The Honorable Andrei Iancu, Co-Chair
The Honorable David Kappos, Co-Chair
Judge Paul Michel (Ret.), Board Member
Judge Kathleen O'Malley (Ret.), Board Member
The Honorable Gary Locke, Board Member
The Honorable Lamar Smith, Board Member

April 24, 2026

Mr. Stéphane Séjourné
Executive Vice-President for Prosperity and Industrial Strategy
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels, Belgium

Dear Commissioner Séjourné:

A recently published study on the application of the European Union's Intellectual Property Rights Enforcement Directive (IPRED), conducted by the consulting firm EY at the European Commission's request, has reignited a debate in the innovation community about the future of patent enforcement in Europe.

The study evaluates the impact of potential changes to IPRED, some of which mirror policies the United States has implemented — and regretted — in recent decades. It ultimately advises against opening IPRED to revision, which we agree is the wisest course. However, EY's work also contains methodological flaws and inaccurate assumptions that risk misleading policymakers and undermining European innovation, competitiveness, and leadership in advanced technologies.

As former U.S. federal judges, lawmakers, and senior officials with extensive experience in intellectual property policy, we write to share lessons from the United States that we hope will provide clarity to this policy discussion.

Our primary concerns are in regard to the study's analysis of the use of injunctions in patent cases where infringement has been proven.. While stopping short of suggesting IPRED be amended, the report repeatedly criticized courts, particularly in Germany, for not applying proportionality in a manner that the report believes is required. To this end, the study discusses the U.S. Supreme Court's 2006 decision in *eBay Inc. v. MercExchange*, which, as applied by lower courts, significantly curtailed the ability of U.S. courts to grant injunctions in patent infringement cases. Although the study does not necessarily recommend incorporating the *eBay* framework into IPRED, it explores the possibility of European courts considering similar factors in the name of proportionality.

Yet while the report acknowledges stakeholder concerns that expanded proportionality would reduce legal certainty, disadvantage small businesses, and incentivize predatory infringement, it does not fully engage with the most substantial empirical evidence against that course of action: the U.S. experience following *eBay*. Since *eBay*, U.S. courts have issued far fewer injunctions in patent cases. According to one study by the economist Kristina Acri, grants of permanent injunctions have fallen by over 90% for patent holders who do not manufacture their own patented products (such as universities and research institutes) and by over 66% for those who do. Requests for injunctions, both permanent and preliminary, have also plummeted.

In effect, the precedent set by *eBay* has made it more difficult for patent holders to obtain court-ordered injunctions even after infringement has been found in court. This precedent benefits infringers, but makes it more difficult for innovators — particularly small and medium-sized enterprises (SMEs) — to prevent unauthorized use of their patented technologies. Many SMEs now face greater challenges in raising the capital needed to bring their innovations to market.

Without injunctive relief, the main recourse for victims of patent infringement — often outright theft — is to seek monetary compensation. That is often insufficient to fully replace the unique, market value of a patent. It also advantages large, deep-pocketed corporations, which can conclude — with good reason — that they can steal from their smaller competitors with minimal consequences. In the United States, between 2013 and 2022, the median monetary award was worth just $3.7 million — an insignificant sum for many of the large tech companies that habitually infringe patents.

Due to the clear chilling effect that *eBay* has had on small business innovation, there is growing bipartisan and sustained pressure in the United States to reverse the decision. Legislators are currently working to pass the RESTORE Patent Rights Act, which would restore the presumption of injunctive relief in cases of patent infringement.

The consequences of weakening injunction standards are particularly evident in the context of standard-essential patents (SEPs), which underpin Europe's telecommunications sector. Standards-based industries depend on predictable patent enforcement to support good-faith licensing negotiations and deter patent hold-out — when implementers refuse to license SEPs up front, forcing patent owners to pursue litigation.

Unlike the often-cited claim of patent "hold-up" — when patent holders allegedly refuse to license their patents except at excessively high rates — hold-out presents significant

problems for innovation. Contrary to what hold-up theories claim, patent holders have every incentive to offer fair rates in order to promote broad adoption and build their customer base. By contrast, implementers clearly benefit from holding out if the expected cost of infringement is lower than the cost of a negotiated license. Hold-out deprives innovators of the revenue they need to continue developing new technologies, making strong patent enforcement critical to promoting innovation.

Research suggests that the availability of injunctions plays a role in deterring hold-out by reducing the expected benefits of delay. Despite this, the IPRED study does not meaningfully examine whether changes to injunction standards would incentivize hold-out tactics or engage with evidence on this topic.

Further, European jurisprudence, such as the decision in *Huawei v. ZTE* (2015),[1] has to date developed a strong, balanced, and fact-specific framework that promotes timely and fair licensing of SEPs. Drastic policy changes that alter incentives for patent licensing risk undermining this successful system.

It is commendable that European policymakers are reviewing the effectiveness of IPRED. However, the report risks misleading policymakers that proportionality requires stricter limits on injunctive relief in patent cases, despite failing to establish that current injunction practices violate that principle. As the U.S. example demonstrates, imposing additional limits in the name of proportionality is actually likely to impose a *disproportionate* burden on innovative and entrepreneurial companies.

We also recognize that European policymakers are mindful of concerns surrounding patent assertion entities (PAEs). At the same time, it is important to keep those concerns in perspective. Despite assertions that abusive behavior by PAEs is rampant, the IPRED study itself notes that this is not regarded as a significant issue across most EU member states. Moreover, the study gives limited attention to the constructive role of secondary patent markets, which enable entities like universities, research institutions, and small innovators to commercialize and enforce their rights by pooling resources or partnering with specialized entities that can license and defend patents on their behalf.

The IPRED study appears to assume that the effects of any policy changes could be confined to problematic actors. However, experience in the United States suggests otherwise. The *eBay* decision, itself motivated by concerns about non-practicing entities, reduced the availability of injunctions for all types of patent holders — illustrating how changes to

[1] Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH, C-170/13 (2015).

injunctions inevitably affect all patent holders that utilize licensing, regardless of their intent or business model.

Europe has taken many positive steps to advance innovation and small businesses. We urge Europe to be mindful of America's experience following *eBay* and avoid making injunction policy changes that are likely to jeopardize these goals.

For example, the European Commission recently adopted a new "Competitiveness Compass," a roadmap for strengthening EU economic competitiveness. Building on the findings of Mario Draghi's 2024 report, the Compass emphasizes reducing barriers to technology commercialization and increasing investment in innovative startups.

The Digital Omnibus Regulation Proposal, currently under legislative review, also seeks to streamline EU digital laws in support of these goals. To succeed, policymakers must ensure that regulatory simplification does not weaken injunctive relief or encourage predatory infringement. Strong intellectual property protections, enforceable through injunctions, remain essential to providing innovators with the legal certainty needed to compete globally.

If the EU acts to limit grants of injunctions and effectively tolerate a broader range of infringement, it runs a high risk of undermining current initiatives to promote startup formation and growth. Investors would likely become less willing to fund innovative startups and small businesses, knowing that these companies' unique technologies are vulnerable to theft. Companies would also be less likely to exclusively license patents if that exclusivity is not fully enforceable in court.

Altering injunction standards would have especially serious consequences for European leadership in advanced technologies such as pharmaceuticals, telecommunications, semiconductors, and renewable energy. These sectors rely heavily on R&D and would be disproportionately harmed by any policy change that deters investment. Weakening injunctive relief would also make it easier for corporations in rival nations, like China, to steal European companies' technology with minimal accountability.

Finally, beyond these substantive concerns, the study's methodology is itself concerning. It relies heavily on qualitative input from interviews and surveys, improperly treating industry stakeholders' perceptions and grievances as evidence of systemic problems. Its empirical analysis, which focuses on the rate at which injunctions are granted in Europe, is limited and draws an unsupported inference that high injunction grant rates are inherently problematic. It then speculates, without strong empirical evidence, that injunctions themselves may be driving the concerns reported by stakeholders.

In addition, the report's key finding about the prevalence of injunctions comes from a study commissioned by an industry advocacy group, IP2Innovate, whose members include companies that prominently and consistently argue for weakened injunctive relief. While the report discloses this in a footnote, it fails to make this context clear in the text or explicitly acknowledge how this conflict of interest might influence the report's largely negative representation of injunctive relief. Following the report's publication, IP2Innovate also joined a letter to the Commission that repeatedly describes the report as "independent" while failing to mention the organization's own role in developing the report's evidence.

These issues provide further reason to approach the study's policy discussion with caution.

Given these considerations, we concur with the study's ultimate recommendation that IPRED should not be reopened. Europe has long been a leader in intellectual property rights, and its approach has served as a model for jurisdictions around the world. The best way for the EU to continue to foster an environment where inventors, entrepreneurs, and investors have the confidence to develop and commercialize groundbreaking technologies is to maintain strong enforcement mechanisms, especially injunctive relief.

We commend the Commission for its careful and deliberate approach to examining the role of patent remedies in Europe's innovation ecosystem. We would welcome the opportunity to share further insights from the United States' experience following *eBay* or provide any other information that may be helpful if the Commission decides to engage further on this issue.

Sincerely,

The Honorable Andrei Iancu
Co-Chair, Council for Innovation Promotion (C4IP)
Under Secretary of Commerce for Intellectual Property and Director, U.S. Patent and Trademark Office (2018-2021)

The Honorable David Kappos
Co-Chair, Council for Innovation Promotion (C4IP)
Under Secretary of Commerce for Intellectual Property and Director, U.S. Patent and Trademark Office (2009-2013)

The Honorable Paul Michel (Ret.)
Board Member, Council for Innovation Promotion (C4IP)
Judge and Chief Judge, U.S. Court of Appeals for the Federal Circuit (1988-2010)

The Honorable Kathleen O'Malley (Ret.)
Board Member, Council for Innovation Promotion (C4IP)
Judge and Chief Judge, U.S. Court of Appeals for the Federal Circuit (2010-2022)

The Honorable Gary Locke
Board Member, Council for Innovation Promotion (C4IP)
Ambassador to the People's Republic of China, U.S. Department of State (2011-2014)
Secretary, U.S. Department of Commerce (2009-2011)
Governor, State of Washington (1997-2005)

The Honorable Lamar Smith
Board Member, Council for Innovation Promotion (C4IP)
Member, U.S. House of Representatives (TX-21) (1987-2019)