

February 1, 2011

The Honorable John Boehner
The Honorable Harry Reid
The Honorable Mitch McConnell
The Honorable Nancy Pelosi

Dear Speaker Boehner, Senators Reid and McConnell, and Rep. Pelosi:

We are writing to ask that you prevent the passage in this Congress of patent legislation that hampers U.S. competitiveness and threatens American jobs by undermining property rights. With our economy in crisis and millions of Americans out of work, this is the wrong time to jeopardize our recovery by passing legislation to remove incentives for innovation and commercialization of new products and processes.

Now being discussed is so-called "patent reform" legislation, like that offered by Rep. John Conyers and Senator Patrick Leahy in the 111th Congress, which would cripple most of America's smaller inventors, research consortia and universities, and even the larger industrial firms that depend on patents. Downgrading patent rights -- which are fundamental property rights -- will hamper innovation and domestic manufacturing. Unfortunately, some Members of Congress are poised to move ill-considered patent legislation through the House and Senate this year. Diminishing patent rights would be dangerous to the future of our economy and our country's global leadership, and must be stopped.

The Federal Government does many things that exceed its constitutional authority and hamper our free-enterprise system. In contrast, issuing patents is one of the few things specifically mentioned in the Constitution. According to Article I, Section 8: "The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Founders understood that protection of intellectual property was vital to innovation and progress. President Washington urged the first Congress of the United States to pass laws encouraging American innovation. James Madison wrote in the Federalist Papers, "The utility of this power will scarcely be questioned." Yet, today it is being threatened in the Senate and the House -- at the behest of a minority of large technology companies.

Sadly, the Federal Government has fallen down in its patent responsibilities and has become a bottleneck to genuine innovation. According to the United States Patent & Trademark Office (USPTO), the average patent applicant must wait 25 months before his or her application is first acted upon. The logical remedy to this problem is to fully fund the USPTO, allowing it to set user fees and keep them to run USPTO efficiently and effectively, rather than letting them be diverted to other parts of the government. In recent years, approximately \$700 million originally

On the contrary, there could hardly be a more critical time for reform of our patent system. The America Invents Act, S. 23 would clarify and update the patent law in a balanced, thoughtful manner and will have a major, positive impact on investment in R&D, bring new products to consumers, and create new high-wage jobs.

S. 23 has the support of universities (AAU, COGR, AUTM), independent inventors, and the nearly fifty companies of the Coalition for 21st Century Patent Reform (for a complete list of Coalition members, see <http://www.patentsmatter.com/about/coalition.php>), AIPLA, IPO, PhRMA, and BIO.

The Chief Executive Officer of Caterpillar, Doug Oberhelman, commented in an op-ed ("Keeping American businesses in business") late last year on what the real impact of patent reform will be: "A strong, efficient patent system, including a well-funded patent office, is critical to promoting and protecting American innovation...Bipartisan legislation that would strengthen the patent system, bring us in line with other countries and stimulate the economy is awaiting floor time in the Senate. As companies consider where to invest billions in research and development, the U.S. needs to show that it's open for business and make patent reform a priority."

While it is implied in the above paragraph that the Federal Government "threatens" to exceed its constitutional authority by the passage of S. 23, there is no explanation of why this would be the case -- as indeed there cannot be. S. 23 has the full endorsement of the Administration, an endorsement it would surely not give to an unconstitutional bill. Moreover, while S. 23 is in fact supported by a majority of large companies, it is important to note that it is also supported by independent inventors and universities who lend their support because it will improve the patent system, not undermine its constitutionality.

Those favoring S. 23 have long favored authorizing the Director of the USPTO to set the fees charged by the Office (provided it is accompanied by a mechanism to ensure that the fees collected can be retained and used by the Office), but contrary to the preceding statement, this authority is only a partial solution. To effectively deal with the growing number of patent applications, the key tools (first-inventor-to-file, enhanced post-grant procedures, etc.) to improve efficiency and quality must also be put in place.

allocated to the USPTO has been used for general government spending, causing a huge backlog of approximately 720,000 patent applications. This is the situation that must be reformed immediately.

Instead, some in Congress – again following the lead of several large multinational companies – want to make it easier to infringe patents, easier to challenge patent rights in administrative proceedings and in the courts, and more expensive for inventors to defend their patents. By creating a new, expensive procedure to challenge the validity of a patent throughout its life, the benefits to patent-holders become far less certain. Incentives to seek patents are severely weakened, and venture capitalists face much higher risks when backing new ideas. The cumulative effect of such "reforms" would be to raise barriers to innovation and dis-incentivize commercialization of those ideas. Changes along these lines will certainly not help us to remain economically competitive in the world economy, which is why officials in China and India have hailed the proposed "reforms" as helpful to their economic interests.

Additionally, some of these so-called reforms have been proposed in the name of "harmonization" with foreign law. Frankly, this notion is misguided. Our competitors should have to "harmonize up" to our superior intellectual property regime, rather than our having to weaken our patent system and "harmonize down" to their levels. Does the United States really need to be "harmonized" with a calcified European system or the impossibly unfair Japanese system, not to mention the Chinese system, where intellectual property theft is a way of life? Such "patent reform" will lead to the plundering of American intellectual property and the loss of American factories and jobs to overseas competitors.

The proposed reforms really benefit large, established corporate market players at the expense of U.S. economic growth. Start-up companies drive innovation and job creation. About one-third of all patent applications are made by independent inventors, small companies, universities, and nonprofit research groups. Some large companies, however, which ironically benefitted greatly from the current patent system when they were start-ups, fear having their market positions disrupted or constrained by new ideas outside their control. They want current law rewritten to make challenges to patents easier and more frequent after they are granted.

This phony, market-distorting "patent reform" is bad for America. We ask that you stop any such legislation from reaching the floor and protect the property rights enshrined in the Constitution. Our nation's economic future depends on your cooperation.

Sincerely,

Phyllis Schlafly
Eagle Forum

Kevin L. Kearns
US Business and Industry Council

Edwin Meese, III
Former Attorney General of the United States

Morton Blackwell
Chairman, Weyrich Lunch

Contrary to the assertion that large multinational companies want "to make challenges easier" and "more expensive," those supporting S.23 for the very opposite reason – it would put in place important safeguards that would streamline post-grant procedures and protect patent owners. In the "first window" post-grant review (PGR) proceeding available during the initial nine months following patent grant:

- the threshold for initiating the proceeding requires that the information presented in the petition be sufficient to establish that it is more likely than not that at least 1 of the challenged claims is unpatentable;
- a petitioner cannot initiate a PGR if it has previously filed a civil action challenging the validity of the patent or more than six months after a petitioner is required to respond to a civil action filed by the patentee;
- a petitioner may not request or maintain a PGR with respect to a claim on any ground that the petitioner raised or reasonably could have raised during a PGR, and may not assert the invalidity of a claim in a civil action arising under section 1338 of title 28 on a ground raised during a PGR that resulted in a final written decision;
- if a patentee files an action alleging infringement within 3 months of patent grant the court may not stay its consideration of a motion for a preliminary injunction on the basis that a PGR has been filed or instituted;
- all PGRs will be conducted by the Administrative Patent Judges on the Patent Trial and Appeal Board ("PTAB"); and,
- a final determination in a PGR must be issued not later than 1 year after it is instituted (with a possible 6 month extension for complex cases).

Similar safeguards and protections for patentees would be added to "second window" inter partes reexamination (IPR) proceedings. These include a higher threshold (reasonable likelihood of prevailing) for initiation, stronger estoppels (no subsequent proceedings in the Office or court on grounds that "the petitioner raised or reasonably could have raised"), IPRs would be conducted by the PTAB, and final determinations would be required in one year/18 months. These safeguards make IPRs quicker, fairer, and less burdensome for both patentees and challengers than existing inter partes reexamination proceedings.

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To the contrary, the processes that S. 23 would put in place would enhance the predictability of patents and give venture capitalists greater confidence that the property rights they were considering investing in were sound and secure.

Articles, such as the one by Yongshun Cheng, former senior judge and Deputy Director of the IP Division of the Beijing High Peoples Court that was published in November 2007, was directed at H.R. 1908, a bill that was strongly opposed by a broad and diverse coalition for the reasons that Director Cheng mentioned. We are now in 2011, and the current patent reform bill, S. 23, has been significantly improved over H.R. 1908.

The first-inventor-to-file provision to which the preceding paragraph presumably refers is not proposed to harmonize with European or Japanese law. S. 23 has been carefully crafted to keep the best features of current U.S. patent law. European and Japanese patent laws are neither inventor-friendly nor collaboration-friendly and do not represent a "best practice" for a first-inventor-to-file patent law. Adoption of a first-inventor-to-file system by the United States will, however, encourage US inventors to avoid the delayed-filing traps inherent in our current first-to-invent system and better position them to obtain patent protection in foreign markets.

As noted above, the independent inventors, small companies, universities, and nonprofit research groups overwhelmingly support S. 23.

As noted above in regard to this allegation, a wide and diverse coalition supports S.23 for the very opposite reason – it would put in place important safeguards that would protect patent owners.