

SANTA CLARA UNIVERSITY SCHOOL OF LAW
HIGH TECH LAW INSTITUTE

September 20, 2006

PATENT REFORM

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PATENT REFORM

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Overview

- The Need for Patent Reform
- Patent Reform From the Hill
- Patent Reform From the Backyard
- Patent Reform From Down the River
- Public Interest Perspective

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Many Believe Reform is Needed

FTC and DOJ Hearings, FTC Report

National Academies of Science Hearings and Report

Congresspersons

PTO Strategic Plan and Rule Changes

Large Constituents in IT Industry

Press

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Frequently Mentioned Areas for Reform

Quality

Remedies

Litigation Abuses

Subjective Elements

- Willfulness
- Inequitable Conduct
- Best Mode

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Subjective Opinion Depends on Who You Ask

Large Practitioners

Small Inventors / Small Businesses

Patent Attorneys

Patent Lawmakers (Patent Office, Patent Court, Legislators)

“Patent Trolls,” Non-Producing Entities

Press; Non – Patent Holding Public

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Reform Opponents

Pharmaceutical Industry

Independent Inventors

Non-Practicing Patent Holders

Patent Practitioner Representatives

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Reform From the Hill

House: Patent Reform Act of 2005, H.R. 2795

- Introduced June 2005
- “Coalition” Revision September 2005
- Many Hearings
- Still in Committee

Senate: Patent Reform Act of 2006, S. 3818

- Introduced August 2006
- Substantially Similar to House PRA 2005 Bill
- Many Hearings
- “*This bill is not perfect.*” - Sen. Hatch at Introduction

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Congressional Substance

- Move to First Inventor to File
- Limit Willfulness, Inequitable Conduct
- Add (another form of) Post-Grant Review
- Damages Apportionment; Extraterritorial Infringement
- Venue

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Reform From the Backyard

- *eBay* (Permanent Injunctions) Decided
- *LabCorp v. Metabolite* (Subject Matter) DIG'ed
- *KSR* (Obviousness) to be Heard this Term
- *Medimmune* (Licensee DJ Standing) TBH
- *Microsoft v. AT&T* (271(f)) on CVSG

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Reform From Down the River

Proposed Rule Changes: To Be Adopted

- Limit Number of Continuations
- Limit Number of Initially Reviewed Claims

5 Year Strategic Plan: Draft Released August 2006

- Improve quality and timeliness of patent examination by developing a Patent suite of products.
- Move away from the current one-size fits all filing and examining system.

Public Interest Perspective: First Principles

- Goal of Patent System is to Advance Technology
- All Affected Interests Should Be Considered At Each Moment of Policy and Decision Making
- Equitable Rhetoric Should Not Govern Economic Law
- Overcompensating Patentees Has a Net-Harmful Effect
- A Deformed Patent System Harms Legitimate Patentees

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Patent System Failing Due to Tragedy of Commons

Arms Race & Hold Up Incentives

Disincentive for Private Actors to Help Public

Traditional Solution Not Working

Obfuscation Ensures Unawareness / Apathy

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Denies Freedom, Harms Public

Procedural Constitutional Concerns

Substantive Constitutional Concerns

Recapture of Public Domain

Economic, Technological Harms

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PUBPAT's Mission and Activities

Protecting the Public Domain

Representing the Economically Disadvantaged

Advocating and Educating

Promulgating Patent Commons

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Public Interest Perspective

- Injunctions
 - The public deserves immediate access to inventions.
 - Patentees deserve fair compensation.
- Continuations
 - Isn't four bites at the apple more than enough?
- Post-Grant Opposition
 - Time and standing limitations vitiate potential.

Public Interest Perspective

- Obviousness
 - The Federal Circuit's current standard is legally erroneous and economically harmful.
- Improper Incentives to Issue Patents
 - Examiners should make decisions based entirely on scientific merit, not political or financial pressures.
- Patents Should Not Restrain Either Constitutional Rights or Technological Research

Questions and Comments Please

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Thank You!

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