In Germany, all patent claims survive a nullity proceeding only 21% of the time.⁵ At the European Patent Office, a patent survives an opposition proceeding unchanged only 31% of the time.⁶ The level of uncertainty for patent owners created by IPR is less than, not greater than, other mechanisms for challenging patent validity.

² U.S. Patent and Trademark Office. “Statistics.” Available at <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/statistics>.

³ The PTAB renders a decision in an AIA proceeding on the merits in two ways: 1) when it denies institution because the petitioner has not shown it's likely that any claims are invalid, or 2) when it issues a final written decision on patentability for a petition that it has instituted. As of May 31, 2018, out of 4307 merits decisions made by the PTAB, 2,558 decisions affirmed all challenged claims. U.S. Patent and Trademark Office. “Trial Statistics: IPR, PGR, CBM.” Patent Trial and Appeal Board (2018). Available at https://www.uspto.gov/sites/default/files/documents/trial_statistics_20180531.pdf.

⁴ John R. Allison, Mark A. Lemley, and David L. Schwartz. “Our divided patent system.” The University of Chicago Law Review (2015): 1073-1154, 1100. Available at <https://chicagounbound.uchicago.edu/uclrev/vol82/iss3/1/>.

⁵ Peter Hess, Tilman Muller-Stoy, Martin Wintermeier. “Are patents merely ‘paper tigers’?” MitttschPatAnw (2014): 439-452. Available at https://www.bardehle.com/fileadmin/Webdata/contentdocuments/broschures/Patent_Papiertiger.pdf. Any member of the public can challenge patent validity in a nullity proceeding, whether or not sued for infringement, although the majority of nullity proceedings are preceded by an infringement action. In that regard, it is similar to IPR.

⁶ European Patent Office. “Searches, examinations, oppositions.” Available at <https://www.epo.org/about-us/annual-reports-statistics/annual-report/2017/statistics/searches.html#tab4>.

Beyond the problematic findings based on incorrect data, a serious failing of the Index is that it ignores the significant benefits that the IPR system has brought to innovators—the most relevant question when evaluating its role in the U.S. patent system. Congress created IPR in response to the widely-recognized problem that low-quality patents were harming innovation, and the existing mechanisms were insufficient for addressing the problem because they were too slow and too expensive. The ability of a patent system to efficiently correct the mistakes of issuing an invalid patent is a strength, not a weakness, because innovators need predictable tools for eliminating invalid patents that would otherwise block their way. That is why the IPR process has strong support among many of America’s most innovative companies, job creating industries, and small businesses.

Similarly, the Index’s criticism of recent unanimous Supreme Court rulings on subject matter eligibility excludes the view of a very broad range of American industries that value the Court’s decisions and believe they have strengthened the patent system by clarifying that the kind of abstract patents often used in abusive litigation are invalid. The evolution of Section 101 of the Patent Act has not deterred innovation according to any economic indicator.

Indeed, innovation in the United States has thrived over the past six years since the inception of IPR proceedings and the recent Supreme Court rulings on Section 101. Since 2012, R&D spending by the top 300 companies in the U.S. has grown 44%.⁷ The amount of venture capital funding nearly doubled from 2012 to 2017,⁸ and the Kauffman Index of Startup Activity increased sharply.⁹ In contrast, there is no credible data, and the Index cites none, showing that IPR or Section 101 case law has caused a decrease in R&D investment in the United States. Our own experience has been the opposite.

Without the mischaracterization of the IPR process based on inaccurate data, the incorrect comparison to other fora for challenging patents, and an imbalanced narrative that ignores the benefits to innovation brought by IPR and recent Supreme Court decisions on subject matter eligibility, the United States’ patent system would have been first in the world under the Chamber’s scoring system. These serious flaws and mischaracterizations demonstrate that the Index cannot be relied upon as an unbiased portrayal of the U.S. patent system and its role in innovation.

cc: House, Senate Judiciary Committee Members

⁷ PricewaterhouseCoopers. “Global innovation 1000 methodology.” Available at <https://www.strategyand.pwc.com/innovation1000#Methodology>.

⁸ PricewaterhouseCoopers. “PWC / CBInsights MoneyTree™ Report Q1 2018.” Available at https://www.cbinsights.com/reports/CB-Insights_MoneyTree-Q1-2018.pdf.

⁹ PricewaterhouseCoopers. PwC / CBInsights MoneyTree™ data explorer. Available at <http://www.pwc.com/moneytree>. Kauffman Foundation. “Kauffman index of startup activity: National Trends.” Available at <http://www.kauffman.org/kauffman-index/reporting/startup-activity>.