



# Remarks by Director Andrei Iancu at U.S. Chamber of Commerce Patent Policy Conference

April 11, 2018

**U.S. Chamber of Commerce Patent Policy Conference**

**Director of the U.S. Patent and Trademark Office Andrei Iancu**

**Keynote Address**

**“Role of U.S. Patent Policy in Domestic Innovation and Potential Impacts on Investment.”**

**April 11, 2018**

**As prepared for delivery.**

Thank you Neil (Bradley) for that generous introduction. Thank you also to the U.S. Chamber of Commerce and its Global Innovation Policy Center for hosting this impressive gathering and inviting me to speak here today.

Dr. Eli Harari, an electrical engineer, always tinkered and invented things. He tells, for example, that he invented a new type of fishing rod, although he never fished. “Imagine how much more successful you’d be,” his wife said, “if you’d invent in a field you knew something about.” And so he did. Dr. Harari is credited with inventing the Electrically Erasable Programmable Read-Only Memory, also known as EEPROM, or “E-squared PROM.” This was in the 1970s, when Harari was working at a major corporation, where he was a star. But a few years later, he wanted to be on his own, to invent, to perfect, to commercialize. In his late 30s, he was also married and had a child. So in the prime of his career, with a family at home, Harari left his comfortable life with major corporations. Seeding it in part with his own money, Harari started a company of his own. And he did not even draw a salary the first several months. He risked everything: his career, his finances, and his family. That first company actually did not work out well, but a few years later, Harari risked it all again and co-founded a new company, which he ultimately called SanDisk. At SanDisk, Harari built upon his EEPROM technology, added critically important new inventions, and perfected flash memory data storage. And he obtained patents, including on how to turn memory chips into reliable systems. Harari’s flash technology came to be used almost universally in devices like digital cameras and cell phones. In 2016, Western Digital acquired SanDisk for \$19 billion. But think about it: Without patents, how could someone like Dr. Harari risk everything, put aside his secure career at an established company, and strike it on his own?

As Dr. Harari told me: “The only asset you have is your idea. If you have no way to protect your idea, you are at the mercy of the next bad guy. The U.S. patent system is genius, really the bedrock foundation of capitalism.” Harari’s sentiment was echoed by President Ronald Reagan, who said in 1982: “Throughout our Nation’s history, the patent system has played a critically important role in stimulating technological

advances.”

How true that is.

Yet today, our patent system is at a crossroads. For more than just a few years, our system has been pushed and pulled, poked and prodded. The cumulative result is a system in which the patent grant is less reliable today than it should be. This onslaught has come from all directions: There has been major reform legislation, and proposed legislation. There have been massive changes brought about by major court cases. And the USPTO itself has taken a variety of actions in an effort to implement these changes. Plus, importantly, the rhetoric surrounding the patent system has focused relentlessly on certain faults in, or abuses of, the system—instead of the incredible benefits the system brings to our nation. We see the result of this years-long onslaught in your own study, the U.S. Chamber’s 6th Annual International IP Index.

I don’t need to tell this audience that the American patent system, which in prior years was deservedly ranked as the number one system in the world, in 2017 fell to number 10. And this year it fell further, tied for number 12. But make no mistake: we are still an elite system, a mere ¼ point away from the systems ranked 2-11. And the United States remains the leader for overall IP rights.

Still, we are at an inflection point with respect to the patent system. As a nation, we cannot continue down the same path if we want to maintain our global economic leadership. And we will not continue down the same path. This administration has a mission to create sustained economic growth, and innovation and IP protection are key goals in support of that mission. So, how do we reverse the trend? The good news is that reclaiming our patent leadership status is within reach.

For today, let me focus on two principal points:

- (1) Creating a new pro-innovation, pro-IP dialogue, and
- (2) Increasing the reliability of the patent grant.

First, we must change the dialogue surrounding patents. Words have meaning. Words impact perception and drive public policy. And for too long, the words surrounding our patent system have been overly-focused on its faults. A successful system cannot be defined by its faults. Rather, a successful system must be defined by its goals, aspirations, and successes. Obviously, errors in the system should be corrected. And no abuse should be tolerated. Errors and abuse should be identified and swiftly eliminated. However, the focus for discussion, and the focus for IP policy, must be on the positive. We must create a new narrative that defines the patent system by the brilliance of inventors, the excitement of invention, and the incredible benefits they bring to society. And it is these benefits that must drive our patent policies.

At my swearing-in, I remarked that through the doors of the U.S. Patent and Trademark Office comes our future. And indeed it does, and it always did. We must celebrate that. From Thomas Edison to the Wright Brothers, from Stanley Cohen and Herbert Boyer to Steve Jobs, American inventors have fueled the imagination of our people for generations. We are a pioneering people, who overcome large obstacles in order to realize our dreams and create prosperity. Inventors help make dreams reality. And American invention changes the world. Indeed, with American patents, humans made light, began to fly, treated disease, and enabled instant communications across the globe from tiny devices in our pockets.

And those patents also enabled these inventors to start companies and grow our economy. Our dialogue and policies need to be focused on these amazing achievements, and how we can encourage more of them. Take Walter Hawkins as another example: Hawkins, who in 1942 became the first African American scientist on staff at AT&T’s Bell Labs, developed the plastic coating that covers telephone wires, a more versatile, durable and eco-friendly alternative to the lead standard at the time. It was so durable, in fact, and so effective, that Hawkins’ invention enabled huge investments to bring affordable phone service across

America, including rural areas, and to millions of people in the 20th Century.

Inventor stories like Hawkins' and Harari's are those we need to tell.

This is the American patent system. This is the dialogue we need to have. And this should be the focus of our patent policy. This is how we incentivize innovation and growth. But, how exactly do we translate this into a better patent system? Here's a start: when we write, interpret, and administer patent laws, we must consistently ask ourselves: Are we helping these inventors? Whether it's an individual tinkering in her garage, or a team at a large corporation, or a laboratory on a university campus—we must ask ourselves: are we helping them? Are we incentivizing innovation?

And that brings me to my second principal point for today: increasing the reliability of the patent grant. Because that is key to incentivizing innovation. Without reliable patents, inventors like Dr. Eli Harari are less likely to risk it all in order to bring their new concepts to the market. As I said at my Senate confirmation hearing: "When patent owners and the public have confidence in the patent grant, inventors are encouraged to invent, investments are made, companies grow, jobs are created, science and technology advance." This year's Chamber report explains why our patent system has dropped to number 12: "innovators and creators face a challenging environment for protecting their IP under current U.S. law... U.S. patentability standards and patent opposition procedures continue to create uncertainty for rightsholders." So your report identifies two principal reasons for the increased uncertainty (or lower reliability) of our patents:

- (1) Patentability Standards, or more specifically, patent subject matter eligibility pursuant to 35 USC Section 101; and
- (2) Opposition procedures, namely, the post-grant procedures, such as IPR, that were established by the America Invents Act.

Let me address each of these in turn.

First, our current law surrounding patentable subject matter has created a more unpredictable patent landscape that is hurting innovation and, consequently, investment and job creation. Recent cases from the Supreme Court – Mayo, Myriad, and Alice – have inserted standards into our interpretation of the statute that are difficult to follow. Lower courts applying these cases are struggling to issue consistent results. Patent lawyers trying to advise their clients are, in turn, struggling to predict the outcome with respect to certain patents. And examiners at the USPTO must spend increased amounts of time addressing this challenging issue. The current standards are difficult for all: stakeholders, courts, examiners, practitioners, and investors alike. System-wide, a significant amount of time is being spent trying to figure out where the lines should be drawn, and what's in and what's out. And multiple people looking at the same patent claims often have trouble agreeing on, and predicting, the outcome. Something must be done. To be sure, we must and will apply Supreme Court law faithfully. This does not mean, however, that more cannot be done to increase clarity and predictability. Of course, given our statutory mandate, there is only so much that the USPTO can do. But within that mandate, we will do everything we can. Currently, we're actively looking for ways to simplify the eligibility determination for our examiners through forward-looking guidance. Through our administration of the patent laws, which we are charged to execute, the USPTO can lead, not just react to every new case the courts issue.

Second, your report also mentions our "patent opposition procedures" as a reason for the increased uncertainty of our patents. This refers primarily to our Inter Partes Review, or the IPR system. This was a creation of the America Invents Act, and since its introduction five and a half years ago, we have now

conducted more than 8,000 such proceedings. It's been a very popular proceeding. Opinions on this new system diverge widely. Yet each opinion is passionately held by its supporters. Pointing to the high invalidation rates in IPR proceedings, some hate the new system with vigor, arguing that it's an unfair process that tilts too much in favor of the petitioner. Others love the system, and think it's the best tool we have to correct errors, eliminate "bad patents," and improve patent quality. Who is right? Well, both arguments have legitimate elements. But I encourage people to reduce the hyperbole and look at the process with fresh eyes, in order to understand its true benefits and true challenges. This is what we are now doing at the USPTO. Indeed, it's one of our highest priorities. We need to carefully balance rights-holder's and rights challenger's interests. On the one hand, for example, this proceeding can come years after issuance, when the patent owners and the public may both have relied on those rights and made investments accordingly. On the other hand, we do want to execute the statutory mandate and help maintain the quality of patent rights. And – assuming the Supreme Court does not declare it unconstitutional – we do want the IPR system to effectively address invalid claims, but at the same time, we don't want to throw out the baby with the bathwater. The filters need to be appropriately set. And so, among various other things, we are now examining: how and when we institute proceedings, the standards we employ during the proceedings, and how we conduct the overall proceedings. The goal, with whatever action we take, is to increase predictability of appropriately-scoped claims.

Finally on the predictability front, let me mention something that was not addressed directly in your report. If we want truly reliable rights, we must ensure that we issue appropriately-scoped patent claims from the get-go. In other words, we must also focus on the front end. And since our examiners are first in line, we must ensure that they have the tools they need for a thorough search and examination. Our examiners already do a fabulous job. And it is not easy, given the state of the law and all the information that needs to be processed and analyzed. To further improve the original examination, a next step would be to increase examiners' ability to find the best prior art during examination. At times, there is a gap between the prior art found during initial examination and the prior art found during litigation. There are many reasons for this, but the main culprits are the ever-accelerating publication and accessibility explosions. These are issues that face every Patent Office around the world. Indeed, we are ahead of most others on this front. But if we could further narrow this gap in prior art between examination and litigation, then the accuracy of the patent grant – and therefore, its reliability – would increase.

We are focusing on this as well, together with the other issues I've already mentioned.

Overall, addressing these various issues, especially as outlined in your report – from patentable subject matter to a carefully balanced post-grant process – we can return our patent system to a higher level of predictability and stability. Finding the right balance on these issues requires work, and a holistic, collaborative approach. As Neil mentioned in his introduction, I come from the private sector. I've seen our patent system at work from all sides. And I have represented clients from various sectors, of different sizes, and in different postures. I understand that there are a variety of legitimate points of view. We must work together to achieve a careful balance that is most beneficial to the American economy as a whole. In the end, the hallmarks of a well-functioning patent system are the reliability and predictability of quality patents. This is critical for both patent holders and the public. And the benefits of a well-functioning patent system are indeed unmistakable. It enabled inventors like Eli Harari and Walter Hawkins, who exemplify the brilliance of American innovation, to make significant technological advances while also generating remarkable job creation and progress for our nation. Of his flash memory inventions, Dr. Harari told me, "We really changed the world." And as to how his patents helped him start his company? He said, "With a patent at a minimum we were able to speak relatively freely under an NDA. And in a small start-up, you need partners who can help you accelerate your development and to invest in you." "If you are not protected," he said, "God help you!"

Let me leave you with this: During his first address to Congress in February of last year, President Trump noted that, on our 100th anniversary, in 1876, citizens from throughout the country came to Philadelphia to

celebrate America's centennial. At that celebration, the country's inventors showed off their wonderful creations. Alexander Graham Bell presented his telephone for the first time. Remington revealed the first typewriter, and Thomas Edison showed an automatic telegraph and an electric pen. President Trump then asked all of us to imagine the wonders our country could know in America's 250th year. He asked us to think about all the illnesses that could be cured, the distant worlds we could walk on, and the marvels we could achieve, if only we could set free the dreams of Americans. That's how I think about intellectual property. As I see it, no dream is too big if we unleash the power of innovation, and give our nation's inventors the protections they need to succeed. That's why it's so important that we find the right balance in the IP system. This is something I'm very passionate about, and fully committed to, as I lead the U.S. Patent and Trademark Office. We have a remarkable patent system, born from our Constitution and steeped in our history. It is a crown jewel; a gold standard. We have a unique opportunity to ensure it meets its full Constitutional mandate to promote innovation and grow our economy.

I look forward to working with all of you in support of that great endeavor. Thank you again for the invitation to participate in this important discussion.

# # #