Consumer Groups and Patent Law Change

Background

Six consumer groups sent Senate Majority Leader Harry Reid (D-Ned.) and Minority Leader Mitch McConnell (R-Key.) a joint letter on November 7, 2007 urging immediate floor action on S.1145, legislation that would alter U.S. patent laws. The six are the Consumer Federation of America, Consumers Union, Electronic Frontier Foundation, Knowledge Ecology International, Public Knowledge and the United States Public Interest Research Group.

Their letter noted their support for a number of provisions in the bill, two of which are of great concern:

1. Create a post-grant review process that would allow anyone to challenge a newly issued patent within a year of its grant or whenever over the patent's life that a third party can show a risk of potential harm from the patent.

2. Adoption of a new method to calculate the apportionment of damages that an infringer must pay the patent owner.

Analysis

These two provisions would bring radical changes to the U.S. patent system.

Although the proposed post-grant review process may be intended to improve patent quality and reduce litigation, unfortunately it will have the opposite effect. It would actually lower patent quality by increasing the burden on the U.S. Patent and Trademark Office (PTO) without providing PTO more resources. The agency would be forced to shift salaries for examiners to new administrative law judges hired to adjudicate post-grant challenges, leaving fewer examiners to address the threshold work of granting or rejecting applications. The PTO is already experiencing problems -- it was recently reported that there is a growing backlog in patent applications now exceeding 760,000. By imposing new duties upon the agency without providing more resources, this problem will only become worse.

Similarly, the post-grant review requirements will have the perverse effect of increasing, rather than decreasing, patent disputes. The estoppel provisions in S. 1145 – those provisions limiting the re-adjudication of a matter in a different forum -- are simply not adequate to keep infringers from challenging patents both at the PTO and in court. Thus,

an infringer will be able to challenge the infringed patent in both forums. Japan abandoned its post-grant review process in February 2004 because it was burdensome and used by predators to game the patent system to extort an inexpensive license or disadvantage inventors. The post-grant provisions in S. 1145 are based on the model used by the European Patent Office, where the challenge rate is 5.4 percent of all issued patents. By contrast, the total litigation rate in the U.S. – including *ex parte*, *inter partes*, interference and federal lawsuits – is 1.8 percent of all issued patents. The assured result of adopting a European-style post-grant review system will be a surge of U.S. patent disputes.

The apportionment of damages is also a key issue in S. 1145. The current framework for determining royalty damages allows courts and juries to consider a variety of factors. S. 1145 would raise one factor – apportionment – above others and make it preeminent. Chief Judge Paul R. Michel of the U.S. Court of Appeals for the Federal Circuit has written that the adoption of this new approach will lead to extra years of litigation before the rules are clarified, as well as large expenses for economic analysis to meet the requirements of the legislation. If this provision is adopted, the result will be chaos in the courts and higher expenses for both plaintiffs and defendants. Small entity inventors, who are already disadvantaged by legal expenses, will be further hampered.

Ironically, if the positions advocated by these six groups were taken, consumers would be one of the primary victims. S. 1145 would lead to massive red tape and judicial proceedings that would take away one of the prime benefits of a patent – the time an inventor would have exclusive use of their creation. It would mean fewer new products and less economic competition, all which would mean fewer consumer choices at higher prices. Although the intent of the six consumer groups is to support legislation which will benefit consumers, S. 1145 actually will be anti-consumer in its effect.

The Signatories' in Patent Issues

Each of these six groups has a deep knowledge and distinguished record in dealing with various consumer issues. None have an equally eminent record in dealing with patent issues.

These consumer advocacy groups are far removed from the product development stage that involves patents. They have no exposure to the crucible (i.e. creation) stages of the innovation ecosystem. Their focus is on product quality, safety and achieving low prices at the tail end of the product development pipeline. Patents come into play at the very start of the innovation pipeline and their relationship to product quality and pricing is far more complex. For example, sometimes a patent for cost-reducing a product enables investment to lower product costs for medicines and other vital goods. Sometimes a patent for a new essential device or drug enables investment needed to create such an essential device or drug, although it may expensive.

The point is that Congress should weigh the value of these recommendations by the six

consumer groups against their experiences and expertise with the creation stage of the innovation process.

- **The Consumer Federation of America** has done dozens of landmark studies on antitrust, consumer literacy, energy, guns, insurance, investments and savings, real estate, banking, credit, consumer protection, food, agriculture policy, housing, mortgage lending, the Internet, product safety, telecommunications, and utilities. Its website identifies no studies or Congressional testimony on the patent law provisions now before the Senate.

- **The Consumers Union** also has a distinguished record in the hundreds of consumer-related studies it has done. Its activities with patents are almost exclusively limited to issues involving generic medicines. Its website identifies no studies or Congressional testimony on patent law provisions now before the Senate.

- **The United States Public Interest Research Group** has done outstanding work on issues such as selling dangerous toys, lobbying reform, improved drug safety, stopping identify theft, holding corporate executives accountable, stopping predatory lending, and reducing fire-related dangers from cigarettes. However, its website identifies no studies or Congressional testimony on the patent law provisions now before the Senate.

- **Knowledge Ecology International** is actively involved on issues such as the compulsory licensing of patents and ways to enhance access to medical technologies and drugs. It has also done advanced research on the history and use of patent pools. Its website, however, identifies no studies or Congressional testimony on the patent law provisions now before the Senate.

- **The Electronic Frontier Foundation** has done historic work on copyright law and Internet-related issues. In 2004, Novell, a Coalition for Patent Fairness member, funded EFF's project to challenge patents that it believes should never have been issued. The 'Patent Buster" project continues. The EFF website identifies no studies or Congressional testimony on the patent law provisions now before the Senate.

- **Public Knowledge** is a public interest group that focuses on citizens' rights in the emerging digital culture. Its position on patent reform mirrors S. 1145. In addition, Public Knowledge advocates removing the presumption of validity that issued patents have, a change that would greatly complicate the ability of inventors to secure financing. It also advocates allowing circuit courts, other than the Federal Circuit, to hear patent appeals, which would take the judicial process back to a time before 1982, when the Federal Circuit was created. The Public Knowledge website identifies no studies or Congressional testimony on the patent law provisions now before the Senate.

Consumer Groups, Patent Law Change and the U.S. Senate

A review of the prior work and websites of the six consumer groups shows little involvement with the complex matters involved in S. 1145. Their recommendations should be judged accordingly.