

2015

## Keynote Address: “Standing Sentinel over Innovation: The Importance of a Balanced and Effective IP System”

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### Recommended Citation

Andrew Byrnes, *Keynote Address: “Standing Sentinel over Innovation: The Importance of a Balanced and Effective IP System”*, 18 CHAP. L. REV. 617 (2015).

Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol18/iss3/2>

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**Transcription of the 2015 *Chapman Law Review* Symposium “Trolls or Toll-Takers: Do Intellectual Property Non-practicing Entities Add Value to Society?”**

**Keynote Address: “Standing Sentinel over Innovation: The Importance of a Balanced and Effective IP System”**

*Andrew Byrnes*

The following is a lightly edited transcription of United States Patent and Trademark Office Chief of Staff Andrew Byrnes’s oral remarks at the 2015 *Chapman Law Review* Symposium.\*

INTRODUCTION OF ANDREW BYRNES BY SAMUEL ERNST,  
ASSISTANT PROFESSOR OF LAW, CHAPMAN UNIVERSITY DALE E.  
FOWLER SCHOOL OF LAW

It is my honor to introduce our keynote speaker, the Chief of Staff at the United States Patent and Trademark Office, and my friend, Andrew Byrnes. Mr. Byrnes graduated with honors and distinction from Stanford University—that’s not Cal, but it’s still very good—and magna cum laude from the Harvard Law School, which is in Boston. He then practiced for ten years at the late, great law firm of Heller, Ehrman, White & McAuliffe in the Silicon Valley, and then at the international law firm of Covington & Burling. I had the pleasure of having Mr. Byrnes as a mentor, a colleague, and at Covington as a partner as we defended and prosecuted patent infringement litigation together. But Mr. Byrnes’s knowledge reaches beyond the vast realm of the patent law to encompass expertise in political, election, and civil rights law, and he also is a film producer. He produced the award winning feature length documentary, *The Power of Two*, and distributed the film in connection with a global campaign promoting organ donation and cystic fibrosis awareness. In 2013,

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\* His keynote address was accompanied by a presentation available at <http://www.chapman.edu/law/publications/chapman-law-review/annual-symposium/2015-symposium.aspx>.

President Obama appointed Mr. Byrnes to serve as Chief of Staff of the United States Patent and Trademark Office. Mr. Byrnes has traveled here today all the way from Washington D.C. into the dead of our winter—there was a mist this morning—to speak to us today, and his talk is entitled “Standing Sentinel over Innovation: The Importance of a Balanced and Effective IP System.” Please join me in welcoming Mr. Andrew Byrnes.

KEYNOTE ADDRESS OF ANDREW BYRNES, CHIEF OF STAFF, UNITED STATES PATENT AND TRADEMARK OFFICE

Thank you Sam. I remember very fondly your deadpan delivery, as well as your very memorable performances of “I Left My Heart in San Francisco” in any of San Francisco’s many karaoke bars.

So, there are many rules to public speaking, one of them, which is lesser known, is that you should not speak after any of the following people: Professors Feldman, Frye, Holte, and Landers. I am, of course, now speaking after all of them, which is certainly rocky shoals to start off with. Thank you Sam, for the warm introduction. I’d like to thank Chapman Law School and the Law Review, and particularly Rachel Baker and her team for putting together just a fantastic symposium. The first panel was really one of the most extraordinarily interesting that I have seen in my increasingly lengthy years in this field, so thank you for that.

It is great to be back in Orange County. This speech is titled “Standing Sentinel over Innovation: The Importance of a Balanced and Effective IP System,” because we at the PTO, the Patent and Trademark Office, are committed to keeping watch over America’s innovation ecosystem and our economic sustainability and growth to which IP—whether it’s patents, trademarks, copyright, or trade secrets—are so critical.

It has been seventeen months since I left Silicon Valley to come to Washington to join the President’s team and take my appointment as Chief of Staff at the PTO. I came to Washington because I believed then and still believe today that this is an all-hands-on-deck moment for innovation and intellectual property in this country. The issues are too important, the timing is too critical, and the impact is too great. Now, over my seventeen plus years in this field, there have been significant changes in IP. It has gone from a topic reserved for specialized scientific and legal circles, of which many of us are a part, to the front pages of *The Wall Street Journal* and *The New York Times*. Patent filings have increased dramatically alongside an acceleration in technological advancement, and it is no wonder

that IP-intensive industries, which are defined as those that for whom patent, trademark, and/or copyright protection is essential, account now for more than twenty percent of American jobs and over sixty percent of our merchandise export. So, in short, IP, intellectual property, matters more than ever before.

Now, I brought with me to this job a respect for and a commitment to a balanced and effective IP system. As a patent litigator for sixteen years, I represented both patent holders and accused infringers. I have argued that some patents were invalid, unenforceable, and worthless, while others were valid, enforceable, and tremendously valuable. I've seen the patent system and the opportunity and challenges that innovators face from many sides. Deputy Director Michelle Lee, who is my immediate boss and the President's nominee to be the Director of the United States Patent and Trademark Office, also has a perspective on the patent system that is both broad and deep. As she has said, she has "prosecuted patents, asserted patents, defended against infringement, and licensed, bought and sold patents," and I know that many of you here in this audience have a similar depth and breadth of perspective. It's important to see this system—this patent system—from all sides. Because from our diverse experiences and perspectives we know that innovation is not a scarce resource or a zero-sum game. We know that some inventions come from whole cloth, but that many emerge from that which has come before.

Now we know that no demographic, industry, business model, or geography has cornered the market on innovation. Although I will say that back home in Silicon Valley we argue about the geography part of that. But it is in fact true that no geography has cornered the market in innovation, and you here in Southern California and Orange County in particular know that because you see so much innovation going on around you every day. We know that when there are disputes about that hallmark of innovation, IP, in some of those disputes it is the IP holder that carries the mantle of innovation. But in others, the lawsuit hampers innovation by stifling the innovating activities and raising the cost of the accused infringer. And just as there is often a reasonable dispute about which party has the most meritorious case given the facts and the law—a reasonable dispute which keeps many of us in the room, or at least has kept me in the practice for so long—there are often differences of opinion as to which result best fosters innovation. So, how do we know, then, whether we are standing sentinel over innovation or we are just standing in the way of it?

Well, one place to look is the Constitution itself, which provides for a patent system that recognizes the power of providing an incentive to inventors of exclusive rights for a limited time to promote the progress of science and useful arts. And no defense to the patent system would be complete without citing the only President to have ever held a patent, President Abraham Lincoln, who said that the patent system added “the fuel of interest to the fire of genius.” Now, that fuel of interest, the right to exclude others, which is in the Constitution, is the cornerstone of this system. Exercising that right may require sending a letter to an infringer informing it of the infringement or requesting a meeting or taking some other action. Exercising that right may require bringing a lawsuit, which, if successful, would require payment of royalties or lost profits or the imposition of an injunction. Fostering innovation requires—and the Constitution demands—that patent holders have the opportunity to exercise their rights; but fostering innovation also requires that the process and result of enforcing those rights, in fact, lead to more innovation. Late last year, President Obama reiterated the need for a patent system that is balanced to encourage and reward innovation and creativity, both for those who hold the patents and for those who don’t, and for those who are asserting infringement and for those who are accused of it. We at the PTO, the Department of Commerce, and the Obama Administration are working aggressively to make certain that America’s patent system, and the IP system as a whole, has that balance.

The PTO, as America’s innovation agency, is an exciting and dynamic place to be, and I’d like to take just a moment to walk you through what it is that we do and what it is that I do. At the PTO, we are laser-focused on our mission of fostering innovation, competitiveness, and economic growth, domestically and abroad, by delivering quality and timely examination of patent and trademark applications, which is the part of our job that most people know a lot about, but also by guiding domestic and international IP policy, and delivering IP information and education worldwide, and doing all of that with a highly skilled and diverse workforce. And to be clear, when I talk about IP in this context, although we issue patents and register trademarks, we provide information and policy guidance on all forms of IP including copyrights and trade secrets in addition to patents and trademarks.

Now, other than how are you handling the winters, which is the most prevalent question I am asked these days, the second question I get is, “What the heck does a Chief of Staff do?” I say,

“Well, thank you for asking that question.” I know you were all thinking it. As the Chief of Staff, I am the principal advisor to the head of the PTO, that would be Deputy Director Lee who I mentioned earlier. Working with her and our executive team, I help run our nearly 13,000 employee, \$3+ billion operation, and manage our policy coordination and external outreach and engagement. I come to work, as do my colleagues, every day, committed to do my part to achieve the PTO’s mission. And to do that I work hand-in-hand with the PTO’s leadership team and colleagues across the government as well as the innovation team globally, like those of you here today.

Now, due to our fantastic team’s efforts, the PTO has had tremendous success in recent years, including implementing the many changes in patent examination and other internal aspects of our operation required by the 2011 America Invents Act, reducing the pendency of patent and backlog patent applications in spite of an average five percent year-over-year increase in applications, and maintaining optimum trademark application pendency. The average trademark pendency is now under a year, closer even to ten months, so it is very good. And we have secured our place as one of the best places to work in the federal government as awarded by the Partnership for Public Service.

Now, let us return to the enforcement of patents. As I mentioned, the ability to enforce a patent against accused infringers is essential to the bargain of the patent system and to incentivizing innovation, and the conversation of the first panel revolved around this issue. Now, ideally, the system would work efficiently and cost-effectively to ensure that patent disputes were resolved quickly in favor of the patent holder when they are meritorious, and in favor of the accused infringer when the patent is invalid, unenforceable, or non-infringed. The system would also seek to ensure that pre-litigation enforcement efforts are conducted, and that demand letters are sent, in good faith and with a reasonable basis. So even as we at the PTO work hard to ensure that our operations, the operation that produces timely, quality patents, it’s also essential that we take a broader look at the patent system to evaluate whether it is working as it should, as a system as a whole. And are its benefits outweighing the costs?

Now, there are a number of potential costs in the system, one of which is the monetary cost with how patents are enforced, which happens primarily in the district courts. According to recent figures from the American IP Law Association (AIPPLA), the average big case in district court, which has over \$25 million at issue, costs about \$5.5 million to litigate, and the so-called

small case, with less than \$1 million at stake, costs about \$700,000 to litigate. For cases brought by non-practicing entities, the subject matter of this symposium, where there is little prospect of an infringement counter-claim from the defendant back to the patent holder, the cost of bringing the suit can be far lower, but the cost of defense is not much less. That means that the cost of defense can amount to seventy percent or more of the exposure, which puts tremendous pressure on the accused infringer to settle, even if and when the case is weak on the merits. So the high cost in patent litigation opens the door to abuse, and then the potential asymmetry in costs between the litigants holds it open.

So let's talk a bit about why patent litigation is so costly, and why the costs in many cases are so asymmetrical. Some of this was discussed earlier, but a complaint, as those of you who are practicing lawyers or those of you have completed courses in your first-year Civil Procedure course know, doesn't require much detail. So it is relatively inexpensive to file a complaint and initiate a lawsuit, but for the accused infringer, the costs of litigation are immediate and often quite significant. It costs a lot of money to hire a lawyer, and I know there are many good lawyers in the audience, and they would probably give you a deal, but even their best deal is going to be a lot. It costs a lot to have a lawyer view a complaint and the patents in suit and develop even a preliminary analysis of potential defenses. Patent law is complicated, there are lots of factors and relevant facts, and it costs money to go through all of that. And then, discovery: over half the cost of a patent lawsuit—again referring to AIPLA figures—is incurred by the end of the discovery of the case. So the phase of the case where you are trying to figure out what this case is all about, that process itself costs over half of the ultimate total cost of the suit. And the accused infringer has to review and produce documents related to allegedly infringing products and services, and additional documents for the damages portion of the case. That is to say nothing of the cost and distraction of depositions, or the cost associated with experts, which can run in the hundreds of thousands of dollars and more. And as you know if you've stayed up for days as I have preparing for trial, working with witnesses and eating several thousand calories of red licorice and those little candy bars, telling yourself that this has nuts in it and that's good enough for dinner, it costs a lot. Trial is intense, and it costs a lot of money. Now, it is true that discovery and going to trial are costly for both sides, and operating company plaintiffs risk facing patent counterclaims, disrupting relationships with suppliers and partners, and triggering the mutually assured destruction of legal department

budgets. However, when the patent holder makes no products or offers no services that can be accused of an infringement, and has few documents to produce or deponents to offer, they are more likely to postpone or avoid paying attorney's fees altogether. Such a patent holder's costs, which are strategic barriers to bringing suit, may be substantially lower.

Now I want to be clear, this asymmetry between the patent holder plaintiff and the accused infringer defendant in these types of cases isn't itself abusive, but it does, as I mentioned, hold the door open for abuse. So then, how can we minimize abuse while maintaining the right of patent holders to meaningfully enforce those rights? Well first we have to ask the right question. The question in evaluating how to improve the patent system is not, what is the identity or type of patent holder or whether the patent holder is an operating entity, a patent assertion entity, or any other type of non-practicing entity. Now the patent system seeks to promote innovation by all inventors in all technologies without regard to the type of entity or the type of business model. The PTO doesn't inquire whether or how an applicant intends to use its patent. Certainly over the course of time, the patent may be used or not in a variety of ways, some of which may have never been contemplated by the patent holder. And so, how the patent holder intends to use, or is using the patent, isn't the right question either. Nor does it make sense, for that matter, to focus on the identity or type of the accused infringer because any patent litigant, whether or not it owns or practices the patent at issue, can engage in abusive litigation practices. The right question is not about what kind of entity you are; it is about what kind of behavior are you engaging in. The question is: "Does the system prevent abusive behavior and facilitate innovation?"

Now, the good news is that there are many complementary ways to ensure that the patent system is balanced and effective. While there are real differences of opinion about the best way to achieve this goal, many of which I think we'll hear during the course of the day, there is a general consensus about the goal we are aiming to achieve. Now much of the attention recently has been given to legislative efforts at patent reform, and balanced, meaningful, and consensus-based legislation is important to prevent abuse. Also, there have been recent important developments in the case law bringing significant changes to the patent landscape in areas like awarding attorney's fees to prevailing parties, claim clarity, and patent eligible subject matter. It is too soon to tell, but these developments may have a significant impact on the potential for abusive behavior. And I'll discuss in detail what we're doing at the PTO to improve many



aspects of the patent system. Ultimately, we need to consider how best to improve this system by looking at the landscape as a whole, including how recent changes have made an impact so far and relevant trends going forward.

Quality—the quality of a patent—is one of the PTO’s top priorities, and I want to spend some time talking about what we are doing in that area because it does help inform this discussion. As responsible stewards of the patent system, we at the PTO are working hard to ensure this system is balanced and effective, and as I mentioned, promotes innovation, because the innovation that is fostered by a strong patent system is a key driver of economic growth and of job creation.

So what do I mean by quality? What are the aspects of quality? This is a discussion that we are having at the agency, and we are going to be continuing to have it with our stakeholders. For purposes of getting into this discussion, I think of quality in a couple of ways. To effectively promote innovation, issued patents must fully comply with all statutory requirements—101, 102, 103, 112, and so forth—and of equal importance is that the patent examination process advances quickly and accurately. A high-quality patent, in addition, clearly sets out not just the boundaries of the claimed invention for its own sake, but by doing so encourages other inventors and innovators to come up with something transformative and new.

The anchor of our efforts on quality is an enhanced patent quality initiative, which Deputy Director Lee announced late last year. The initiative brings together in an all-hands-on-deck effort. In recent years, we have launched a variety of initiatives with the broad engagement of the innovation community on how we can do even better on quality, which will lead to additional improvements. And while the agency’s commitment to quality isn’t new, the America Invents Act guaranteed us a sustainable source of funding, and the reduction of our application backlog and pendency allows us to focus more than ever on building the workforce and tools to support a world-class patent quality system.

We have a number of existing initiatives that are making a significant impact on quality. We are working to improve claim clarity by increasing the level of scrutiny given to proposed patent claims that may be too broad. We are providing targeted training for patent examiners, including four new training modules on how best to examine functional claims under section 112(f), improving the clarity of the examination record and the quality of any patents that are issued. This additional training

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supplements the routine training that we give examiners when the law changes due to new legislation or case law developments.

In addition, we have launched a pilot program that allows applicants in certain fields of art to use glossaries in patent specifications to define terms, leaving no doubt not only to their meaning for the examiner who is looking at that application, but for judges, juries, and potential adversaries down the road. Participants in the glossary pilot receive expedited processing through a first office action, and we recently extended the pilot to June 2. So it's not too late to participate, and I hope that those prosecutors in the room will work with your clients to do so.

In addition, as you know, patent examiners need to be skilled in determining whether a particular application should be granted based on the state of the art in their particular technology area. So as part of a White House administrative action, we are expanding our patent examiner technical training program, which engages experts in industry and academia in updating the examiners on technical developments, the state of the art, and emerging trends. The experts can present in person at our headquarters in Virginia, from our satellite offices, which I'll talk about more later, or even from their own location via webinar, so it is a great way for the industry community and academia to work with us to ensure better patent quality.

In addition, greater patent harmonization by aligning laws and procedures among IP systems worldwide will help ensure the consistency and clarity of rights for American innovators. As part of that effort, since IP protection around the world is so critical for American innovators, we have implemented programs to take advantage of the search and examination work done in corresponding applications filed in other IP offices around the world. One of which is the patent prosecution highway, which enables the PTO to fast-track examination procedures already in place among participating foreign patent offices, allowing applicants to reach final disposition of an application more quickly and efficiently than average. And of course, our American filers who are filing abroad get the same advantages. According to the AIPLA, the patent prosecution highway can cut prosecution costs roughly in half because you are not reinventing the wheel as you go from country to country. Similarly, the common citation document program consolidates the prior art cited by the world's five largest IP offices for the family members of an application. So across all five offices, you can easily see on a single page all the art that has been cited and considered. Again, this ease of identifying prior art and having it up to date is a

boon to quality both in the United States and other key IP venues around the world.

In addition, we recognize that prior art relevant to many patent applications isn't just patents, applications, and printed publications, and therefore maybe more difficult for patent examiners to find. In partnership with the public, we are evaluating the most effective way to use crowdsourcing to obtain hard-to-find prior art. Leveraging the knowledge of those in the technical and scientific communities, we are also working to improve the pre-issuance prior art submission process to make it easier for the public to submit prior art that the public believes is relevant to a particular patent application, and make it easier for examiners who receive that art to evaluate if it is relevant.

Another major focus is IT improvements. We want to ensure that our twenty-first century agency has up-to-date IT systems. Our next generation system, Patents End-to-End, which is designed to streamline patent prosecution from application to issuance, is a key part of that effort. Patents End-to-End will enhance the way examiners view documents, search for prior art, take notes, and complete tasks. By providing our examiners with those enhanced tools, we are helping to improve the quality of their work.

Another key initiative is to ensure that more people have access to the patent system. So we are helping to make sure that under-resourced independent inventors, startups, and small businesses have access to the PTO by providing dedicated resources to pro se applicants who lack legal representation, and working with our partners nationwide, including here in California, to expand the AIA's—the America Invents Act's—pro bono program, because assistance from the PTO's pro se program, or from a pro bono attorney, can be critical in preparing the necessary documents in such a fashion that if the invention is patentable, a patent can issue as quickly as possible. So if you're a patent prosecutor, I strongly encourage you to lend your skills to inventors who need your help through the California Inventors Assistance Program, which is run by the California Lawyers for the Arts. California's is a model for programs across the country.

As you can see, we are already doing a lot to ensure that we issue quality patents. So what else are we doing, what is next? The enhanced patent quality initiative will take our efforts to the next level. It is built around three core elements: excellence in prosecution, products, and services; excellence in customer service; and excellence in measurement of quality. If you have no way to measure the quality of the patents, it does at least significantly diminish the confidence that the community has in

those patents. We are looking at patent quality from every angle. We are leveraging expertise from across the agency, and we are considering all options big and small about how we can improve the quality of patents. Now, this effort isn't just the product of our best thinking of the PTO's. As I mentioned we have almost 13,000 employees, many of whom are in the patent space and they're skilled, but the conversation shouldn't be just coming from inside of the PTO, and it will not be. We recognize that many of the best ideas will come from our stakeholders; by that I mean not only the people or companies that use our patent services, but also the American public who stands to benefit from the innovation that is supported by a U.S. patent. We will be having that conversation with the public at a two day quality summit later this spring at our headquarters in Alexandria, Virginia, followed by a series of discussions across the country explaining how we currently seek and measure quality and seeking input on how we can do even better. We will also receive written comments from anyone who wishes to join us in our quest for patent quality. And more specific details on this effort will be laid out in a Federal Register notice coming soon. If you're like me, in D.C., Federal Register notices are things that people tend to look at a lot. If you're not in D.C. they tend not to be. But we will also promote it not simply in a Federal Register notice, but on our blog and through our subscription lists as well. This is a huge and important effort for us at the PTO; it is a signature effort of Deputy Director Lee and we hope that you'll engage with us.

In the meantime, we are ramping up our quality team, and Deputy Director Lee announced just last week that the PTO has created a new senior position, the Deputy Commissioner for Patent Quality, who will be solely dedicated to coordinating all of the agency's efforts to ensure patent quality and guide new initiatives in this area. A big thinker with over twenty years of experience in the agency, we are so excited that Associate Deputy Commissioner for Patent Operations Valencia Martin-Wallace is taking that role. Deputy Commissioner Martin-Wallace's promotion also highlights another important PTO success which, although not directly related to quality, is essential to ensuring that our innovation ecosystem is broad based and is as productive as possible. The PTO is proud to have one of the most diverse workforces and leadership teams in the United States government, with a woman of color leading our agency and women leading our patents, trademarks, policy, and legal teams.

Another key component of quality is our Patent Trial and Appeal Board because, while the PTO's increasing our efforts to

issue the best quality patents possible based on the law at the time of issuance, the law may change and that may cast doubt on whether the patent that was issued in the past would have been issued today. Also, as a particular patent becomes more economically important and higher profile, prior art may be discovered, or more closely analyzed, that suggests that the patent is invalid. Now, these issues can be addressed in district court litigation, but as concerns about the cost and pace of district court litigation grow, more and more parties are taking advantage of the post-grant trial proceedings created by the America Invents Act, which are designed to test patents of questionable validity.

These proceedings are faster, more efficient, and less expensive than district court litigation. For example, to date, for proceedings that are subject to the statutory deadlines, the Patent Trial and Appeal Board (PTAB) has rendered a final determination of patentability within twelve months of instituting a proceeding, which is a fraction of the time it takes for most court cases to resolve. The proceedings reduce the burden on parties by streamlining and converging issues for decision using conference calls for pretrial hearings and instituting trial on a claim-by-claim, ground-by-ground basis. In addition, the parties' and the public's confidence in the proceeding is enhanced because, unlike like a lay jury in district court litigation, a technically trained panel of three administratively trained patent judges decides the matter.

The public has recognized the value of these AIA proceedings by filing nearly 1500 petitions in fiscal year 2014, between October 2013 and September 2014. We had expected about 500 petitions a year, so receiving 1500 petitions does reflect the demand for these proceedings. And in fact, if the PTAB were a federal district court, it would be in the top three district courts and, depending on how you calculate, potentially even number one in the number of patent case filings. The others, of course, being the Eastern District of Texas and the District of Delaware.

Now, Congress intended that the AIA trial proceedings invalidate claims that don't meet current legal standards, particularly in the small subset of patents that are in, or likely to be in, litigation and therefore are of greatest economic significance. Let's dig deeper in terms of what the PTAB is doing once these petitions come in. In fiscal years 2013 and 2014, the PTAB instituted trials on seventy-five percent of petitions for both IPR, that's *inter partes* review, and CBM, covered business method patent reviews, the percent instituted petitions, seventy-five percent. What that means in terms of looking at just

the petitions themselves, three-quarters of the time the PTAB instituted the proceeding and the other quarter they denied it.

What is happening to the claims that are challenged? There have been statements about the difficulty of a claim finding its way through the process. So let us look at the actual numbers on this. The top band, there were 617 petitions IPR that were terminated, so went for the entire process through termination as of January 15 of this year. Of the claims in these petitions, over half, over 11,000 of the claims were not challenged at all, the petitioner did not challenge the claims, so there were just over 9000 claims challenged among those petitions. Of those, the rate of institution was 68%. What that means is that, of the claims that were challenged, the PTAB determined that roughly two-thirds of those were reasonably likely to be unpatentable on the grounds raised by the petitioner, and therefore a trial was instituted, and that nearly a third were not. The PTAB looked at those claims and said, "We don't think there is a reasonable likelihood of those being unpatentable; we aren't going to look at those." Now, of those 6114 claims that were instituted, 36% were affirmatively found unpatentable by the PTAB, 15% were cancelled or disclaimed without a determination of unpatentability by the PTAB, so at some point along the line, the patent holder cancelled or disclaimed the claims. Approximately half remain patentable. Of those that remain patentable, while many of them were the subject of a settlement before a final written decision and therefore didn't go through the entire process and have a PTAB ruling, the PTAB affirmatively found that 21% of those had overcome all the instituted patentability challenges. Those are claims that the PTAB, in instituting the proceeding, said, "We think there is a reasonable likelihood that these are patentable." But after having gone through the process, they said, "No, we don't think that they are unpatentable after all; we decided that they are not."

If you look at the entire group of 6114 claims that were instituted, roughly 10% of those went through the entire process and were found to have survived review. I know I have given you a lot of statistics, but the message here is that the PTAB is calling balls and strikes. PTAB proceedings are not simply "bring us a patent and some claims and we are going to invalidate them." Many of the claims don't even get to the institution phase. Of those that do, those that actually go through the process for the PTAB to substantively consider—while many of them do not survive review, which is not surprising given the intent of these proceedings given by Congress, and the passage of time, the change of law—a significant number of the claims actually are

found to remain patentable. And I do want to just make another comment because it came up in the first panel: in these IPR proceedings, the grounds for challenge are only sections 102 and 103, so section 101 as it would be implicated, for example by the *Alice* case, is not a ground for challenge in these proceedings.

In any event, with regard to the PTAB, the PTO last year solicited feedback from the public on all aspects of the AIA post-grant program. We are reviewing those comments and we'll make some initial modifications of the rules and guidelines surrounding those trials early this year with more involved changes later this year. It is extremely important to us that as these proceedings become even more a part of the system, they are efficient and fair. And every time I go out and talk about the PTAB, I encourage those to whom I am speaking to take a look and see whether becoming an administrative patent law judge is something that would be of interest. As the demand for the PTAB's services grows, we continue to hire more administrative patent judges and are looking to add another sixty this year. Those announcements, as all government civil service jobs, are posted on USAjobs.gov. Those judges, at present, work out of any of our five locations: Alexandria, Dallas, Denver, Detroit, and Silicon Valley; so not in Orange County per se, but just a quick flight up north.

I wanted to talk about promoting American business abroad. I mentioned part of the PTO's mission is to provide leadership on a global scale along with our partners in the federal government. We work with IP offices and governments around the world to ensure that those countries establish and maintain IP systems that protect American innovators who wish to export to and conduct business in those countries. Eighty percent of the world's purchasing power lies outside the United States, and exports already account for 13.5% of gross domestic product and are tied to over 11 million American jobs. But we can and should do more to develop more export opportunities for our American companies, and the PTO is doing its part. In addition to our team here in the United States, we have IP attachés posted in embassies in eight countries, promoting U.S. IP policy internationally, working with host countries to secure appropriate IP provisions in international agreements and encouraging appropriate IP protection and enforcement by our trained partners.

We also support the U.S. Trade Representative in its trade negotiations, including providing technical assistance on IP provisions. And as President Obama has said, the Administration will continue to work with Congress to enact bipartisan trade

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promotion authority to protect our workers and the environment, and to open new markets to American goods. Trade promotion authority is important to getting new trade agreements done, including the Trans-Pacific Partnership, which will help the United States continue to play an economic leadership role in Asia and knock down trade barriers to create more export opportunities for American companies and create more American jobs.

Now, I'm here, out from Alexandria, as part of a much larger and robust effort to reach out to what we call the innovation community. Because whether we are talking about our pursuit of quality, PTAB trials, or any other aspect of our work at the PTO, we are committed to hearing from our stakeholders and where possible addressing their concerns. The PTO's education and outreach efforts extend from those who are experienced users of the patent system, to those who need assistance as they seek patent protection, and to those who could benefit from patent protection but just don't know much about it and don't know where to begin. We seek public input on many key issues that implicate us at the Patent and Trademark Office, and there are many ways to participate. I've just listed a few examples from recent months on the slide. So as I have mentioned, we have PTAB meetings and roundtables across the country getting feedback about those AIA proceedings, we had a number of sessions on our *Myriad* and our *Alice* guidelines implicating section 101, and we recently had a trade secret symposium as trade secret legislation makes its way through Congress. With our copyright green paper, which was issued by the Department of Commerce in summer 2013, we are continuing to do work with our colleagues in government and around the innovation community on how the copyright system in the digital age can be best positioned to facilitate creativity and innovation.

We have also expanded our efforts further recently with an online patent litigation toolkit for those unfamiliar with the patent system who may have been threatened with a patent lawsuit or received a demand letter. The toolkit provides plain language answers to key questions such as: What is a patent? How can I tell whether or not I am infringing? And what are my options if I receive a demand letter or a lawsuit? Our new offices in Detroit and Denver are now open in permanent locations with both examiners and administrative patent judges on the ground, and later this year we will open permanent locations for our offices in Dallas and Silicon Valley, which now have administrative patent judges, but when they open in permanent space, will have examiners as well.



As we strive to ensure that the patent system works for innovators as well as the public as a whole, there is no silver bullet, no single step by Congress, the courts, or the PTO that will itself bring the system into perfect alignment or keep it there. But I am confident that all of us working together can and will keep the system effective and balanced and a force for innovation. Your engagement in this process is critical because ultimately the key to building a stronger and more consistent and more nimble twenty-first century IP system requires your engagement. Whether you are already a practitioner or student studying in this area, you will live and breathe the consequences of decisions we make about IP and patent law during the entire course of your career. And having that engagement, the conversation like we hope we will be having momentarily, is a priority for me, for the PTO, and for the Administration, because it helps us identify and define problems and potential solutions. It is a conversation that started well before I arrived and it is one that will continue into the future.

Before I came to D.C., I thought that having a seat at the table was a metaphor rooted in some historic practice, maybe from King Arthur having a seat at the table. But I have learned that in conference rooms throughout Washington, in government buildings, there actually is a table and having a seat at the table means you're part of the conversation among those who influence the decisions that get made. At the same time, while there are seats at the table, there are just as many seats not at the table lining the walls of the room. If you're in one of those seats against the wall, you are most definitely not at the table. Now, this is all true; I didn't realize it either. Among those in government, there is actually an unwritten protocol about who gets to sit at the table for any particular meeting. Some know to sit against the wall even if there are seats open at the table. Now, I am not one of those people, in part because I am usually in rooms where I plausibly can sit at the table. But as a litigator, if there is a table I will sit at it. The important message here is, as a private citizen, individually or through an association, you can have a seat at the table. Now, I make this distinction not because I spend lots of time thinking about seating arrangements, but because it is a helpful illustration of what engagement in the process looks like because there is a difference between commenting on the process from the outside and actually being a part of it. I bring this up today because there are voices that are in that room sometimes, and perhaps even in this room, in fact I guarantee you that there are voices in this room that aren't at the table but yet have deep expertise when it comes to IP and innovation and the ramifications of each on the real world. So to

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*Keynote Address by Andrew Byrnes*

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each of you here, be a part of the process and join us at the table. It takes some effort and engagement to do so, but whether you engage by attending our patent quality summit that will be happening in a few months, responding formally to our request for comments or a Federal Register notice, getting involved with one of our new satellite offices, participating in one of our topical round tables, or just relaying your views more informally to us, to me and my colleagues, or other policy makers, your participation matters. We, and our colleagues across the government, really are listening.

A lesson that I have taken from my experience thus far in government is that nothing is automatic about innovation or about the laws governing innovation. In fact, there is not even a consensus inside or outside government about what innovation means, but that may be the symposium for next year. What we have today is the result of choices we have made about how best to foster innovation, including striking the right balance between rewarding inventors and creators and enabling the next generation. Standing sentinel over innovation means that as the pace of technological change accelerates, as the costs of patent litigation grow, and as the patent law remains as dynamic as it has ever been, we have to revisit old choices and make new ones to keep the system in balance and effective. We at the PTO and the Obama Administration look forward to working with those of you here today and the entire innovation community on this critical effort. Thank you very much.

