



U.S. Business and Industry Council



Fighting for American companies
Fighting for American jobs



PIAUSA.org
Professional Inventors Alliance USA

February 23, 2011

Dear Senator:

Our organizations represent America's *small businesses, start-up entrepreneurs, independent inventors*, and *technical professionals* employed by companies of all sizes. We write to clarify recent representations made to you by advocates of this bill: ***this sector of the innovation community does NOT support S. 23***, the Patent Reform Act, in its current form.

The “first inventor to file” section of the bill has unique adverse effects on small business, start-up entrepreneurs, independent inventors, and U.S.-based technical professionals. It disrupts the unique American start-up ecosystem that has led to America’s standing as the global innovation leader—the ecosystem that is vital to our businesses, but with which large firms have less expertise. Within the “first to file” section, the change to the filing grace period disadvantages small companies and independent inventors in favor of larger firms—the bill disadvantages companies that must seek outside financing and strategic partners, in favor of firms that can arrange all of their investment, testing, manufacturing, and marketing internally.

The bill favors multinational and foreign firms over start-up firms seeking an initial foothold in U.S. domestic markets, and favors market incumbents over new entrants with disruptive new technologies. Because S. 23 removes the option to delay patent expenses, the bill advantages established companies, and disadvantages start-ups that must seek and carefully shepherd their

capital. S. 23 reduces current advantages for U.S. inventors and employees, and thus increases incentives for off-shoring jobs. S. 23 changes the rules to favor global companies, against the start-up business model that utilizes the American grace period.

In addition to the issues raised above, many of the organizations that have signed this letter have serious concerns with other provisions of S. 23, including but not limited to post-grant review. Increased filings driven by S. 23's "use it or lose it" grace period rules and by post-grant review will further burden PTO at a time when PTO's backlogs are unacceptable.

We urge Congress to shift its attention away from the broad and technically difficult S. 23, and instead pass a streamlined, targeted bill that focuses only on long-term PTO funding. Furthermore, both chambers of Congress should renew their oversight of PTO operations, to ensure that new funding is properly administered, and that PTO addresses its operational challenges. If (and only if) increased examination quality does not result from increased funding and operational oversight, should Congress revisit broader patent reform.

The attachment sheet lists materials from our respective organizations, with our concerns for S. 23's changes, harms to our members, and backlog increases for PTO.

America's patent system has always focused on the needs of inventors, not bureaucracies. For 200 years, it has demonstrated its singular ability to foster and grow the country's small-business inventors, to help America achieve its status as the global leader in technological innovation and job creation. Changing U.S. patent law to be like the less-successful patent systems of Europe and Asia cannot be regarded as positive "reform."

We urge the Senate not to enact a bill that will assuredly damage one of the keys to America's competitive edge, and that jeopardizes job creation and start-up company formation. We urge that S. 23 not be enacted, and that the Senate shift its focus to putting PTO on a sound financial footing.

Sincerely,

American Innovators for Patent Reform
CONNECT
IEEE-USA
IP Advocate
National Association of Patent Practitioners
National Congress of Inventor Organizations
National Small Business Association
Professional Inventors Alliance USA
U.S. Business and Industry Council

American Innovators for Patent Reform

The *American Innovators for Patent Reform* (AIPR) is a coalition of inventors, small patent owners, researchers, engineers, entrepreneurs, licensing executives, patent agents and attorneys, and others involved in creating or protecting innovation and advocating for stronger patent protection. www.aminn.org

<http://www.aminn.org/patent-legislation>

CONNECT

CONNECT is a non-profit organization dedicated to creating and sustaining the growth of innovative technology and life science businesses in San Diego. Since 1985, CONNECT has assisted in the formation and development of over 2,000 companies and is widely regarded as the world's most successful regional program linking inventors and entrepreneurs with the resources they need for success. www.connect.org

IEEE-USA Institute of Electrical and Electronic Engineers

IEEE (the Institute for Electrical and Electronic Engineers) is the world's largest professional association of technology professionals. With 210,000 members, IEEE-USA's mission is to recommend policies and implement programs specifically intended to serve and benefit the members, the profession, and the public in the United States in appropriate professional areas of economic, ethical, legislative, social and technology policy concern.

<http://www.ieeeusa.org/policy/policy/2011/021511a.pdf>

IP Advocate

IP Advocate is a non-profit organization representing the academic research community. We educate our members in the complex flow of policy, law and procedure, and provide practical entrepreneurial advice for technology transfer and commercialization of intellectual property.

www.ipadvocate.org

<http://www.ipadvocate.org/mibj/index.cfm>

National Association of Patent Practitioners

The *National Association of Patent Practitioners* (NAPP) is a professional organization of patent practitioners, that is people who assist inventors and small businesses (and sometimes larger corporations) to obtain patents. NAPP members overwhelmingly believe in maintaining a strong US patent system that can produce strong patents to benefit emerging businesses.

www.napp.org.

<https://www.napp.org/resources/NAPP-PartialOppTo2009SenateBill.pdf>

National Congress of Inventor Organizations

The National Congress of Inventor Organizations is an educational organization that provides independent inventors and entrepreneurs with resources, guidance, articles, and how-to information along the path to commercialization. NCIO also offers support through its web site and newsletter to entrepreneur and independent inventor groups. NCIO web sites attract 150,000+ unique visitors annually with an email broadcast outreach estimated at 10,000 per broadcast.

<http://www.nationalcongressofinventororganizations.org>

National Small Business Association

The *National Small Business Association* (NSBA) is a national nonprofit membership organization. Established in 1937 and reaching 150,000 small businesses across the nation, NSBA is proud to be the country's oldest, nonpartisan small-business advocacy organization.

www.nsba.biz

http://www.nsba.biz/docs/patent_reform.pdf

Professional Inventors Alliance USA

The *Professional Inventors Alliance USA* (PIAUSA) is a national organization promoting inventor-entrepreneur and small business interests since 1993. PIAUSA works to protect American invention and encourage innovation by providing the nation's independent inventors a united voice to improve public policy. www.piausa.org

U.S. Business and Industry Council

The *U.S. Business and Industry Council* is non-profit business association founded in 1933 to represent the concerns of America's small and medium-sized businesses. Member companies are typically family-owned or privately held, mostly in the manufacturing sector. They are often the major employers in their home communities and the mainstays of the local economy.

www.americaneconomicalert.org.

<http://thehill.com/blogs/congress-blog/economy-a-budget/141663-leahy-patent-bill-litigation-not-innovation>

For more detailed discussion of our concerns, the following links provide studies of empirical evidence analyzing the issues

S.T. Lo and D. Sutthiphisal, *Does it Matter Who Has the Right to Patent: First-to-Invent or First-to-File? Lessons from Canada*, NBER Working Papers, No. W14926 (April 2009), at <http://ssrn.com/abstract=1394833> This paper by two economists at McGill University (one of Canada's two premier universities) studied the economic effects of a very similar switch from first-to-invent to first-inventor-to-file in 1989. They obtained extensive economic and patent filing data to conclude as follows—the change contemplated in S. 23 will harm American inventors (employees of any size firm), small firms, and independent inventors:

VI. CONCLUSION

A switch from a first-to-invent to a first-to-file patent regime may be imminent in the U.S. To understand how such a policy change may affect U.S. inventive activity, we

examine a similar policy change that took place in Canada in 1989. We find that the adoption of the first-to-file rule *did not induce additional R&D efforts* made by Canadian inventors. Nor did such a policy change have any effects on Canada's overall inventive output whether measured as patenting at home or abroad. However, the new patent regime seemed to have a small adverse effect on Canadian domestic-oriented industries. The policy shift also appeared *unfavorable to independent inventors and small businesses*, and it channeled inventive activity towards large corporations.

The fact that Canada's adoption of a first-to-file system had *virtually no positive effect on its overall inventive activity* but a *negative impact on its domestic-oriented industries as well as independent inventors and small firms challenges the merits of the proposed 2007 U.S. Patent Reform Act*. The U.S. relies even more heavily on its domestic markets than Canada. In addition, as independent inventors and small firms rarely have comparable resources to compete with large corporations in the race to the Patent Office, a switch to a first to file system contradicts the very essence of the longstanding U.S. patent laws: making patent protection equally accessible to anybody. More importantly, independent inventors and small firms have played an important role in the U.S. technological leadership since its independence. ... It is therefore crucial to provide an unbiased legal environment for invention and innovation, which helps these independent inventors and small firms to prosper, and the first-to-invent rule apparently serves such a purpose better than its first-to-file counterpart

Boundy & Marquardt, *Patent Reform's Weakened Grace Period: Its Effects On Startups, Small Companies, University Spin-Offs And Medical Innovators*, Medical Innovation and Business Journal, vol. 2 no. 2 (Summer 2010), http://journals.lww.com/medinnovbusiness/Fulltext/2010/06010/Patent_Reform_s_Weakened_Grace_Period_Its_Effects.6.aspx

Boundy & Marquardt discuss the differences between the ways small companies and large companies use the patent system, and how the Patent Reform bill disadvantages small companies. *Empirical data* from the Canadian Patent Office show that the loss of a useful grace period will add over *\$1 billion per year in patent costs for small companies*, while partial "harmonization" will provide comparatively negligible benefit for large companies. If data from Canada and Europe extrapolate to the U.S., Patent Reform will increase the numbers of applications filed, and reduce their quality, worsening the Patent Office's backlog.

Small Business Coalition on Patent Legislation, letter to the U.S. Small Business Administration, provides rich analyses of empirical data from Europe and Canada, statistics on the use of the grace period, and the adverse effects of the change as proposed in S. 23. <http://bit.ly/SB-Coalition-Letter-to-SBA>