

**OVERSIGHT OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTEENTH CONGRESS
SECOND SESSION

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OVERSIGHT OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

TUESDAY, MAY 22, 2018

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The committee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. Bob Goodlatte [chairman of the committee] presiding.

Present: Representatives Goodlatte, Chabot, Issa, King, Gohmert, Poe, Marino, Labrador, Collins, DeSantis, Buck, Ratcliffe, Johnson of Louisiana, Biggs, Rutherford, Handel, Lofgren, Johnson of Georgia, Bass, Jeffries, and Demings.

Staff Present: Shelley Husband, Staff Director; Branden Ritchie, Deputy Staff Director; Zach Somers, Parliamentarian and General Counsel; Tom Stoll, Subcommittee on Courts, Intellectual Property, and the Internet; David Greengrass, Minority Senior Counsel; and Veronica Eligan, Minority Professional Staff Member.

Chairman GOODLATTE. The Judiciary Committee will come to order. Without objection, the chair is authorized to declare recess of the committee at any time. We welcome everyone to this morning's hearing on oversight of the United States Patent and Trademark Office. I will begin by recognizing myself for an opening statement.

Thank you, Director, for testifying before the committee today. America continues to be the leader in innovation. We brought the world the light bulb, the telephone, the Model T, the airplane, the television, the microwave oven, computer chips, personal computers, and so much more. We are now the leader in developing artificial intelligence; software; cures for disease. The list of life-altering and life-saving inventions created in this country is endless.

Our Founding Fathers recognized the need for a strong patent system to foster an environment of invention and thereby grow the economy and create jobs. A strong patent system enables large and small companies alike to invest in R&D so that they may develop the next great American innovation. To achieve those goals, patents must be of the highest quality. Innovative companies must be able to rely with certainty on the legitimate patents they are granted, while allowing other businesses to innovate without stepping on the rights granted to the patent owner by the PTO.

It is equally important that the patent system include mechanisms for weeding out invalid patents so that they may not be used

to harass legitimate businesses or to extort the revenue that companies need to grow. During the 112th Congress, this committee passed the America Invents Act to address patent litigation abuse and stop patent trolling. This included establishing the PTO's inter partes review proceedings.

The committee's efforts to deter patent trolling have been a resoundingly success. The combined effects of our efforts, along with several important court decisions, have deprive patent trolls of many of the weapons they used to extort payments from innocent companies. In recent years, abusive patent litigation has decreased substantially, as has the cost of defending a patent claim.

Some stakeholders say these reforms have gone too far. They argue that many startups and small businesses can no longer rely on their patents to secure funding needed to grow. They argue that uncertainty surrounding the validity of patents in the U.S. has forced large companies and investors to look outside of the U.S. to other countries where their investments in the development of new technologies can be better protected.

They point to the PTO's IPR proceedings as contributing to this perception of uncertainty surrounding patent. Users of IPR proceedings argue that they are needed to invalidate the many improperly issued patents that overworked patent examiners continue to issue.

In this hearing we will investigate whether the PTO is implementing AIA post-grant review proceedings as Congress intended to address patent litigation abuse and whether it is doing so in a manner that is fair to patent owner and petitioner alike. We want to hear from Director Iancu regarding what, if any, changes he is considering making to these proceedings. We also want to hear how he plans to improve patent examination to ensure that examiners issue only valid patents.

With the impending expiration of fee setting authority, the committee will also take this opportunity to investigate whether efforts to curb fee diversion are still working as intended, whether the PTO is using its resources wisely, and whether it is setting reasonable fees. The committee will want to investigate the status of the application backlog; the possible transfer of user fees to the Department of Commerce as part of a shared enterprise program; efforts to address international IP theft, trademark search quality, and any actions the agency has taken to address concerns regarding waste discovered in connection with previous examiner time and attendance investigations.

I want to thank the Director for his participation in this hearing, and I look forward to delving into these very important issues.

Mr. Nadler is not yet with us, so we will proceed to the testimony. We welcome our distinguished witness, and if you will please rise, I will begin by swearing you in.

Do you swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. IANCU. I do.

Chairman GOODLATTE. Thank you. Let the record show the witness answered in the affirmative.

Andrei Iancu is the Undersecretary of Commerce for Intellectual Property and Director of the PTO. Before joining the PTO, Mr. Iancu was a managing partner at Irell & Manella, LLP, where his practice focused on intellectual property litigation. Prior to his legal career, he was an engineer at Hughes Aircraft Company.

Your entire written statement will be made a part of the record, and we ask that summarize your testimony in 5 minutes. There is a timing light on the table for that purpose. Director Iancu, we are very honored to have you with us today. Thank you, and you may begin.

STATEMENT OF THE HONORABLE ANDREI IANCU, DIRECTOR OF THE U.S. PATENT AND TRADEMARK OFFICE, UNDERSECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY, U.S. DEPARTMENT OF COMMERCE

Mr. IANCU. Thank you. Chairman Goodlatte, Ranking Member Johnson, and members of the committee, good morning and thank you for this opportunity to discuss the operations, programs, and initiatives of the United States Patent and Trademark Office.

I am honored to be here with you today and proud to represent an agency that plays such an important role in our Nation's innovation, entrepreneurship, and overall economic growth. While I have been on this job for only a few months, I have already seen the experience, dedication, and professionalism of the office's employees. Together we are focused on engaging in a new dialogue surrounding the patent system, a dialogue centered on the brilliance of inventors, the excitement of invention, and the incredible benefits they bring to the American economy and country as a whole.

For the intellectual property system to function as intended, rights owners and the public must have confidence in the system. I believe that we need to take steps to strengthen that confidence. This requires focusing our efforts on an intellectual property system that is reliable, predictable, and high quality, and that promotes inventors, invention, and investment.

Mr. Chairman, my written statement has detailed information on an array of USPTO programs, initiatives, and recent accomplishments. In the time I have remaining, I would like to highlight some issues of particular interest. First, we are pleased that the administration and Congress continue to provide the USPTO with access to all anticipated fee collections to support a budget that maintains the workforce we need and that improves operations.

A critical factor in managing the agency's budget has been fee setting authority, which is scheduled to expire this coming September. This authority has allowed the agency to efficiently and cautiously adjust user fees as needed to recoup operational costs and drive effective operations. We look forward to working with this committee on legislation that extends this important authority as soon as possible. I want to thank Congressmen Chabot and Johnson for introducing legislation on this issue yesterday.

Second, on patents. We are carefully reviewing the AIA trial process conducted by our patent trial and appeal board to ensure that the agency's approach to these critical proceedings is consistent with the intent of the AIA and relevant court rulings and

the overall goal of ensuring predictable, high-quality patent rights. We recently issued guidance on the impact of the recent SAS case of the Supreme Court that requires the USPTO to decide the patent ability of every claim challenged in a petition when an AIA trial is instituted.

Although in the near term this adds work for the parties and our administrative patent judges, our board is well-positioned to address the increase at this time. We are assessing whether further adjustments, procedural or substantive, or additional resources will be needed.

Earlier this month, we also published the notice of proposed rule-making that would change the claim construction standard for interpreting claims in PTAB proceedings to the same standard used in patent litigation in district courts and at the ITC. We are also studying the institution decision, the amendment process, and the variety of standard operating procedures, among other things.

The current patent eligibility legal landscape is another critical area, and we are considering ways to increase the certainty and predictability of the eligibility analysis. At the PTO, we are working to provide more concrete tests to the extent possible, given Supreme Court precedent, to guide examiners and the public toward finding the appropriate lines to draw in this area. Last month, for example, we issued guidance with respect to the conventionality analysis in step two of the Alice framework.

This is an area we must all address and one on which we will continue to engage stakeholders and the public and should Congress decide to explore a legislative adjustment of section 101, we would work with this committee to explore viable options. Third, on the trademark front, we are working to manage a recent increase in foreign filings and to assess ways to declutter our register in a balanced manner.

Finally, with respect to our technology, we are continuing to improve the USPTO's infrastructure for all operations, including production systems for both patent and trademark. Thank you again for this opportunity to testify today, and I look forward to your questions.

Chairman GOODLATTE. Thank you, Director. We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself. You have stated that the PTO is examining how and when the PTO institute post-grant proceedings, the standards it employs during proceedings, and how the PTO conducts the overall proceedings. What specific changes to AIA post-grant proceedings are you likely to make in the coming months, and why are these changes necessary?

Mr. IANCU. So, just a couple of weeks ago we had proposed a new rule to change the claim construction standards to make it the same as the standard used in district courts and at the ITC. The main motivations for that change would be to increase predictability and consistency with other proceedings on an issued patent and to increase judicial efficiency.

We are looking at the amendment process, among other things, to increase the ability and to simplify the process for amendments during the AIA trial process itself, and we can go into more details about that as needed. We are also looking at the institution proc-

ess. The office has discretion as provided by the AIA on institution once the substantive standard is met, and there are a variety of things to consider during the institution process.

For example, have the same issues been considered already by the examiner during the initial examination or by a court in parallel litigation or otherwise? Those are just some examples. And we are also looking at the actual hearing itself; we have heard from stakeholders that perhaps there is not enough time in some of the proceedings at the hearing. Some folks have asked whether there can be testimony, witness testimony, at the hearing, or an increased opportunity for such testimony. There are pros and cons for those issues.

Chairman GOODLATTE. Let me stop you there and go to a couple of other questions I want to get in my time here. You have stated that the U.S. Supreme Court's recent decisions regarding and establishing a new patent eligibility test are difficult to follow and that something must be done to provide better clarity on where the line of eligibility should be drawn. Can you explain in some detail the problem with the Court's current patent eligibility test and what if anything should be done to fix it?

Mr. IANCU. Sure. So, the Supreme Court's framework from Alice is a two-step analysis that the courts and the Patent Office are implementing. And there is some confusion in industry as to what some of the terminology means and what is patentable and what is not patentable.

So, things such as what exactly is an abstract idea? What exactly does it mean to be directed to—those specific words: directed to—the abstract idea? What does it mean to be conventional, which is part of step two? And what we can try to do from the office's perspective within that construct is to try to provide better guidance for our examiners and, obviously, the applicants who come before us as to some of those terms, as we did last month when we provided additional guidance as to the term “conventional.”

What does it mean, and how should the examiners document it? That was an example of things we can do, and we are looking at providing additional guidance on some of the other aspects.

Chairman GOODLATTE. The AIA established a reserve fund whereby Congress appropriates back to the agency fees collected from its users, and excess revenue is deposited to a PTO account. Is the PTO annually receiving all the funds it collects from its users, or are some of those funds not being appropriated back to the agency?

Mr. IANCU. By and large Mr. Chairman, we have been receiving our appropriated funds. The only exception in memory was during sequestration. But other than that, the system is working, I believe, as intended and as provided in the AIA. Obviously, fee setting authority, as I have mentioned in my testimony, is critically important, and hopefully we can work on that before it expires in September.

Chairman GOODLATTE. With the impending expiration, can you explain how the agency has demonstrated that it is capable of setting fees to only recover the cost of examining patent applications and registering trademarks and not more?

Mr. IANCU. Sure. So, we are entirely funded by user fees. We are not funded by taxpayer funds, and we carefully watch our expenses. We very cautiously raise fees; it is a multiyear process. Before we raised the last fees, it took several years to go through that process. We go through a public comment period; we have the public advisory committees, the patent and trademark advisory committees, that look at what we do, and we discuss with them those efforts.

And I should say that we do not only raise fees. Sometimes we lower fees in order to drive a more efficient operation. So, for example, we lowered some trademark filing fees in order to make sure that we encourage electronic filing. That is just one example.

Chairman GOODLATTE. Thank you very much. My time has expired. The gentlewoman from California, Ms. Lofgren, is recognized for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman, and I have been looking forward to this hearing. Mr. Iancu, this is the first time we have had a chance to meet, and there have been some proposed changes in the office that, frankly, cause me concern. I wanted to express my concern on the rulemaking on claims construction from BRI to the judicial standard.

Congress has been active on this, and as the chairman knows, we worked very hard, and we worked in a bipartisan basis to accomplish a reform. And we did that in the context of competing interests and consideration of various alternatives. And in the end, the standard was a part of a much larger package to decrease patent litigation, and we accepted this.

And it just causes me concern, especially in light of the recent Supreme Court decision upholding the constitutionality, that the office would move forward and move in a different direction. I am not saying that it is unlawful, but it does seem to me to circumvent Congress' prerogative on this issue. And, you know, you are seeking for us to eliminate our prerogative to set fees while you are assuming our prerogative in a way that I think is disturbing, honestly.

Now, as I have looked at the suggestions on why this is necessary, I have not found them compelling. One concern I have as well as the potential of res judicata arising from district court interpretation tying the hands of the PTAB, which does not happen now because there are different standards.

And if you make this change, the PTAB could be bound by res judicata to follow a district court or the ITC's finding and validity, which would completely blow up what we were trying to do as a Congress to clear this out. I did not see anything in your testimony addressing that threat, which is a potential, but it would be a very serious one for us.

You know we were well aware of the competing views on this among different industries, and when we made the decision that we did, you know, it is hard to get legislation passed and into law. This was a rare exception to how hard that was, and signed into law, and the Republicans and Democrats worked together to make it happen.

And it looks to me that the people who disagreed with the decision and lost in the Congress; they went to the Supreme Court.

They lost in the Supreme Court, and now they are going to you, and you are reversing what the Congress decided to do and what the court said was permissible to do. So, I have a concern about that.

Now, it is my understanding, according to the study out of the PTO Office, that 83 percent of all petitions challenging Orange Book-listed patents resulted in a patent being unchanged. So, I do not consider, you know, the death squad argument a very persuasive one. You know, one of the reasons why this works is that during the process you can do claim amendments. Are you looking to eliminate claim amendments if you go to this judicial standard as well? In which case, that would thoroughly, I think, undercut what the Congress tried to do and, I fear, return to the kind of unbridled patent fooling that led us to work together to make some changes.

So, I guess those are a lot of questions without much time for you to answer, but I think they are significant ones, and I think they are shared among many members, both Republicans and Democrats. So, if you could address those issues.

Mr. IANCU. Sure. Let me try to be brief in the amount of time left here. So, first of all, the AIA statute provides for discretion to the Patent and Trademark Office—

Ms. LOFGREN. I did not challenge that you did not have the discretion, but that using the discretion was essentially preempting the prerogative that the Congress had given an indication to do.

Mr. IANCU. So, this is an exercise of that discretion based on 5-plus years of experience. You know, it turns out, after more than 5 years and thousands of petitions for post-grant review, IPRs, and the like, that more than 80 percent of our petitions and the patents in our—in IPR—are involved in parallel litigation. And one of the purposes of the proposal is that we want consistency, perhaps, between the office and district court litigation and the ITC, which, again, more than 80 percent of the patents are involved in.

Among other things, it reduces gamesmanship between the various forum, and it really does work to enhance and drive towards the congressional intent that was behind the AIA to provide an alternative to district court litigation. So, getting the standards closer together or on the same page would reduce the potential discrepancy and therefore enhance the forum as a true alternative to litigation.

To answer, Congresswoman Lofgren, the last question, as I mentioned in my opening statement, we do plan to have an amendment process and to enhance it. And then, one final point: in order to have a predictable patent system that folks can rely on, it seems that the meaning of a patent—when one sits down to look at a patent and try to invest in it or invent around it, where the owner or the public—it seems that the meaning of that patent or the boundaries of that patent, at least objectively, should not depend on the forum on which it might happen some years down the line that that patent is challenged in if one is to make predictable decisions based on that patent.

So, those are some of the reasons behind our proposal, and obviously the proposal is up for comment, and we will see what the public has to say.

Ms. LOFGREN. Mr. Chair, I know that my time has expired, but—

Chairman GOODLATTE. It has expired.

Ms. LOFGREN. If I could ask for just 30 seconds.

Chairman GOODLATTE. You have already got 2 minutes and 30 seconds.

Ms. LOFGREN. But there are so few of us here.

Chairman GOODLATTE. Someone can yield to you, and you can follow up.

Ms. LOFGREN. All right.

Chairman GOODLATTE. The chair recognizes the gentleman from Ohio, Mr. Chabot, for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. Mr. Director, back in 2016 the House Oversight Committee conducted a review of your agency and found there to be over \$18 million in unsupported hours paid by the PTO, including at least one employee who was paid for 730 hours that he did not work, resulting in the erroneous payment of \$25,000 to the employee. At the time, the Inspector General testified that the PTO did not fully address all the recommendations issued in the 2015 report.

While the legislation that I introduced yesterday, along with my colleague on the other side of the aisle, Mr. Johnson, gives the PTO Director the ability to raise and lower fees to support the operations of the PTO, since you have been Director, what has the agency done, and what is it doing to address examiner time and attendance abuses described in the 2015 general report?

Mr. IANCU. Congressman Chabot, this is a critically important issue to me and to the Office. No abuse should be tolerated, and any abuse needs to be quickly discovered and promptly dealt with. All of the recommendations by the OIG have been implemented, and more. Things such as badging in and badging out have been implemented now; logging in and logging out as well; use of collaboration tools; and mandatory schedule notifications to managers. Things of that sort have been implemented, and we continue to look at whether other measures are necessary. But we have gone beyond what the recommendations were, and for good reason, because this is such an important issue.

Mr. CHABOT. Thank you very much. I will move on. What is the PTO doing to investigate reports that there has been a flood of questionable trademark applications from overseas, many containing false information?

Mr. IANCU. This is a very important issue as well. The number of applications, trademark applications, from China, for example, have increased more than 1,100 percent in the past 5 years, and we believe that a significant number of those and some others from overseas are fraudulent. They have fraudulent claims to use, for example.

So, the office has, first of all, dealt with the increase well. In other words, we have staffed up; we have worked more efficiently, so our pendency times and things like that on the trademark operations have not suffered.

Mr. CHABOT. Is the number that accurate? Let me just ask you this, because my time is kind of limited, too. Is it reasonable for us to believe that you will give additional scrutiny to those coming

from overseas, especially those in which there is some indication they may be questionable?

Mr. IANCU. We are, and we are looking at some additional measures as well that we can discuss, time permitting.

Mr. CHABOT. Thank you very much. And again, because I am running out of time; I do not think I have time for two. But, one, is there any evidence that suggests that some large companies are using IPR proceedings as a tool to invalidate the patents of small companies—I happen to be the chairman of the House Small Business Committee right now—to prevent them from growing and becoming a competitive threat?

Mr. IANCU. You know, I am not aware directly of specific statistics to that extent. Having said that, the process is available to be used as necessary by folks who have questions about the validity of a patent. If there is any abuse on any side we need to look at it carefully and address it, obviously.

Mr. CHABOT. Okay. We may be providing some information about that to you, and we would welcome working with you on that. I do have time for one final question; I have got all of 42 seconds. What is the current status of the patent application backlog?

Mr. IANCU. It is doing well under our measures. So, our backlog has decreased; our pendency time has decreased, both for the first office action as well as the ultimate issuance. So, the first office action pendency is down to a little bit over 15 months, total pendency is down to a bit over 24 months, and we keep improving on those numbers.

Mr. CHABOT. Thank you very much. Mr. Chairman, my time just expired. Thank you.

Chairman GOODLATTE. The chair thanks the gentleman and recognizes the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON of Georgia. Thank you, Mr. Chairman, and congratulations to you, Mr. Iancu, on your position. As you know, the fee setting authority for the USPTO has allowed the USPTO to efficiently set user fees to recoup operational costs. I have worked with Congressman Chabot to introduce legislation that would renew the USPTO's fee setting authority, which is scheduled to expire in September of this year.

Do you believe that it is important that the USPTO be allowed to control its finances, and if so, why?

Mr. IANCU. Yes, thank you, Congressman, both to you and to Congressman Chabot for introducing the legislation yesterday. It is critically important for our office to be able to set our fees appropriately. We are entirely based and supported by user fees; we are not supported by taxpayer dollars beyond what is provided by our users. We run a more than 12,000-person operation, \$3.5 million budget, give or take, and it is critically important that we be able to manage efficiently and effectively the fees and those operations to serve our users.

And as I mentioned a bit earlier, we need to be able to increase the fees as necessary to continue the highest level of operations, but sometimes we also reduce fees as appropriate to run an efficient operation. We have reduced some trademark filing fees, for example, to encourage electronic filing.

Mr. JOHNSON of Georgia. All right. Thank you. Let me ask you this. How is it that you provide training and guidance to USPTO's employees that support the issuance of high-quality patents? And is your fee setting ability impacted, or does that impact your ability to train and your employees?

Mr. IANCU. Yes, absolutely. So, our ability to set the fees appropriately and efficiently allows us, among other programs, to train our examiners at the highest levels possible. Currently, we have consistent training seminars for our examiners; we have programs for our examiners to work with the public and with our stakeholders for training purposes, which is a two-way training kind of thing. All those activities obviously require resources, and having fee setting authority is critically important for that.

Mr. JOHNSON of Georgia. What guidance has the USPTO provided to patent examiners and the public to understand Supreme Court decisions issued between 2010 and 2014?

Mr. IANCU. So, with respect to section 101, patentable subject matter, for example, there have been a number of Supreme Court cases as well as Federal circuit decisions that we track very closely, and we issue guidance to examiners whenever important cases come out from the Supreme Court and the Federal circuit as well. We provide summaries to our examiners of those cases, and where appropriate, we provide guidance of how to implement those decisions in future examination.

On a going-forward basis, especially with patentable subject matter, we want to provide forward-looking type of guidance to our examiners as to where we think the Supreme Court law is requiring the lines of patentability to be drawn and how to make it more clear to the examiners and the applicants that come before them as to how to draw those lines.

Mr. JOHNSON of Georgia. Thank you. Can you give us a critique on how you believe the Patent Trial Appeal Board has been functioning?

Mr. IANCU. I do think that the PTAB has been functioning well. It has met its statutory deadlines in virtually all cases with very few exceptions. We have not gone over the 12-month period; we have never gone over the 18-month statutory period. So, it has gone well from those points of view. I am aware of significant criticism; I am also aware of significant support both ways from stakeholders. There is a lot of attention on our operations from the PTAB.

There is criticism, as I have mentioned earlier, that there is an inconsistency between the treatment we provide to patents in reviewing patents and the PTAB versus the district court, and to that end we have proposed a change in the claim construction rule standard a couple of weeks ago. And we are looking at other potential changes as well on a variety of subjects, and we will see if we need to make more.

Mr. JOHNSON of Georgia. Thank you sir. With that, I yield back.

Chairman GOODLATTE. The chair recognizes the gentleman from California, Mr. Issa, for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman. Director, like Ms. Lofgren, I am concerned about a change in standards, and I just want to run through quickly: you oversee the examiners who, essentially,

decide what is patentable, what is not patentable, what the claims are, and they do so based on their expertise, correct?

Mr. IANCU. Yes, correct.

Mr. ISSA. Okay. And when somebody comes back to the Patent and Trademark Office for an inter partes reexamination, you currently use essentially a de novo standard, because you are able to look at it to a great extent in the same way as the examiner looked at it but with new information, correct?

Mr. IANCU. Well, I do not know that I would say that it is de novo, because the original examination is of record.

Mr. ISSA. No, I understand that, but I said, "Except as to new information." In other words, the question that a judge is being faced with is "Here is something we did not previously consider. Had an examiner had it, would they have granted this claim?" And if they look and say, "With this new information, the answer is no," they make that decision. So, their judgment is much more similar to the examiner than it is to the restrictions that an Article III judge has under current law, correct?

Mr. IANCU. I do not know that I would put it quite like that, because—

Mr. ISSA. Well, I am putting it like that because you are considering moving a standardization to the standard that an Article III judge has, which is a deference to the examiner.

Mr. IANCU. There is a presumption of validity that exists in district court litigation. Having said that, if I may—

Mr. ISSA. Go ahead, please.

Mr. IANCU. Having said that, a significant difference between a PTAB proceeding on an issued patent versus the original examination is that for the PTAB proceeding, just like in district court, the original record in its entirety is available to the PTAB panel. And from that point of view, that proceeding is much more akin to what happens in district court. The same record is available.

Mr. ISSA. Let's continue on, because I want to get this one thought in, and it is going to take the whole time. So, when you go to an ex parte reexamination, essentially going back to a senior examiner—but let's just say it is the same examiner for purposes of the public understanding that there is no difference—those examiners do look at the record and the new evidence, and they make a consideration essentially. And I have had examiners give me this personally for years; they essentially are making a de novo decision there.

They are looking and saying, "If the original examiner had known this, would he or she have given it?" And sometimes they are even looking at a material mistake. But the reality is ex parte reexaminations have a standard that is much more similar to PTAB than to Article III. Is that not correct?

Mr. IANCU. Well, a reexamination is being conducted by examiners in the—

Mr. ISSA. Okay. Well, let's go back to ex parte reexamination, then. At the time that PTAB was envisioned, there were groups that wanted a one-and-done, and they wanted this other standard, and they did not get it. So, now here we are; you have a court which has a bad habit, which is it does not amend patents. And you and I have spoken offline, so let me just run through a ques-

tion for you, and information for the public and the others on this panel.

Currently, the PTAB judge does not have the benefit of the expertise of the examiners, and we, you and I and others, have called that an on-ramp. In other words, can we bring examiners from the other part of your operation as undersecretary in to provide direct guidance and help for the patent, PTAB, judge so that we can have more amendments and a more accurate reexamination?

And then, the second part of the question is because at the end of this they may have a shambles of a patent, but they still have patentable material, can we have an equally expedited process through an ex parte reexamination? In whatever time the chairman would give you, I would like your thoughts on both how we could give you the on-ramp capability, specific authority to use examiners from the other part of your operation to make the system work better, hopefully, and then what your thoughts would be on a post-PTAB conclusion of a quick reexamination to empower the patent holder to legitimize whatever patentable material is left.

Chairman GOODLATTE. The time of the gentleman has expired, but the Director may answer the question.

Mr. IANCU. Thank you. So, the amendment process is very important, Congressman Issa, because it is part of the AIA. The statute does provide for an amendment, the right to have some amendments considered, and it requires that any amendment claim should be addressed in the final written decision.

The statute likewise requires that the final written decision come within 12 months after institution, barring some extension up to 18 months. So, that means that whatever amendment needs to take place, part of the statute needs to happen during the AIA time frame. We are looking at how to do that in an expeditious and efficient manner that allows the parties in the IPR process, or the PGR, as it may be, to participate and have an appropriate amendment.

And potentially, an on-ramp, as you call it, perhaps bringing up an examiner to assist is one option among many, and that we can do at the Office within our current system if, logistically, it works out. We can also do an ex parte reexam afterwards or at any time the provisions are in place. And the question that the Congressman raises with respect to an expedited option; that is something we are looking at as well.

Mr. ISSA. Thank you, Mr. Chairman.

Chairman GOODLATTE. The chair thanks gentleman and recognizes the gentlewoman from California, Ms. Bass, for 5 minutes.

Ms. BASS. Thank you, Mr. Chair. Director, I would like to ask you one question, and then I want to yield some time to my colleague. I wanted to know what actions that your Office is planning to take to engage stakeholders on issues related to patent qualities.

Mr. IANCU. Sure. So, we have a whole variety of programs at the PTO to address patent quality and to improve and increase the quality of the patents that we issue. It is a very important issue for us.

To address the Congresswoman's specific question about engaging stakeholders on that issue, we spend a lot of time with stakeholders; I have myself. We have several programs on the specific

issues; so, in particular, we have a program where we have meetings between our examiners and stakeholder groups at large to discuss the technology and issues surrounding improving understanding of that particular technology.

We also have meetings, and we encourage meetings between examining groups and companies, where, again, the understanding of a specific technology area can be developed both from the PTO's point of view and the public's point of view.

Ms. BASS. How are those meetings noticed? How do people know about them?

Mr. IANCU. Well, there are discussions with stakeholders directly.

Ms. BASS. They are public announcements of meetings?

Mr. IANCU. You know, I am not sure. I have been there only 3 months, so I do not know if there are public announcements, but I can look into that.

Ms. BASS. Okay, thank you. And I will yield my time to Ms. Lofgren.

Ms. LOFGREN. I thank the gentlelady for yielding. I just wanted to get back to the questions I was asking earlier, which is, you know—and I think my colleague from California, Mr. Issa, got into some of this as well—the biggest patent quality issue is overbroad claims. And you know, the IPR was envisioned not just as a way to invalidate patents but to bring some sanity back to the scope.

There is an issue relative to what evidence can be brought to bear on that decisionmaking, but I am interested in, instead of going to the judicial standard, why you might not seek our legislation to provide for greater evidentiary provision as an alternative.

And I also want to say: my staff has been investigating this in terms of the USPO; we have looked at the change. And they have been told that in the past, not a single past PTAB decision would have been decided differently under a judicial claim construction. And if that is the case, I do not see how greater predictability and certainty would be the result, that generally these are the same issues.

I sound unduly critical; I hope I do not, because we do appreciate you and everybody in your office. But your scope is the efficiency of the office and the like. You know, we were responding to, you know, the Eastern District of Texas and everybody having to appear and be held up by patent trolls, which is really not the focus of your office. And so, I am concerned, however well-intentioned your efforts are in terms of, you know, your world, with some missteps we end up where we were before we adopted the bill.

And understanding that we gave discretion to the Office, I think it would be very smart to have some collaboration with this committee before you make steps of this nature, because we had a much broader view of this whole thing than is your legal obligation to look at. So, I do not know if you have a comment on this.

Mr. IANCU. Sure, I can comment on a variety of the points the Congresswoman makes. We are very much engaged with stakeholders and with members of the committee to discuss this and many other issues.

Ms. LOFGREN. No one talked to me.

Mr. IANCU. And I would be very happy to do so, and we do have quite a bit of time left in the comment period, and I would be very

happy to come and speak with you as well. Now, to address a couple of the other points you have raised, the ultimate question of the breadth of a patent, obviously, it is not good to be overbroad, but the question is, overbroad to whom and when? Right?

So, the ultimate question of a patent's enforceability is when it comes to a court when an owner wants to enforce that patent and the accused infringer wants to defend against it. Ultimately, the breadth is in that context and—

Ms. LOFGREN. Well, if I may, my time is about to expire. That is a law school answer, and in the real world we have got patent trolls out there holding people up. And I see once again my time has expired, Mr. Chairman, and I yield back.

Chairman GOODLATTE. It has indeed. The chair recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. Director, I appreciate your testimony here this morning, and I would like to start out with: can you give us a sense of where America has men as far as the strength of our patent system in this country in relation to the rest of the world, historically or, say, the last half a century or so?

Mr. IANCU. I am sorry, Congressman, I missed the question.

Mr. KING. Oh, okay. Could you give us a sense of where America has been in its standing in the world with our patent system and, say, in relation to the rest of the world over the last half a century or so?

Mr. IANCU. Yes. So, for a long time in a variety of studies we have been the number one system in the world. The ranking in a variety of studies has been decreasing in recent times. There are a number of studies that we can point to as well as anecdotally. We hear evidence of that; one example is the U.S. Chamber of Commerce study where we had been ranked number one for a number of years, and we fell to number 10 a couple years ago, and this year we fell to number 12.

I should say that the rankings at the top are close to each other, so even though we are ranked number 12, we really are only half a point behind on a scale to eight behind the first position. And in other words, we can make up ground.

Mr. KING. Okay. I like the attitude part of that thing, but when was the last year we were number one?

Mr. IANCU. I believe 2 or 3 years ago.

Mr. KING. Okay. And do you have any idea as to what has caused that to slip, and is it the other countries are getting better? We are getting worse?

Mr. IANCU. Well, it is a combination of both, actually, Congressman, and from our point of view, the various studies point to two main issues. One is decreased certainty with respect to patentable subject matter—that is section 101—and the second is the decreased certainty caused by post-grant proceedings such as the IPR, and we are looking at the PTO at ways to address both of those issues.

Mr. KING. Did the passage of the American Inventions Act in 2011 impact the result of our standings in the world with regard to our patents?

Mr. IANCU. The American Invents Act does a number of things, and some of the things have helped the patent system, but the one

issue that is in the AIA that has negatively impacted the various rankings is the implementation of the IPR process. That does not mean that we cannot improve it and make it work as it was intended by the AIA, and those are the types of steps we are trying to undertake right now.

Mr. KING. Did the changing of the “first to invent” versus “first to file” impact this?

Mr. IANCU. Congressman, I have not seen specific evidence of that particular issue.

Mr. KING. It would come to you anecdotally first?

Mr. IANCU. We would probably see it anecdotally. We have heard comments on both sides of that issue, but it is not one of the main issues. The main issues were the couple that I have mentioned earlier.

Mr. KING. Yes, and I appreciate that, and it is valuable information to this committee. Also, we have heard the President talk about the piracy of U.S. intellectual property by the Chinese in particular. And he has pegged that number, at least in Twitter, at \$300 billion a year. Do you have any data that supports that or contradicts it? Would you speak to the scope of that?

Mr. IANCU. I personally do not have that with me right for today. I can definitely look into that. However, I do know that the piracy of the intellectual property of American companies is very, very large, and we fully support, and we do work in the interagency process in the administration. We do support the administration’s efforts in this area.

Mr. KING. Okay. I would like to point out to you that I have introduced legislation a number of years. In this Congress it is H.R. 1048, and what it does is it directs the U.S. Trade Representative to conduct a study, which I understand he already does, to determine the value of U.S. intellectual property that is pirated by the Chinese and then to apply a duty on all products coming from China in the amount equivalent to recover that intellectual property loss plus an administrative fee and then distribute those proceeds to the rightful property rights owners.

It is a self-correcting piece of legislation that essentially says if you are going to steal from us we are going to back-charge you for it, so go ahead and keep it up. And that is in the repertoire of our trade negotiators today, and I wanted to point that out to you, and I noticed you wrote down H.R. 1048. Do you have any comments on that?

Mr. IANCU. Well, all I will say is that we definitely support efforts to enforce our intellectual property worldwide and to protect our companies from having their IP stolen.

Mr. KING. Thank you, Director. I appreciate it. I yield back, Mr. Chairman.

Chairman GOODLATTE. Thank you very much. The chair recognizes the gentleman from Rhode Island, Mr. Cicilline, for 5 minutes.

Mr. CICILLINE. Thank you, Mr. Chairman. Thank you to our witness. Many U.S. patent holders are finding that technology that they have designed has been usurped and at times reverse-engineered in a foreign jurisdiction. For example, some U.S. businesses who sell their products in China find that another company has

replicated their design and obtained a Chinese patent for the U.S.-owned product. Of particular concern to me is the theft of American design defense technology.

It is my understanding that PTO's Intellectual Property Attaché program and its Office of Policy and International Affairs are working to improve policies abroad for the benefit of U.S. stakeholders. What would you recommend to a U.S. business that has discovered that its patent has been misappropriated in a foreign jurisdiction? I have heard from a number of constituents, actually, about this issue and would love some guidance from you as to what you think the appropriate course of action is.

Mr. IANCU. Well, I appreciate the Congressman's mention of our attachés. They perform critically important functions overseas and they support our companies doing business overseas. In a situation as you have mentioned, the U.S. companies doing business overseas should obviously take advantage of enforcement mechanisms in those countries. They can get in touch with our attachés in the relevant region; they can also get in touch with the USPTO itself here at headquarters in D.C. and elsewhere. And between our attachés and folks at the headquarters, we can provide help and guidance through the enforcement mechanisms in the relevant country that they are operating in.

Mr. CICILLINE. And does that include technical assistance? Because for a lot of these operations they may not have the capacity to sort of engage in the work that is necessary to protect their patents.

Mr. IANCU. Yeah, we can help them understand the local laws, for example, and how to navigate those and direct them to the appropriate folks in the relevant jurisdictions for technical work and the like.

Mr. CICILLINE. And are there additional steps that the attaché program in the Office of International Affairs is taking to reduce patent theft in China specifically? This seems to be a well-documented problem. Are those offices taking steps to make a significant impact in that area, and if so, what are those steps?

Mr. IANCU. Well, we are watching carefully what is happening overseas and what is happening with the potential theft of our IP. With respect to China in particular, we have an office at the PTO that is focused expressly on China and what takes place there. And through our attachés we keep our ear closely to the ground to make sure we have the appropriate information. And I should say that the PTO is working closely in the interagency process, including with the USTR, to address the theft of American IP in China and elsewhere.

Mr. CICILLINE. Thank you. Thank you, Mr. Chairman. I yield back.

Mr. KING [presiding]. The gentleman yields back, and the chair will now recognize the gentleman from Pennsylvania, Mr. Marino.

Mr. MARINO. Thank you, Chairman. Welcome, Director. Congratulations.

Mr. IANCU. Thank you.

Mr. MARINO. We have discussed a lot of things: Constitutional cases; ex parte reviews. I just want to make something that is very basic a question I have for you. What are the two or three tools

you need to improve the effectiveness and the efficiency of your office?

Mr. IANCU. So, first of all, we need the fee setting authority. It is critically important to the fundamental operation of the office, and as we know, it expires shortly. But I am very happy to see that there is a bill introduced, and hopefully we can work on that or other legislation in that regard.

We are very carefully monitoring the balance of the IP system on a variety of issues as well. So, the key to a well-functioning patent system is a careful balance; the rights of the owners and the rights of the public as one example. We are meeting with stakeholders across the spectrum and trying to understand their various needs. So, the discretion given to us in the various statutes to implement the patent laws and balance them, balance the process carefully: this is something we need and that we are implementing with a very steady hand.

Because to achieve balance we just simply have to be carefully monitoring the various needs on all the sides. And we are engaged in that process as we speak.

Mr. MARINO. Do you have enough qualified personnel?

Mr. IANCU. I think we do. We have more than 12,000 employees of the USPTO, many, many of them with higher education degrees. The examiners that we have, both on the patent and trademark side, get significant training, and they come in with good qualifications. So, overall, I would say, yes, we have the appropriate levels of personnel.

Mr. MARINO. Do you have the state-of-the-art 21st-century equipment?

Mr. IANCU. We have technology that serves the needs of the office and of the operations right now. That is a process that is in the need of continuous improvement. Technology keeps improving. One thing that we are working on is improving technology for the initial search process, for example.

Critically important to the patent quality and the predictability of our patents is that we surface upfront the most relevant prior art for a particular patent. And given the growing amount of publications out there, improved technology might help us in that regard, and we are working towards that end. So, we have good technology, but we really are always in the need for improving it.

Mr. MARINO. Thank you. I yield back.

Mr. KING. The gentleman returns his time, and the chair now recognizes the gentlelady from Florida, Ms. Demings.

Ms. DEMINGS. Thank you so much, Mr. Chair, and thank you to the Director for being with us today. With respect to present trade agreement negotiations, has your office been involved in seeking to include strong IP protection and enforcement provisions in a revised agreement? And if so, how has your office and your employees been involved?

Mr. IANCU. And I apologize; we are speaking about NAFTA, or?

Ms. DEMINGS. Yes.

Mr. IANCU. Yes? Okay. So, yes, our office is working closely with the U.S. Trade Representative on NAFTA and, frankly, other trade negotiations as well. We are providing technical assistance, including in any such agreements state-of-the-art IP provisions are criti-

cally important, and we do provide the technical assistance to the Trade Representative in that respect.

Ms. DEMINGS. How does your office advise the administration on international and domestic copyright policy issues?

Mr. IANCU. What I just mentioned is one example, working with the Trade Representative on that. We also work closely with the Copyright Office itself.

Ms. DEMINGS. And how do you notify the administration, though?

Mr. IANCU. Well, we work in the interagency process through the administration and through the Secretary of Commerce, for example. The second part of my title is Undersecretary of Commerce for Intellectual Property, so we are called upon to advise on all intellectual property issues.

Ms. DEMINGS. I know you spoke somewhat earlier about the attaché program and how important and critical it is. Could you talk just a little bit? I think my colleague kind of ran out of time on that. Could you just talk a little bit more about how they promote strong and balanced protection and effective enforcement rights abroad as well?

Mr. IANCU. Sure. The attachés in a variety of regions around the world sometimes are the first point of contact for American companies doing business overseas, and frankly, for others; members of Congress, for example, traveling overseas and other administration officials traveling overseas. One thing that would help improve the functioning of the attachés would be an elevation in diplomatic rank at their various missions.

Ms. DEMINGS. Okay. And also, you spoke a little bit about the importance of being able to set or have an authority over the fee schedule or the fees. Could you elaborate a little bit about why that authority is so critical?

Mr. IANCU. Sure. As I have mentioned, we are funded entirely by user fees, not taxpayer dollars, and we operate a very large entity that is focused on delivering the highest quality services to our users. To that end, we need to be able to attract, retain, train the highest levels of professionals.

We obviously compete in the STEM world with private entities out there. And overall, we need to be able to keep pace so that we do have the highest qualified workforce, which, as I have mentioned earlier, I think we do right now, and we need to be able to efficiently manage that workforce. And in addition, our fee setting authority allows us to drive and improve certain interactions with our users. For example, we can reduce fees in order to incentivize certain activities such as electronic filing of applications.

Ms. DEMINGS. And finally, you are having no challenges at all with recruiting or retaining a qualified and well-trained workforce?

Mr. IANCU. Well, I think we are doing a very good job at that. I think we have currently the tools in place to allow us to do a very good job at that, and I should mention that our turnover rate, our attrition rate, is very low compared to industry. The USPTO is a wonderful place to work, and I think the processes we have in place help that. But our ability to have access to our fees and to set them appropriately to continue attracting and retaining the highest-level professionals is critically important.

Ms. DEMINGS. Thank you so much. Mr. Chair, I yield back.

Mr. KING. The gentlelady returns her time. The chair now recognizes the gentleman from Louisiana, Mr. Johnson.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chairman. Mr. Director, thank you for being here today. You mentioned in your testimony that your Office is actively working to address the current inventory of applications that are awaiting review, and I think the number has been set at approximately 540,000. Can you update the committee on what you are doing to ensure that pending applications can be reviewed in a more expedited timeframe?

Mr. IANCU. Sure. So, yes, the backlog is a bit over 500,000, approximately. So, we always have to balance the backlog and the pendency times against the quality, obviously, and the resources that we have in the office, and we watch that very carefully. We want to make sure we have the appropriate number of examiners on staff to be able to review in a timely fashion, and they are appropriately trained to provide the highest quality during that review.

We are currently engaged in an examination time analysis, an analysis of the overall time given to each individual examiner or groups of examiners to review patent applications. And we are looking forward in the near term to making some changes that would optimize that time allocation even further.

Mr. JOHNSON of Louisiana. You have stated that the Patent and Trademark Office is looking for ways to simplify patent eligibility determinations through the new examiner guidance, and I know you may have covered this. We are coming in and out, because we all have different meetings. But weeks ago, of course, the PTO issued new examiner guidance focused on how examiners are to document a finding that a claim is old or conventional. And you may have covered some of this already: but just briefly, what are the plans you have to change how the PTO determines whether the invention is patent-eligible?

Mr. IANCU. The guidance we have provided a few weeks ago deals with the second step, the conventionality part of the analysis. They address how an examiner is to document it and actually what it means. On a going-forward basis, we are also trying to address through guidance what the other parts of the Alice framework mean or how they should be applied by the examiners, such as what is an abstract idea, for example, what does directed to mean and things of that sort. It is not a simple issue, and there are a lot of competing issues, obviously, and we have to be very careful to have a balanced approach.

Mr. JOHNSON of Louisiana. I appreciate that. You had a dialogue with Congressman King a few moments ago; you were talking about our place in the world, so to speak. And in your testimony, you mention how the American Invents Act has taken significant steps to harmonize the U.S. patent system with many of our trading partners overseas, and you talked about how you have been working with stakeholders across the industry and the world to better harmonize patent law among all these countries. So, can you give us just a quick update on how that is going and what those efforts look like?

Mr. IANCU. Sure. So, the AIA provided one major step towards harmonization with the first-to-file system. There are other efforts,

primarily driven by industry, regarding the harmonization of prior art, for example, and other such issues.

So, we are meeting in international forums where both various patent offices from various countries as well as industry groups from various countries are meeting independently and together to address some of those issues. There is a meeting coming up, actually, of IP5 in Louisiana, in New Orleans, just next month. That is the top five IP offices in the world, and we will address harmonization there as well.

Mr. JOHNSON of Louisiana. We have a lot of intellectual capital in Louisiana. I just want you to know and thank you for coming. As a conservative—and many of us agree that we believe that the protection of individual property rights and intellectual property as well is essential to who we are as Americans, so I appreciate your efforts in that regard.

And I hope as we harmonize this with other countries around the world we can share this idea about inalienable rights and why this is so important to who we are not only as Americans but as human beings. So, I appreciate your efforts, and I will yield back.

Mr. KING. The gentleman returns his time, and the chair now recognizes the gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman. What is your Office doing to improve patent examination searches so that the quality of patents improves?

Mr. IANCU. As I mentioned a few minutes ago, that is critically important. If we want to improve the quality of patents, beginning at the very beginning is a good place to begin, and that is with the initial search. Over the past number of years, past decades, there has been an explosion in the number of publications. There has also been an explosion in the accessibility to a vast number of publications around the world, yet examiners necessarily still look for one or two or whatever, a limited number of key references, and the job becomes increasingly more difficult, obviously, just by the sheer numbers.

So, we have a taskforce to improve the technology surrounding that. There is new technology that is being released in the coming months. But also, we are looking at potential use of artificial intelligence and how that can be used to surface some of the key references.

Mr. LABRADOR. What can you do to prevent the Department of Commerce from using PTO user fees to support the work of other agencies?

Mr. IANCU. I am in close contact with the secretary and the acting deputy secretary and the leadership of the Department of Commerce on this and other issues relevant to our office, of course. And I am keenly aware of the issue and very focused on not having PTO user fees diverted for any other purpose. So, we are continuously working on that, so, I am committed to that issue, and I believe the secretary and the leadership of the Department of Commerce are likewise committed.

Mr. LABRADOR. What do you view as the PTO's role in protecting American companies from forced technology transfer and other forms of theft of intellectual property imposed on U.S. companies as a cost of doing business in a foreign country?

Mr. IANCU. The theft of American intellectual property overseas has been tremendously high, and the overall administration is focused on lowering that. We fully support the administration's role in that; I do from the PTO, and Secretary Ross is from the Department of Commerce.

And from the PTO's perspective itself, we work with the USPTR and other administration agencies to make sure that the appropriate enforcement mechanisms, A, exist in our trade agreements, and, B, American companies doing business overseas know about them and have the tools necessary to make use of the enforcement mechanisms.

So, those are just some examples of what we do, and we provide technical assistance on the specifics of IP protections and enforcement to our stakeholders and other government agencies.

Mr. LABRADOR. Thank you. I yield the rest of my time to Mr. Collins.

Mr. COLLINS. Thank you. I appreciate the gentleman. I have got more questions that will come up later, but just following up on some things that we have just stated, you stated that the PTO is examining how and when the PTO institutes post-grant proceedings and the standard employees during proceedings and how the PTO conducts the overall proceedings. What specific changes to AIA post-grant proceedings are you considering, and why are these changes necessary? And also, again, congratulations. Good to see you again.

Mr. IANCU. Good to see you. So, there are a variety of things we are looking at, and some of them include the amendment process, as I have mentioned a bit earlier. The amendment process is important. It is important to have an IPR process that the result of which is not an all-or-nothing proposition, and I think that is important for patent owners and the public alike.

The ultimate goal of the goal really is to have good patent claims out there, and if we can have a process during an AIA trial that drives the towards improved claims, I think that would be useful. So, we are looking at various alternatives to how to include that in the process while giving both parties in an IPR the opportunity to participate in that.

We are also looking at the hearing itself. Do we need to give folks more time at the hearing? Do we need to include, for example, more access to testimony at the hearing itself from witnesses? And, again, there are pros and cons to this, and just because we are looking at it does not mean we are going to make a particular change. We are also looking at the institution decision; how much of other activities—for example, decisions from other tribunals, courts, examiners, and the like—do we consider in that decision process as well? These are some examples.

Mr. COLLINS. That is good. We have got some more, and I will be on those in just a few minutes, but I yield back the rest of that time.

Chairman GOODLATTE. The chair thanks gentleman and recognizes the gentleman from Colorado, Mr. Buck, for 5 minutes.

Mr. BUCK. Thank you, Mr. Chairman. Sir, I want to talk a little bit about the IPR system. What is the alternative to the IPR system as it exists now?

Mr. IANCU. Well, district court litigation; ITC litigation.

Mr. BUCK. Which is more efficient?

Mr. IANCU. It depends on a case by case, but overall, I would say that the IPR process itself is statutorily mandated to conclude in 12 months from inception.

Mr. BUCK. I am going to give you a hypothetical. Say you owned a small business, and you were looking at an army of lawyers to go to district court or the opportunity to go through the IPR process. Which would you choose?

Mr. IANCU. It is a case by case determination, Congressman. There are reasons to go to district court and avail yourself of the jury; there are reasons to come to the PTAB and avail yourself of the 12-month process. I should say that, as it turns out, over the past 5.5 years over 80 percent of the IPR patents in IPR are involved in co-pending district court litigation.

Mr. BUCK. Okay. So, what can you do to ensure that the IPR process runs more smoothly than it does right now?

Mr. IANCU. So, we are looking at that precise issue as we speak. We want to make sure that all parties that come before us have a fair hearing and have a fair process and that we reduce the opportunities for gamesmanship.

And one of the reasons that we have mentioned for proposing a rule change to the claim construction standards—one of the various reasons—is to increase traditional efficiency and reduce the ability to game the system as between the district court and the PTAB process. And I do think that is one example that would increase efficiency in the overall system and perhaps reduce the litigation fees overall for a particular party.

Mr. BUCK. So, there are some claims out there that the IPR system has hurt innovation. Do you agree with that?

Mr. IANCU. I am aware of those claims, and the fact is that the IPR system, as implemented, has the opportunity for some gamesmanship which could put an additional burden on the innovation ecosystem, and we are looking at ways to correct some of that and bring it back within the original intent of the statute.

Mr. BUCK. So, what are you looking at specifically?

Mr. IANCU. Well, again, an example is the claim construction standard. If we harmonize with the district court, I think it increases the chances of the IPR to be that true alternative to litigation and potentially reduce overall fees. We are looking also at the institution decision, as I have mentioned.

Mr. BUCK. So, what I hear you saying is if the IPR system is improved it would be a drastic benefit over the district court litigation system. If what you are hoping to do with these administrative improvements bears fruit—I mean, you cannot do much on the district court side, but you can do a lot on the IPR side. So, I am hearing you say that you can make the system better by improving the IPR side of the equation.

Mr. IANCU. Yes, Congressman, I think those changes would definitely improve the IPR system, but I should say that I think they actually would improve the overall process as between the district court and the—

Mr. BUCK. Because more people would use the IPR system and take some of the burden off the district court?

Mr. IANCU. That is one example, and you have judicial efficiency as well.

Mr. BUCK. Okay.

Mr. IANCU. I could go in more detail if—

Mr. BUCK. Well, I am concerned about a U.S. Chamber piece that was done. And I have always thought that America was number one in everything and certainly in innovation, and I am concerned about some of their findings and wanted to get your opinion on those findings also with the improvements in the IPR system. It seems like between first and 12th—while the numbers appear big—there is a very small measuring difference there, and I wanted to get your thoughts on that piece and what the impact of the revisions that you are talking about will have on that.

Mr. IANCU. I am also concerned with the decline of the American patent system in the world. The American patent system has been a crown jewel for this country; it has been at the crux of our economic growth, our historical and cultural development, and we should not cede one inch in this area.

I do believe that the changes we are considering right now will make a significant difference and help us rise back in the ranks and once again lead the world. We have always been the gold standard in this area, as well as many other areas, and other countries look up to us as to how to conduct their patent system.

Mr. BUCK. They continue to?

Mr. IANCU. Well, they have in the past, and we need to return to that position at this point.

Mr. BUCK. Great. I yield back. Thank you, Mr. Chairman.

Chairman GOODLATTE. Thank you. The chair recognizes the gentleman from Florida, Mr. Rutherford, for 5 minutes.

Mr. RUTHERFORD. Thank you, Mr. Chairman. Director, thank you for being here today. I am going to go a little tangential on you here with my topic. You know, the right to own property is basic to our American way of life. And so, when the Castro regime took power in Cuba, not only did they seize real property like the property from the Garcia family who now resides in Florida. And in fact, the United States government, I am told, is actually paying rent in their home, a property that they once owned. And the State Department is now paying rent for that property that was seized by the Castro regime.

But there are also companies like McCarty, who not only was a real property seized but their trademark was confiscated as well. And so, in 2016, the USPTO renewed the Cuban government's request for that trademark, and in response to that, you may remember that the U.S. Congress moved in the omnibus appropriations bill in 1998, created section 211, which would stop the Cuban government from being able to affect trademark within America that had been seized as confiscated property.

Now, because it specifically at that time outlined the Cuban government, the World Trade Organization had some issues with that. They said that it violated the national treatment of most favored nation principles under the TRIPS agreement, because section 211, on its face, only applies to Cuban nationals and their successors.

Mr. Issa on this committee has introduced H.R. 1450, which will make it clear that section 211 applies to all parties claiming U.S.

rights in confiscated Cuban trademarks regardless of their nationality. And I am curious: Has the USPTO taken a position on this legislation? Are you aware of it?

Mr. IANCU. I am not aware of that specific position or a position on that specific piece of legislation. I am aware that the issue was at the PTO with respect to these particular trademarks. As you may know, Congressman, we have stayed all proceedings at the PTO pending current litigation in the court system. This is a very complex, long-running dispute that is cross-disciplinary, so we are awaiting court decisions.

Mr. RUTHERFORD. But you know, when your office understands how basic the right of property ownership and trademark ownership is, I would be surprised if the USPTO would not support a change in section 211 that will actually meet the WTO's requirement that it not be so specific to Cuba, and it opens it up to any nationality that might confiscate an American trademark. So, I guess what I am asking you is, what do you think of that? And I understand that there is litigation going on, but I would like to know where you would stand on that.

Mr. IANCU. Well, I would be very happy to review the legislation and come back to you and the committee as appropriate.

Mr. RUTHERFORD. Thank you. I would greatly appreciate that, and I see my time is running out. But some of these issues with confiscation by foreign nationals of property and trademarks—you know, the real property—the fact that the United States government is actually making payments to the Castro regime for property that was seized from an American citizen. I know that is another issue not for your office, but it does go to the basics of, you know, property ownership and trademark ownership. So, I would appreciate an answer on that if you could send me something in writing and let me know where the USPTO stands on that.

Mr. IANCU. Will do.

Mr. RUTHERFORD. Thank you.

Chairman GOODLATTE. The chair thanks the gentleman. We will return now to the gentleman from Georgia, Mr. Collins, for his 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate that. Let's continue into the conversation where we were at. And as we are dealing with really some of the decisional post-grants, there is something you had mentioned. You were talking about, you know, better review of the appeals process, which is coming in to this process, the question will become, does the board have expertise and resources to examine amended claims? And if not, how can we ensure that the board can competently review amended claims, especially as we get more complicated in this process?

Mr. IANCU. So, there are several issues that are important with respect to that process. First of all, there is a timeliness question. We have to do it within the 12 months provided by the statute. Second of all, it is important to the office and to the system that whatever claim issues from the office should be examined. The PTO should not issue claims, in my view, that have not been examined, for the good of the patent owner and the public alike.

So, we are looking at exactly how we can accomplish both of those things efficiently—so, within the 12 months and, in addition,

give the parties in the IPR the opportunity to participate fully. There are a variety of options we can employ; an example would be to use an examiner from the Corps, for example, or from a resentment nation unit. Those are examples that can assist the board and provide advice on those amended claims. That is one option. There are other options as well.

Mr. COLLINS. Okay. Let's switch gears, because that is something we could talk about for a while. The European Union and their so-called incentive review has resulted in some calls by stakeholders to basically reduce IP protection. Most notably, to introduce a manufacturing exception to supplementary protection certificates, or SPCs, critical to the ability of U.S. rights holders to protect pharmaceutical innovation and deliver new therapies to patients. Can you explain how you are meeting these challenges in talking about this issue with our partners in Europe? You know, briefly talk about that as how we are dealing with that.

Mr. IANCU. So, the patent system needs to be balanced so that we provide appropriate opportunities for the innovative ecosystem to apply for and obtain rights, and obviously, first of all, to incentivize them to innovate in the first place.

At the same time American companies are doing business overseas, they have to have similar types of protections and enforcement mechanisms. So, we do work with our stakeholders, and we work with our foreign PTO colleagues in foreign offices to make sure that they have similar protections as we do for American companies doing business in their jurisdictions.

Mr. COLLINS. And I think that is something, and for anybody who has heard me talk about this, you know, look, we can talk about the Chamber ratings; we are talking about everything. But, look, our standards are the standards the rest of the world should emulate, and those are the things we are going to be pushing forward on, because I believe the best protection is the best source of innovation, and when we have the best protection, we have the innovation that is incentivized to do that.

So, I think this is going to come up in many other areas, especially the trade transfers, the secret transfers with China that is just demanding if a company comes in—we will deal with those as we go along. Just know that is something that is important to me; it is important to the Hill as well. But let's go back to some things that have been issued. You talk about the uncertainty issues of patentability, so let's go back to Myriad and Alice. Sounds like a great TV show.

These two decisions have increased uncertainty about the patent on subject matter eligibility. Now, as someone who has dabbled a little bit in subject matter eligibility, it can be amazing what comes out when you start dealing with this issue. In the matters of life sciences and [indiscernible] in particular, how significant do you believe this problem is? We have talked about this. What plans do you have about it? And also, I am going to add a third party in here. What do you think exceeds your authority to actually deal with it, and if so, what should we be dealing with up here?

Mr. IANCU. The issue is very significant. It is significant to the office, to our applicants, and it is significant to the entire industry. In some areas of technology, it is unclear what is patentable and

what is not, and that can depress innovation in those particular areas.

Our plan at the PTO is to work within Supreme Court jurisprudence to try to provide better guidelines; what we think is in and what we think is out. We are trying to work on forward-looking guidance that helps examiners and the public understand what, at least from the PTO's point of view, we think is right.

Section 101; the code itself has not been amended since 1952. In fact, the language is by and large written by Thomas Jefferson in the early 1790s, with very little amendment ever since then. Obviously, we have developed some new technologies since then. So, if this committee, or Congress in general, is interested in tackling section 101, we would be very happy to work with the committee on those issues. In the meantime, the PTO is going to do what we must do, which is help our examination process.

Mr. COLLINS. Well, my time is running out, and I am going to yield back, but I do think it would be good from your Office to tell us what you believe exceeds your authority, because there are some things you said—working with the Supreme Court; that is fine, working with innate jurisprudence. But what exceeds your authority that Congress probably would have to at least take a look at? Whether it is changed or not, Congress would have to look at it. If you could get that to us, I would appreciate it. Mr. Chairman, I yield back.

Chairman GOODLATTE. The chair thanks the gentleman and recognizes the gentlewoman from Georgia, Mrs. Handel, for 5 minutes.

Mrs. HANDEL. Thank you Mr. Chairman. And, Director, I apologize for not hearing your testimony, but know that I did read it prior to, so thank you for that.

I wanted to go back to intellectual property theft. Do you agree that any new trade agreement that we would embark on as the United States should have sufficient IP protections in it to prevent trading partners from benefiting from the theft of American innovation and creativity?

Mr. IANCU. Yes, it is important for our trade agreements to have very good intellectual property provisions.

Mrs. HANDEL. And what do you see as PTO's role in protecting American companies from forced technology transfers and other forms of theft of intellectual property?

Mr. IANCU. We have several roles to play in this area. We work with the U.S. Trade Representative as well as other government agencies to make sure that our various agreements have the appropriate provisions, both protection and enforcement mechanisms, in them. We have an education role with our stakeholders to help them understand their rights in foreign jurisdictions, and we have a role to help American companies doing business overseas navigate the intellectual property landscapes in those various jurisdictions.

Mrs. HANDEL. Great, thank you. I want to turn now to online platform responsibility. I know that you sit on the Internet Policy Task Force, and you did make some encouraging comments when you were testifying before the Senate Judiciary Oversight.

To me, the debate is about a whole lot more than just Facebook or Cambridge Analytica and privacy. It is really about the broader issue of how these internet platforms are being used for reprehensible and illegal activities like human trafficking, illicit sale of drugs, cyberespionage, IP theft, fraud.

We really do need to have a broader conversation around this and what we can do to curb misuses. We ask that of any other business out there, that if they have illegal activities coming through we hold them responsible for attempting to deal with that. Can you elaborate a little bit more on how we can foster greater online platform responsibility?

Mr. IANCU. Well, I think, first of all, engagement of stakeholders is critically important. I think there have to be good communication channels between governments agencies and stakeholders in this field. And this is a multidisciplinary issue; multiple government agencies have input on a variety of issues. That is why we do participate on the Internet Policy Task Force.

We do provide our points of view and guidance and the views of our stakeholders when it comes to intellectual property and how those issues would apply to the internet, online platforms, and the like.

Mrs. HANDEL. Do you see any specific steps/measures that we can take? Is there something that Congress needs to do?

Mr. IANCU. This is an issue that I would have to get back to Congress on. I do not know that specific legislation is something that our office has been advocating for—

Mrs. HANDEL. It may not be.

Mr. IANCU [continuing]. In this area.

Mrs. HANDEL. Okay. All right, thank you. Mr. Chairman, I yield back.

Chairman GOODLATTE. Thank you very much. Director, I thank you very much for your participation today. This has been an important hearing, and members have had the opportunity to ask some close questions about the plans at PTO. I want to say, personally, I am encouraged that the effort is being made here to assure that the quality of patents is strong, but the process is also fair.

So, we will continue to communicate with you about this, and as Mr. Collins suggested, we will watch closely to make sure that what you do is related to authority you have under the law, and if we think it exceeds it, then we want you to come here and discuss those aspects of it with us. So, again, thank you for your very helpful testimony today. I want to thank you for participating.

And without objection, all members will have 5 legislative days to submit additional written questions for the witness or additional material for the record.

And, Director, if we submit questions we hope you will answer them promptly so that we can have the benefit of that insight on matters that the committee is interested.

So, with that, the hearing is adjourned.

[Whereupon, at 11:48 a.m., the committee was adjourned.]