IP at a Crossroads: Washington's Changing Patent Landscape
Remarks by Coke Morgan Stewart for 70th Annual Intellectual Property, Information & Privacy Law Conference
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Good morning.

Thank you for inviting me to speak at the University of Illinois Chicago's 70th Intellectual Property Conference.

Seventy years is an impressive milestone.

And if there's one thing seventy years of intellectual property law teaches us, it's that the law never stays still for very long.

I've spent much of my career working in intellectual property law and policy, including at the USPTO, where I served as Acting Director at the beginning of the second Trump administration.

And I can tell you that this is a particularly interesting time to be talking about patent policy in Washington.

We've seen major changes at the USPTO, important developments in the Federal Circuit and Supreme Court, and now a midterm election that will substantially reshape Congress.

All three branches of government are engaged in decisions that will affect the future of the American patent system.

But I think there's a bigger story here.

We're at a crossroads between a patent system whose rules can change substantially with each administration and one with clearer, more durable protections established by Congress.

And I believe we have an opportunity to move toward positive change.

The executive branch has taken important steps to address problems with administrative patent challenges.

The courts have respected the boundaries of executive authority.

Now Congress has an opportunity to establish lasting rules governing patent eligibility, patent challenges, and remedies.

So I'd like to talk about what's happening in each branch, why these developments matter, and why I'm optimistic about the opportunity ahead.

Let's start with the executive branch, where some of the most significant changes have occurred.

When Congress enacted the America Invents Act in 2011, it created inter partes review as an alternative mechanism for challenging issued patents.

The idea was that certain patentability disputes over so-called “bad patents” could be resolved more efficiently at the Patent Office than through federal court litigation.

That was a reasonable objective.

But over time, the system developed in ways that raised serious concerns.

Rather than addressing bad patents, it became the go-to forum for challenging the strongest patents.

Rather than replacing litigation, IPR frequently became an additional layer of litigation.

Rather than being less expensive, it added expense.

Patent owners could find themselves defending the same patent in district court and at the PTAB, sometimes against multiple challenges involving overlapping arguments.

And because challenging a patent is often much less expensive than defending one, these proceedings could create significant leverage against patent owners.

For a large company with substantial resources, that may simply be another litigation expense.

For a startup, university, or individual inventor, it can be a very different story.

The patent may be the company's most important asset.

It may be the basis for raising capital, attracting partners, or bringing a product to market.

And the cost and uncertainty of repeated challenges can threaten the value of that asset.

The question we faced at the USPTO in January 2025 was straightforward:

How do we preserve a meaningful opportunity to challenge patents while ensuring that administrative proceedings do not become a tool for imposing unreasonable costs and uncertainty for the patent system?

When I became Acting Director, we believed the PTAB needed stronger guardrails.

Congress had not enacted comprehensive PTAB reform, despite years of debate.

But Congress had given the USPTO Director substantial discretion over institution.

Section 314(a) establishes a threshold for institution, but it does not require the Director to institute every petition that meets that threshold.

The statute says the Director *may not* institute unless the threshold is satisfied.

It does not say the Director *must* institute whenever it is satisfied.

That distinction matters.

Congress recognized that the Director would need discretion to determine whether administrative review was appropriate.

Additionally, 35 USC 316(b) explains that the Director, in promulgating rules, can take into account the economy, the integrity of the patent system, the efficiency of the Office, and the ability to meet deadlines.

This direction from Congress guided additional discretionary consideration the Office shared with the public.

We were also guided by the original intent of the AIA, which was to correct Office errors and ensure some level of quiet title.

So, in February 2025, one of our first steps to reform the AIA implementation was to rescind the Vidal memorandum that had restricted discretionary denials in cases involving parallel litigation.

In March, we established a bifurcated institution process, separating discretionary policy considerations from the merits of a petition.

And later in 2025, we centralized institution decisions under the Director's authority, consistent with the express language of the AIA, which states that the Director, not the PTAB, makes institution decisions.

We also made sure that petitioners did not fill gaps in prior art with expert testimony, another step to conform to the intent of Congress.

These changes reflected a deliberate effort to restore balance to the system.

We wanted to ensure that the Office considered more than whether a petition presented a potentially meritorious challenge.

We also wanted to consider whether institution was the right thing to do in light of other available approaches.

Was the same dispute already moving toward a faster resolution in federal court?

Had the patent already been subjected to repeated challenges?

Had the patent owner and others made substantial investments in reliance on the issued patent?

Would institution promote efficiency, or simply add another expensive proceeding?

These are legitimate considerations in deciding whether the government should reconsider the validity of an issued patent.

One of the most important developments was the increased consideration of settled expectations.

This concept sometimes gets treated as an abstract legal principle.

But it's actually quite practical.

Patents are property rights. People make decisions based on them.

A startup may spend years developing a technology.

A university may license an invention to a company willing to undertake the expensive work of commercialization.

Investors may provide financing because they believe the patent will protect the company's ability to compete.

Inventors may create businesses that in turn create jobs based on their patent rights.

And those decisions often occur long before a patent is ever asserted in litigation.

If issued patents can be subjected to repeated administrative challenges without safeguards, that uncertainty affects the willingness to invest.

Now, of course, patents should be subject to legitimate validity challenges.

No one benefits from an invalid patent being enforced improperly.

But we should recognize that there is a difference between correcting an examination error and creating a system in which patent rights can be challenged repeatedly, at great expense, with limited regard for the investments made in reliance on them.

Our objective was to determine whether PGRs, IPRs, reexamination, or court validity challenges, or a combination of those approaches, was best for the system.

And I believe the changes we made were important steps in the right direction.

The changes also produced an interesting and perhaps predictable response.

IPR filings declined, while challengers increasingly turned to ex parte reexamination.

Ex parte reexamination has come a long way, and examiners deserve a lot of credit.

They are faster, in some cases faster than IPRs, even including the appeal to PTAB.

And they provide patent owners with meaningful opportunities to amend claims in response to prior art.

Improved ex parte reexamination may be the sweet spot that the system needs to ensure access to patent challenges without the expense of another adversarial proceeding.

Ex parte reexamination has different procedures and participation rights from IPR.

It also raises its own questions about how to balance legitimate patent challenges with the need for certainty.

The USPTO has taken steps to address those questions as well.

The most important of which was to waive a rule that prevented patent owners from responding to a request to reexamine their patent before the Office decided whether there was a substantial new question of patentability.

Another is to take a closer look at when ex parte reexamination takes the form of a repeat challenge by applying the tool Congress gave to the Office in the form of 35 USC 325(d).

But the broader point is this:

Administrative action has limits.

A future Director could take a different approach.

Policies that provide important protections today could be modified or rescinded tomorrow.

And we could drift back toward a system in which patent owners face repeated challenges and parallel proceedings with fewer meaningful guardrails.

That would be unfortunate.

The improvements the Office has made should be a foundation for lasting reform, not merely another chapter in a cycle of changing administrative policies.

That's why Congress needs to step in—not because the USPTO lacked authority to act, but because the protections we established should not depend indefinitely on who happens to be Director.

And that brings us to the judiciary.

I want to focus on three developments: judicial review of PTAB institution decisions, patent eligibility, and the future composition of the Federal Circuit.

The recent litigation over PTAB institution decisions has raised important questions about the relationship among Congress, the executive branch, and the judiciary.

Congress created the IPR system.

Congress gave the Director substantial discretion over institution.

And Congress generally limited judicial review of institution decisions.

That statutory structure is important.

The courts have a responsibility to ensure that agencies act within the law.

But when Congress delegates discretion to an executive official, the judiciary is not responsible for substituting its preferred policy for the choices that official is authorized to make.

One particularly important development involved mandamus challenges to the USPTO's consideration of settled expectations and other considerations.

Some petitioners argued that the Office's approach effectively imposed additional restrictions on IPR petitions beyond those established by Congress.

Among other things, mandamus requires a clear violation of law that the courts can remedy.

The Federal Circuit denied thirteen such challenges.

Several petitioners are seeking review by the Supreme Court.

In the first such case, the Court denied certiorari.

Of course, a denial is not a decision on the merits.

It does not mean the Supreme Court endorsed the USPTO's policy.

But it reminds us of the importance of separation of powers.

The executive branch has authority to exercise the discretion Congress delegates.

The judiciary determines whether that authority is exercised within constitutional and statutory limits.

And Congress has the power to establish different rules if it believes the existing statutory framework needs improvement.

That is exactly how our system of government is supposed to work.

The second judicial issue is patent eligibility.

I suspect everyone in this room has spent at least some time trying to explain the *Alice/Mayo* framework to a client.

And perhaps you've had the experience of finishing that explanation and wondering whether you've made the situation any clearer.

The Supreme Court's eligibility decisions have created substantial uncertainty, particularly in areas such as software, diagnostics, and biotechnology.

The Federal Circuit has spent years trying to apply those precedents.

And individual decisions continue to illustrate how difficult it can be to determine what constitutes an abstract idea, a law of nature, or a natural phenomenon.

But here's the important point.

The Federal Circuit cannot simply decide to replace the Supreme Court's framework with a different one.

It must apply controlling precedent.

And even the Supreme Court can only do so much to resolve a problem rooted in statutory language that Congress has not substantially revisited for decades.

That's why I believe patent eligibility is an especially strong candidate for legislative action.

We need clearer rules.

And we should remember that eligibility is only one part of the patentability inquiry.

Sections 102, 103, and 112 still require novelty, nonobviousness, adequate disclosure, and enablement.

An invention can be patent eligible without being patentable.

Sometimes our debates over Section 101 lose sight of those other requirements.

Congress has an opportunity to clarify the role of eligibility and allow the other statutory provisions to do the work they were designed to do.

The courts have also had an enormous influence on patent remedies.

Since the Supreme Court's decision in *eBay v. MercExchange* in 2006, permanent injunctions have been governed by the traditional four-factor equitable test.

The decision rejected traditional patent rules governing injunctive relief.

But it also changed the practical debate over the right to exclude.

For an inventor or startup, a patent may be valuable precisely because it gives the owner the ability to prevent others from using the invention without permission.

If infringement occurs and the patent owner cannot obtain meaningful relief, the economic value of that right can be substantially diminished.

That issue is particularly important for inventors and organizations that commercialize their technologies through licensing rather than manufacturing.

And importantly, it doesn't mean that injunctions will shut down services or remove products from the market.

It means that parties will have an incentive to sit at the table and negotiate a resolution, rather than have patent owners loan their technology to implementers and wait to be paid until they pursue damages in court.

This unnecessarily burdens the courts with business disputes.

Here again, Congress can clarify how equitable principles apply to the property rights created by patents.

There's another judicial development worth watching.

The Federal Circuit is a relatively small court with an extraordinary influence over American innovation.

It was created in 1982, in part to bring greater uniformity to patent law.

Several judges are eligible for senior status, creating the possibility of significant changes in the court's composition in the near term.

Judicial appointments can shape patent law for decades.

Different judges may bring different perspectives to eligibility, obviousness, damages, injunctions, and administrative patent challenges.

Congress may soon decide what perspectives they want to be represented on the Court.

And that brings us to the branch of government with the greatest opportunity to establish lasting reform.

We just had a midterm election, and Washington is going to look quite different in January.

Democrats have won control of both the House and Senate.

That means changes in committee leadership, oversight priorities, and the legislative agenda.

It also means that many of the people who have been leading congressional IP policy will be moving into different roles—or leaving Congress altogether.

Senator Thom Tillis and Congressman Darrell Issa, both important figures in patent policy as the chairs of the House and Senate IP subcommittees, are retiring.

And with Democrats taking control of Congress, Senator Adam Schiff and Congressman Hank Johnson are positioned to play potentially larger roles in shaping the IP agenda.

Both receive high marks on IP policy issues.

While the precise leadership arrangements remain to be determined, I have hope that new IP champions will emerge and that we can work with even the most ardent IP skeptics.

Strong supporters of patent rights can be found in both parties.

So can members who favor greater restrictions on patent enforcement or broader opportunities to challenge patents.

That creates challenges, but it also creates opportunities for bipartisan engagement.

The next Congress has an important opportunity to take up several reforms.

Let me start with the PREVAIL Act, because it connects directly to the changes we've been discussing at the USPTO.

PREVAIL addresses several important features of administrative patent challenges.

It would establish additional restrictions on who may bring certain PTAB proceedings, address repetitive petitions and estoppel, and modify the evidentiary standard applied to issued patent claims.

One particularly significant proposal would generally require unpatentability to be established by clear and convincing evidence, rather than the current preponderance-of-the-evidence standard.

That would bring the PTAB's standard closer to the one applied in district court and bring needed stability to the patent system.

Supporters emphasize the reliability of issued patents and the need to protect patent owners from duplicative proceedings.

Critics are concerned about preserving effective mechanisms for correcting improperly issued patents.

Those issues deserve careful consideration.

But I believe the underlying need for legislative reform is clear.

For years, we saw how PTAB practice could impose substantial costs and uncertainty on patent owners.

The USPTO used its existing authority to establish stronger safeguards.

But those safeguards remain vulnerable to changes in administrative policy.

PREVAIL offers Congress an opportunity to address the problem directly.

We should not have to rediscover the need for PTAB guardrails every time a new administration takes office.

The Patent Eligibility Restoration Act addresses another longstanding problem.

PERA would replace much of the current judicial-exception framework with clearer statutory rules governing eligibility.

This is an area where the need for congressional leadership has become increasingly apparent.

For years, courts, patent applicants, and practitioners have struggled with the boundaries of Section 101.

The uncertainty affects decisions made long before litigation begins.

Companies must decide which technologies to develop.

Universities must decide how to commercialize discoveries.

Investors must evaluate whether the intellectual property supporting a business is likely to be reliable.

When eligibility standards are unclear, those decisions become more difficult.

Life-saving innovations are left on the cutting room floor because no one is going to invest their time and money into inventions that can't be protected.

We should be careful not to confuse eligibility with patentability.

Sections 102, 103, and 112 remain powerful tools for ensuring that patents are awarded only for inventions that are new, non-obvious, and properly disclosed.

PERA would give Congress an opportunity to clarify the threshold eligibility inquiry while preserving those other protections.

The goal should be a system in which inventors can understand the rules before they commit years of work and substantial resources.

The RESTORE Patent Rights Act addresses injunctions.

It would establish a rebuttable presumption of permanent injunctive relief following a final judgment of patent infringement.

That would not make injunctions automatic.

Courts would retain authority to determine whether the presumption should be overcome.

But it would recognize the importance of the right to exclude.

And that right is fundamental to the patent bargain.

An inventor discloses an invention to the public in exchange for a limited period of exclusive rights.

If those rights cannot be meaningfully enforced, the incentive to invest in invention and commercialization can be weakened.

RESTORE offers Congress an opportunity to clarify the relationship between patent infringement and equitable relief.

Like PERA and PREVAIL, it addresses an issue that has generated years of litigation and uncertainty.

There are also proposals moving in a different direction.

The ETHIC Act and the Medication Affordability and Patent Integrity Act, or MAPIA, are examples.

Both arise in the context of concerns about prescription drug affordability.

Making medicines more affordable is an important goal.

But we should distinguish between proposals that directly address prices and those that alter patent rights or impose additional patent-related requirements.

ETHIC would restrict enforcement of certain patents connected through terminal disclaimers.

Terminal disclaimers are a recognized mechanism for addressing closely related patents to ensure common ownership and consistent terms.

Restricting enforcement of patents subject to terminal disclaimers without an individualized determination of invalidity raises important questions about the treatment of legitimate patent rights.

MAPIA would create additional requirements involving representations made to the FDA and USPTO.

Accuracy in representations to federal agencies is essential.

But the FDA and the USPTO perform different functions, and statements made in those proceedings address different legal and scientific questions.

We should be careful about creating additional obligations without understanding their practical consequences.

The one that concerns me the most is imposing additional burdens on examiners, who are already addressing an unprecedented patent backlog.

Neither proposal directly establishes lower drug prices.

Instead, they would change patent enforcement rules or patent-related regulatory requirements.

And that distinction matters.

It's always tempting to focus on the possibility of short-term savings.

But innovation is a long game.

Developing new technologies requires substantial investment, often over many years, with no guarantee of success.

The possibility of obtaining and enforcing meaningful intellectual property rights is part of what makes those investments possible.

We should evaluate legislative proposals not only by their stated objectives, however noble, but also by how they may affect the willingness of companies, universities, and investors to pursue the next generation of inventions.

So the next Congress will have important decisions to make.

PREVAIL offers an opportunity to establish lasting safeguards for administrative patent challenges.

PERA offers an opportunity to clarify patent eligibility.

RESTORE offers an opportunity to strengthen the practical value of the right to exclude.

And proposals affecting pharmaceutical patents deserve careful consideration of both their intended benefits and their potential harmful consequences for innovation.

I think there is a real opportunity for progress.

Patent policy has never been exclusively a Republican or Democratic issue.

It is about creating the conditions in which inventors can take risks, investors can provide capital, and new technologies can reach the marketplace.

Those are goals that should command broad support.

Let me close by returning to the crossroads I mentioned at the beginning.

We've seen important developments across all three branches of government.

At the USPTO, we took meaningful steps to address problems that had developed in administrative patent challenges.

We did so because reform was needed and because Congress had entrusted the Director with discretion to act.

I believe those changes were important and constructive.

They reflected an effort to restore balance, respect the reliability of issued patents, and ensure that administrative proceedings serve their intended purpose.

In the judiciary, we've seen the courts grapple with the boundaries of administrative authority, the uncertainty surrounding patent eligibility, and the practical enforcement of patent rights.

And in Congress, we have an opportunity to establish clearer, more durable rules.

That's where I think the greatest opportunity lies.

We should build on the progress made at the USPTO, not risk returning to a period when the PTAB operated with too few meaningful guardrails.

And we should address the longstanding uncertainty surrounding patent eligibility and remedies rather than expecting the courts to resolve every difficult policy question.

The United States has extraordinary strengths in innovation.

Our universities produce remarkable discoveries.

Our entrepreneurs take risks that others are unwilling to take.

And our inventors pursue ideas that can transform entire industries.

A reliable patent system helps make those efforts possible.

But reliability requires more than granting patents.

It requires clear rules about what can be patented, fair procedures for challenging issued patents, and meaningful remedies when patent rights are infringed.

Those rules should be durable enough that inventors and investors can make long-term decisions with confidence.

So when I look at what's happening in Washington, I see reasons for optimism.

I see a future where improvements to the patent system create clear, predictable, and enduring protections—one that encourages the next generation of American innovation.

Thank you. I'd be happy to take questions.