"Patent Reform Act of 2007" is Bad for America's Citizens, Small Businesses and Economic Prosperity

March 2008

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Small Businesses Create 90% of All New Jobs; Yet Receive Less than 23% of All Patents.

Reliable statistics show that "...*small business is…where the overwhelming majority of job growth and innovation occurs*." [1] (Emphases supplied) Currently "…*businesses with fewer than 20 employees …are responsible for more than 97 percent of all new jobs*, according to a new report by the Small Business Administration." [2] (Emphases supplied) In addition, *between 1989 and 2007 firms with less than 20 employees created 20.174 million or 86.1% of all net new jobs; firms with less than 500 employees created 21.899 million or 93.5% of all net new jobs*; while for this same period firms with 500 or more employees created a paltry 1.532 million or only 6.5% of all net new jobs. [3] (Emphases supplied)

Yet only 10% of all patents are issued to individuals,[4] and *only "…23% of patents are issued to 'small entities*'…" [5] (Note: A 'small entity' is defined as 'individuals, small businesses having fewer than 500 employees, universities and non-profits,' so patents issued to small businesses and individuals could be substantially less than 23%). In addition, and as alarming, the *percentage of patents issued to 'small entities' has steadily declined, by 20% over the past 9 years, while the percentage for large entities had steadily increased*.[6]

Ownership of Utility, Plant and Reissue Patents (UPR)	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Total Utility, Plant and Reissue (UPR) Grants (FY)*	140,159	143,681	165,500	170,638	162,216	173,065	170,637	152,088	164,115
Large Entity Grantees - Percent of Total Patent Grants	71%	71%	72%	73%	76%	77%	76%	76%	77%
Small Entity Grantees - Percent of Total Patent Grants	29%	29%	28%	27%	24%	23%	24%	24%	23%

As Ronald Reagan said, "Government can and must...foster productivity, not stifle it." [7]

These statistics have profound implications - not only for America's economic well-being, but also in terms of America's declining 'democratic ideals.'

The plain fact is our *patent system is not helping to promote economic growth and prosperity among individuals and small business which create the jobs most likely to stay in America*.

The Current Patent System is Too Expensive and Slow, Creates Uncertainty, Favors Big Business, and Hurts Small Businesses, Individual Inventors and Our Economy

It has been know *for over 20 years* that the, "...the PTO lacks the funding necessary to address issues of patent quality..." [8] And "... the USPTO has been unable to hire,

train, and retain the number of skilled examiners needed to cope with the ever increasing number of patent application filings." [9]

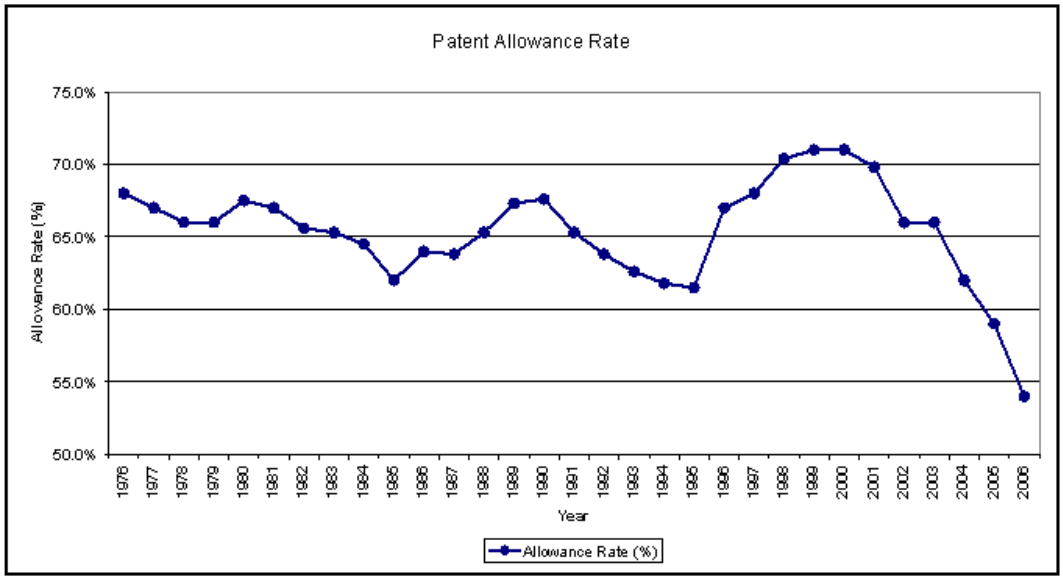
In the 1990s it *used to take less than a year to have a patent application reviewed and issued*. But currently, contrary to the statistics put out by the USPTO that it's taking less then 3 years on the average to issue a patent, it is now taking 4 years or more for 'first office actions' by the USPTO on 'original' computer-related patent applications, and another several years to have a patent 'examined' and issued. [10]

This is a direct result of the failure of congress to fund the PTO in the face of a wave of innovation and progress in our country. The result is not enough examiners, poor work conditions at the USPTO, and incompetent USPTO management. And this hurts small businesses and individual inventors disproportionately.

Because of the backlog, it is doubtful that in far too many cases examiners are doing anything but the most cursory review. To get applications off their desks and because they don't have the time to do proper searches, *PTO examiners are doing very poor reviews and searches, citing totally irrelevant art, and issuing unjustifiable rejections*, forcing inventors to pay $10s of thousands to respond to them.

This is *particularly hurtful to small inventors* who don't have money to pay for numerous rejections and appeals, and who may be trying to raise money for their ideas from investors. I'll guarantee you, investors don't like putting their money into a new idea or business when they're told that the PTO has rejected an inventor's claims. You can just kiss your 'widget' goodbye.

As a result "At 54%, *the patent allowance rate was also the lowest on record* (for 2006). Patent allowance rate is the percentage of applications reviewed by examiners that are approved." [11] (Emphasis supplied)



One will notice that the 'allowance rate' stayed relatively constant between 60% and 70% for 25 years, then there was a rapid decline.

This rapid drop may be patent examiners 'weeding out' bad patents, but more than likely it is a direct result of poorly-done examinations by over-worked examiners unable or unwilling to do proper 'prior art' searches and issuing hasty rejections to 'small entities' which can least afford expensive 'continuing examinations' and 'appeals.'

This rapid drop in the 'approval rate' exactly coincides with the lack of funding and increase in patent applications, and the reduction in the approval rate for 'small entities' which create virtually all new jobs in our country.

This should raise all sorts of red flags for Congress to look into. Yet Congress has done nothing.

There is Far Too Little Certainty and No Finality in the Patent Process.

There is far too little certainty and no finality in the patent process.

On top of the lack of funding, the entire patent process is too slow, too expensive and too lengthy and patents are subject to endless challenges, both in the PTO and in the courts, which make them expensive to obtain and enforce, particularly by individual inventors and small business.

On top of the *normal prosecution process, which now takes 4 to 5 years*, there is the possibility of "...expensive and lengthy interference proceedings that are often ineffective. Some have *estimated that the average cost of an interference proceeding is $600,000, which can present a substantial barrier to smaller players...*"[12]

For a big corporation this is not a problem, but I can assure you that few individual entrepreneurs and small businesses have $600,000 lying around.

Making matters worse there is the *prospect of a virtually unlimited number of challenges in the USPTO called 'reexaminations' for an unlimited period of time*. The procedure for reexamination is conducted separately from court cases for infringement and is an open-ended process allowing a challenger to go back time and time again for multiple 'bites at the apple.' [13] [14] [15]

This lengthy, open-ended process creates a huge cloud of uncertainty over the value of a patent, and does nothing but hurt the patent holder; in particular the individual inventor, small businesses and the American economy.

The open-ended nature of the process is unheard of. *In all other areas of the law there is some sort of 'finality,'* either through 'statues of limitation' or the thru the concept of *res judicata*.

How many applications are abandoned because of these delays and costs, how many inventors don't even file applications because of the time, expense and ultimately the uncertainty of the value of a patent that this open-ended process creates? I wonder.

Small Business and Individuals are Subject to the Same Processes and Costs in the PTO and in the Courts as Large Multinational Corporations

The problem is compounded by the fact that, while many other areas of government regulations have different rules and procedures for 'the little guy,' except for some small relatively inconsequential exceptions such as a lower 'filing fee', *small entities i.e. small business and individuals, are subject to the same processes and costs in the PTO and in the courts as behemoths like IBM and Microsoft*; the exact same processes and costs of patent prosecution and, God forbid, patent litigation!

The Burden of Patent Litigation Falls Disproportionately on Small Business, Entrepreneurs and Individual Inventors

In addition to the uncertainties that the USPTO process causes for a patent holder, there is the prospect of years of expensive litigation; particularly if a patent is really worth something and disrupts the activities of major corporations. And *the delays, cost and uncertainty of patent litigation impose a disproportionate burden on the*

individual inventor and small, new businesses which has a significant adverse effect on the economy. "Defending against infringement is disproportionately burdensome for small venture backed companies while the benefit of infringing relative to the cost is disproportionately attractive to large companies;" [16] "With few exceptions, small entities cannot afford to litigate their patents;" [17] "…*the cost of just getting in front of a jury is staggering: A big patent trial now costs each side more than $4 million to try*;" [18] (Emphasis supplied) and, "*Trial court delays in patent cases are already typically two-to-three years*…" [19] (Emphasis supplied)

But that's great for the major corporations because they can use the threat of the cost of litigation to bludgeon the small business and individual inventor over the head. They love it like this. They use the cost, time and effort of patent litigation to their advantage, to drain and exhaust the small patent holder's resources, get him to capitulate. It's no big deal to them because they can afford to budget these things; litigation is just another cost of doing business, and a small cost at that. IBM for instance "employs 370 corporate patent attorneys" and they're going to be around forever. Five, $10 million or more and 3 to 4 years to litigate a patent is nothing for them.

It becomes like a poker game, they know they might have a losing hand but they're in a position to 'up the bet' forcing the little guy to 'settle for pennies on the dollar,' or fold 'a better hand.' As the saying goes, "You don't pull on Superman's Cape."

But it's hardly good for the 'little guy.' The *cost of patent litigation will deter many small businesses from defending their inventions, settle for lower licensing fees, or capitulate to a large corporation threatening to enforce their patent, thus hurting the formation of new businesses, job creation and innovation.*

Recent Court Decisions Diminish the Value of Patents and Make Defending Patents Much More Expensive and Difficult for Small Businesses and Individuals

The old not-so-funny joke is, "A patent is a license to litigate." This is not true, *a patent is in actually a license to litigate, and litigate, ad infinitum.*

To make matters worse, *a series of recent court decisions will make defending a patent process much more difficult and costly for individuals and small businesses, not less!*

"In the next decade...expect to see at least another two-fold increase in patent litigation...as a result of the greater ease with which an accused infringer can now file suit for declaratory judgment,...MedImmune Inc. v. Genentech Inc., 127 S. Ct. 764 (2007) [20] ...an accused infringer may be more willing to sue for declaratory judgment of invalidity in light of the Supreme Court's KSR International Co. v. Teleflex Inc., 127 S. Ct. 1727 (2007), which may make it easier to prove obviousness, and in light of eBay (eBay Inc v. MercExchange, 126 S. Ct. 1837), which makes it much more difficult...to obtain an injunction." [21] In addition there is In re Seagate, 497 F. 3d 1360 (Fed. Cir. 2007) [22] which will make 'willful' infringement more difficult to prove. These have been enormously valuable tools to the small patent holder in getting fair treatment from big corporate infringers, and are now much less effective protection.

eBay v. MercExchange [23] will make getting an injunction *much* more difficult for a patent holder. The so-called 'strict constructionists' *threw out over 190 years of legal precedent* and totally ignored the word '*exclusive'* in Article I, Section 8 of the U.S. Constitution giving "…Inventors the *exclusive* right to their…Discoveries." [24]

(Emphasis supplied) It is in line with the Court's disregard for private property rights shown in other recent cases.[25]

With a vastly watered-down threat of injunction big companies will be much more willing to litigate, particularly against the little patent holder without the financial resources to defend it. As Bruce Sewell, General Counsel of Intel Corporation states *as a result of eBay, "There will now be a greater willingness to take cases to trial (by infringers)*..." (Emphasis supplied) [26] eBay is an invitation to infringe on a wholesale level by the big, multinational companies, will create an even bigger backlog of litigation in the US courts instead of less, and which will unfairly penalize the small inventor in America.

In addition eBay and these other *recent court decisions will help to dry up new 'capital' for inventions which will slow economic growth*. "...the effect of eBay is to increase the number of patent litigations; it increases inefficiency in the marketplace and decreases the liquidity of patents as an asset class. Quite simply, inefficiency and illiquidity means lower value." [27]

The Consequences

New ideas are already extremely risky. As Mark Twain said, "A person with a new idea is a crank until the idea succeeds." And as Nicolò Machiavelli said in The Prince, "Nothing is more dangerous or difficult than introducing a new order. This is because those who benefited from the old order will fiercely oppose the prince who tries to introduce a new order, whereas those who stand to benefit from the imposition of a new order will offer only lukewarm support." [28]

Research and development is a crap shoot, most take years of hard work filled with uncertainty. And commercialization is hugely risky for a new product. Many of these inventions will be extremely valuable to your economy, but try to go out and find customers or investors and venture capitalists willing to invest money, a bank willing lend money to build a new factory with just a 'good idea.'

The cost doesn't only include patent attorneys at $300-$400 per hour to prosecute a patent, $100 thousands for 'interferences,' and 'reexamination,' and possibly $1 millions and years to litigate a patent.

The patent system has become a perfect storm of greater delays, costs and risks for small business and individuals. The system encourages lengthy if not endless challenges and litigation. There is literally no finality to the process.

The indirect costs of this lengthy, open-ended process and the uncertainty it creates *distracts the inventor from further creativity*, *deters capital investment in new technology, deters job creation, and inhibits producing better products.*

And *these burdens fall disproportionately on the individual inventor and small businesses which are the source of virtually all new jobs in the country.*

Quite frankly, our country's economic well-being and prosperity suffers.

Bad Patents, Unjustified Patent Litigation and Patent Trolls are Not the Problem - Patent Suits Have Remained Only 1.5% of all Patents Issued

The advocates of the Patent Reform say that it is *needed to reduce a flood of bad patents and flood of patent litigation*. Mark Chandler, general counsel at Cisco Systems states they have seen, "...a huge increase in the amount of litigation and in expense." [29] Maybe it's because Cisco Systems is infringing patents, because it's obviously not because there is an increase in patent litigation generally.

But bad patents and excessive patent litigation are just not a problem. There is absolutely no abuse of the legal system by patent holders to enforce bad patents. Patent enforcement suits filed have remained consistently low, at *only around 1.5% of all patents issued, for the past 15 years*! [30]

And the number that have actually gone to trial are miniscule; "…*there were only 102 jury trials about patent disputes in 2006,* out of 2,830 such cases filed, according to the Administrative Office of the U.S. Courts." [31]; *or only .056% of patents granted.* And this has remained historically low. [32] *And the "...CAFC has upheld their (patents) validity in greater percentages*..." [33] (Emphasis supplied)

Maybe I'm missing something, but this sounds pretty good to me. So where are all the bad patents, and the flood of patent trolls who are supposed to be ruining everything for America? You got me.

And contrary to what its proponents are saying, *patent reform is actually more likely to increase, not reduce litigation.*

Big Business Has Used a Couple High-Profile Law Suits to Dupe Congress into Passing Patent Reform which Will Hurt the Patent System, Small Business and the Economy

These bills could more rightly be called the 'Protect Big Corporations from All those Pesky Little Inventors Act of 2007!"

Patent reform was proposed by a group of very large companies in order to reduce their risk of infringement. Large companies in the US are tired of having their lunch eaten by small startup companies that invent new things, get patents, and beat the big companies in the market place.

"Current efforts in Congress to reform patent laws are being driven by lobbyists...based on the industry interest they represent." [34] So-called 'Patent Reform' is just another example of big business and big money taking over the legislative process. "The list of companies favoring the proposed Patent Reform Act of 2007...seemingly includes all of today's major tech-sector players..." [35]

The bill is backed by Microsoft and other major IT firms who dominate their markets and don't want to be bothered checking who owns the technology they have grabbed and used. Microsoft lost a $520 million award to Eolas Technologies and the University of California in 2003 for patent infringement. In another case, it had a $1.5 billion judgment overturned on appeal this last August, but faces a retrial. "… super-dominant companies cannot *abuse their position to hurt consumers and dampen innovation*." (Emphasis supplied) [36]

Microsoft has never been a great innovator. They copied 'windows,' networking, GUI interface, and the Web browser from others. And Microsoft has a horrible reputation for abusing smaller companies. Remember Microsoft was losing a major 'anti-trust' suit a few years ago until the Bush Justice Department gave them a 'get out of jail free' card.

But rather than change their bullying behavior, Microsoft would rather dupe Congress into changing the patent laws.

"There is a far greater national interest in the promotion and protection of innovation across the economy. Congress should not 'reform' the patent system just to benefit one corporate sector – especially a sector whose desire to weaken the protection of other people's intellectual property for its own gain is fundamentally illegitimate." [37]

These big corporations have taken the opportunity of just a few high-profile cases to claim that patent litigation is rampant and out of control and 'dupe' Congress again, this time with the canard call of 'bad patents,' unjustified patent litigation, and 'patent trolls' being the cause of the problem. A couple sensational high profile cases, such as the recent Blackberry and Microsoft have elicited a *'the sky is falling'* mentality which Congress has bought into 'hook, line and lobbyist check.'

Consider this *statement by Representative Howard Berman*, the Chairman of the House Judiciary Committee who has pushed for this absurd legislation, *"The courts are confronted with huge numbers of infringement cases, many of which just aren't meritorious. There is an industry of individuals and companies that seek patents – not because they intend to produce and sell some product – but solely to seek licensing fees…the notorious patent 'trolls.'"* [38]

Oh really? There are no "huge numbers of infringement cases." There is no "industry of…patent 'trolls'." And there are not "too many questionable patents." The shocking thing is the there were 225 members of the House who voted for this legislation. Talk about 'Alice in Wonderland' government.

Congress Ignored Small Business and the Individual Inventor

But while entrepreneurs and small businesses is busy creating 97% of all new jobs, the House was more interested in listening to and protecting corporate America; the 'big IT companies' and the 'pharmaceutical companies,' and not the small businessman or individuals who drive this Country's economy with new jobs.

As noted by Congressman Sensenbrenner, *the House heard only one individual inventor 'behind closed doors,'* "Although a small high-tech company was included in the subcommittee's closed-door session on the legislation, *no small business representative was included in the subcommittee's only public hearing on the bill*… I think we must reach out to small businesses and venture firms on this matter. *To the extent that we reduce intellectual property protections domestically, we reduce the willingness of investments in start-up activities and job growth*. We also unwittingly contribute to overseas competition. The proposed legislation should be assessed in terms of job creation and retention." (Emphasis supplied) [39]

Thank you Mr. Sensenbrenner!

And in the Senate report on the bill, "...you'll see that it's the witness for Goldman Sachs quoted again and again and again; it's the witness for J.P. Morgan quoted again and again and again; it's the witness for Visa quoted again and again and again...I would have thought that the Congress would have relied quite heavily on broad-based groups ... there is no footnote quoting any of these broad-based groups' input..." [40]

Even the very prominent, "…IEEE-USA, which represents American electronics and electrical engineers...were not asked to participate in any of these discussions." And there was "…an utter failure by its sponsors to seek out the perspective of Silicon Valley start-ups." [41]

But small businesses don't give that much money to Congress, they're too busy creating 97% of all new jobs here in America. Why should Congress listen to them?

Patent Reform Will Make the Process More Costly, More Time-consuming and Difficult, Make Infringement Easier and Lessen the Penalties if Caught, and Diminish the Value Patents.

There are major concerns from many corners about the overall content of Patent Reform. *So-called Patent Reform will exacerbate the problems with the patent system, particularly for small businesses and individuals, not reduce them.* Patent Reform will make the patent process more difficult, more uncertain, and more costly, and make patents worth less.

The pending Patent Reform legislation is opposed by the biotech and pharmaceutical industries, smaller domestic manufacturers, many Fortune 100 companies (e.g., Caterpillar, Corning, Milliken), major research universities, the U.S. Patent and Trademark Office, the Department of Justice, the Department of Commerce, the National Venture Capital Association, the Patent Office Professional Association (i.e., the patent examiners), and many labor unions.

Venture capital firms around the country have reinforced the message that S. 1145 as written *will chill investment in new patents*... [42] placing a bigger burden on small emerging business.

There are concerns that the pending patent reform will make infringement easier, for example by the Chinese.[43] As stated by the AFL-CIO's legislative director, William Samuel, "At a time when the Chinese government is constantly being challenged to live up to its intellectual-property obligations, we do not want to take actions (on Patent Reform) that may weaken ours…," [44]

Expect a title wave of litigation in the next 5 to 15 years in the light of Patent Reform and recent court decisions. Chief Judge Paul Michel of the U.S. Court of Appeals for the Federal Circuit recently wrote Senators Leahy and Hatch to say that "…S. 1145 and H.R. 1908 *would impose significant administrative burdens on an already-stressed federal bench*. We should learn more about the judicial impact of the proposed legislation."[45] (Emphasis supplied) "*Trial court delays in patent cases are already typically two-to-three years. The new provision could double that delay*…" [46]

Who better than the Chief Judge of the CAFC is in a position to know?

Patent Reform – Specific Provisions

First-to-File Will Hurt the Small Inventor

> This provision will disproportionately hurt the small inventor and small business who don't have large 'patent staffs' on hand but who do come up with 'good ideas' all the time. First-to-File priority system will give an advantage to big well-capitalized 'patent factories' like IBM, able to deluge the PTO with many applications; opponents to "… this provision assert that it will create a race to the Patent Office...*significantly disadvantage small inventors that do not have the resources that larger corporations do*..." [47] (Emphasis supplied)
>
> This provision may very likely violate Article I, Section 8 of the U.S. Constitution which grants patent protection to "…*Inventors* the exclusive right to their…Discoveries." [48] (Emphasis supplied)

Publication after 18 Months (S. 1145 SEC. 7 and H.R. 1908 Sec. 9) Will Hurt Small Entities Disproportionately

This provision will affect small entities disproportionately. The law should *allow applications to remain 'non-published' for small entities to enable them to develop their creative ideas in secret* and avoid others rushing in to preempt with numerous small changes or even outright 'pirating' which would happen with 'first to file.' "The Congressional Research Service estimates that counterfeits constitute 15 percent to 20 percent of all products made in China. And yet the number of criminal cases related to intellectual property fell by 35 percent in China in 2006. In addition to undermining the strength of America 's patent system, such rampant, unchecked counterfeiting abroad stifles economic growth and technological progress at home." [49] *'Pirating' by foreigners will be particularly difficult and costly to fight by small inventors with limited resources.*

"The historical U.S. system…protected intellectual property and trade secrets…*publishing the invention's details after only 18 months is a windfall for pirates*, especially in China. The U.S. Trade Representative's Office has stated that *intellectual property theft by the Chinese is at "epidemic" levels. Why make it easier?* Section 337 of U.S. trade law protects American companies from foreign intellectual property pirates…Yet the effect of the new "reform" bill on Section 337 has never been considered by the current Congress."[50] (Emphasis supplied)

Prior Art Search Reports (AKA "Applicant Quality Submissions") (H.R.1908 Sec. 12 and S. 1145 Sec. 11) Will Impose a Tremendous Cost on Small Businesses and Independent Inventors with Limited Financial Resources

This provision is a result of Congress' unwillingness to properly fund the PTO, and *most assuredly will impose a tremendous cost on small business and independent inventors with limited financial resources*. It changes the burden from the USPTO having the burden to show why an invention is not patentable, to requiring applicant to perform searches, submit prior art and convince an Examiner that the invention is patentable.

Combined with the proposed 'post-grant review procedures' (below), it is predicted that these provisions can *easily increase the cost of obtaining patents for small business and individuals by $100s of thousands*, particularly for complicated patents and patents that 'step on the toes' of big corporations. At $300 to $400 per hour for a patent attorney, four weeks of work cost somewhere around $50,000. To IBM this is the cost of 'paper clips;' to a small business or entrepreneur, it's huge!

And the 'small entity' inventor could well be exposed disproportionately to "... the "inequitable conduct" defense..." [51] because of the undue burden placed on them. And "…*these provisions would add significantly to the burden and expense of the patent application process* and potentially expose applicants to charges of inequitable conduct or failure to meet their duty of candor." [52]

Or is that just what the authors of this legislation intend?

And the *House exemption for so-called "Micro Entities"* with 2.5 times the median income *is so small, it's absurd*. It *would not help 99.9% of small businesses* which are the real economic engine of our country. Someone needs to buy each Congressman and Senator a pocket calculator.

Even patent examiners oppose this change stating, "*The AQS requirement is dangerous*....The search is a critical part of the examination process and should remain an inherently governmental function performed by patent examiners who are free of conflicts of interest…The *proposed legislation attempts to solve the prior art problem by providing multiple opportunities for multiple parties to provide multiple prior art submissions to invalidate a patent...undercut the economic value of patents by dramatically increasing litigation costs and eliminating the certainty required by venture capitalists who provide funds to bring an invention to market. A far simpler solution* to the prior art problem is *to retain experienced and highly skilled patent examiners and provide them with sufficient time and resources so they can uncover the relevant prior art during examination. The job should be done right the first time*." [53] (Emphasis supplied)

Brilliant! In other words, "A job half done takes twice the time and costs twice a much."

Conversely, this provision is a 'no brainer' for large 'multinational' with large full-time patent staffs. IBM, Microsoft, etc. have hundreds of full-time, well-paid people working around the clock prosecuting patent applications and defending infringement suits for them. For them it a miniscule cost of doing business.

It is just one more way for the 'big guys' to get a leg up.

Pre-Grant Submissions by Third Parties (S. 1145 SEC. 7 and H.R. 1908 Sec. 9)

This provision is subject to abuse by large corporations if used against a small inventor with no provisions for protection. There would be nothing stopping them from submitting vast amounts of irrelevant 'prior art' and burdening the PTO and the inventor with having to review and deal with it, slowing the process and adding to the costs of the applicant. This is particularly hurtful when the patent office is already understaffed and back-logged.

Any such a provision should require petitioner to submit *all* prior art they could reasonably have presented or be estopped presenting it later, to limit the number of 'most relevant' references, and *be estopped from raising such 'prior art' in all subsequent proceedings* if they fail to prevail. They should also be forced to pay a very significant fee for such a filing

Without some sort of protection this will allow challengers numerous and endless 'bites at the same apple' to the detriment of the small inventor.

Post-Grant Review Procedures (S. 1145 SEC. 5 and H.R. 1908 SEC. 6)

Post-grant review coupled with 'prior art search requirements,' and 'pregrant challenges by third parties' are insidious provisions that *will significantly add to the cost and uncertainty of obtaining a patent.* It is estimated that these provisions together *could increase the cost of obtaining a patent by $100s of thousands for a small business or individual inventor*.[54] Such expanded costs favor deep-pocket corporations over smaller firms and inventors. *This burden will fall most greatly on the small inventor*.

The same people calling for Patent Reform, "...charge that the lack of post-grant review procedures has resulted in poorly defined patents and increased litigation after patent issuance." [55] *Again, I repeat, there has been in fact no "increase in litigation." But what this does do is impose a huge additional*

burden and greatly increased uncertainty for a small patent holder by making a patent subject to an open-ended series of costly challenges.

In addition to eliminating the presumption that a patent is valid, it weakens the evidentiary standard to challenge a patent. This diminished standard threatens to undermine the confidence in the validity of patents issued by the USPTO. And it *allows for a patent to be challenged both in the PTO and in court at the same time, further draining the independent inventor and small business of time and money.*

Even worse is the huge cost and burden created by the 'uncertainty.' The so-called '1st Window' *will cast a shadow of uncertainty over a patent for up to 2 ½ years plus an additional appeal period of unknown duration*. Even worse a proposed *'second window' casts a shadow of uncertainty* over the value of a patent *for the entire life of a patent*.

Because of this uncertainty, a small patent holder is much more likely be precluded from raising sorely needed capital, [56] generating new customers, hiring new employees, and growing our economy than if he had a patent less subject to costly and endless challenges and uncertainty.

Could anything be more absurd and hurtful to our economy?

This provision is simply a ploy by large, well-capitalized companies to make the value of patents uncertain for those without huge financial resources to defend their inventions. *It is an attempt to force patent holders to expend huge amounts of time, money and effort to protect their inventions. It will only benefit the large corporations and greatly hurt small businesses and individuals.*

The big winners will be the multinationals with lots of lawyers who want to wear down small patent holders. It will be 'open season' by major corporations who will pay full time staffs to review patents, one after the other. And guess who they are going to 'pick on,' the little guy!

Venue and Jurisdiction (S. 1145 SEC. 8 and H.R. 1908 SEC. 11)

This is proposed to stop a 'flood of litigation,' by 'bad patents,' owned by all those 'bad patent trolls;' but as previously pointed out, *a 'flood of litigation,' 'bad patents,' and 'patent trolls' are not the problem*.

This is purely designed to reward and accommodate the big corporations who infringe, and benefit those with substantial resources. These provisions are *clearly designed to punish the independent and small business inventor by making litigation more expensive, more difficult, and delaying a timely, cost-effective resolution of patent disputes.*

The major proponents of this provision bring cases in the 'rocket dockets' at the same frequency as other litigants. The real effect will be to *preclude the small inventor from utilizing convenient, efficient and knowledgeable forums, while leaving them available for most of the major corporations* who have established business operations in those venues, i.e. the big corporations.

Transfer for 'evidential burden' is 'code talk' for judges who love to clear their dockets whenever they have a chance, particularly for judges who don't want to deal with complex patent litigation.

This provision *will reward slow and inefficient courts adding to the cost and delay of litigation which will, again, disproportionately burden the small independent inventor*.

Jurisdiction should be assigned to courts that are good and fast at hearing patent cases, like U.S. District Court for the Eastern District of Texas, U.S. District Court for the Eastern District and Virginia and U.S. District Court for the Western District of Wisconsin,[57] not slow, inefficient and unknowledgeable courts.

"Apportionment" for Infringement Damages (H.R. 1908 Sec. 5. and S. 1145 SEC. 4.) Lowers Damages for Infringement and Will Hurt the Small Inventor

"Proponents argue this provision is necessary in light of recent cases where patent owners have been awarded excessive judgments … that the current system has created an industry of patent speculators…to extort money from infringement defendants." [59]

As previously noted, *there simply is no epidemic of bad patents, excessive litigation and excessive damages being awarded*. As already noted, the amount of *litigation has remained minuscule at around 1.5% of patents issued over 15 years*. Considering the costs and risks of obtaining a patent, that is remarkable.

These provisions *will hurt patent holders* and would reduce the damages that a judge and jury can award to an inventor. This provision, coupled with making a finding of 'willful infringement' more difficult, is *particularly damaging to patent holders in light of the recent court decisions*.

These provisions will not adequately compensate patentees for the actual harm caused by the patent infringement and the related cost of the research and development that produced the invention in question. Courts can (and do) ensure that any damages awarded by juries are appropriate and not excessive by exercising their discretionary oversight.

Again, *the winners will be the multinationals with big legal departments and deep pockets, and the most likely to suffer will be small business and independent inventors.*

The opposition to this provision is far-reaching.

Venture capitalists, the ones who take great risk, helping to turn innovation into real economic progress *favor maintaining "…the current multi-factored analysis..." [60] under Georgia-Pacific*. [61] (Emphasis supplied)

Many others argue similarly; "...proposed legislation to limit damages would weaken patents and encourage infringement." [62] "…an apportionment standard that was universally condemned more than 60 years ago would represent a major step backwards for our patent system…" [63] As the head of the Biotechnology Industry Organization in Washington DC has said about 'apportionment' of damages, "*Under that kind of approach, it pays to infringe*. *And if it pays to infringe, people will no longer invest in companies with novel...patents*." [64] (Emphasis supplied)

Europeans found that the apportionment methodology like that proposed in patent reform inadequately compensated patent owners and inadequately deterred infringers, so they changed their law two years ago.

The legal profession concurs. As pointed out by Richard A. Epstein, professor of law at the University of Chicago and a senior fellow at the Hoover Institution, "…after the US Supreme Court's 2006 decision in Ebay v. MercExchange …*The absence of reliable injunctive relief should lead Congress to beef up damages to pick up the slack. Unfortunately, the PRA appears to weaken the damage remedy*…" [65] (Emphasis supplied) And as pointed out by Chief Judge Paul R. Michel, US Court of Appeal for the Federal Circuit, "…the provision on *apportioning damages…is a massive undertaking for which courts are ill-equipped…the costs in delay and added attorneys fees for the parties and overburden for the courts would seem to outweigh any potential gains*…"[66] (Emphasis supplied)

This will provision *will disproportionately hurt small patent holders* who are already least able to afford the huge costs of patent litigation.

Willful Infringement (S. 1145 SEC. 4.) Damages Should be Strengthened, Not Weakened

It appears that the current bill would also narrow the potential situations where willful infringement may be found making it more difficult to prove.

A series of recent cases including eBay, making obtaining an injunction for infringement much more difficult, and In re Seagate, making proof of 'willful infringement' more difficult already will invite more infringement by big corporations against the small patent holder. *The burdens in litigation are now already much greater for the patent holder and there is now less chance the infringer will ever be 'penalized.'*

This change in patent law is designed specifically to make it easier of an infringer to bankrupt a small patent owner through costly litigation. It will lead to more infringement, more litigation, not less, and will put the patent owner at a greater disadvantage then is currently the case.

Lessening the penalties for infringement will encourage big corporate infringers to 'game the system,' invite litigation, lessen the value of patents for the small patent holder, and will stifle capital investment in small companies and job growth. The provisions in patent reform will devalue patents by allowing willful infringers to pay considerably less in monetary damages, effectively allowing large companies to buy – through monetary damages – the right to trespass on patents of small businesses.

This *doctrine of "willful infringement" needs to be strengthened in favor of the patent holder* to discourage corporations from trespassing on the intellectual property rights of individual inventors and small businesses.

Interlocutory Appeals (S. 1145 SEC. 8 and H.R.1908. Sec. 11)

This again is clearly an *attempt by those with deep pockets to delay and increase the costs of litigation which will disproportionately burden the small inventor.*

As Chief Judge Paul R. Michel, US Court of Appeal for the Federal Circuit states, "We already get each patent case two or three times, and now it's going to be four or five times. It already takes, what, $4 or $5 million in the average case, and somewhere on the order of five to eight years? Well, maybe *it's going to end up taking $8 or $10 million and we're going to be at eight to 12 years before we have a final result* of a damages..." [71] (Emphasis added)

It will simply be *another layer of cost, delay and uncertainty for the small inventor.*

Rule-Making Authority (H.R. 1908 SEC. 12)

The USPTO currently has limited authority to promulgate regulations and Congress would be well advised not to give it broad rule-making authority because of *the PTO's questionable rule making track record*.

This would be misplaced Congressional power and responsibility. There is simply too much at stake.

There are numerous allegations that "The Patent Office is already 'politicized'" and that the administration is already manipulating the Patent Office. [72] Giving the PTO 'broad rule-making authority will make *politicization of the process a virtually certainty*, making the PTO more subject to 'lobbying' and 'political pressure' where *'small business and individuals investors have little influence*, but where major corporations have full-time staffs to read and comment on regulations, and 'lobby' bureaucrats.

Already many of the rules promulgated by the PTO are controversial at best and "…*impose the greatest burden on innovators and small entities*." [73] (Emphasis supplied) The PTO is frequently criticized for rules that are either outright illegal, or as Senator Charles Schumer recently concluded about the PTO's recent, highly controversial "Continuation Rules" "...may have the *unintended consequences of stifling… innovation*." [74] (Emphasis supplied)

Take for example *the PTO's "Accelerated Examination Program"* which has gone over like a 'lead balloon.' This program which was *designed to speed the approval process to 12 months has had, get this, exactly 650 applications total out of a 1 million pending applications. That's a whopping .065%! At that rate you'll get through the pile in, um, let's see, in exactly 1,538 years! Way to go guys! Keep up the good work!* [75]

Sec. 553 of Administrative Procedure Act, gives the public the opportunity to comment on proposed regulations. "USPTO claimed that their rules are exempt from the Administrative Procedure Act and, by inference, the *Regulatory Flexibility Act" [76] which requires an agency to 'where possible minimize potential economic impact' on small entities*. It is the *position of the USPTO that it is exempt from the RFA requirements* because it alleges its rules are 'procedural' in nature and therefore are not covered by the RFA thereby *allowing the PTO to totally disregard the impact its rules have on 'small entities.'* [77]

This position can *hardly be good considering small businesses create 97% of all new jobs*.

The effect is that, except for a smaller filing fee, *a small entity has to go through the exact same PTO process as multimillion dollar companies* which have huge full-time staffs and virtually unlimited budgets. This is a huge and unfair burden on individuals and other 'small entities' as well as our economy.

A Slow, Costly, Poorly Functioning Patent System is a Formula for Economic Disaster

Two hundred years ago America's wealth was in agricultural land and natural resources, 100 yeas ago it was in manufacturing and industrial assets, and today it is

in 'intellectual property;' "...intellectual capital has emerged as a leading asset class...intangible value as a percentage of market value has grown from 16.8% in 1975, to 32.4% in 1985, to 68.4% in 1995, and to 79.7% in 2005..;"[78]

So fostering the growth of 'intellectual property' should be given the highest priority.

But while China's patent office was not established until the mid 1980's "...*already as many patents are filed each year in China as are filed in the US*..."[79] (Emphasis supplied); Congress starves funding for the PTO and panders to big corporate donors; the PTO brags "...*at 54%, the patent allowance rate was also the lowest on record*," [80] (Emphasis supplied); fewer and fewer patents are issued to individuals and small business which create virtually all our jobs; and the courts and Congress create laws which burden them even further.

This is a formula for economic disaster.

Suggestions for Real Patent Reform

Congress needs to pass real patent reform to simplify, reduce the cost of, and add certainty to the process for small inventors and small businesses. This should include:

1. Keep 'first to invent' to protect the real inventors;
2. Keep applications 'non-published' and confidential until approved to allow inventors the time to refine, raise capital and commercialize their inventions;
3. Fund the PTO to retain experienced and highly skilled patent examiners and provide them with sufficient time and resources to perform *thorough* 'prior art' searches and examinations; then endless, multiple reviews, challenges and litigation will not be necessary.
4. Create special low-cost rules and procedures to streamline and simplify patent examinations, 'interference', and 'reexamination' proceedings for small entities and micro-entities. This should include:
    a. have the patent office do the review work including prior art searches for 'small entities' at no cost to the inventor;
    b. expedite small entity patent applications to a mandatory 12 month review to 'final office action;'
    c. appropriate funds to pay for 'micro entity' (defined as an individual or business with 20 employees or less) patent counsel of their choosing; this money will come from Congress and fees from the large patent applicants; in the long-term, this will be paid in full from increased tax revenues generated by increased jobs and economic growth); or, alternatively, require *all* PTO approved 'patent lawyers and patent agents' (for the privilege of practicing before the PTO) to allocate not less than 10% of there time before the PTO representing 'micro entities' *pro bono;*
5. Put greater finality in the process, thereby creating greater certainty for the value of a patent, by limiting the number of challenges and the time period for challenging patents, both in the PTO and in the courts:
    a. limiting the number of challenges and the time period for challenging a patent once it is issued, both in the PTO and in the courts,

b. limiting *any* PTO 'reexaminations' to be brought within 12 months and requiring a final decision within 18 months from issuance and publication;

c. require any challenger to the validity of a patent to elect either a PTO or a court proceeding, but not both;

d. requiring any entity requesting more than a certain number of 'reexaminations' in any period to pay for the cost of such proceedings, including reimbursing the patent holder if unsuccessful;

e. introducing '*res judicata'* to PTO 'reexamination' proceedings and patent infringement legal proceedings, preventing raising *any* 'prior art,' 'inequitable conduct,' or 'obviousness' arguments in *any* subsequent PTO or legal proceedings, i.e. limiting challenging any patent as being valid to 'one bite of the apple,' thereby leaving only the questions of 'infringement,' 'willfulness,' and 'damages' for any subsequent proceedings;

f. limiting bringing any 'declaratory judgment' action to 12 months from, the earlier of publication or actual notice of alleged infringement;

6. Reverse eBay v. MercExchange decision by eliminating the "four-factor test" and *reinstituting the 200-year-old "absent exceptional circumstances test"* for the issuance of an injunction to protect the small patent holder,

7. Reverse In re Seagate rationale by strengthening the finding of 'willful' infringement and the right to 'enhanced damages' for any patent issued to a 'small entity' by imposing on an infringer "…upon notice, an affirmative duty to promptly, and without unreasonable delay, make a good faith effort to determine whether the patent is either invalid or not infringed, and notify the patent holder in writing stating with particularity all facts and circumstances why the patent is believed to be either invalid or not infringed, and…further, limiting any subsequent defense(s), to those facts and circumstances so raised, during any subsequent legal action to enforce such patent;" this will reduce infringers ignoring patents and using 'catch-me-if-you-can' tactics;

8. Require an infringing defendant wishing to raise any defense of 'inequitable conduct' to state the specific facts and circumstances alleged in the earlier of, any response to actual notice of alleged infringement, and any answer to a complaint; this will reduce defendants from raising bogus defenses, which is frequently the case, adding to the cost of litigation needlessly;

9. Allow a 'small entity' to sue an infringer in any jurisdiction in which the defendant is 'doing business;'

10. Establish and properly fund efficient 'special patent administrative law courts,' separate from the PTO and free from political influence, staffed with judges and staff familiar with complex patent litigation, with expeditious, convenient, and low-cost procedures for patent enforcement;

11. Allow 'accelerated tax write-offs,' e.g. 2-3 years, under the IRC for any capital investment in 'small entity' patent-pending or patented technology, to attract 'high risk' investment capital for 'small entity' inventors;

12. Extend the life of a patent to 20 years from the date of final resolution of any challenge to the 'validity' of a patent;

13. Amend the "Administrative Procedure Act" and the "Regulatory Flexibility Act" to require the USPTO to 'minimize the potential economic impact' of its rules on 'small entities;'

This will actually create jobs, stimulate the economy, stop jobs from going overseas, reduce wasteful litigation, improve the patent system and reward American inventors for ingenuity and being creative.

Conclusion - 'Patent Reform' Will Hurt Individual Inventors, Small Businesses, the Creation of New Jobs and the American Economy.

If Congress cares about American jobs and prosperity they should not pass so-called Patent Reform. It was proposed by a group of very large companies and will reward and benefit, for the most part, only a relatively small number of large and powerful corporations.

Small businesses create virtually all new jobs in this country yet receive only a small fraction of patents issued.

The lack of funding by Congress has caused overworked patent examiners to do cursory and inadequate patent searches and reject a disproportionate and increasing number of patent applications by individual inventors and small businesses.

In addition, individual inventors and small entities are subjected to the same lengthy and costly and indefinite patent and litigation processes as multimillion dollar corporations.

A series of recent court cases will make it more difficult and more costly to enforce patents, particularly for the individual patent holder and small businesses. And slow and inefficient courts add to the cost and delay which, again, disproportionately burden the small independent inventor and small business.

The current patent and legal process it too costly, too lengthy and creates too much uncertainty particularly for the small inventor and small business, greatly diminishing the value of patents, deterring capital investment in new business, and stifling job creation and economic growth.

Most of the proposed reform provisions such as burdensome and expensive mandatory search requirements, an indefinite post-grant opposition process, excessive venue restrictions, costly interlocutory appeal provisions, and apportionment of damages, pose serious negative consequences for the small independent inventor and small business.

Patent Reform will make the patent process more difficult, more uncertain, more costly, and weaken the enforceability and lessen the value of patents. The combined effect of so-called Patent Reform and court decisions will be to discourage and inhibit innovation and cause the real driver of our economy individual entrepreneurs, individual inventors, and small businesses to suffer, inhibiting job growth and American technological leadership in a competitive global economy.

If Congress cares about losing American jobs overseas they would start by fostering innovation and job growth here in America by reforming the patent system for small business and individuals. Hundreds of thousand of new jobs each year and American prosperity is at stake. Congress, do the right thing. Give American small businesses, inventors and entrepreneurs a fair deal and 'Main Street' will reap the dividends, not just Wall Street.

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