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November 4, 2011

3<sup>rd</sup> Annual Georgetown Law & Stanford Law Conference

“The America Invents Act: A Patent Law Game-Changer”

*Draft Remarks as Prepared for Delivery*

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- Good afternoon everybody – and thank you so much for inviting the United States Patent and Trademark Office to join in on the Georgetown Law and Stanford Law School 3<sup>rd</sup> Annual Joint Conference.
- I’d like to thank Professors Jay Thomas of the Georgetown University Law Center and Mark Lemley of the Stanford Program in Law, Science & Technology—as well as Emily Cullum—for giving me the opportunity to address you this year, especially at such a historic juncture in our nation’s intellectual property history.
- It’s especially an honor to be able to do so alongside the esteemed company of the Honorable **Kathleen O’Malley** (Court of Appeals for the Federal Circuit), the Honorable **Randall Rader** (Court of Appeals for the Federal Circuit), the Honorable **James Spencer** (U.S. District Court for the Eastern District of Virginia), the Honorable **Ronald Whyte** (U.S. District Court for the Northern District of California), and Carl Shapiro of the President’s Council of Economic Advisors.
- Being in the company of such distinguished guests, there’s no doubt this year’s conference lends itself to a spirited conversation about the evolving landscape of patent policy & the courts. So today, I’d like to add to that discussion by

addressing what President Obama’s signing of the *Leahy-Smith America Invents Act*, means for American innovation, American jobs, and American leadership.

- Certainly this is a crowd that is partial towards the importance of patents—but even having spent most of my professional career in the intellectual property (IP) field, I can still be the first to admit that patents haven’t always held the title for the “*sexiest*” of topics.
- But, even if the brand new patent reform law isn’t enough to make IP the subject of dinner table conversation everywhere...passage of this new law is reflective of what people everywhere are increasingly noticing:
  - ...That whether it’s the microprocessors in our cameras; the components in the smart phones some of you are texting from right now; or even the official seal and logos of the Georgetown Hoyas and the Stanford Cardinals— they are all built from patented technologies and trademarked brands that sought protection at the United States Patent and Trademark Office.
- So no longer is intellectual property a topic reserved for highly technical or specialized scientific and legal circles, like us. IP now permeates **all** fields of interest, **all** layers of society and **all** parts of our daily lives.

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## THE GRAND BARGAIN AND WHY PATENTS MATTER

- This is an important reality that should be recognized, because as we bear witness to the awe-inspiring progress of technology—at a pace never before seen in any previous generation—protecting those technologies with clear, consistent and dependable patent rights is fundamental to disseminating scientific advances. And ultimately, that dissemination affords society the opportunity to build upon and leap-frog from one breakthrough to the next.
- Without the incentives offered by patent protection, there would be little motivation for anyone to share their new idea for the laser or the microprocessor, with the rest of the world. And arguably, plenty of incentives *not* to share.
- The laser alone has spawned whole industries, through multiple uses and multiple follow-on breakthroughs. And as if gazing into the far depths of our galaxy or correcting visual impairments via laser was not enough, follow-on advancement of technologies like the laser continue to create high-growth job sectors, to this day.
- So with their experimental drive, curiosity, and foresight—our founding fathers left a legacy so profound...that our faith in **the transformative power of American inventiveness has become almost a genetic pre-disposition.**
  - that innovation **will grow** the next great industries and promote the next wave of jobs; that innovation, even in the face of failure, will provide us with a greater understanding of the world around us; and indeed that

innovation **will underwrite** the next great chapter of 21<sup>st</sup> century growth for our country.

## SOUND IP POLICY AND INNOVATION

- That's **exactly** why the *America Invents Act* is an historic moment for our nation. Because in the centuries since the first patent examiner—Thomas Jefferson—reviewed and granted the first U.S. patent, our nation has observed sweeping revolutions in the **pace** of innovation—but with *no* comprehensive legislative adjustment in patent policy.
- By building out the world's first and only 21<sup>st</sup> century Patent and Trademark Office, equipped to manage the demands of a globalized economy, this new law enables a better resourced USPTO to grant IP rights with greater speed, greater quality and greater clarity. It also **advances** the President's overall strategy of deploying American innovation to build businesses and build jobs.
- By cutting costs for independent inventors and entrepreneurs, issuing patents that obviate expensive court challenges, and by providing tools to reach patent decisions three-times faster than in the past, the new law **topples** many existing structural impediments to business & technological growth.
- With greater efficiency built into the American IP system, investors have greater confidence in the American patent. As you all know well -- **for investors**, patents are strong indicators of market potential for new companies. And **for inventors**, patents are essential to attracting the capital necessary to develop their products. So by allowing universities, early-stage startups, independent

inventors, and even larger companies to **effectively** acquire that capital, our newly reformed patent system is in turn enabling innovators to develop their technologies **faster**, hire employees **sooner**, grow their businesses to be **stronger**, and sell their products more **widely**.

- This historic new patent law is therefore a down payment on the aggressive jobs agenda President Obama has outlined in the *American Jobs Act*. By shrinking the gap between ideation and the bottom line, companies are able to leverage the resources required to move molecules to the marketplace, spurring the sort of business and economic growth necessary to out-innovate our economic competitors globally.
  - Ultimately this ensures that new jobs and new industries take root in this nation, and not somewhere else.
- One of the areas where we've seen strong linkage to competitiveness and economic strength, and a direct correlation to employment opportunity is in IP intensive industries. These are industries we see represented all over the country—where great ideas born in a lab, a garage, or a dorm room have blossomed into Fortune 500 companies, because they've had the strength of the *US Patent* behind them to build out the far-reaching products and services that benefit communities and the economy generally.
- But **sound IP** policy—the kind embodied in the *America Invents Act*--doesn't just embolden the American manufacturing sector, or inspire new innovative possibilities—*as if that's not enough for 1 piece of bipartisan business*

*legislation*—it also helps American innovators **compete** by offering clear, timely and *enforceable* rights.

## **SOUND IP POLICY AND MARKET FORCES**

- In a world where the corrupt can so readily steal, mimic and distribute products as if they were their own—clarity and consistency in patent rights help American businesses better protect their IP from theft and gives them a fighting chance to compete on a level playing field. Now none of us needs a lecture on the sinister competitive impact of counterfeiting and piracy. But below the surface there is an equally insidious impact on national competitiveness.
  - Because the copyists enjoy “free” access to others’ property, their operating costs are reduced compared to legitimate U.S. businesses that pay for access to others’ property, or that is developed on their own. It shouldn’t be surprising that these rogue “competitors” have a marketplace advantage over US competitors. **Cheaters cheat for a reason.**
  - And the costs exacted to cope with this unfair cheater’s advantage don’t just shrink revenues, they inhibit product development for companies, they stunt a business’s hiring potential, they risk irreparable damage to a brand and in sum—they ultimately stymie broader economic growth nationally.

## **PILLARS OF THE AIA**

- What the AIA does is ensure that entrepreneurs, innovators and businesses of all sizes have the best tools available to protect their market participation in a hypercompetitive & often ruthless global economy. And provisions in the new law that promote such sound IP policy are governed by three principal pillars: speed, quality and clarity.
- Speed in the patent application review process is paramount for inventors to get their businesses off the ground; but the USPTO also places a premium on ensuring that only high quality patents are granted.
- A commitment to the pillar of quality moves our Patent Office to tighter patenting standards, helping cutting-edge products reach the marketplace—while allowing manufacturers to do business without the threat caused by improvident patents. Finally, clarity in what exactly is covered under a patent, and for whom, moves the patent system away from constant challenges caught in the dockets of district courts, to mutual respect and accountability for innovators, manufacturers and the public.

## **PROVISIONS OF THE AIA**

- So let's talk about how specific provisions of the new law meet these 3 standards and give the U.S. the world's first and only 21<sup>st</sup> century patent system.

- For the first time, the USPTO will have the ability to set its fees to recover the actual costs of the services it provides. And for the first time, the law helps the USPTO access all the fees it collects. And before the ink of the President's signature was even dry, we began aggressively implementing this mandate by hiring new examiners, instituting new processes, and modernizing our IT infrastructure.
- While in these tough economic times, our funding model is still not perfect, we appreciate the strong and continuing support of Members of Congress and our stakeholders, to ensure that the USPTO retains the funding it needs to implement this legislation and accompanying core programs.
- To alleviate an average wait time of almost three years for patent protection, we have already begun offering inventors an opportunity to have important patents reviewed in one-third the time – with a new fast track option that guarantees a 12-month turnaround. The Track 1 prioritized examination provisions allow the USPTO to move with urgency when needed and bring the sort of patented American ingenuity—that will define the next era of our nation's growth—to the marketplace faster.
- And our users are already taking advantage of this tool to grow their companies. As of the end FY2011—which was just a few a few days after the program started—we received **853** applications, with **433** already filed in this Fiscal Year as of yesterday (November 3).

- This legislation also enables us to bring online the additional resources needed to help us further combat the backlog of patent applications, which represent an untold number of jobs and innovations idling in the pipeline. Under the Obama Administration, the patent backlog has been reduced from over 750,000 patent applications to **less** than 670,000, despite a 4% increase in filings. But additional resources provided in the law are allowing us to push that number down even further, and even faster—unclogging the backlog and regaining jobs lost in the recession.
- Beyond even the 112 provision of the law, The Patent and Trademark Office has re-engineered its quality management processes to increase the quality of the examinations and has issued guidelines that clarify and tighten its standards for the issuance of patents.
- The law also establishes a new in-house review process for challenging granted patents—a process that is much faster and cheaper than litigation. By resolving disputes about patent rights earlier, more efficiently, and at lower cost, we will add **greater certainty to**—and cultivate **greater confidence in**—the American patent system.
- That confidence, in turn, will invite more companies to do business in the United States, and will inspire individuals to work towards the next great medical and nano-tech breakthroughs that will sustain America’s visionary leadership for decades to come.

- The AIA also promotes a system of clearer and more enforceable patent rights by adopting a First to File standard for patent priority. By transitioning to this simpler, more objective, and more transparent system for determining patent priority, the new Act helps ensure that independent inventors and small entities have greater access to their rightful claims to patents and are able to navigate the patent system on a more equitable footing with larger enterprises.
- And let me be clear. Independent inventors and small businesses play a critical role in driving innovation in the U.S., creating 2 out of every 3 new jobs in our country. That’s why this new system was specifically designed to better protect them, by offering small businesses a more reliable way of filing that can better withstand challenges from competitors, and at reduced costs.
- With the new law, the US will enjoy objective standards for assessing patentability—standards easily applied by examiners and applicants alike. And of course the foundation for quality is always built on clear, objective and simple standards. The new law also permits 3rd party submissions of prior art, a term we in the IP community use to reference technologies already known to the public. In the era of tools like Wikipedia, allowing the USPTO to harness the internet and crowd-source the search for additional prior art helps patent examiners widen the scope of their review and offers applicants heightened confidence in the validity of their patents once issued.

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- Now, the courts—under the leadership of jurists like Chief Judge Rader and Judge O’Malley—have taken several important strides in addressing the array of problematic issues confronting the intellectual property bar today, which ultimately impact the way businesses are using patents as a vehicle of growth.
- On the one hand, they are deciding cases, like *Microsoft v. i4i*, that press the law forward around standards of proof, and on the other hand, they are working to re-balance areas of the law that have arguably become imbalanced and demand enforceable checks—as in issues of inequitable conduct and false marking that have impacted litigation in *Therasense* and *BP Lubricants*.
- Certainly the specific case law is up for debate, but all vectors point to the need for a clear and well-balanced patent system. And the enactment of this new law moves us directly toward that more well-balanced system; the kind that must account for the ever-evolving and shifting nature of our intellectual property terrain.
- There’s no doubt that the sheer tonnage of these provisions will certainly be a challenge to implement, but as we stand at the forefront of a new era in American innovation, I submit to you today that the United States Patent and Trademark Office is up to the challenge. In its totality, the *America Invents Act* fosters a nimble IP infrastructure for our country, allowing businesses to grow and technologies to flourish, by leveraging inventive efforts with the fulcrum of a U.S. patent—the currency of innovation in this 21<sup>st</sup> century.

## IMPLEMENTING & NEXT STEPS

- Our new law in the US is anchored in the desire to more effectively match the rate & pace of the patenting process to the rate & pace of invention, and the rate & pace of commercialization. But in saying this we realize that there is a difference between invention and innovation—**the latter is the economically relevant version of the former**. With this distinction in mind, the *America Invents Act* creates not just the simplest patent system, or the most precise patent system, but rather the most innovation-friendly & inventor-friendly patent system that reduces costs, levels the playing field for businesses small & large, and spurs economic growth.
- The process of implementing this law will span the course of the next 18 months. And I do mean precisely that – because no matter how challenging adapting to these provisions may be – this law was crafted with eye towards making the patent prosecution process a bit easier on all of us. So any amount of justice delayed in that regard, would be justice denied.
- In developing a system of rules to put many of these provisions into effect, input from the academy and industry and the entire innovator community will remain vital. We've already convened working groups under the leadership of a chief implementation coordinator—and we've already started reaching out for help. We've even begun conducting studies in areas like international protection and prior user rights to get a feel for what everyday practitioners are experiencing in different areas of the prosecution process. We recognize that the USPTO cannot

implement this law singlehandedly. The US innovation community must implement our country's new patent law **together**.

- So I encourage each and every one of you to remain a part of the dialogue, even after today's conference by visiting [www.uspto.gov/americaninventsact](http://www.uspto.gov/americaninventsact) and offering your inputs.
- Through judicious rule-making, thoughtful guidelines and policy-based interpretations of the new laws in the courts, we can animate the AIA with the **balance & stability** that is elemental to strong business growth.
- And **when we are done**, our new patent laws will streamline processes that optimize patent quality and minimize barriers to research, development and growth that have plagued small and large businesses in this economic climate, for far too long.

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- We live in an age where technological change occurs in the blink of an eye. Our new law patent law offers inventors a USPTO capable of adapting to changes. This new law not only boosts confidence in the US patent, it also boosts inventor willingness to take the risks involved in turning dreams into reality—design them, build on them and map uncharted industries with them.

- **We are a nation of big ideas.** Larger than life ideas. We are a nation that wakes up and says: “I might not have a lot of money, but I have a vision for a great new idea that will help others. I might not know exactly how to get this product off the ground, but I’m going to try.”
- We do big things.
- And today, more than two centuries after Thomas Jefferson examined that first patent, turning great American ideas into **great American businesses has gotten the upgrade of the century.**
- And I’m thrilled to be here, now, to help Americans make the most of the America Invents Act.
- Thank you

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