Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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STATEMENT OF SENATOR PATRICK LEAHY,
RANKING MEMBER, SUBCOMMITTEE ON INTELLECTUAL PROPERTY
"PATENT LAW REFORM: INJUNCTIONS AND DAMAGES"
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This afternoon, the Intellectual Property Subcommittee continues its public examination of the many issues faced by our patent system. Americans' inventions, and their entrepreneurial drive, have helped to make the United States the undisputed global leader when it comes to intellectual property. We in Congress must do our part to ensure that our leadership continues, and that Americans are encouraged and rewarded for their contributions.

Our task here is a complex one, as we try to retain the best aspects of a system that has fostered and promoted the innovative spirit of our country, while making the changes necessary to ensure that we are not inadvertently hampering those same efforts. And so, the Senate must produce legislation that will do just that. I have been working with Senator Hatch, and will continue to do so, on this important initiative. I am grateful to our friends in the House for all their work, and look forward to a day - a day coming soon - when we can introduce related legislation in the Senate. If past experience is a useful predictor of future outcomes, there is a very good chance that Senator Hatch and I will produce legislation that can reach the President's desk.

At this Subcommittee's hearing in April, we heard a great deal about patent quality, and about reforms that may be necessary to ensure that the Patent and Trademark Office issues patents for work that is truly innovative. Today, we move our focus from the work rooms of the PTO to the court rooms across America. In discussions with interested parties, three possible areas of reform have featured prominently: the use of injunctive relief and damages in patent infringement cases; the possibility of administrative processes rather than litigation to resolve certain issues; and, finally, the role of subjective elements in patent litigation. While we need to be thorough in considering all of these issues, and others besides, I am particularly interested today in hearing about injunctions and damages, as those seem to be the so-called "hot buttons" as we try to draft fair legislation.

I would like to thank our witnesses for taking time out of their busy schedules to share their thoughts and insights with us. As I mentioned, I am particularly interested in hearing from you all on the subject of injunctive relief. In issuing injunctions, courts are directed to balance the equities in a given case, evaluating the harm to one party if an injunction is issued versus the harm to the other party if the injunction is not issued, and to consider the public interest. Some argue that under the current legal standard, plaintiffs are granted injunctions in nearly all cases. In such cases, where a defendant is faced with the virtual certainty that production and marketing will grind to a halt, weak cases may be leveraged into lucrative licensing agreements. On the other hand, I am sensitive to the fact that injunctive relief must be available for those cases in which irreparable harm is truly likely, and where the demands of equity compel injunctive relief. We all know that there is not yet consensus on how to solve this piece of the puzzle, but I hope today's hearing will move us toward a solution.

A related issue that I would encourage the witnesses to address is the question of apportionment of damages. I have heard from some quarters that a verdict of infringement can result in an award of damages out of proportion to the actual role that the infringed item plays in the overall product. It seems reasonable that the damages awarded should relate to the value of the infringement, but that is doubtless easier for me to say than for a judge and jury to determine. I would be grateful for some discussion of this issue by the witnesses.

Another reform we have heard mentioned - one that was touched on at this panel's last hearing - is the use of administrative procedures to reduce the quantity of litigation, as well as to improve patent quality. There seems to be general support for this idea, and when we met last April several witnesses spoke of the desirability of creating a "post grant review" process that would allow a third party to challenge a patent's validity within the PTO, without entering the courtroom.

Finally, I have heard considerable support for some proposals to modify the subjective elements of patent litigation -- the finding of "willfulness" in infringement, and the determination of "inequitable conduct" and what that can entail. Investigating these elements can be costly and requires a determination of a party's state of mind at the time a patent application was filed. For example, the willful infringement standard, by which treble damages can be awarded if a defendant was aware of a plaintiff's patent, may have the unintended effect of discouraging companies from making a comprehensive search of prior art so that they can avoid being penalized with an enhanced award. We must look at these issues, as well, before we can claim to have produced a comprehensive patent reform bill.

When we talk about patent reform, we must remember that we are ultimately talking about the products that will be available to consumers. The ongoing Blackberry dispute drives this home to me, and I expect to many of you, in a particularly powerful way. I do not know who is right in that case, but I do know that I was not alone in breathing a sigh of relief when the parties announced an agreement. Now, the newspapers tell us, that deal may be unraveling. Even as we contemplate reform, many of us will be watching this case in particular with a nervous tick in our thumbs.

The Blackberry case has the potential to affect many people in this hearing room, but a ruling by the Supreme Court yesterday may affect millions of people in homes throughout the United States. I hope that the ruling in Merck v. Integra Lifesciences will provide a much needed boost to scientific research developing life-saving medicine and lead to the development of lower cost drugs. In this regard, I would also like to see greater sharing of drug patents and an end to the practices by which some companies have delayed competition through anti-competitive conduct.

A few years ago, I authored and we passed legislation to force companies signing non-compete agreements to disclose those agreements to the FTC. I think the FTC and the Department of Justice need to do more to encourage competition.

In a similar vein, I hope that the Senate Republican leadership will soon allow us to turn to the Stem Cell Research Enhancement Act, H.R. 810. This is a bill with 200 House sponsors, led by Congressman Castle and Congresswoman DeGette. It passed the House last month with 238 votes. The critically important research this legislation would authorize on embryonic stem cells, which would otherwise be discarded, holds great promise and hope for those with family members suffering from debilitating disease and injury.

More effective treatments for Parkinson's and Alzheimer's disease, for diabetes, for spinal cord injuries, and for many other diseases and conditions are all possibilities. This is vital work, critical research but its authorization by the Senate has been shunted aside by the Republican leadership.

Mr. Chairman, you and I have a lot of years invested in tackling some pretty tough issues, and in few areas do the issues get more complex than in patent litigation. The solutions will not be simple, but I am confident that you and I, working together and working with our colleagues in the House, can solve this puzzle and get it to the President's desk.