

AIPLA

American Intellectual Property Law Association

December 23, 2024

Donald J. Trump
President-Elect, United States of America
The Mar-a-Lago Club
1100 South Ocean Boulevard
Palm Beach, FL 33480

Re: Recommendations on Intellectual Property Priorities for the Trump Transition Team

Dear President-Elect Trump:

Congratulations on your election to be the next President of the United States. The American Intellectual Property Law Association (AIPLA) is eager to work with your Administration in furthering important intellectual property (IP) initiatives that are vital to the U.S. economy. During a time when technology and innovation is rapidly changing, we see this as an opportunity for this Administration to advance effective IP protections so that America can maintain its role as a global leader in the IP ecosystem. As you work to choose personnel and develop policy objectives, we offer the following recommendations with respect to intellectual property.

I. Background

Founded in 1897, AIPLA is a national bar association of approximately 7,000 members including professionals engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

The U.S. intellectual property system, fundamentally rooted in our Constitution, serves as a vital mechanism for fostering innovation and creativity. Recognized from our nation's inception, the Constitution grants Congress the authority "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹ This foundational principle has propelled the U.S. to the forefront of global innovation.

¹ U.S. Const. art 1, §8, cl. 8.

Today, intellectual property is intricately woven into every sector of the U.S. economy, influencing daily interactions for all Americans. From artificial intelligence driven innovations and digital advancements that enhance connectivity, the protection of creative content through copyrights, to medical and scientific breakthroughs, the impact of strong and effective intellectual property rights is profound.

The significance of intellectual property was underscored in a report² published by the USPTO, which found that in 2019, industries within the United States that heavily utilize IP, contributed to 41% of the nation's economic output. These IP-intensive industries were directly responsible for employing over 47 million Americans. Furthermore, they supported an additional 15.5 million jobs in various sectors that provide them with intermediate goods and services. Altogether, industries centered around intellectual property sustained 63 million jobs in the U.S., representing 44% of the total employment in 2019.

The USPTO's report builds upon a report published by the Department of Commerce in 2012 titled "Intellectual Property and the U.S. Economy: Industries in Focus" which found that IP-intensive industries accounted for about \$5.06 trillion in value added, or 34.8% of U.S. gross domestic product (GDP), in 2010.³ Subsequently, in an updated report published by the Department of Commerce in 2016, the share of total U.S. GDP attributable to IP-intensive industries increased from 34.8% in 2010 to 38.2% in 2014 accounting for \$6.6 trillion.⁴

Recent reports⁵ further demonstrate the escalating value of IP industries, particularly emphasizing the challenges posed by artificial intelligence, digital piracy, the economic damages from counterfeit goods, and the need for vigorous IP enforcement both domestically and internationally. These issues demand a nuanced and dynamic approach to IP policy. Given this context, AIPLA urges the Administration to prioritize the selection of informed leadership and to cultivate intellectual property policies that address current challenges while fostering an environment conducive to future innovation and economic prosperity.

II. USPTO Leadership

The USPTO plays a crucial role in fostering technological innovation and economic growth by securing exclusive rights for inventors and businesses. Effective leadership is essential for guiding policy and managing the operations of patent issuance and trademark registration. A highly qualified USPTO Director is pivotal in guiding policy and managing the operations involved in issuing patents and registering trademarks. Several years ago, AIPLA adopted recommendations⁶ regarding the preferred qualifications for the next Director and Deputy

² U.S. Patent and Trademark Office, *Intellectual property and the U.S. economy: Third edition*, (2019), <https://www.uspto.gov/sites/default/files/documents/uspto-ip-us-economy-third-edition.pdf>.

³ U.S. Department of Commerce, *Intellectual Property and the U.S. Economy: Industries in Focus*, (March 2012), <https://www.commerce.gov/sites/default/files/migrated/reports/ipandtheuseconomyindustriesinfocus.pdf>.

⁴ U.S. Department of Commerce, *Intellectual Property and the U.S. Economy: 2016 Update*, (2016), <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

⁵ Office of the United States Trade Representative, *2024 Special 301 Report*, <https://ustr.gov/sites/default/files/2024%20Special%20301%20Report.pdf>.

⁶ *AIPLA Recommendations Regarding USPTO Director*, (July 2018), https://www.aipla.org/docs/default-source/advocacy/aiplawhitepaperusptodirector_july2018_final.pdf?sfvrsn=58bc9092_2.

Director of the USPTO. The USPTO Director and Deputy Director should be a highly skilled, experienced intellectual property executive with significant legal and managerial capabilities, a comprehensive understanding of both domestic and international IP law, and a proven track record in fostering innovation and economic growth. We encourage your Administration to refer to these specific recommendations during the appointment process. Your Administration's appointment of a knowledgeable and experienced leader will be instrumental in enhancing the USPTO's domestic and international effectiveness, promoting innovation, and protecting economic interests.

III. Patent Eligibility

Inventors and businesses of all sizes rely on a robust, balanced, and predictable patent system to encourage research, development, manufacturing, and sales. Title 35, Section 101 defines what may qualify for patent eligibility. However, recent jurisprudence has injected uncertainty regarding what qualifies as patent-eligible, especially in fields like biotechnology and computer software. The USPTO has been challenged to adapt these judicial interpretations into its examination practices. Over the past decade, the USPTO has frequently updated its guidelines to reflect these complex legal standards, most notably in its 2019 guidance.⁷ AIPLA has emphasized the need for clearer legislative guidance on this issue, urging the Administration to support the USPTO's efforts to provide further clarity in patent law.

In September 2024, AIPLA issued a support letter⁸ for three pieces of legislation including, S. 2140, the Patent Eligibility Restoration Act, which seeks to address the uncertainty and unpredictability resulting from the Supreme Court's subject-matter eligibility decisions over the past two decades.

AIPLA supports such legislation because it clarifies that any useful process, machine, manufacture, or composition of matter, or useful improvement thereof, should be patent eligible, subject only to specific exclusions in the bill, and patentable if they meet the other requirements of the statute. We believe that restoring clarity to patent eligibility will incentivize investment across various fields of technology, including emerging technologies, thereby preserving our nation's position as an economic and technological leader.

To safeguard the competitive edge of the United States in the global economy, particularly against major players abroad, it is imperative to reinforce the predictability and clarity of our patent system. By ensuring that our patent system is clear, certain, and robust, the U.S. can stimulate investment in key sectors, from biotechnology to software and beyond, thereby not only maintaining but advancing our leadership position in the global technological arena. AIPLA looks forward to working with your Administration to address these issues surrounding patent eligibility.

⁷ U.S. Patent and Trademark Office, *Manual of Patent Examining Procedure (MPEP)*, Ninth Edition, Revision 01.2024, <https://www.uspto.gov/web/offices/pac/mpep/index.html>.

⁸ *AIPLA Letter in Support of S. 2140, S. 2220, and S. 4713*, (September 16, 2024), https://www.aipla.org/docs/default-source/advocacy/aipla-letter-in-support-of-s.-2140-s.-2220-and-s.-4713.pdf?sfvrsn=d9518e32_1.

IV. Patent Quality

The U.S. patent system is designed to foster innovation by offering inventors exclusive rights to their discoveries for a limited period. Ensuring the issuance of high-quality patents is vital for the system's effectiveness. A high-quality patent clearly defines the invention, making its scope and boundaries understandable to those skilled in the relevant field. The USPTO has been actively exploring methods to enhance the quality of patents, with stakeholder engagement playing a significant role in this ongoing effort.

It is critical for the USPTO to prioritize prompt and quality examinations of patent applications. An efficient patent system is particularly crucial for small and medium-sized enterprises (SMEs) that rely on rapid patent approvals to secure funding, enter markets, and drive business growth. AIPLA appreciates the challenges facing SMEs, notably that “70% of venture capital dollars go to California, New York and Massachusetts” and that over “50% of U.S. patents are issued to inventors in just five states.”⁹ We also note, for example, our concerns over the impact of significantly high inventory levels causing significant delays in the patent process.¹⁰ By ensuring the efficiency of the examination process and reducing wait times, the USPTO can provide more substantial support to all inventors, especially SMEs, helping to sustain innovation and economic activity across diverse industries.

The America Invents Act (AIA) of 2011 introduced the Patent Trial and Appeal Board (“PTAB”) to add a layer of quality control for issued patents. Initially, the PTAB proceedings were heavily utilized, leading to some concerns about fairness and a perceived bias. Recent adjustments by the USPTO have aimed to balance these proceedings, ensuring they are more equitable and continue to fulfill their intended role effectively. AIPLA sees these as beneficial reforms, which advocate for continued evaluation and adjustment of PTAB processes to preserve its integrity and fairness.

In 2024, AIPLA submitted comments to the USPTO on Expanding Opportunities to Appear Before the PTAB,¹¹ on Rules Governing Director Review of PTAB Decisions,¹² and on Briefing Discretionary Denial Issues.¹³ We further emphasized the need for PTAB reform in our support letter for S. 2220, the PREVAIL Act to the Senate Judiciary Committee.¹⁴ In our letter, AIPLA supported adjustments to enhance procedural protections in proceedings at the PTAB, to

⁹ *Trump and Vance will make America competitive again, former U.S. Patent Office director says*, Fortune, (October 30, 2024), <https://fortune.com/2024/10/30/trump-vance-make-america-competitive-again-patents-china-startups-tech/>.

¹⁰ U.S. Patent and Trademark Office, *Patent Pendency Data October 2024*, <https://www.uspto.gov/dashboard/patents/pendency.html>.

¹¹ *AIPLA Comments to USPTO on Expanding Opportunities to Appear Before the Patent Trial and Appeal Board*, (May 21, 2024), https://www.aipla.org/docs/default-source/advocacy/aipla-comments-on-expanding-opportunities-to-appear-before-the-ptab.pdf?sfvrsn=2df7fe90_1.

¹² *AIPLA Comments on Rules Governing Director Review of Patent Trial and Appeal Board Decisions*, (June 17, 2024), https://www.aipla.org/docs/default-source/advocacy/aipla-comments-on-rules-governing-director-review-of-ptab-decisions.pdf?sfvrsn=9a6cb1f2_1.

¹³ *AIPLA Comments on Briefing Discretionary Denial Issues*, (June 17, 2024), https://www.aipla.org/docs/default-source/advocacy/aipla-comments-on-briefing-discretionary-denial-issues.pdf?sfvrsn=2d908b6c_1.

¹⁴ See *supra* AIPLA Letter in Support of S. 2140, S. 2220, and S. 4713.

eliminate duplication with district court litigation, applying a presumption of validity for challenged patents, and changing the burden of proof for petitioners to the clear and convincing evidence standard. We believe that since the passage of the AIA over a dozen years ago, reforms are necessary to ensure balance and equity in the patent system. AIPLA remains committed to collaborating with your Administration to refine these critical improvements.

V. Artificial Intelligence and IP Rights

The advent of artificial intelligence and machine learning have created profound opportunities for innovation. However, while this rapidly evolving technology can have monumental societal impacts, it is accompanied by significant challenges. For example, it is critical that AI does not supplant human innovation, but rather acts as a tool to aid creators in furthering their ideas.

In May 2023, AIPLA submitted comments¹⁵ to the USPTO in response to its Request for Comments Regarding Artificial Intelligence and Inventorship.¹⁶ In our comments, AIPLA emphasized that AI should be considered a tool in the inventive process, not as an inventor. We argued against requiring patent applicants to disclose AI contributions, citing potential complications and highlighting the importance of human creativity in the innovation process. AIPLA also recommended improving the patent application process for AI-enhanced innovations and called for responsible AI development through interagency collaboration. We recommended that the USPTO foster responsible AI innovation through collaboration with other relevant agencies, aligned with overarching principles such as those in the Blueprint for an AI Bill of Rights¹⁷ and the AI Risk Management Framework.¹⁸

In October 2023, AIPLA also submitted comments¹⁹ to the U.S. Copyright Office in response to its Notice of Inquiry and Request for Comments related to the study of copyright law and policy issues raised by artificial intelligence systems.²⁰ In its comments, AIPLA highlights the crucial role copyright protection plays in promoting creativity by giving creators exclusive rights to their works, thus encouraging innovation and investment in both artistic and intellectual projects. We recognized that the emergence of AI introduces complex challenges in defining authorship and managing copyright, particularly given AI's capability to easily replicate and disseminate copyrighted content. Balancing the protection of creators' rights with

¹⁵ *AIPLA Comments to USPTO On Artificial Intelligence and Inventorship*, (May 2023), https://www.aipla.org/docs/default-source/advocacy/aipla-comments-to-uspto-on-ai-and-inventorship-051523-final.pdf?sfvrsn=5d6eac22_1.

¹⁶ U.S. Patent and Trademark Office. "Request for Comments Regarding Artificial Intelligence and Inventorship." *Federal Register*, Vol. 88, No. 9492, Tuesday, February 14, 2023, Docket No. PTO-P-2022-0045, <https://www.federalregister.gov/documents/2023/02/14/2023-03066/request-for-comments-regarding-artificial-intelligence-and-inventorship>.

¹⁷ The White House, *Blueprint for an AI Bill of Rights*, (October 22), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

¹⁸ National Institute of Standards and Technology, U.S. Department of Commerce, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, (January 2023), <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>.

¹⁹ *AIPLA Comments to the Copyright Office on Copyright Law and Policy Issues Raised by Artificial Intelligence*, (October 2023), https://www.aipla.org/docs/default-source/advocacy/aipla-letter-to-copyright-office-on-ai-inquiry_final_10302023.pdf?sfvrsn=6a0d46e2_1.

²⁰ U.S. Copyright Office, Library of Congress. "Artificial Intelligence and Copyright." *Federal Register*, Vol. 88, No. 59942, August 30, 2023, Docket No. 2023-6; COLC-2023-0006, <https://www.federalregister.gov/documents/2023/09/21/2023-20480/artificial-intelligence-and-copyright>.

the push for technological advancement is becoming a significant challenge for both policymakers and the legal system. This balance is essential, as human-generated creative works like art, music, dance, and storytelling are integral to cultural expression and human experience.

Our comments emphasize that as AI technology continues to evolve rapidly, its potential to mimic or even replace human-authored works raises critical questions about the future of creativity. This situation calls for a cooperative approach among various stakeholders including artists, AI developers, and legal experts to balance strategies that protect creative communities while fostering innovation. This includes considering AI as a tool in creative processes rather than an independent author and categorizing AI contributions to ensure clarity in copyright law application. AIPLA's comments aim to navigate these complexities within the current technological context, recognizing that future advancements in AI might shift these dynamics further.

AIPLA believes that if this Administration prioritizes the development of emerging technologies, the United States will be able to maintain its role as a leader in this sector and develop comprehensive standards that other nations will adopt.

VI. International IP Harmonization

Intellectual property rights are crucial both domestically and internationally, reflecting U.S. efforts to set strong and consistent IP protection standards worldwide. Differences in IP systems across countries bring significant challenges. These disparities increase costs, complicate compliance, and may endanger U.S. IP rights. There is a clear need for greater international harmonization to ensure that U.S. IP owners can secure and enforce their rights abroad in a cost-effective manner. Harmonization reduces complexities and lowers costs, facilitating a more predictable and efficient environment for global operations.

AIPLA is dedicated to promoting international law harmonization and uniform adoption of best practices for prosecution and cooperation amongst IP offices worldwide.

Your Administration should continue to support these efforts, emphasizing the importance of such initiatives for ensuring that U.S. interests can obtain protection worldwide on a less costly and more predictable basis. A commitment to these objectives is vital for advancing a globally efficient and predictable IP landscape, which benefits U.S. economic interests and promotes innovation across international borders.

Additionally, in November 2024, the World Intellectual Property Organization (WIPO) adopted a new Treaty making it more efficient for innovators to protect their designs internationally.²¹ As a result, Member States will be able to sign the treaty and undergo accession or ratification

²¹ *WIPO Member States Adopt Riyadh Design Law Treaty*, WIPO, (November 22, 2024), https://www.wipo.int/pressroom/en/articles/2024/article_0017.html.

processes. AIPLA strongly supports swift ratification of this Design Law Treaty, as we believe it will facilitate greater international cohesion with respect to design patents.²²

VII. Digital Piracy and Counterfeiting

The landscape of digital piracy and counterfeiting remains a significant challenge across the global economy, continuously evolving with technological advancements. The proliferation of internet access and digital distribution technologies has enabled piracy to extend far beyond music and movies, into software, games, books, and a range of other copyrighted and patented materials. The ease with which digital files can be replicated and distributed has made anti-piracy efforts a game of ‘whack-a-mole’ at times, with new sites and methods popping up as soon as others are taken down.

Counterfeiting has become a significant issue in the digital landscape, in particular through online marketplaces and digital platforms, where the availability of counterfeit goods ranging from everyday consumer products to luxury goods is unfortunately on the rise. These venues also provide copyright infringers with the means to reach a global audience more easily, often masking their operations under the guise of legitimate listings and storefronts. Additionally, trademark issues arise as these platforms often struggle to monitor and control the misuse of registered brand names and logos, further complicating the challenge of protecting intellectual property rights online.

Efforts to combat these issues involve a mix of technological solutions, legal actions, and consumer education. For example, digital watermarking and blockchain technologies are being explored to verify the authenticity of digital goods and chain of ownership. There has been a push for stronger regulations and penalties for digital piracy and counterfeiting, including a bill introduced in 2024 to expand the sharing of information with respect to suspected violations of intellectual property rights in trade.²³ This bill seeks to enable the U.S. Customs and Border Protection (CBP) to communicate with the person possessing intellectual property rights in the goods as well as any party showing an interest in the merchandise, as deemed appropriate. Legislation such as this is a positive step in combating counterfeit products from entering the U.S. market.

For many years, AIPLA has supported efforts²⁴ that would have authorized the CBP to seize imported merchandise that infringes a design patent. Counterfeit and knockoff designs not only cause economic damage to rightful design patent owners, but also pose safety risks to consumers due to potentially lower quality and safety standards. These policy efforts would expand the CBP enforcement capabilities to include design patents, aligning U.S. practices with international norms and enhancing protection against counterfeit goods.

²² *AIPLA Comments on the WIPO Diplomatic Conference on the Design Law Treaty*, (June 25, 2024), https://www.aipla.org/docs/default-source/advocacy/aipla-comments-on-wipo-diplomatic-conference-on-the-design-law-treaty.pdf?sfvrsn=340596f8_1.

²³ S. 5160, 118th Cong. (Introduced by the Senate – Finance Committee 2024).

²⁴ S. 2987, 116th Cong. (2019-2020).

Moreover, there is a growing emphasis on educating consumers about the risks of purchasing pirated or counterfeit goods, not only in terms of potential legal repercussions, but also concerning safety and quality. By increasing awareness, stakeholders hope to reduce the demand that drives these illicit markets.

These multifaceted approaches reflect the complexity of tackling digital piracy and counterfeiting in an interconnected world where digital goods are easily and rapidly disseminated across borders. The ongoing efforts against these practices are critical to protect the rights of creators and manufacturers, and to uphold the integrity of global commerce and digital economies. AIPLA looks forward to working with your Administration to address pervasive digital piracy and counterfeiting.

VIII. Additional Intellectual Property Areas of Interest

- a. **Appointment of a Qualified IP Enforcement Coordinator (IPEC):** To secure the effectiveness of America’s intellectual property strategy, it is important for the Administration to appoint a highly qualified Intellectual Property Enforcement Coordinator (IPEC). The ideal candidate should be equipped with a deep understanding of the complexities surrounding IP law, robust experience in enforcement, and a proven track record of leadership within the field. Given the Executive Branch has operated without a designated IPEC since 2021, this leaves a significant gap. We strongly encourage your Administration to swiftly appoint a qualified candidate as the IPEC, to begin effectuating necessary national IP enforcement strategies.

- b. **Trade Secret Protection:** Trade secret protection is crucial for American businesses to safeguard their innovations. Recent trends indicate a surge in trade secret misappropriation by foreign entities, cybercriminals, and internal threats.²⁵ The enactment of the Defend Trade Secrets Act (DTSA)²⁶ in 2016 significantly bolstered the legal framework, allowing U.S. companies to effectively pursue federal remedies against such thefts. We urge your Administration to further consider the legal landscape, and if warranted, strengthen these protections and ensure that American innovation remains secure against increasingly sophisticated threats.

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²⁵ See *supra* Office of the United States Trade Representative at 23.

²⁶ S. 1890, 114th Cong. (2016).

We appreciate your willingness to consider our perspectives. AIPLA is eager to collaborate with your Administration to support a robust intellectual property system that benefits both the U.S. economy and the general public.

Sincerely,

A handwritten signature in black ink, reading "Salvatore Anastasi". The signature is written in a cursive style with a large, sweeping initial 'S'.

Salvatore Anastasi

President-Elect

American Intellectual Property Law Association