



January 19, 2021

The Honorable Joseph R. Biden, Jr.
President-elect of the United States
1401 Constitution Avenue NW
Washington, DC 20230

The Honorable Kamala D. Harris
Vice President-elect of the United States
1401 Constitution Avenue NW
Washington, DC 20230

Dear President-elect Biden and Vice President-elect Harris,

Congratulations on your historic election. We are eager to work with you and your administration to support and grow opportunities for tech entrepreneurs across the country. As you continue to vet and select candidates for roles in the Department of Commerce, we write to express our optimism for the incoming leadership at the Department and identify principles to guide your selection of the next director of the U.S. Patent and Trademark Office (“USPTO”). We urge the incoming administration to nominate a new USPTO director who will promote patent quality and balance, engage diverse stakeholders, and embody the diversity we want to see in the nation’s innovation ecosystems.

Engine is a non-profit that works with government and a community of thousands of high-tech, growth-oriented startups across the nation to support technology entrepreneurship through research, policy analysis, and advocacy. Startups are major drivers of economic growth, innovation, and U.S. competitiveness. These emerging companies are not only essential to advancing technology, but they also make outsized contributions to net job creation. Especially as the nation embarks on a long path to economic recovery, it is essential to support startups now—so that they can survive and be well-positioned to expand rapidly after the pandemic ends.

Engine congratulates Governor Gina Raimondo on her nomination for Secretary of Commerce, and looks forward to working with her to advance innovation and entrepreneurship across the country. Indeed, Governor Raimondo’s experience with early-stage companies will be a vital asset. Engine is optimistic that under her leadership—and with her first-hand understanding of what nascent technology companies need to grow and thrive—the Department of Commerce will be uniquely situated to foster high-growth, high-tech startups and, with them, competition and the broader U.S. economy.

Within the Department, the USPTO also has a role to play supporting the nation’s innovators and preventing imbalanced intellectual property (“IP”) policies that stand in the way of progress. With that in mind, the following priorities should guide the selection of the next USPTO director:

- ***The next USPTO director must prioritize patent quality—seeking to ensure only valid patents issue, and protecting against the issuance and enforcement of low-quality patents.*** Patent quality is essential to innovative startups. High-quality patents can be a valuable asset for many emerging companies. But low-quality patents—those that claim things that were already known or that are written in vague, overbroad terms that are difficult to understand—lack value and routinely stand in

the way of innovation. Indeed, low-quality patents can be weaponized against startups to slow them or shut them down altogether. Unfortunately, in recent years, the USPTO deprioritized patent quality,¹ and the U.S.'s global rankings in quality have dropped.² The next USPTO director should restore the Office's focus on quality, align incentives toward issuing only valid patents, and make sure there are affordable ways to weed out low-quality patents.

- ***Relatedly, the next USPTO director should help stem abuse of the patent system and endorse tools that reduce the costs and risks imposed on startups by frivolous litigation.*** Startups are regrettably familiar with abusive, frivolous patent litigation. For instance, patent assertion entities (“PAEs”) routinely acquire and assert low-quality patents, and try to coerce startups to pay costly settlements knowing they cannot afford the even higher costs of litigation. But policymakers can reduce the costs of frivolous patent suits—and have created or reinforced mechanisms that allow startups to defend themselves—which in turn discourages abusive litigation. For example, the 2011 America Invents Act created *inter partes* review (“IPR”), a procedure through which the USPTO can take a second look and cancel patents that never should have issued. By reducing the cost of challenging low-quality patents, IPR helped level the playing field in litigation and contributed to a drop in abusive assertion.³ However, the USPTO has recently taken steps to weaken IPR, which means that more invalid patents remain in force, and current USPTO policies to protect invalid patents from scrutiny have contributed to a sharp increase in litigation numbers and costs.⁴ The incoming USPTO director should instead preserve the progress made by IPR, explore other alternatives to costly litigation, and help protect startups from abusive litigation over low-quality patents.
- ***The USPTO director should promote balance and consistency domestically and abroad.*** Balanced, certain IP frameworks are critical for innovation and startup growth and success. Startups operating on thin margins and tight budgets cannot easily accommodate the costs and risks of defending IP litigation—especially against a backdrop of sometimes weak IP claims and unjustifiably high damages awards—and it is difficult for any business to navigate a patchwork of legal regimes. The next USPTO director should advocate for balanced IP systems that support startups globally.
- ***An effective USPTO director must balance the interests of myriad stakeholders—ranging from patent owners and applicants to innovators and entrepreneurs who only interact with the patent system when they are accused of infringing (even low-quality) patents.*** The director will no doubt need to engage diverse stakeholders on complex and emerging topics during her tenure. Likewise, a commitment to evidence-based, data-driven decisionmaking is key. As such, it is essential that the next director engage a full scope of stakeholders in an impartial and consensus-driven way—and not

¹ See, e.g., Abby Rives, *A Declining Focus on Patent Quality at the USPTO and What it Means for Startups*, Engine (Oct. 21, 2020), <https://www.engine.is/news/ip-recap-102120>.

² E.g. Adam Houldsworth & Bridget Diakun, *Benchmarking 2020 – Europe Holds its Lead but Honeymoon Might be Over for USPTO Head*, IAM (June 8, 2020), <https://www.iam-media.com/law-policy/benchmarking-2020-europe-holds-its-lead-honeymoon-might-be-over-uspto-head> (U.S. ranks 4th out of 5 patent offices for quality).

³ See, e.g., *Patent Review is Working for Startups*, Engine, <https://innovatewithoutfear.engine.is/wp-content/uploads/2020/01/IPR-is-working-one-pager.pdf> (less PAE litigation since IPR went into effect).

⁴ E.g., *Engine Submits Comments to USPTO on Proposed Changes that Would Weaken Patent Review*, Engine (Dec. 4, 2020), <https://www.engine.is/news/engine-submits-comments-to-uspto-on-proposed-changes-that-would-weaken-patent-review>; *Companies Urge Congress to Investigate Policies Shielding Invalid Patents*, Engine (Oct. 14, 2020), <https://www.engine.is/news/companies-urge-congress-to-investigate-policies-shielding-invalid-patents>.

discount or ignore the experiences and views of startups and small business innovators.⁵

- ***A USPTO director that embodies diversity will be a role model who can bring unique viewpoints to guide the agency and advance the critical goals of promoting more inclusive innovation ecosystems.*** The importance of diverse leadership—including in the tech sector—is no secret. But it was not until 2015 that the first woman and the first person of color was selected to lead the USPTO.⁶ At a time when the nation is correctly focused on addressing deeply rooted inequality, we applaud your commitment to building a cabinet “that looks like America.” We encourage you to nominate a USPTO director that reflects the current diversity of the startup ecosystem, but also someone who can lead in the direction of even greater and sustained diversity.

Thank you for your consideration of these principles as you weigh, no doubt many, qualified candidates for the role of USPTO director. Startups are an essential component of our innovation economy, and it is critical to weigh their interests in policy and leadership decisions. Engine is committed to engaging with the incoming administration on these and other important issues. Collectively, we can ensure startups have the support they need to continue developing some of the most exciting new technologies and contributing to our overall economic success as a nation.

Sincerely,

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⁵ The current administration has instead downplayed or ignored these concerns. *See, e.g.*, Letter to Hon. Iancu from Small Business Owners (Feb. 14, 2019), <https://www.eff.org/document/letter-andre-iancu-director-us-patent-and-trademark-office> (responding USPTO remarks “downplaying , or even denying” serious harms experienced due to abusive patent litigation); Press Release: Patent Trolls and Bad Patents Continue to Be Reality for U.S. Companies, United for Patent Reform (Oct. 23, 2018), <https://unitedforpatentreform.com/files/iancu-edtx-speech-stmt1175616836.pdf> (similar).

⁶ Press Release, Michelle K. Lee First Woman to Lead United States Patent and Trademark Office, NAPABA (Mar. 10, 2015), https://www.napaba.org/page/PR_MKLee31015.