

August 31, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
2184 Rayburn House Office Building
Washington, DC 20515

The Honorable Howard L. Berman
Chairman
Committee on the Judiciary
Subcommittee on Courts, the Internet and Intellectual Property
2221 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Howard Coble
Ranking Member
Committee on the Judiciary
Subcommittee on Courts, the Internet and Intellectual Property
2468 Rayburn House Office Building
Washington, DC 20515

Re: Patent Reform Act of 2007

Dear Chairman Conyers, Ranking Member Smith, Chairman Berman, and Ranking Member Coble,

The undersigned organizations submit this letter to express our support for H.R. 1908, the Patent Reform Act of 2007. We represent a broad range of public interest groups dedicated to improving intellectual property policy to benefit innovators, consumers and the general public. Numerous flaws have emerged within the current patent system that can foster poor quality patents and invite uncertainty that inflates the risk and cost of litigation, especially in the areas of software and online services. As a result, innocent innovators may face unwarranted threats of liability and spend valuable resources on unnecessary litigation and licensing instead of on innovation. The poor quality of these issued patents also discourages follow-on innovation and distorts competition, which ultimately harms consumers and the general public. H.R. 1908 takes a significant first step towards improving patent quality and reducing the costs and

uncertainties of litigation. We greatly appreciate the efforts you have taken to craft this complex piece of legislation, and wish to comment specifically on a few of its provisions that we regard as necessary for substantial improvements to the patent system.

Third-Party Submissions

Patent examiners are under immense time constraints and do not always discover prior art that might render a patent invalid. In addition, patent applicants often do not provide the Patent Office with all relevant art. Section 9 of the bill helps fill this gap by allowing third parties to submit relevant documents to examiners before the issuance of a patent. Allowing third parties to aid in the examination process increases the chances that relevant prior art will be discovered and decreases the possibility that invalid patents will issue. We support any measure that encourages valuable input to examiners, and believe that barriers, if any, to third-party submissions should be as low as possible to encourage the robust application of this provision.

Post-Grant Review

Current post-grant challenges to issued patents are limited to severely-constrained reexamination proceedings or costly litigation. H.R. 1908 supplements these procedures by introducing a post-grant review procedure that would allow third parties to challenge issued patents in the USPTO within a year of the patent's grant. This provision would provide a comparatively inexpensive and quick means to ensure the validity of issued patents, before litigation becomes necessary. An earlier version of H.R. 1908, as well as the Senate's parallel bill, S. 1145, also allow for a review beyond this one-year period, if the third party can show a risk of substantial harm. Retaining such a provision would provide further opportunities to resolve disputes without recourse to litigation.

Apportionment of Damages

H.R. 1908's provisions concerning apportionment of damages would encourage courts to limit damages for infringement so that they bear some relationship to the actual value of the damage to the patent owner. Current practice allows patent holders to recover damages for infringement based on the entire value of the infringing product even where the patented technology is a small part of the infringing product. Thus, damages can far exceed the value of the patent. Fear of having to pay excessive damages forces defendants to settle lawsuits and license patented technologies even where the validity of the patent is doubtful. H.R. 1908's apportionment of damages provision would go a long way towards remedying this situation.

Willful Infringement Standards

H.R. 1908's provisions on willful infringement would clearly define situations in which defendants would be liable for willful infringement. Until the recent Federal Circuit Court of Appeals' decision in *In re Seagate Technology*, the law allowed defendants to be found liable for willful infringement and hence treble damages if they

merely knew of the existence of the patent. This low threshold for a finding of willfulness coupled with the threat of treble damages discouraged competitors from reading each other's patents. In addition, many companies, especially small businesses, preferred to license patents of questionable validity rather than risk litigation. Although the Federal Circuit's decision in *Seagate* improves this situation to a certain degree by raising the threshold for a finding of willfulness, the clarity that Section 5 of H.R. 1908 would provide is necessary to reduce pressure on defendants to license patents of questionable validity.

These provisions of the Patent Reform Act of 2007 represent a valuable first step in improving the quality and ensuring the strength of validly issued patents. We thank you for introducing H.R. 1908 and hope that the bill will succeed in initiating the much-needed reform to the U.S. patent system.

Respectfully submitted,

Consumer Federation of America

Electronic Frontier Foundation

Knowledge Ecology International

Public Knowledge

United States Public Interest Research Group

cc:

Members of the House of Representatives