

March 14, 2014

Mail Stop Comments—Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450
Attn: Nicole Dretar Haines

Dear Ms. Haines:

I am David Balto, an antitrust and intellectual property attorney. I am the former Assistant Director of the Office of Policy and Evaluation at the Federal Trade Commission where I worked extensively on intellectual property issues and contributed to the issuance of the FTC/DOJ Guidelines for Intellectual Property Licensing. You can find information on my practice at www.dcantitrustlaw.com.

I write today about the PTO design patent system. The U.S. design patent application system lags behind utility patents in many ways, especially in transparency. These problems simply have not been addressed since it is only recently that design patents have arrived on the public's radar due to high profile corporate litigation that has garnered media attention. I am thankful to the USPTO for opening comments on the design patent process. While the PTO has identified the issue of written descriptions, I would like to express concerns for another area where design patents need transparency.

Design patents by their nature rely heavily on the images included in the applications. This makes searching for prior art more challenging for examiners. Therefore, I believe a change that could help the review process significantly would be pre-grant publication. This would allow third parties to file submissions of prior art and greatly assist the examiners. It is my understanding the utility patent processing has benefitted greatly from crowd-sourcing but currently this is unavailable due to the secrecy surrounding design patent applications.

Unlike utility patents, design patents do not have pre-grant publication. Pre-grant publication allows innovators, companies, and consumers to see what patent applications are pending. It also makes it accessible for stakeholders with the most to lose to file comments on the patents, which ultimately cut down on litigation and infringement in the long run once a patent is awarded. Currently design patents are not published until they are awarded.

I appreciate the USPTO beginning to address design patents. I commend your offices for opening comments and considering reform to the design patent process. This will invite efficiency and transparency to a critical system that the U.S. must maintain to be at the forefront of Intellectual Property policy. As such, I encourage USPTO, lawmakers, and fellow regulatory agencies to consider other areas where design patents need further openness.

Sincerely,

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