



UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

March 7, 2023

Thomas J. Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Jenny Lester Moffitt
Undersecretary for Marketing and Regulatory Programs
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Dear Secretary Vilsack and Undersecretary Moffitt:

We appreciate the opportunity to work with you and your team in response to President Biden’s Executive Order (EO) of July 9, 2021, titled “Promoting Competition in the American Economy.”¹ This effort is part of a deeper and more meaningful collaboration between the Department of Agriculture (USDA), the United States Patent and Trademark Office (USPTO), and other government agencies.

As the President noted in the EO:

Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input industries — seed, fertilizer, feed, and equipment suppliers — and concentrated market power in the channels for selling agricultural products. As a result, farmers’ share of the value of their agricultural products has decreased, and poultry farmers, hog farmers, cattle ranchers, and other agricultural workers struggle to retain autonomy and to make sustainable returns.

The EO further directs the Secretary of Agriculture (the Secretary), in consultation with the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office (the Director of the USPTO), to submit a report to the Chair of the White House Competition Council. The report will relay any relevant concerns and strategies to help ensure “that the intellectual property system, while incentivizing innovation, does not also

¹ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

Thomas J. Vilsack and Jenny Lester Moffitt

March 7, 2023

Page 2

unnecessarily reduce competition in seed and other input markets beyond that reasonably contemplated by the Patent Act.”

Sharing the President’s concerns, the USPTO was pleased to work with you and your team on the March 2023 report entitled “More and Better Choices for Farmers: Promoting Fair Competition and Innovation in Seeds and Other Agricultural Inputs.” The report memorializes our shared priority of ensuring that intellectual property continues to incentivize innovation in the seed and agricultural input industries, while ensuring that the system as a whole does not unnecessarily reduce competition beyond what is reasonably contemplated by the Patent Act. Additionally, the report captures stakeholder feedback on competition, consolidation and market power, intellectual property, and other business practices in the agricultural industry that might be affecting the American farmer’s ability to participate in a fair and competitive market. The USPTO commits to working with the USDA to do its part to support the Biden-Harris Administration to help ensure that competition in agricultural markets remains vigorous and in accord with what is reasonably contemplated by the Patent Act.

The patent laws are designed to strike an important balance between providing incentives to innovate in exchange for increasing public knowledge about advancements by requiring public disclosure of patented inventions. On the one hand, the period of exclusive rights provided by the patent system permits innovators to raise capital, build their businesses, and bring new, innovative products and services to the marketplace. And on the other hand, by requiring disclosure of inventions to the public in patent grants and publications, the patent system provides the public with information that allows innovators to improve upon patented technologies, including how to make and use them in new ways. Though patents play a critical role in incentivizing and protecting the investment essential for innovation, including innovation necessary to mitigate climate-related disruptions to food and agricultural systems, we must make sure the system facilitates a fair and competitive market and does not unnecessarily discourage new market entrants. We further acknowledge the important role that other forms of intellectual property play in the seeds and agricultural landscape, in particular certificates under the Plant Variety Protection Act which are administered by USDA.

Thomas J. Vilsack and Jenny Lester Moffitt

March 7, 2023

Page 3

I look forward to continuing to collaborate with you and your team to further the Biden-Harris Administration's goals. To support our discussion, I am attaching a summary of the USPTO's current thoughts on what we can do as an agency, and in collaboration with the USDA, to make real progress. I look to advancing these initiatives and any others we may jointly develop.

Sincerely,

A handwritten signature in black ink that reads "Kathi Vidal". The signature is written in a cursive, flowing style.

Katherine K. Vidal
Under Secretary of Commerce for
Intellectual Property and Director of the
United States Patent and Trademark Office

cc:

Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Jonathan Kanter
Assistant Attorney General, Antitrust Division
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

USPTO Initiatives

The Administration believes that a robust patent system is needed to incentivize and protect the immense research and development that is essential to key and cutting-edge innovations, including innovation necessary to mitigate climate-related disruptions to food and agricultural systems. Going back to first principles, our patent system must work for the public good. We must not only incentivize and protect break-through innovation, we must also encourage inventors, companies, universities, and non-governmental organizations to collaborate and build on each other's ideas for the good of all. And, critically, we must bring innovation to impact for all Americans.

In the seed and agricultural space, this means ensuring that our patent system protects key innovation while facilitating a fairer and more competitive market that does not unnecessarily discourage new market entrants.

Because of the importance of this issue to our country, the United States Patent and Trademark Office (USPTO) is prioritizing the following initiatives. Moreover, the patent system should work to serve the public interest along with other forms of intellectual property (IP) that are important to the seed and agricultural sector, in particular certificates under the Plant Variety Protection (PVP) Act. PVP certificates strike a different balance from patents in permitting farmers to save seeds and for plant breeders to engage in continued research on the protected variety.

- ***Enhance collaboration with the U.S. Department of Agriculture (USDA).*** The USPTO will create formal mechanisms to collaborate with the USDA. Specifically, the USPTO will:
 - In consultation with the USDA, work with the Farmer Seed Liaison office to facilitate engagement and public input into existing public USPTO input processes including regarding prior art.
 - Explore joint USPTO-USDA opportunities, including issuing requests for comments and hosting roundtables, for collecting broader stakeholder input from researchers, breeders, farmers, and others in the seed and agricultural input space.
 - Explore initiatives to enhance the quality of the patent examination process for innovations related to agricultural products and processes, including opportunities for enhancing prior art search capabilities and providing additional training and guidance to patent examiners.

- Engage in a greater exchange of information regarding processes and procedures at the USPTO and USDA, including providing joint training and informational sessions on IP protection for seeds, varieties, and other agricultural inputs.
 - Collaborate on developing materials and conducting outreach to better educate plant breeders and farmers on IP protection and enforcement.
 - Collaborate on initiatives that enhance the transparency of IP information on existing IP rights for agricultural-related innovations.
 - Engage with recognized depositories to assess availability and viability of patented and off-patented germplasm.
 - Conduct a comparative analysis of the protection and enforcement of seed and agricultural-related IP in the U.S. with other jurisdictions, including underlying policies and practices. In addition, the USPTO plans to conduct an analysis to evaluate whether additional initiatives or changes will strengthen our intellectual property system. Director Vidal and the USPTO team will also explore this topic in bilateral and multilateral discussions with other countries.
 - Consider and evaluate new proposals for incentivizing and protecting innovation in the seed and agricultural-related space, including the addition of research or breeders' exemptions for U.S. utility patents, to ensure that our IP laws continue to incentivize innovation without unduly delaying competition and new market entrants.
- ***Work together to promote competition.*** The USPTO will work with and support the USDA, together with the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), to contemplate a number of actions to enhance competition in the seed industry.
- Conduct outreach and education to farmers, plant breeders, seed businesses, and the public, including around potentially anticompetitive behavior and how to file confidential tips and complaints.
 - Educate farmers about the rights conferred by the sale or voluntary exchange of seed that are subject to bag tags, licenses, and MTAs so that farmers and others better understand when use of those products is and is not subject to IP protections.

- Assess the impact of reduced competition and IP on pricing, choice, and availability of adapted varieties of commodity and specialty crops across growing regions.
 - Coordinate and consult on actions related to practices in the seed industry that may harm competition or adversely affect consumers. Provide information related to food security, genetic vulnerability, and regional production issues for consideration by DOJ and FTC in the context of competition matters that may come before them, including as they may relate to the appropriateness of providing non-exclusive licenses for IP to address anticompetitive practices and market structures.
- *Explore opportunities for promoting the development of generic competition when appropriate.*
- Improve the patent examination process to ensure the USPTO issues robust and reliable patents. In addition to the above initiatives, the USPTO, under the Biden Administration, continues to improve the robustness and reliability of patents. The USPTO issued a Request for Comment on Robust and Reliable patents on October 4, 2022. See <https://www.federalregister.gov/documents/2022/10/04/2022-21481/request-for-comments-on-uspto-initiatives-to-ensure-the-robustness-and-reliability-of-patent-rights>. Public comments can be seen at <https://www.regulations.gov/docket/PTO-P-2022-0025/comments>. The USPTO will study the comments received, will coordinate with the USDA on any feedback the USDA may have, and will move forward with guidance and rule-making as appropriate.



Office of the Secretary
Washington, D.C. 20250

March 7, 2023

Kathi Vidal, J.D.
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office
United States Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

Dear Director Vidal:

On behalf of the Secretary, I am excited to share with you our report “More and Better Choices for Farmers: Promoting Fair Competition and Innovation in Seeds and Other Agricultural Inputs.” As you know, the report satisfies the mandate set forth in President Biden’s historic Executive Order 14036, “Promoting Competition in the American Economy” (the EO) to produce a report on the intellectual property system and competition in seed and other agricultural input markets. As a consulting partner under the EO, we deeply appreciate the time, expertise, and spirit of collaboration you brought to our process. Our work to listen to a wide range of different viewpoints has, I believe, helped both our agencies better understand the challenges and opportunities we face in accomplishing our respective missions.

The USDA has unique historical ties with the USPTO. In the first half of the nineteenth century, the Patent Office, through its Division of Agriculture, maintained a federal seed repository and distributed seeds to farmers for free, so that farmers could create regionally-specific improvements to crop varieties through trial, error, and selection. In 1862, the Division was elevated to its own department, with the express mandate to “to procure, propagate, and distribute among the people new and valuable seeds and plants,” marking the creation of the USDA. In this way, facilitating access to innovative crop varieties is at the core of our agency’s mission. Later, when the Plant Patent Act was signed into law in 1930, the Act made a special provision for the assistance of the USDA to furnish relevant information to the USPTO. As you know, the USDA also administers certificates under the Plant Variety Protection Act, which provides a vitally important avenue for encouraging innovation while balancing the needs of farmers and plant breeders for saving seed and research. That long tradition of shared missions underscores how our agencies can work together in support of the needs of agricultural innovation today.

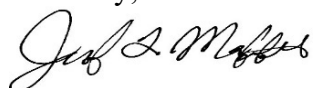
With that in mind, we are excited to announce a number of new commitments to enhancing transparency, choice, fair competition, and innovation. These include a new joint working group between the USPTO and USDA and a new USDA Farmer Seed Liaison, located in our Agricultural Marketing Service, to coordinate collaboration between our agencies and focus on some of the efforts outlined in our report. We also look forward to working together with the Department of Justice and the Federal Trade Commission to enhance the antitrust and consumer protection enforcement and regulatory environment that can support a fairer marketplace and robust innovation.

Director Vidal
Page 2

We encourage all those interested in learning more about our initiatives and ideas for further exploration to read our report, available at <https://www.ams.usda.gov/about-ams/fair-competitive-seed>.

Innovators in agriculture are a diverse community, from molecular geneticists to field breeders to farmers and seed keepers, and businesses large and small. Ensuring that all voices are heard is no small task but is vital to a vibrant and resilient food system. We appreciate the USPTO's engagement with our broad range of stakeholders and look forward to working together to ensure a fair and competitive market for the future.

Sincerely,



Jenny Lester Moffitt
Under Secretary
Marketing and Regulatory Programs

CC: Lina Khan
Chair, Federal Trade Commission
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