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The Manufacturing Policy Project is a non-partisan, 501(c)(3) research institute that studies long-term U.S. competitiveness. It has issued several reports on the role of intellectual property (IP) in national development. Pat Choate is the author of three recent books that deal with innovation and U.S. IP policy – **Hot Property** (Knopf 2005), **Dangerous Business** (Knopf 2008) and **Saving Capitalism** (Vintage 2009).

Based on that work, I offer the following suggestions on how to improve U.S. intellectual property protections.

1. **Fund the USPTO with an Adequate Operating Budget.** Strong patents are the heart of the U.S. system of innovation. The reliance on patent and maintenance fees to fund the USPTO has proven insufficient to the national needs. Today, the USPTO has a backlog of 1.2 million patent applications – the rough equivalent of three years of work even if the USPTO did not receive a single new patent application. This backlog wastes untold billions of public and private research dollars as technologies age while they wait for patent processing. The fastest and least expensive way to stimulate new U.S. innovation is to fully fund the USPTO from appropriated funds.

2. **Stop the Widespread Use of the "Engineering Ignorance" Technique by Patent Applicants.** Many of the nation's largest big tech corporations instruct their employees not to read existing patents, or patent applications or technical journals that might in anyway give them knowledge about the patented works of others. The goal is to be able to testify when sued for infringement that they did not know about the existence of others' work and thus avoid treble damages for willful infringement. This command avoidance of due diligence creates infringements that would not otherwise happen. The posting of patents and patent applications on the Internet, plus the existence of specialized firms that perform due diligence analyses, now

enables firms to conduct a due diligence (clearance) with speed, ease and modest costs. A quick way to reduce the level of patent litigation in the United States, and infringements, would be to alter patent law so that in those instances when a trial results in a finding of infringement, the award will be automatically tripled unless the infringer can prove to the court with contemporaneous evidence that a competent due diligence effort was made.

3. **Separate the WTO-TRIPS Enforcement Mechanism from the Office of the United States Trade Representative (USTR)**. Today, the USTR decides which cases against other nations involving intellectual property violations the United States will mount at the World Trade Organization. While the USTR identifies hundreds of such violations annually, it takes no IP cases to the WTO. Embodying the negotiating and enforcement functions in one body has proven ineffective. My recommendation is to shift the WTO – IP enforcement function to the Justice Department, along with other IP enforcement activities and provide the function with sufficient resources to enforce U.S. IP agreements at the WTO.

4. **Eliminate the Post-Grant Challenge Function at the USPTO**. The use of the existing ex parte and inter partes post-grant challenge functions has devolved into a litigation tactic designed to delay lawsuits against patent infringers and drain resources from patent owners. Attached is a table that documents the rise of litigation-related reexaminations. Consequently, the average pendency of ex parte cases is now 25.4 months and for inter partes cases it is 36.2 months. As of this date, not a single inter partes case has gone all the way from filing through an appeal. I recommend that the federal government scrap both these post grant challenge mechanisms. If a challenge to a patent's validity is mounted, let it be in federal courts where rules establish the rights of all parties and infringement and litigation abuses can be effectively addressed.

5. **Establish Specialized IP Courts in Each of the Federal Circuits.** IP law is complex and most of the District Court judges are inexperienced in such litigation. The so-called "Rocket Dockets" for patent litigation are in fact courts with Federal Judges who are skilled in IP law. A way to reduce infringement is to provide specialized IP courts.

6. **Alter the Life of a Patent to 17 or 20 Years, whichever is longer.** Much of the litigation and challenges surrounding issued patents are to consume big parts of its 20-year effective life. A 35-month processing pendency, coupled with a 36-month inter partes challenge uses six of a patent's 20-year life. To encourage innovation and investment, the life of a patent should be either the 17-year term used between 1863 and 1999 or 20-years as per U.S. obligations under TRIPS at the WTO. The WTO limit of 20 years is a minimum not a ceiling. The U.S. can encourage innovation by setting patent terms for longer periods.

Table 1

The Surge in Litigation-Related Patent Reexaminations

(FY 2002-2009)

		Ex Parte Reexaminations			Inter Partes Reexaminations			Total – Ex Parte and Inter Partes			
Fiscal Year	Patent Lawsuits Commenced	Ex Parte Re-Exam Requests	Related Litigation	Litigation as % of Ex Parte Re-Exams	Inter Partes Re-Exam Requests	Related Litigation	Litigation as % of Inter Partes Re-Exams	Total Re-Exam Requests	Total Related Litigation	As % of Related Litigation	As % of All Commenced Litigation
2009	2,883	658	372	**56%**	258	220	**85%**	**916**	**592**	**64%**	**20%**
2008	2,817	680	316	**46%**	168	115	**68%**	**848**	**431**	**50%**	**15%**
2007	2,712	643	360	**56%**	126	81	**64%**	**769**	**441**	**57%**	**16%**
2006	2,830	511	229	**45%**	70	32	**45%**	**581**	**261**	**34%**	**9%**
2005	2,720	524	176	**33%**	59	29	**49%**	**583**	**205**	**35%**	**7%**
2004	3,075	441	138	**31%**	27	5	**18%**	**468**	**143**	**30%**	**5%**
2003	2,814	392	109	**28%**	21	4	**19%**	**413**	**113**	**27%**	**4%**
2002	2,700	272	52	**19%**	4	0	**--**	**296**	**52**	**17%**	**2%**

Source: Data on patent lawsuits is from **Federal Judicial Statistics, Table C-4.U.S. District Courts - Civil Cases Terminated, by Nature of Suit and Action,** the respective years. Data for patent reexaminations are from **Performance and Accountability Report: Fiscal Year 2009, USPTO**, p. 124 and **Fiscal Year 2004**, Tables 13b and 13b.