



**Oversight Hearing on: American Innovation at Risk: "The Case for Patent Reform."**

Statement of the Honorable Howard L. Berman  
Chairman, Subcommittee on Courts, the Internet, and Intellectual Property

Hearing on  
American Innovation at Risk: The Case for Patent Reform

February 15, 2007

The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

Before we begin, I'd like to apologize for holding a hearing when the Ranking Member and a number of other Members could not be here because they are attending Congressman Norwood's funeral. My condolences go out to the Norwood family.

I also want to thank the witnesses for traveling through the snow to get here to testify – we could not have a productive hearing without you.

Finally, I'd like to recognize the Ranking Member of the Full Committee, Lamar Smith. We worked together throughout the 109th Congress on patent issues and I know he shares my hope that we can achieve necessary patent reform.

I am going to recognize both myself and the Deputy Ranking Member in an opening statement and any other member that wishes to make a short opening statement, and we'll get to our witnesses immediately after that. We are looking forward to a great hearing today, and expect to learn a lot from those who are testifying.

Welcome to the first Subcommittee hearing of the year. I'd like to greet our new Members and ask forgiveness for starting out of the gate with such a complex issue. However, this hearing will be a great first step in elucidating some of the issues which sparked the patent reform debate.

Patents are one of the cornerstones of the American economy, and are at the foundation of life saving drugs and ground breaking technologies. It is beyond dispute that robust patent protection promotes innovation. However, I also believe that the patent system is strongest, and that incentives for innovation are greatest, when the system only protects those patents that are truly inventive. When functioning properly, the patent system should encourage and enable inventors to push the boundaries of knowledge and possibility. If the patent system allows questionable patents to issue and does not provide adequate safeguards against patent abuses, the system will stifle innovation and interfere with competitive market forces.

The issuance of the one-click patent, the patent for standing on line for the bathroom, the patent for a side-to-side swing and many others generated concern from industry experts on the soundness of our current patent system. While I will not opine on the validity of these patents, many have questioned whether such patents meet the standard of patentability. Therefore, beginning in 2001 in the 107th Congress, and in each successive Congress, Congressman Rick Boucher and I have introduced patent reform bills designed to address the need for increasing patent quality. Since our initial attempt at bringing this issue to the forefront, many have now joined in our efforts.

Over the course of the last five years there have been numerous attempts to define the challenges that face the patent system today. For example, the Patent and Trademark Office developed its Twenty First Century Strategic Plan. In addition, the Federal Trade Commission released a report entitled "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy." Soon thereafter, the National Research Council published a compilation of articles about "A Patent System for the 21st Century," and two economists authored a critique of patent law in a book titled Innovation and Its Discontents. These experts make a number of recommendations for increasing patent quality and ensuring that the patent system promotes, rather than inhibits, economic growth and scientific progress. I am very pleased that some of these experts will be our witnesses today.

The Supreme Court has also recognized the need for greater guidance in the patent system, and has recently addressed the issue of automatic permanent injunctions in *E-bay v. Merck Exchange*, and granted certiorari on both the obviousness issue in *KSR v. Teleflex* case and the issue of interpretation of Section 271(f) of the Patent Act in *Microsoft v. AT&T*.

While I acknowledge some undeserving patents will inevitably slip through the system, I have concerns about a number of situations. For example, it's inconceivable that a patent application with over 650 claims would receive a cursory review (NTP/blackberry), and it's worrisome that the PTO can grant a patent for a tax strategy when many claim the Patent Office lacks the requisite expertise to determine whether the particular tax business method is novel.

Therefore, part of any reform to the system should begin by strengthening the PTO. The PTO has implemented a number of quality initiatives and has hired additional staff. Furthermore, while the Continuing Resolution would have diverted close to \$90 million, I worked with the appropriators to ensure that the PTO could keep all of the fees it collected. The Subcommittee should continue its effort to stop diversion of PTO fees.

But we must look further and address the goals and recommendations of those reports in an effort to improve patent quality, deter abusive practices by unscrupulous patent holders, and provide meaningful, low-cost alternatives to litigation for challenging patent validity. Past legislative attempts at achieving more comprehensive patent reform have met with resistance and for one reason or another failed to move out of the subcommittee. Now, however, the call for legislative action is loud. The New York Times has noted that "[s]omething has gone very wrong with the United States patent system," and The Financial Times has stated that "[i]t is time to restore the balance of power in US patent law." Therefore, I intend to introduce a patent reform bill soon which will have bipartisan and bi-cameral support in addressing some of the more urgent patent reform concerns.

For now, let's start at the beginning and explore some of the issues which make the case for patent reform.