coalition for patent fairness

Myths and Facts of Patent Reform

MYTH: The patent bill in its present form picks winners and losers among American industries with different business models.
FACT: The patent law has always applied the same standards to all types of inventions whether the discovery covers beds, shoes, airplanes, biotechnology, software or flatware. The Patent Reform Act of 2009 (PRA) preserves this two century old tradition of the patent law. It contains no special rules that apply to some inventions and not to others. As areas of invention have changed, the patent law has been amended repeatedly to reflect new marketplace realities. But the law has not been substantially revised since 1952, before the invention of the microprocessor, cell phones, transistor radios, biotechnologies and computers. While the current law works well for long established technologies, both the National Academy of Sciences and the Federal Trade Commission have concluded that the law needs to be changed to keep pace with modern times.

The nature of patent litigation has changed fundamentally in recent years. As Supreme Court Justice Anthony Kennedy explained in his opinion in the May 2006 eBay decision, "In cases now arising... the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases. An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees." A recent survey found that ***88% of the patent claims against technology companies come from NPEs.*** Litigation rules must be adjusted to account for this new development.

The PRA updates the law to ensure quality is maintained in the grant of patents and that rights are fairly enforceable. These changes are sensible and balanced. They follow the trend established by half a dozen Supreme Court cases, each of which has been decided in ways that cure imbalances in the law. The PRA is the proper expression of Congress's role as the entity charged with ensuring our laws are modern and up to date.

MYTH: Patent Reform needs no Congressional action.
FACT: Because our economy and new job creation depend on innovation, a broad and growing group of institutions and experts on innovation and competitiveness, including the Center for American Progress, the National Academy of Sciences, the Federal Trade Commission, the Council on Foreign Relations and legal scholars from the nation's top universities, are calling for reform to our patent system to spur innovation and economic growth. The editorial boards of the nation's most prominent publications, including the *New York Times*, *Wall Street Journal* and the *Los Angeles Times,* have called for congressional action to modernize our patent system that hasn't seen significant reform in over 50 years. A half a dozen Supreme Court cases, each of which has been decided in ways that cure imbalances in the patent law, have signaled the need for reforming our patent system.

The Court's ability to effect needed changes is limited because it is restricted by the language Congress enacted more than 50 years ago. Only Congress has the authority and the responsibility to ensure that our patent system is meeting the needs of the 21st century economy and the current need for economic growth and job creation.

MYTH: Patent reform will drive jobs overseas.
FACT: The patent system today discourages U.S. job growth. Productive companies are spending billions of dollars to defend themselves against patent lawsuits. The median cost of defending a patent lawsuit of reasonable complexity exceeds $5.5 million. Furthermore, prior to 1990, there had been only one patent damages verdict in history larger than $100 million, yet in the past five years, there have been at least ten judgments and settlements in that category, and at least four that topped $500 million. One topped $1.5 billion. These huge litigation costs and the additional costs associated with unjustified licensing requests that result in payments without the filing of a lawsuit sap funds that otherwise would be used to create innovative products and services, and produce new jobs and economic growth. Patent reform will eliminate this significant burden on innovation and result in new, high-paying jobs in the United States.

Indeed, a recent analysis by distinguished economist Everett Ehrlich, found that ***clarifying the reasonable royalty standard would create 100,000 jobs over the next five years due to additional investment in R&D and commercialization of new products***. If we do nothing to address this problem, our economy could lose as many as 150,000 jobs over the same period from the continued adverse effects of the existing legal standard.

MYTH: Proponents of damages reform are companies that don't respect intellectual property rights and want to be able to infringe with impunity.
FACT: Supporters of patent reform include numerous companies whose value rests on IP, including four businesses that ranked in the top 10 US recipients of US patents in 2007: HP, Microsoft, Micron, and Intel. And patent reform supporters include other innovation leaders, such as Google, Oracle, and Cisco. We strongly support IP protection, including effective remedies for IP owners whose rights are violated. What we do not support is the misuse of the patent system to extort unjustified royalties through the equivalent of a tax on innovation. And that is what is happening now.

MYTH: S.515's change to the reasonable royalty standard will hurt innovation by reducing the value of all patents.
FACT: Clarifying the reasonable royalty standard is a very modest change. It simply eliminates the risk of excessive, unjustified royalty awards by revising what numerous independent experts agree is an unclear rule that gives juries and even judges no real guidance.

Moreover, S.515 does not affect the separate damages rule allowing a patent owner to recover lost profits – essentially business stolen by an infringer. That rule is applied in 40+% of all patent cases and is frequently invoked by patent holders who produce and/or sell products or services. The target of reform is the opportunistic lawsuits filed by NPEs, who can use only the reasonable royalty standard because they do not make or sell products or services and therefore cannot invoke the lost profits standard.

Finally, those who oppose reform now made the same arguments before the *eBay* decision about the availability of injunctions, claiming that application in the patent context of the test that applied in every other area of the law (in contrast to the Federal Circuit rule automatically granting injunctions in every case in which patent infringement was proven) would dramatically reduce the value of patents. The Supreme Court rejected the special patent rule, but the value of patent s has not collapsed as predicted. S.515's focused, measured reform of the reasonable royalty rule similarly will not have the dramatic impact its opponents claim.

MYTH: Patent Reform Act of 2009 would hurt American competitiveness by empowering Chinese and Indian citizens to both evade their intellectual property obligations and undermine the interests of American inventors.

FACT: This is a fanciful charge without any basis in the provisions of the 2009 bill. Improving patent quality – ensuring that only meritorious inventions receive a patent – is a high priority of the bill. Every witness at the more than 20 hearings held over the past three Congresses testified that poor patent quality creates severe and immediate problems. The Patent and Trademark Office (PTO) proposed establishing a post-grant opposition system to challenge patents. As introduced, HR 1908 (the Patent Reform Act of 2007) adopted the PTO's proposal. It would have created a post-grant opposition mechanism enabling challenges of patents within 12 months of their being issued, or at any time during the life of the patent – the so-called "second window" – if the challenger could meet certain very rigorous criteria.

The bill as introduced came under considerable criticism, primarily by US drug makers. Their objection was limited to the "second window." They argued that the ability to challenge a patent at any time would empower the very kind of challenges those quoted in the India Times greet with such glee. The Judiciary Committee took these concerns to heart. The 2009 bill no longer has a "second window" for post-grant opposition. The bill permits challenges only in the first 12 months after a patent is granted. For most drugs, because its takes about 7 years after the patent is granted to begin selling the drug, these challenges will simply not be available when a drug is actually marketed.

MYTH: Patent reform will weaken America's global economic standing.

FACT: The opposite is true: patent reform will strengthen America's global competitiveness; doing nothing will weaken it. As the Council on Foreign Relations reported in 2006, "Failure to rein in the patent regime could have global repercussions. To hinder innovation is to hinder the dynamic competitiveness of U.S. companies. … [S]ignificant problems with patents put the U.S. system at a disadvantage vis-à-vis more balanced and less costly foreign [patent systems]."

MYTH: Patent reform is being rushed through Congress.

FACT: Congress has considered patent reform legislation and key issues like post-grant review and damages reform in each of the last three sessions. In that time, the House and Senate Judiciary Committees have held more than 20 hearings on patent reform, not including the hearings held on pharmaceutical-specific patent issues. For years before that, the issue has been widely debated in policy circles, driven in large part by a groundbreaking 2003 study by the Federal Trade Commission (FTC), which found serious flaws in the patent system and called for Congress to take action.

MYTH: Patent reform will harm individual inventors and small businesses.

FACT: By strengthening and opening the patent grant process as well as removing confusion from the legal process, patent reform will benefit small businesses and individuals. The issuance of poorly defined patents and subsequent confusion in the courts are real barriers-to-entry for entrepreneurs and start-ups that have limited resources to manage the so-called "patent thicket" or protect themselves from companies that seek to exploit imbalances in the patent system. It is also time to clarify the law on willful infringement so that small companies do not feel compelled to get expensive opinions of counsel costing tens of thousands of dollars in response to broadcast letters from "licensors" with questionable business method patents.

MYTH: Patent Reform will only help big technology companies.
FACT: Patents affect every industry and companies of every size. CPF is a broad range of small, medium, and large companies and trade associations in the financial services, technology, energy, chemical, manufacturing and media industries that have come together to reform the current patent system to support innovation and job creation. The patent law has always applied the same standards to all types of inventions. With patent reform, that will continue.

MYTH: Reform will make inventors more vulnerable to infringers and weaken the enforceability of validly issued patents.
FACT: The nature of the patent system has fundamentally changed since Congress last addressed patents, more than 50 years ago. As Supreme Court Justice Anthony Kennedy explained in a concurring May 2006 eBay decision, "In cases now arising... the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases. An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees." The current abuses of the system require reform to protect inventors and innovators against unjustified patent infringement lawsuits.

MYTH: Patent reform will inhibit universities' ability to research.
FACT: While universities had some initial concerns with the PRA, it has since been amended to protect them – including a provision specifically exempting universities from venue reform. The PRA will weed out questionable patents, making it easier for universities to navigate the patenting process, and it will provide universities with a cost-efficient tool to challenge patents without having to litigate. Many universities that remain opposed to patent reform have substantial financial ties to pharmaceutical manufacturers.

MYTH: Patent reform will keep life-saving drugs off the market.
FACT: The patent system has been tailored over the past several decades to make it easier for pharmaceutical manufacturers to protect their intellectual property. Such patent protections enable pharmaceutical manufacturers to reap record profits from the sales of their drugs. The PRA will not undermine the ability of pharmaceutical manufacturers or biotech companies to protect their intellectual property. In fact, the FTC has even found that the patent system today inhibits the development of new drugs: "firms in the biotech industry reported that they avoid infringing questionable patents and therefore will refrain from entering or continuing with a particular field of research that such patents appear to cover. Such effects deter market entry and follow-on innovation by competitors and increase the potential for the holder of a questionable patent to suppress competition."