

April 14, 2022

The Honorable Katherine Vidal
Under Secretary of Commerce for Intellectual Property and
Director of the U.S. Patent and Trademark Office
600 Dulany Street
Alexandria, Virginia 22314

Dear Director Vidal,

ACT | The App Association (App Association) congratulates you on your confirmation as director of the U.S. Patent and Trademark Office (USPTO). The App Association represents thousands of small business software application development companies and technology firms located across the mobile economy. Our members develop innovative applications and products that meet the demands of the rapid adoption of mobile technology and that improve workplace productivity, accelerate academic achievement, monitor health, and support the global digital economy. Our members play a critical role in developing new products across consumer and enterprise use cases, enabling the rise of the internet of things (IoT). Today, the App Association represents an ecosystem valued at approximately \$1.7 trillion that is responsible for 5.9 million American jobs. The App Association welcomes your leadership in promoting the progress of science and useful arts at this critical time for our country.

We also write to provide recommendations on actions the USPTO should take to support job creation and growth for small companies in the app economy. Patents and trademarks allow small business innovators to protect the investments they make, attract venture capital, establish a position in the marketplace, and compete on a level playing field in dealings with established companies and competitors. Small business innovators rely on the ability to protect their rights (whether in licensing or in litigation) within a predictable environment.

You are also well-positioned to help eliminate disparities and inequities through intellectual property (IP) policies that affect startup costs for minority-owned businesses. For example, a patent system that fails to purge poorly defined patents or encourages patent abuse raises costs on entrepreneurs. This is an unacceptable outcome for those who already experience higher costs and barriers to entry given their ethnic backgrounds.¹ For Black entrepreneurs, access to capital is also harder to come by, with banks approving credit for Black-owned firms at rates that are 19 percentage points lower than for White-owned firms² (particularly for venture capital). From a startup costs perspective, all these factors indicate that the barriers to entry for

¹ Such barriers are caused by, for example, an education funding gap between predominantly white and predominantly nonwhite school districts of approximately \$23 billion. Laura Meckler, "Report finds \$23 billion racial funding gap for schools," THE WASHINGTON POST (Feb. 26, 2019), *available at* https://www.washingtonpost.com/local/education/report-finds-23-billion-racial-funding-gap-for-schools/2019/02/25/d562b704-3915-11e9-a06c-3ec8ed509d15_story.html.

² FED. RESERVE BANK OF CLEVELAND, REPORT ON MINORITY-OWNED FIRMS (Nov. 9, 2017), *available at* <https://www.clevelandfed.org/en/newsroom-and-events/press-releases/2017/pr-20171108-atlanta-and-cleveland-feds.aspx>.

minority-owned businesses in tech-driven markets are greater. USPTO's policies can, and should, significantly impact these costs.

As described in our appended recommendations, the App Association recommends that the USPTO enable all small business innovators to succeed through making the patent system accessible to all entrepreneurs by:

- Prioritizing patent quality by ensuring that only valid patents issue and safeguard against the issuance or enforcement of low-quality patents;
- Helping avoid abusive patent litigation and behavior by improving the USPTO's tools that reduce risks for all entrepreneurs (e.g., the Patent Trial and Appeal Board);
- Joining with the Department of Justice and National Institute for Standards and Technology in advancing a recently rewritten draft policy statement that describes remedies available for standard-essential patent (SEP) licensors that better reflects the state of federal law, and discourages the issuance of injunctions against would-be licensees of SEPs on antitrust grounds;
- Advancing a strong, fair, transparent trademark system that will protect consumers while supporting small business entrepreneurs;
- Better coordinating with other agencies with functions that impact intellectual property rights, including the U.S. International Trade Commission, the U.S. Copyright Office, and others; and
- Expanding international leadership through coordination and education activities through both bilateral interactions as well as through multilateral fora.

The App Association again congratulates you on your confirmation to lead the USPTO at this critical time, and we welcome the opportunity to work with you moving forward.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive, flowing style.

Morgan Reed
President

ACT | The App Association
1401 K St NW (Ste 501)
Washington, DC 20005

RECOMMENDED ACTIONS FOR THE U.S. PATENT AND TRADEMARK OFFICE TO SUPPORT SMALL BUSINESS INNOVATION

Prioritize patent quality by ensuring that only valid patents issue and safeguard against the issuance or enforcement of low-quality patents

The Patent Act allows patents to be granted for any new and useful process, machine, article of manufacture, or composition of matter, as well as for any improvement to such inventions, and a robust body of case law now clarifies the limits on patent eligibility and establishing important protections to promote free access to abstract ideas, laws of nature, and natural phenomenon. Current Supreme Court case law prescribing the subject matter that is eligible for patent protection strikes the correct balance between rewarding innovation and protecting competition and further advancement. Notably, the software industry, also, has continued to thrive in the years following the Supreme Court’s decisions clarifying patent subject matter eligibility limitations, suggesting that the current restrictions do not harm software developers or businesses. Investment in research and development for the software industry doubled in 2018,¹ four years after *Alice* “clarif[ied] that the addition of a generic computer was not enough” for subject matter eligibility,² and venture capital funding for software startups was the highest it had ever been.³

Section 101 also has a critical role to play in weeding out low-quality patents, especially the types of low-quality patents that are routinely asserted against startups and small businesses. Indeed, broad, preemptive patents directed to abstract ideas—those appropriately deemed ineligible under current law—are especially concerning because they can be, and are, asserted against numerous accused infringers based on routine business activities or use of generic technology. Section 101 is valuable, and needed especially now, to focus the U.S. patent system on technological advances, improvements, and solutions, as well as to the curb the amount of and expense associated with litigation over low-quality patents.

Yet, better training is needed to help examiners appropriately grant patents, consistent with the law. Overall diminished patent quality and doubt around the validity of a number of existing patents limits the ability of patent owners to make full use of their patents and makes it harder for independent app developers to avoid litigation when making use of abstract ideas. The potential cost of a lawsuit means that even when a patent that is likely found invalid is asserted, a small business innovator’s only option is to accede to the patent owner’s demands. Inconsistency in the application of the *Alice/Mayo* framework has decreased U.S. competitiveness by opening up the U.S. system to frivolous patent litigation and reducing access to means for efficient resolution.

¹ *The State of Patent Eligibility in America: Part II Before the S. Subcomm. on Intellectual Property*, 116th Cong. (2019) (statement of David W. Jones, Exec. Dir., High Tech Innovators All.), <https://www.judiciary.senate.gov/imo/media/doc/Jones%20Testimony1.pdf>; strategy&, *PWC 2018 Global Innovation 1000 & What the Top Innovators Get Right* (Oct. 2018), slide 28, <https://www.strategyand.pwc.com/gx/en/insights/innovation1000/2018-global-innovation-1000-fact-pack.pdf>.

² *Netflix Inc. v. Rovi Corp.*, 114 F. Supp. 3d 927, 934 (N.D. Cal. 2015).

³ Jones, *supra* note 21; National Venture Capital Association, *Venture Monitor*, 4Q 2018 at 19, https://files.pitchbook.com/website/files/pdf/4Q_2018_PitchBook_NVCA_Venture_Monitor.pdf.

The App Association also calls on the USPTO to consider ways to improve its technical training of patent examiners. Today, the Patent Examiner Technical Training Program (PETTP) remains the USPTO's effort to train patent examiners on technical (as opposed to legal) matters. While we commend the USPTO for building a successful training program utilizing skilled volunteers that work to provide the technical training necessary for examiners to do their jobs, the App Association urges for a more formalized and curriculum-based approach to examiner training, akin to the proven legal training programs the USPTO provides to all its examiners. Further, the PETTP's subject matter should be constantly updated to keep pace with technological advances (e.g., today's PETTP omits key emerging technologies such as artificial intelligence).

Help avoiding abusive patent litigation and behavior by improving the USPTO's tools that reduce risks for all entrepreneurs (e.g., the Patent Trial and Appeal Board)

When enacting the America Invents Act (AIA) in 2011, Congress sought "to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs."⁴ Congress also recognized "a growing sense that questionable patents [were] too easily obtained and are too difficult to challenge."⁵ Small businesses, the main drivers of the U.S. economy, were at the core of Congress' decision to enact the AIA, especially the *inter partes* review (IPR) process. IPR provides a more affordable and efficient recourse for businesses of all sizes to exercise their rights – whether defending the validity of their granted patent or challenging a granted patent. Since its creation, IPR, administered by the Patent Trial and Appeal Board (PTAB), has worked as intended and has reduced unnecessary litigation, saving \$2.3 billion over just five years.⁶

The IPR process allows App Association members to have a fair and dispassionate tribunal to first assess whether the patent used against them was properly reviewed and issued. Our members have limited resources for litigation, and the IPR process successfully provides a much-needed alternative for these small businesses that do not have the ability to withstand years of expensive federal court patent litigation that can easily cost millions of dollars. Patent litigants often rely on the fact that many of these small businesses do not have the capital to fight a case and use that to their advantage to force them into licensing arrangements accompanied with terms greatly benefiting the litigant. IPRs protect our members from some of the financial and temporal burdens associated with proceedings in front of Article III tribunals.

⁴ H. R. Rep. No. 112-98, pt. 1, p. 40 (2011).

⁵ *Id.* at p. 39 (2011).

⁶ See, e.g., Josh Landau, *Inter Partes Review: Five Years, Over \$2 Billion Saved*, PATENT PROGRESS (Sept. 14, 2017).

Unfortunately, over the last few years the USPTO has taken a series of actions that impose requirements rejected by Congress in the AIA and that serve to reduce IPR's effectiveness. For example, USPTO implemented changes to the rules of practice for instituting review on all challenged claims or none in IPR, post-grant review (PGR), and the transitional program for covered business method patents (CBM) proceedings before the PTAB in accordance with *SAS Institute Inc. v. Iancu*. As part of this change, USPTO amended the rules to eliminate the presumption in favor of the petitioner for a genuine issue of material fact created by testimonial evidence submitted with a patent owner's preliminary response when deciding whether to institute an IPR, PGR, or CBM review. This rule change shifts the PTAB's process to unduly favor patent owners, significantly reducing due process for PTAB petitioners. Further, it appears that USPTO has failed to meet the requirements of the Administrative Procedure Act in proposing this rule change.

Equally worrisome is the rapidly growing string of "discretionary denials" from the PTAB in which the USPTO has chosen to ignore the statutory deadline allowing an IPR to be brought within one year after service of the complaint upon a petitioner. In conflict with congressional intent, the USPTO has substituted its own policy preference and directed the "discretionary denial" of timely-filed IPR petitions if the district court docketed an early trial date in a parallel infringement suit. This practice results in meritorious petitions being denied on extra-statutory grounds and adds cost, complexity, and uncertainty that Congress specifically sought to avoid by adopting a simple, clear one-year time bar. These discretionary denials under Section 314(a) have grown exponentially over the past three years and are on track to double yet again this year, and routinely deny timely-filed IPR petitions, leaving invalid patents in force to be litigated. Such policy changes most negatively impact minority-founded and operated small businesses that demonstrably experience more difficulties in launching and growing new businesses in the digital economy.

Unsurprisingly, the PTAB's reserved approach to patent scrutiny has not gone unnoticed by patent assertion entities (PAEs). Abusive patent litigation, along with forum shopping, is increasing as a result of changes made to the IPR system. PAE litigation has grown substantially across districts,⁷ and the Western District of Texas, in particular, has seen an increase in PAE cases since the precedential *NHK Spring Co. v. Intri-Plex Techs., Inc.* decision.⁸ Defending against frivolous litigation is prohibitively expensive and more costly than an IPR.⁹ The resurgence of behavior that necessitated the creation of IPR in the first place should send a strong signal that the USPTO's policy changes over the last four years have been ineffective and stray from Congress' envisioned role.

⁷ *Litigation on the Rise: Number of New Cases Filed by Patent Assertion Entities*, ENGINE (Nov. 9, 2020), https://www.engine.is/s/Pae-stats-Diagram_Jan-Oct-2020.pdf.

⁸ See *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752 (Sept. 12, 2018), see also Scott McKeown, *Texas Plaintiffs More Likely to Side-Step PTAB?*, PATENTS POST-GRANT, (Apr. 7, 2020), <https://www.patentspostgrant.com/texas-plaintiffs-more-likely-to-side-step-ptab/>.

⁹ Britain Eakin, *PTAB Discretionary Denials Harming Patent System, Atty Says*, LAW360, (Dec. 1, 2020), <https://www.law360.com/articles/1332942/ptab-discretionary-denials-harming-patent-system-atty-says>.

Recent PTAB denials of legitimate and proper IPR petitions undermine progress made through the IPR. Increasing procedural burdens on IPR petitioners saddles them with higher costs and additional obstacles by forcing them to bring claims against invalid patent holders in court. The USPTO's actions modifying IPR proceedings can be traced back as a direct contributor to the recent growth in the number of abusive suits brought by non-practicing entities.¹⁰

The USPTO should course correct by returning its attention to patent quality and restoring the IPR system to its former function. We encourage USPTO to unwind its efforts in the previous Administration that have undercut the purpose of the IPR process in contrast to congressional intent. USPTO should undertake a new and reoriented approach that uses all data available to correctly focus on patent quality, and which appropriately makes the IPR process available to identify and eliminate invalid patents that should never have been issued. Making these changes will help spark innovation and remove the financial weight of litigation. Without those burdens, small businesses can focus on their actual business and restoration from the current pandemic. USPTO has the power to re-prioritize patent quality through IPR and we request that it use that power to reinstate the systems as Congress intended.

Join with the Department of Justice and National Institute for Standards and Technology in advancing a recently rewritten draft policy statement describing remedies available for standard-essential patent licensors that better reflects the state of federal law, discourages the issuance of injunctions against would-be licensees of SEPs on antitrust grounds

The App Association supports the USPTO, U.S. Department of Justice (DOJ), and National Institute of Standards and Technology (NIST) to jointly provide guidance promoting good-faith standard-essential patent (SEP) licensing negotiations and the scope of remedies available to patent owners that agreed to license their essential technologies on fair, reasonable, and non-discriminatory (FRAND) terms. USPTO's efforts are integral to President Biden's strategy and vision for economic growth in the United States, and we support withdrawal of the prior Administration's 2019 *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (2019 Policy Statement) and replacement of the 2019 Policy Statement with one that promotes competition and innovation. This new statement should build on the 2013 *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (2013 Policy Statement).

¹⁰ Q3 2020 Patent Dispute Report, UNIFIED PATENTS, (Sept. 30, 2020), <https://www.unifiedpatents.com/insights/q3-2020-patent-dispute-report>.

The world changed significantly after the issuance of the 2013 Policy Statement. In 2013, the perception of SEP licensing was only as a communications sector concern. Now, use of SEPs has expanded into the automotive and smart energy sectors. Today, it is spreading further and further across internet of things (IoT) markets. It also is clearer now that U.S. government policies that fail to clearly limit injunctions and exclusion orders for FRAND-encumbered SEPs benefit foreign companies, to the detriment of the American small businesses the App Association represents. It is critical for the U.S. government to ensure that FRAND-encumbered SEPs serve their intended purpose—to preserve, protect, and promote competition and innovation, rather than to stifle them. The Biden Administration’s strategy requires taking steps to ensure American innovators can design and manufacture products that realize the benefits of emerging technologies like 5G, IoT, and artificial intelligence.

The previous Administration’s policies encouraged SEP asserters to seek injunctions and exclusion orders to block standards users from participating in markets for their innovative products. These policies invited SEP asserters to avoid the commitments they voluntarily made to license their patented technologies included in a standard on FRAND terms. Among other problems, the prior Administration’s 2019 Policy Statement (1) disregards that injunctions on FRAND-encumbered SEPs should be rare, if available at all under the four-factor analysis of the U.S. Supreme Court’s *eBay Inc. v. MercExchange LLC* decision, because SEP owners voluntarily agree to license anyone using the standard; (2) ignores the need to similarly align exclusionary remedies at the U.S. International Trade Commission (ITC) with the scope of the voluntary FRAND licensing commitment; (3) improperly suggests that antitrust law never applies to breaches of FRAND licensing commitments; and (4) promotes a biased perspective that prioritizes SEP holders that monetize their patents over other downstream innovators and SEP owners. Indeed, the 2019 Policy Statement has even been used to argue that injunctions are always available for FRAND-encumbered SEPs.

We applaud and support the new draft policy statement, which represents a much-needed shift in policy towards a balanced and pro-competitive approach which acknowledges that “opportunistic conduct by SEP holders to obtain, through the threat of exclusion, higher compensation for SEPs than they would have been able to negotiate prior to standardization, can deter investment in and delay introduction of standardized products, raise prices, and ultimately harm consumers and small businesses” (Draft Policy Statement at 4). The new draft recognizes, consistent with OMB Circular A-119, the procompetitive benefits of voluntary collaborative standard-setting activities, and the need to balance those benefits against the anticompetitive risks associated with standard setting, including opportunities to assert SEPs to hold-up users locked into a specific standard. We also strongly support a new DOJ-USPTO-NIST policy statement recognizing that strong limits for exclusionary remedies based upon the FRAND commitment are necessary to protect against competitive harm caused by the adoption of a standard that chooses just one set of technical solutions among what would otherwise be competing options. Further, we support the draft policy statement reinforcing that standards-setting organizations (SSOs) can and should develop and adjust patent polices to best meet their particular needs, consistent with the DOJ’s recent restoration of DOJ’s 2015 IEEE Standards Association Business Review Letter.

The draft policy statement also appropriately states that “[w]here a potential licensee is willing to license and able to compensate a SEP holder for past infringement and future use of SEPs subject to a voluntary F/RAND commitment, seeking injunctive relief in lieu of good-faith negotiation is inconsistent with the goals of the F/RAND commitment” (Draft Policy Statement at 4). We appreciate your recognition that injunctions for FRAND-committed SEPs should be rarely available, if at all, under the standard set forth for injunctive relief in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). In almost all, if not all, cases monetary compensation through damages at law is a sufficient remedy for infringement of such SEPs by users of the relevant standard, and the nature of the FRAND commitment generally precludes irreparable harm. Indeed, injunctive relief has never been awarded for FRAND-committed SEPs under *eBay*. We believe that injunctions for FRAND-committed SEPs would only be appropriate, if at all, where the defendant is bankrupt, or a defendant refuses to pay a FRAND royalty awarded in a final judgment of a U.S. court. Absent these circumstances, it is inappropriate to leverage injunctive relief in licensing negotiations, when the SEP holder forswore to use such leverage when making a FRAND licensing commitment.

We offer the following further input on the draft DOJ-USPTO-NIST policy statement:

- **We strongly encourage a deeper discussion of how the FRAND commitment protects *ex ante* competition, including an exploration of the relationship between SEP licensing negotiations, antitrust law, and potential remedies.** Accordingly, the policy statement should describe how seeking injunctions on FRAND-encumbered SEPs represents an anticompetitive exploitation of the leverage a SEP holder has over entire markets of innovators who rely on technical interoperability standards to compete. Similarly, the statement should describe how certain SEP holders exploit ambiguities introduced into the standards and SEP licensing ecosystems by the last Administration, such as systematic refusals to provide licenses to reasonable and willing parties seeking licenses, based on arbitrary characterizations and metrics. Such a discussion would provide further needed clarity to small businesses that rely on the FRAND commitment to innovate, ultimately promoting U.S. interests in competition and innovation.
- **We request that the new policy statement clarify that the alleged SEP “hold-out” theory perpetuated by the previous Administration has no evidentiary basis.** The previous Administration’s theory characterizes the outcomes of negotiations where the licensee disagrees with demands unilaterally set by the SEPasser as harmful. In those few cases where the licensee is acting maliciously and unreasonably, the courts can fully compensate an SEP holder for willful infringement as it would any patent holder, including by awarding interest to compensate the patent holder for any delay in realizing payment for infringed patents. App Association small business members would benefit from understanding that their efforts to understand and engage in a complex SEP licensing negotiation process is not “holding out,” particularly in light of the harm to competition SEP hold-up causes and how courts are already equipped to address the overstated concerns of those promoting the flawed “hold-out” theory. Equating hold-up and “hold-out” gives certain SEP licensors to use abusive tactics to attain supra-FRAND terms in a SEP licensing negotiation with small businesses.

- **DOJ, USPTO, and NIST should clarify that exclusion orders issued by the ITC on SEPs should also be rare because of their negative effects on competition and licensing negotiations.** We appreciate the draft policy statement noting that, as part of the International Trade Commission’s (ITC’s) authority to issue exclusion orders under 19 U.S.C. § 1337, the ITC must consider the effect of “exclusion upon the public health and welfare, ...and United States consumers” (Draft Policy Statement at FN 15). We see continued growth in SEP holders seeking ITC exclusion orders on claimed SEP infringements. Seeking exclusion orders in this manner clearly violates the FRAND commitments those SEP holders have voluntarily placed on their SEP(s), and such anticompetitive behavior is even the subject of ongoing litigation today. See *Koninklijke Philips v. Thales Usa Inc et al.*, 1:20-cv-01709 (Delaware District Court); *In re Certain UMTS and LTE Cellular Communications Modules & Products Containing the Same*, No. 337-TA-1240. Such exclusion orders should only issue under the public interest factors set forth in 19 U.S.C. § 1337(d)(1) if the defendant is not subject to the jurisdiction of a U.S. court that could award FRAND royalties for the use of a valid and infringed SEP, or bankruptcy, or refusal to pay following a final judgment as listed above. Otherwise, as the draft statement provides in the context of injunctions in federal courts, exclusion orders are used to leverage a SEP owner’s power in licensing negotiations beyond what is contemplated by the FRAND licensing commitment. Indeed, the new policy statement should recognize that the U.S. Trade Representative rejected the ITC’s last exclusion order based on infringement of a FRAND-encumbered SEP because the exclusion order did not accord with the 2013 Policy Statement. Whether in the form of an injunction or an exclusion order, prohibitive orders pose an outsized risk of forcing App Association small businesses to design around open standards or to abandon entire product lines.
- **We request that the new policy statement further clarify that, like all patent holders, SEP holders bear the burden of proving their patents infringed and must withstand any validity or enforceability challenges before any entitlement to infringement remedies.** Small businesses already face immense difficulties in bearing the costs of challenging patents asserted against them. Such a clarification in the new policy statement would provide further support for the draft policy statement’s appropriate assertion that “a potential licensee should not be deemed unwilling to take a F/RAND license if it agrees to be bound by an adjudicated rate determined by a neutral decision maker; if it reserves the right to challenge the validity, enforceability, or essentiality of the SEP in the context of an arbitration or F/RAND determination; or if it reserves the right to challenge the validity or essentiality of a patent after agreeing to a license” (Draft Policy Statement at 9).
- **We urge the new policy statement to directly reject the primacy of “efficiency” in licensing negotiations to the extent that it favors monetizing SEPs over the antitrust interests in limiting monetization strategies.** Valuing efficiency over fairness, transparency, balance, and other interests would put App Association small business members at a heightened disadvantage as they lack resources compared to SEP licensors. We urge you to continue to reject the privileging the benefits of patent rights over the competitive harms that result from abusive licensing conduct. Further, the new policy statement should reject the previous administration’s erroneous assertion that SEP holders may recover lost profits for infringement of a FRAND-encumbered SEP.

- **We agree that good-faith negotiation that leads to widespread and efficient licensing between SEP holders and those who seek to implement technologies subject to FRAND commitments helps to promote technology innovation, further consumer choice, and enable industry competitiveness.** We agree that any good faith SEP holder approaching a potential licensee should provide sufficient explanations and bases for each SEP so that the potential licensee can readily assess whether it needs to take a license, and, if so, whether the licensor's offer complies with the SEP owner's FRAND obligation; and that, after taking necessary steps to determine that a SEP license should be taken, the potential licensee should provide confirmation that it is willing to negotiate a SEP license in good faith and on FRAND terms, while also reserving the ability to fully challenge essentiality, validity, and infringement claims.

Once negotiations commence, it is critical that the SEP holder continue to act in good faith and alignment with the FRAND commitment. Therefore, we encourage the policy statement to endorse the idea that potential licensees should be entitled to obtain, without any pre-conditions or demands for secrecy, details regarding the alleged basis and support for the patent holder's SEP licensing demands to fairly and transparently assess whether a licensing proposal is FRAND. A lack of transparency makes it particularly difficult for App Association small businesses that are potential licensees to evaluate the terms on which they should consider concluding a FRAND license. The informational disadvantages can easily (1) give rise to non-FRAND outcomes; (2) interfere with the FRAND public interest function; and (3) impede the ability to determine whether SEP licenses are available on terms that are demonstrably compatible with FRAND (a problem often exacerbated in cases where SEPs are transferred to third parties such as patent assertion entities). App Association small businesses face a significant challenge when incurring costs in assessing the SEP holder's claims (either privately or in court), often resulting in their acquiescence to a non-FRAND license. To the extent the policy statement discusses good faith behavior, it should clarify that SEP holders must be open and transparent about the rates they seek to charge for their SEPs, what patents are licensed, and their basis for believing that the patents are actual, valid SEPs. Many from our community that develop IoT products often do not have the expertise or resources to sufficiently address SEP issues, particularly when the SEP is asserted as part of a portfolio of patents, and need access to information necessary to verify whether SEP asserters are complying with FRAND terms and conditions.

We recognize that parties may voluntarily elect to keep certain items confidential as part of normal commercial practice. However, certain information that enables the assessment of FRAND compliance and generally facilitates FRAND license negotiations should not require confidentiality.

To the extent that the new policy statement addresses good faith behavior in SEP licensing scenarios, we urge DOJ, USPTO, and NIST to maintain the ability of parties to fully challenge the essentiality, validity, and infringement claims, while also acknowledging that preserving such rights should not constitute a lack of good faith. Given patents are jurisdictional in nature, the new policy statement should recognize that a potential licensee should not be compelled to participate in worldwide FRAND adjudications (i.e., a rate-setting exercise for a broad portfolio license), such as by being threatened with an injunction if the licensee does not agree to a worldwide license. Moreover, we agree that parties may, in the event negotiations fail, mutually agree to

mediate/arbitrate to determine the merits of the patents at issue and FRAND licensing terms. Likewise, in the arbitration context, which may require the waiver of a party's due process rights and right of access to the courts, seeking to compel a portfolio determination or to impose penalties if such a procedure is not agreed to would be improper and counter to existing laws and rights.

The above recommendations are consistent with the Executive Order's guidance to protect standard-setting processes from abuse. We look forward to working with you to improve and finalize the policy statement and congratulate you on taking this important step towards that goal in issuing this draft.

Advance a strong, fair, transparent trademark system that will protect consumers while supporting small business entrepreneurs

Small business innovators must build and maintain customer trust to succeed and protecting the way their goods and services are identified is crucial in achieving this goal. USPTO should continue to build on its successful implementation of the Lanham Act, focusing on enhancing the ability of small businesses and startups to easily leverage the trademark system to proactively protect their brands and to avoid consumer confusion. Building on the USPTO's successful efforts to date, we urge (1) a review of ways to make trademark protections more accessible and affordable for small businesses, including a review of access to the Trademark Trial and Appeal Board (TTAB); and (2) enhanced training of and support for trademark examiners.

Better coordinate with other agencies with functions that impact intellectual property rights, including the U.S. International Trade Commission, the U.S. Copyright Office, and others

Numerous other U.S. federal agencies, through policy decisions and enforcement actions, impact intellectual property rights. All would benefit from the USPTO's expertise as they make these decisions. For example, the ITC regularly conducts investigations under Section 337 of the Tariff Act of 1930 to address allegations of patent infringement and trademark infringement by imported goods and would greatly benefit from enhanced coordination in intellectual property matters. Further, the U.S. Copyright Office's policies on copyrights are increasingly addressing emerging technology issues, including artificial intelligence. We support enhanced collaboration between the USPTO and other federal agencies to advance a coordinated approach to intellectual property rights, particularly to support small business education.

Expand international leadership through coordination and education activities through both bilateral interactions as well as through multilateral fora

The USPTO does, and should continue to, have a leading role in advancing the rule of law and sound intellectual property rights policy internationally. Notably, USPTO's Global Intellectual Property Academy (GIPA) is a successful program that has done much to advance responsible enforcement, patent, trademark, and copyright policies and enforcement abroad. The App Association supports USPTO's role in advancing pro-innovation intellectual property policies through bilateral and multilateral international discussions. We urge for increased funding to the GIPA and commit to assisting the USPTO in accomplishing its international goals.