UNITED STATES
PATENT AND TRADEMARK OFFICE

Expanding Admission Criteria for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office Expanding Opportunities to Appear Before the Patent Trial and Appeal Board	Docket Nos. PTO-P-2022-0027-0001, PTO-P-2022-0032-0001

COMMENT OF THE ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE

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I. INTRODUCTION

The Antitrust Division of the United States Department of Justice ("the Antitrust Division") appreciates this opportunity to share its views with the United States Patent and Trademark Office ("USPTO" or "the Office") on its Requests for Comment in two separate but related rulemakings: (1) *Expanding Admission Criteria for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office*[1] and (2) *Expanding Opportunities to Appear Before the Patent Trial and Appeal Board*.[2]

The USPTO is considering changes to its current eligibility restrictions that would allow more practitioners to file non-technical design patent applications and increase the number of service providers that patent applicants can turn to in filing both design and utility patent applications. Similarly, the Office is considering whether to revise its registration requirements and expand the practitioners who are eligible to represent parties in an America Invents Act ("AIA") proceeding before the Patent Trial and Appeal Board ("PTAB"). The Antitrust Division applauds the USPTO for its efforts to improve access to the Office.

II. THE ANTITRUST DIVISION'S INTEREST

The mission of the Antitrust Division is to promote competition through enforcement of the federal antitrust laws and by advocating for sound competition principles. Competition is a core organizing principle of the American economy.[3] Vigorous competition increases economic liberty, opportunity, and fairness for consumers and workers alike.[4] Because of the importance of legal services to the economy, the Antitrust Division, along with the Federal Trade Commission, has long sought to foster competition by providing comments to policymakers and stakeholders on the scope of the practice of law, the unauthorized practice of law, attorney advertising, and other aspects of the regulation of legal services.[5] The Antitrust Division has also submitted amicus briefs to courts regarding the application of competition principles to the provision of legal services.[6] We consistently encourage legislatures, courts, and state

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[1] *Expanding Admission Criteria for Registration To Practice in Patent Cases Before the United States Patent and Trademark Office,* 87 Fed. Reg. 63,044 (Oct. 18, 2022).

[2] *Expanding Opportunities to Appear Before the Patent Trial and Appeal Board*, 87 Fed. Reg. 63,047 (Oct. 18, 2022).

[3] *See*, *e.g.*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 504 (2015) (referencing "the Nation's commitment to a policy of robust competition"); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

[4] *See*, *e.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (noting that the antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

[5] For the Agencies' joint letters regarding the practice of law, *see* U.S. DEP'T OF JUSTICE, *Comments To States and Other Organizations*, https://www.justice.gov/atr/comments-states-and-other-organizations (last updated Jan. 9, 2023); FED. TRADE COMM'N, *Legal Library: Advocacy Filings*, https://www.ftc.gov/policy/advocacy/advocacy-filings (last visited Jan. 13, 2023) (Topic Filter: Attorneys).

[6] *See*, *e.g.*, Brief for the U.S. Dep't of Justice and Fed. Trade Comm'n as Amici Curiae Supporting Respondent, *In re William E. Paplauskas, Jr.*, Case No. SU-2018-161-M.P. (R.I. S. Ct. Sept. 17, 2018).

bars to avoid restrictions that are not necessary to address legitimate and substantiated harms to consumers.[7]

The Antitrust Division recognizes the important role the USPTO plays in protecting consumers from harm and ensuring a high-quality patent system with high-quality practitioners. We do not believe that expanding the pool of patent attorneys and agents is in tension with these goals. In fact, imposing unnecessary restrictions on who can offer certain services can impose significant competitive costs on consumers, restrict access to patent legal services, deprive practitioners of economic opportunities, and inhibit innovation.[8]

III. FACTORS FOR THE USPTO TO CONSIDER

The Antitrust Division commends the USPTO for considering a variety of options in its efforts to expand admission criteria to practice before the USPTO. The Division supports regulatory restrictions when they are necessary to address well-founded quality concerns, but these restrictions should be appropriately tailored to, among other things, protect consumers without harming competition for patent legal services.

The Antitrust Division believes the factors that USPTO should consider when evaluating restrictions on eligibility include: (1) the risk patent applicants will receive inadequate patent counsel; (2) whether existing and potential safeguards (*e.g.*, ethics and competency rules, necessary qualifications) sufficiently protect against potential harms; (3) the potential effect on patent quality and on meeting consumer demand; (4) how expansion of the patent bar could increase competition and lower costs for patent legal services; and (5) whether the existing restrictions actually provide the intended benefits to consumers, patent applicants, and workers. The Antitrust Division is hopeful that taking these considerations into account will allow the USPTO to strike the right balance between protecting the public from unqualified practitioners and increasing access to the USPTO.

IV. EXPANDING ACCESS TO THE DESIGN PATENT BAR WILL ENHANCE COMPETITION

By expanding who can prosecute (or challenge) design patents at the USPTO, the Office can enlarge the pool of available service providers, including those practitioners whose background may be more tailored to the needs of a patent applicant. Expanding the pool of eligible bar applicants would also increase the supply of these services, which would tend to put downward pressure on the legal fees patent applicants must pay while increasing economic opportunity for practitioners. The Antitrust Division encourages the USPTO to consider these potential procompetitive benefits when assessing the impact of expanding access to the design patent bar.

A. Relaxing Eligibility Requirements Opens Opportunities for Workers

The Antitrust Division recognizes that patent prosecution can require specialized scientific knowledge and training. Nonetheless, the Antitrust Division believes that

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[7] *See*, *e.g.*, U.S. FED. TRADE COMM'N & DEP'T JUSTICE, Comments on the American Bar Association's Proposed Model Definition of the Practice of Law at 13-15 (Dec. 20, 2002), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf.

[8] *See id*. at 9-12.

consumers and practitioners generally benefit from competition in the provision of patent legal services and restrictions on entry into the patent bar should be limited to circumstances where they are necessary to protect consumers, practitioners, and patent quality.

As the USPTO recognizes, design patents are fundamentally different from utility patents, and these differences warrant considering whether there are qualified attorneys and potential agents who could meet the needs of applicants for design patents, yet are excluded from providing these services due to the Office's stringent scientific and technical admission requirements. Relaxing requirements for eligibility to the design patent bar could increase economic opportunities for practitioners by allowing them to access a new labor market for the provision of their professional services. In contrast, overbroad restrictions that are not limited to those necessary to ensure patent quality can needlessly restrict worker opportunity and hinder competition in those labor markets.

According to the USPTO's General Requirements Bulletin, an attorney must have "requisite scientific and technical training" demonstrated by a degree in a recognized field, or equivalent coursework in a science or technology field, in order to practice before the USPTO.[9] These eligibility restrictions reflect the technical nature of patents. These requirements apply equally to utility and design patents, despite the fundamental differences between the two.[10] For example, someone with a background in the arts likely could offer more valuable feedback on the aesthetics of a design than someone trained in sciences. The USPTO's own hiring practices underscore design patent applicants' logical preferences for someone with a degree more aligned with fashion or design than the hard sciences. In its current job posting for a Design Patent Examiner, the Office seeks individuals with an educational background in "industrial design, product design, architecture, applied arts, graphic design, fine/studio arts or art teacher education" who "[u]ses professional knowledge of designs and practices to evaluate the invention claimed in each patent application."[11]

The Antitrust Division does not advocate for the removal of non-degree specific eligibility requirements for design patent bar members, including requiring a knowledge of the USPTO and a basic understanding of utility patents. These skills can help ensure a design patent attorney or agent is able to recognize when a utility patent might be more appropriate and guide a client to qualified counsel. The professional responsibility obligations and duties of good faith, disclosure, and candor that all individuals associated

[9] *See* U.S. PATENT AND TRADEMARK OFFICE, *General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office* (Sept. 2022), *available at* https://www.uspto.gov/sites/default/files/documents/OED_GRB.pdf.
[10] *Expanding Admission Criteria for Registration To Practice in Patent Cases Before the United States Patent and Trademark Office,* 87 Fed. Reg. 63,044 (Oct. 18, 2022) ("Presently, there is only one patent bar that applies to those who practice in patent matters before the Office, including in the utility and design patent areas. The same scientific and technical requirements for admission to practice apply regardless of the type of patent application (*i.e.,* whether the application is a utility patent application or a design patent application.)").
[11] USA JOBS, Design Patent Examiner (Oct. 28, 2022), *available at* https://www.usajobs.gov/job/686135400 (job posting detailing the requirements and duties of a design patent examiner).

with the filing and prosecution of a patent have when dealing with the USPTO further mitigate concerns about service quality and will continue to support patent quality.[12]

B. Introducing More Competition to the Design Patent Bar May Lower Costs

Loosening the eligibility requirements is likely to lead to a greater supply of members of the design bar, as more practitioners would qualify under less stringent restrictions. This increased supply would likely result in lower attorneys' fees, which account for a substantial portion of the costs of obtaining a design patent.[13] In the absence of such a change in eligibility requirements, designers would be forced to choose between hiring a more expensive member of the design patent bar or foregoing design patent protection altogether. This tradeoff, and its potentially harmful effects on the competitive patent ecosystem, is mitigated when more patent bar members are available to offer their services and, in turn, lower costs for patent applicants.

C. Lowering Barriers to the Patent Bar Promotes Competition

Expanding the educational degree requirements for design patent work to include fields like industrial design, product design, graphic design, fine/studio arts, and art teacher education would expand competitive economic opportunities for practitioners and increase access to patent legal services. Several commenters have pointed out that certain technical requirements are often unnecessarily rigid and can serve as unreasonable barriers to practice before the USPTO.[14] Recalibrating eligibility criteria has the potential to increase representation within the patent bar,[15] and this expansion may also better align to consumer demand for more choice in patent legal services and improve the profession overall.

Expanding access to design patent bar membership may also increase access to the patent system for inventors by encouraging more inventors to seek design patents, which would promote innovation. As one commenter points out, "[o]pening the door

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[12] 37 C.F.R. §§ 1.56, 42.11 (2022). Members of the design patent bar also would, like all other members of the patent bar, be subject to USPTO Rules of Professional Conduct, which conform to the American Bar Association's Model Rules of Professional Conduct. These rules would provide a safeguard that design patent bar members would need to abide by certain ethics rules in their practice and could undercut worries that creating a design patent bar could unnecessarily harm consumers or impair the ethical duties of the patent bar writ large. *See* U.S. PATENT AND TRADEMARK OFFICE, *Ethics Rules* (Sep. 26, 2019), *available at* https://www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners/current-patent-practitioner/ethics-rules.

[13] Christopher Buccafusco, Mark A. Lemley & Jonathan S. Masur, *Intelligent Design*, 68 DUKE L.J. 75, 107-08 (2018) (detailing the average costs associated with a design patent).

[14] *See, e.g.,* Comment by ADAPT, Comments in Response to "*Expanding Admission Criteria for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office,*" 87 Fed. Reg. 63044, Docket No. PTO-P-2022-0027-0025 (Jan. 16, 2023); *see also* Comment by Uber, *infra* note 15; Comment by Invent Together, *infra* note 15.

[15] *See* Comment by Uber, Comments in Response to "*Expanding Admission Criteria for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office,*" 87 Fed. Reg. 63044, Docket No. PTO-P-2022-0027-0017 (Jan. 17, 2023) (providing data and reporting that science and technical requirements hinder patent bar diversity); Comment by Invent Together, Comments in Response to "Expanding *Admission Criteria for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office,*" 87 Fed. Reg. 63044, Docket No. PTO-P-2022-0027-0014 (Jan. 13, 2023) (providing similar data on lack of diversity).

wider to more patent practitioners from under-represented groups may, for example, enable those newly-admitted practitioners to then open the door to more inventors from under-represented groups as well."[16]

Promoting economic opportunities and increasing the pool of practitioners that can assist more innovators can be achieved in a manner consistent with the goals of the USPTO to ensure a well-functioning patent system. As is under consideration, the USPTO could create a separate design patent bar that expands the list of recognized degrees or coursework to include subject areas better tailored to the work of a design patent attorney or agent. Such an option would enhance competition in the market for design patent attorneys and may result in more applicants seeking these patent legal services.

V. EXPANDING ADMISSION CRITERIA TO THE PATENT BAR AND TO PRACTICE BEFORE THE PATENT TRIAL AND APPEAL BOARD CAN ENHANCE COMPETITION

The USPTO is also considering changes to its bar admission criteria that would expand the pool of practitioners eligible to prosecute utility patents and would increase the number practitioners that can practice and serve as lead counsel in a proceeding before the PTAB. Both of these changes have the potential to enhance competition for patent legal services and increase consumer choice while preserving patent quality.

A. Criteria Relevant to Utility Patents

Like the design patent bar, the Office's current requirements relating to utility patents may be excluding highly qualified candidates from practicing before it. First, the current requirements that a computer science degree must be from a university with specific accreditations for eligibility purposes may exclude degrees from a number of the most highly-ranked schools in the country. For example, Stanford, Berkeley, Caltech, MIT, and Yale do not have ABET accreditation. The Division also sees competitive benefits in the Office regularly revisiting its Category A requirements so that it can make sure practitioners with relevant and desirable backgrounds are not arbitrarily excluded.

B. Expanding Practice Before the PTAB

In its Notice, *Expanding Opportunities to Appear Before the Patent Trial and Appeal Board*, USPTO has asked for the public's views on whether it should amend its rules or procedures that currently require each party in an AIA proceeding[17] to designate a lead counsel that is a registered USPTO practitioner. This designation requires a

[16] Comment by Uber, *supra* note 15; Comment by Invent Together, *supra* note 15 ("Research demonstrates that more individuals from historically underrepresented groups may patent when they can retain patent attorneys who look like them, understand them, and can relate to them. However, only 20% of patent attorneys are women, 5% are people of color, and 2% are women of color."); *see also* Comment by Meredith Lowry, Comments in Response to "*Expanding Admission Criteria for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office,*" 87 Fed. Reg. 63044, Docket No. PTO-P-2022-0027-0026 (Jan. 25, 2023) ("The change to the admission criteria will allow presumably more women to practice design patent law and aid more women inventors in acquiring patent assets. The Office is also aware of the substantial benefit these assets provide woman-run companies.").

[17] In AIA proceedings a third-party petitioner may challenge the validity of the claims in an issued patent before the PTAB.

practitioner to demonstrate possession of "the legal, scientific, and technical qualifications" through a registration examination. 37 C.F.R. 11.7(a)(2)(ii), (b)(ii). The USPTO is considering potential reforms that (1) would expand opportunities to practice before the PTAB by amending the rules for admitting non-registered practitioners and (2) would allow non-registered practitioners to serve as lead counsel in proceedings when they currently can only serve as back up counsel. The USPTO has asked whether these practitioners need only meet fitness-to-practice standards (*e.g.*, no prior suspensions or disbarments, no prior sanctions or contempt citations, and familiarity with the PTAB's rules and Trial Practice Guide) or whether they should meet additional standards and training for admission.[18]

As the Office recognizes, relaxing the current requirements would increase opportunities for legal practitioners. Indeed the Office noted in its Request for Comments that its goal is "to expand the admission criteria to practice before the PTAB so more Americans, including those from traditionally under-represented and under-resourced communities, can participate in Office practice, while maintaining the Office's high standards necessary for the issuance and maintenance of robust and reliable intellectual property rights."[19] As with the proposals discussed above, this change could increase competition to the benefit of consumers, inventors, and practitioners. The Antitrust Division wholeheartedly supports the Office's consideration of these issues. We defer to the USPTO on how best to craft its admission rules in a way that promotes its goal of protecting the public from unqualified practitioners without erecting unnecessary barriers to entry to practice in patent cases before the PTAB.

VI. CONCLUSION

For the reasons above, the Antitrust Division commends the USPTO for considering the impacts of its eligibility and registration requirements on economic opportunities for workers, including patent practitioners, and how these policies affect access to patent legal services.

We appreciate this opportunity to offer our views to the Office, and look forward to continuing participation as the Office addresses these important issues.

Respectfully Submitted,

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[18] *Expanding Opportunities to Appear Before the Patent Trial and Appeal Board*, 87 Fed. Reg. 63,047 (Oct. 18, 2022).
[19] *Id*.