22 December 2016

The Honorable Donald J. Trump
President-Elect of the United States
Office of the Presidential Transition
1800 F Street, NW
Washington DC 20270-0117

Re: Key Issues for Intellectual Property Owners

Dear President-Elect Trump:

Congratulations on your election to be the next President of the United States. I am writing on behalf of Intellectual Property Owners Association (IPO) to make several recommendations concerning key aspects of intellectual property (IP) law and policy that we believe should be priorities in your administration.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes about 200 companies and nearly 13,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. Members of our corporate Board of Directors are listed on the right side of this letter.

IPO members rely heavily on United States intellectual property laws to provide reliable, effective, and efficient protection for their inventions via patents and trade secrets, as well as for their trademarks and copyrights. The intellectual property system is fundamental to the nation's economic growth and job creation. To preserve its effectiveness, we ask that your administration consider the following recommendations.

I. U.S. Legislative Priorities

a. Patentable Subject Matter Under Section 101

IPO members continue to struggle with the fallout from the U.S. Supreme Court's jurisprudence with regard to patent eligible subject matter. *See, e.g., Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Mayo Collaborative Serv. v. Prometheus Labs*,132 S. Ct. 1289 (2012). The Court has articulated a test that is difficult to apply and that has yielded unpredictable results for patent owners in the courts and at the U.S. Patent and Trademark Office (USPTO). Although this jurisprudence might have addressed some undeserving patents, it is clear to IPO that the Supreme Court decisions have curtailed legal protection for deserving innovation, which risks a chilling effect on R&D investment. The impact is being felt most acutely in two of the most innovative sectors of the U.S. economy: the life sciences and software.

Uncertainty and unpredictability in the system undermine the incentive to innovate and invest in research, development, and production in industries that rely on software-based innovation and in healthcare treatment methods, including targeted medicine. Uncertainty as to whether a startup company's technology will be protected by patents increases the risks to early stage investors and thus reduces both the overall likelihood of funding cutting edge technologies, as well as the amount of such investments.

This harm to the patent system is real, it is significant, and it is not going away. We and other stakeholders will be discussing the need for legislation to reverse the Supreme Court's unduly narrow and rigid definition of patent eligible subject matter, and we hope your administration will support these efforts.

b. U.S. Patent and Trademark Office Post-Issuance Patent Proceedings

The America Invents Act, enacted in 2011, created new adjudicatory proceedings that were intended to provide an avenue to quickly and inexpensively review the validity of granted patents. These new post-issuance proceedings have been very popular among patent challengers and have made the USPTO's Patent Trial and Appeal Board (PTAB) a fast-growing forum for adjudicating patent validity.

With the benefit of five years' experience conducting these proceedings, the USPTO is now in a position to review both its interpretation of the statute and the regulations it has implemented to govern these proceedings. We believe that such review is warranted in light of the number of patent invalidations in post-issuance proceedings and the resulting gamesmanship that unfortunately has arisen, whereby patent challenges are filed to impact the stock price of the patent owner. Further rulemaking is needed to address unintended consequences of the current procedures and to ensure fairness and balance for petitioners and respondents in these proceedings. We ask that you urge the new USPTO Director to implement new regulations to address any unintended consequences or issues of unfairness in the proceedings, and where statutory changes are required, that your administration support such legislation.

c. Patent Litigation

The America Invents Act included several provisions designed to curb certain patent litigation abuses, and has helped in that regard. Moreover, judicial decisions, administrative actions, and changes to the Federal Rules of Civil Procedure have addressed many aspects of patent litigation, including attorney fee shifting, pleading requirements, proportionality in discovery, patent claim definiteness, bad faith demand letters, and other issues. We urge lawmakers to engage in a comprehensive evaluation of any changed circumstances before proposing further legislation.

One area that some consider ripe for legislation is limiting venue for patent infringement lawsuits to curb forum shopping. The Supreme Court recently granted certiorari in a case raising this issue, *TC Heartland, LLC v. Kraft Foods Group Brands LLC*, No. 16-341. We will be following this case and will reassess whether we believe patent venue legislation is needed after it is decided.

d. Copyright Office Modernization and Autonomy

A well-functioning Copyright Office is of critical importance to authors, content creators, and other copyright owners. The Copyright Office is part of the Library of Congress and therefore currently reports to a federal entity that does not share its mandate. It has faced numerous information technology (IT) issues and personnel shortages amidst a growing user base. Congress is currently considering whether a more efficient U.S. copyright system would include a Copyright Office that has the staffing, budget, IT, flexibility, and autonomy it needs to meet the current and future demands of copyright owners and the public.

Most recently, House Judiciary Committee leadership released a Copyright Office modernization proposal to give the Office more autonomy over its budget and IT systems. The proposal would keep the Copyright Office in the legislative branch, but would make the Register of Copyright a Senate-confirmed position with a 10-year term. It does not discuss whether the Copyright Office should be moved outside the Library of Congress. The proposal also urges the "quickest rollout possible" of an IT modernization plan released by the Copyright Office and calls for the creation of a searchable, digital database of copyright ownership information.

Congress should ensure that the Copyright Office has the resources and autonomy it needs to meet the current and future demands of copyright owners and the public. This should be accomplished by, at the very least, passing legislation requiring that the Register of the Office be a presidential nominee and that the Copyright Office be autonomous from the Library of Congress, including having its own budget and IT systems.

II. IP Enforcement in Foreign Jurisdictions

a. Upgrading Trade Secret Protection

Trade secrets are an increasingly important component of our members' IP portfolios. These trade secrets include manufacturing processes, industrial techniques, proprietary technologies, formulas, codes, designs, customer lists, and other confidential technical and business information. Our competitiveness in the global economy depends on this information remaining confidential and protected from misappropriation.

Trade secret theft is a large and growing problem. We are increasingly being targeted by sophisticated efforts to steal our proprietary information. The threat comes both from company insiders who would take trade secrets and sell them to the highest bidder and from outsiders, including competitors who try to infiltrate company networks and foreign governments using their espionage capabilities against American companies. The rise of sophisticated technology, perpetual connectivity, and globalized supply chains has made it even easier for would-be thieves to access competitively sensitive information. When that information lands in the hands of a rival, the rival can replicate market-leading innovations at a fraction of the cost, bypassing the years of research and development we put into those products.

In our global, information-based economy, the U.S.'s most valuable currency is its knowledge. Many countries provide insufficient protection for trade secrets, which presents significant economic risks to American companies seeking to expand operations globally.

IPO submitted comments earlier this year to the Office of the United States Trade Representative (USTR) in response to USTR's request for public comment in preparation for the Special 301 Report. (http://www.ipo.org/wp-content/uploads/2016/02/IPO_2016-Special-301_Review_Comment.pdf). IPO's comments highlighted the problem of trade secret misappropriation overseas and discussed where there are significant gaps in protection around the world. Issues of concern include forced regulatory disclosure of trade secrets, compulsory licensing, uneven enforcement, difficulties in evidence-gathering to prove trade secret theft, and an overall lack of effective intellectual property protection. Inadequate protection of trade secrets abroad harms not only companies whose property is stolen, but also the country where the theft occurs, because companies are then less likely to form joint ventures and make high-value investments in those countries.

We ask that your administration pay careful attention to these threats and provide leadership in convincing our trading partners to enact strong and effective laws protecting trade secret assets.

b. Unfounded Assertions That IP Rights Are a Barrier to Technology Transfer

IPO members continue to witness concerted efforts to weaken intellectual property rights in the name of development, access to health, and environmental concerns. Intellectual property rights have been unfairly portrayed as a barrier to technology transfer based on arguments that they limit availability of technologies and make them more expensive to secure. It is the threat of intellectual property erosion, however, that increases the cost of technology and slows its adaptation and deployment across countries. Sadly, attempts to place limitations and conditions on intellectual property by developing countries are adversely impacting the transfer of needed technology and slowing those countries' innovation growth. Innovators in the U.S. as well as in other countries make investments over many decades before new technology can emerge that can be deployed at a significant scale. Intellectual property rights should be reinforced rather than eroded to encourage this investment.

More specifically, initiatives that impair incentives to innovate continue to grow in a number of international organizations and countries. To provide one example, an instruction manual for introducing exceptions and limitations to intellectual property rights has been a longstanding agenda item for the agenda at the World Intellectual Property Organization, and forced technology transfers are a regular topic of discussion. The real cost of these policies is fewer investments in innovation and the chilling of technology diffusion, and we hope your administration will join us in opposing such misguided proposals.

c. **Backlogs and Other Bars to Securing Intellectual Property**

Increasing global competition drives our members to innovate faster than ever before, and in many cases product life cycle times are becoming extremely short. In some countries, debilitating application backlogs at patent and trademark offices exist at odds with the pace of innovation. The inability to timely secure intellectual property rights discourages entry into

foreign markets and encourages fast followers to free ride on investments made by innovators. In addition to difficulties in clarifying our own rights, extended pendency makes it harder to identify the intellectual property rights of others. This can lead to costly and inefficient redesign of product offerings after they have been introduced or to reduced margins from payment of license fees for a patent that could have been designed around.

Our economic future relies on robust and well-functioning intellectual property systems. These systems need to supply incentives that enable U.S. and other innovators to invest, collaborate, and tackle difficult problems. These efforts will improve lives all over the world, while supporting growth, exports, and the creation of high paying jobs in the U.S. We hope your administration will support our calls for intellectual property regimes around the world to issue prompt, secure, and enforceable legal rights to protect the fruits of R&D investments.

President-Elect Trump, I thank you for your attention to these issues of paramount importance to the intellectual property owning community. Please let us know what we can do to be of help.

Sincerely,

Kevin H. Rhodes
President