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[Pages E773-E775]
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THE PATENT REFORM ACT OF 2007

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of california

in the house of representatives

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Mr. BERMAN. Madam Speaker, today, I introduce ``The Patent Reform Act of 2007'', a product of both bicameral and bipartisan effort to reform the patent system to meet the challenges of the 21st century. I would especially like to thank Senator Leahy for his dedication to addressing many of the inadequacies in our current patent system. Furthermore, I appreciate my past and present partners in this area--especially Congressman Rick Boucher, with whom I've worked closely to increase patent quality for the past several years, and Congressman Lamar Smith, who championed this issue last Congress.

Introduction of this legislation follows a number of recent judicial opinions and many hearings conducted over the past several years by the Subcommittee on Intellectual Property which ascertained that the current patent system is flawed. Over the last 5 years, there have been numerous attempts to define the

[[Page E774]]

challenges facing the patent system today. Among the most notable contributions to this discourse are the Patent and Trademark Office's Twenty-First Century Strategic Plan, the Federal Trade Commission's report entitled ``To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy,'' The National Research Council's compilation of articles ``A Patent System for the 21st Century'' and the book titled ``Innovation and Its Discontents,'' authored by two respected economists. These studies offer a number of recommendations for increasing patent quality and ensuring that patent protection promotes--rather than inhibits--economic growth and scientific progress. Consistent with the goals and recommendations of those reports, and based on past patent bills, the Patent Reform Act contains a number of provisions designed to improve patent quality, deter abusive practices by patent holders, provide meaningful, low-cost alternatives to litigation for challenging the patent validity and harmonize U.S. patent law with the patent law of most other countries.

Past attempts at achieving comprehensive patent reform have met with stiff resistance. However, the time to reform the system is way past due. The New York Times has noted, ``Something has gone very wrong with the United States patent system.'' The Financial Times has stated, ``It is time to restore the balance of power in U.S. patent law.'' Therefore, we are introducing this bill as a first step to restoring the necessary balance in our patent system.

I firmly believe that robust patent protection promotes innovation. However, I also believe that the patent system is strongest, and that incentives for innovation are greatest, when patents protect only those

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inventions that are truly innovative. 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 may stifle innovation and interfere with competitive market forces.

This bill represents our latest perspectives in an ongoing discussion about legislative solutions to patent quality concerns, patent litigation abuses, and the need for harmonization. We have considered the multitude of comments received concerning prior patent bills and over the course of numerous negotiations between the parties. We acknowledge that the problems are difficult and, as yet, without agreed-upon solutions. It is clear, however, that introduction and movement of legislation will focus and advance the discussion. It is also clear that the problems with the patent system have been exacerbated by a decrease in patent quality and an increase in litigation abuses. With or without consensus, Congress must act to address these problems. Thus, we introduce this bill with the intent of passage in the 110th Congress.

There are a number of issues which we have chosen not to include in the bill, primarily because we hope they will be addressed without the need for legislation. For instance, the Supreme Court recently resolved questions regarding injunctive relief. In that category, we include amendments to Section 271(f) and the obviousness standard as both issues are currently before the Supreme Court. If either of those issues are left unresolved, Congress may need to reevaluate whether to include them in a patent bill.

The bill does contain a number of initiatives designed to harmonize U.S. law with the law of other countries, improve patent quality and limit litigation abuses, thereby ensuring that patents remain positive forces in the marketplace. I will highlight a number of them below.

Section 3 converts the U.S. patent system from a first-to-invent system to a first-inventor-to file system. The U.S. is alone in granting priority to the first inventor as opposed to the first inventor to file a patent. There is consensus from many global companies and academics that the switch in priority mechanisms provide the U.S. with greater international consistency, and eliminate the costly and complex interference proceedings that are currently necessary to establish the right to obtain a patent. While cognizant of the enormity of the change that a ``first inventor to file'' system may have on many small inventors and universities, we have maintained a grace period to substantially reduce the negative impact to these inventors. However, we need to maintain an open dialogue to ensure that the patent system will continue to foster innovation from individual inventors.

Section 5 addresses both the topic of apportionment and wilfullness. Patents are provided to promote innovation by allowing owners to realize the value of their inventions. However, many have argued that recent case law has tilted towards overcompensation, which works against the primary goal of promoting innovation. ``Excessive damages awards effectively allow inventors to obtain proprietary interests in products they have not invented, promote patent speculation and litigation and place unreasonable royalty burdens upon producers of high technology products. Such consequences may ultimately slow the process of technological innovation and dissemination the patent system is intended to foster.'' While preserving the right of patent owners to receive appropriate damages, the bill seeks to provide a formula to ensure that the patent owner be rewarded for the actual value of the patented invention.

Furthermore, this Section seeks to curb the unfair incentives that currently exist for patent holders who indiscriminately issue licensing letters. Patent proprietors frequently assert that another party is using a patented invention and for a fee, offer to grant a license for

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such use. Current law does little to dissuade patent holders from mailing such licensing letters. Frequently these letters are vague and fail to identify the particular claims of the patent being infringed and the manner of infringement. In fact, the law tacitly promotes this strategy since a recipient, upon notice of the letter, may be liable for treble damages as a willful infringer. Section 5 addresses this situation by ensuring that recipients of licensing letters will not be exposed to liability for willful infringement unless the letter clearly states the acts that allegedly constitute infringement and identifies each particular patent claim to the product or process that the patent owner believes is being infringed.

Section 6 provides a needed change to the inter-partes reexamination procedure. Unfortunately, the inter-partes reexamination procedure is rarely used, but the changes we introduce should encourage third parties to make better use of the opportunity to request that the PTO Director reexamine an issued patent of questionable validity. Primarily though, Section 6 creates a post-grant opposition procedure. In an effort to address the questionable quality of patents issued by the USPTO, the bill establishes a check on the quality of a patent immediately after it is granted, or in circumstances where a party can establish significant economic harm resulting from assertion of the patent. The post-grant procedure is designed to allow parties to challenge a granted patent through a expeditious and less costly alternative to litigation. Many have expressed concerns about the possibility of harassment of patent owners who want to assume quiet title over their invention. In an effort to address those concerns, the bill prohibits multiple bites at the apple by restricting the cancellation petitioner to opt for only one window one time. The bill also requires that the Director prescribe regulations for sanctions for abuse of process or harassment. During the legislative process we will likely provide more statutory guidance for the Director in establishing regulations guiding the post-grant opposition. We appreciate that this is an extremely complicated and new procedure and therefore we look forward to working with various industries to ensure the proceeding is balanced, fair and efficient. Part of the goal of this Section is to also address the quality problem in patents which have already been issued and are at the heart of the patent reform discussion.

Section 9 permits third parties a limited amount of time to submit to the USPTO prior art references relevant to a pending patent application. Allowing such third party submissions will increase the likelihood that examiners have available to them the most relevant ``prior art,'' thereby constituting a front-end solution for strengthening patent quality.

The bill also addresses changes to venue to address extensive forum shopping, provides for interlocutory appeals to help clarify the claims of the inventions early in the litigation process, establishes regulatory authority for the USPTO to parallel the authority of other agencies, and expands prior user rights to accommodate in part for the switch to first-inventor-to-file.

When considering these provisions together, we believe that this bill provides a balanced package of reforms that successfully accounts for the interests of numerous stakeholders in the patent system, including individual inventors, small enterprises, universities, and the varied industry groups, and that are necessary for the patent system to achieve its primary goal of advancing innovation.

This bill is the latest iteration of a process started many years ago. Deserving of thanks are the many constitutional scholars, policy advocates, private parties, and government agencies that have and continue to contribute their time, thoughts, and drafting talents to this effort, including, of course, the legislative counsel. I am pleased that finally, we have a critical mass of interested parties who understand the need for reform.

Though we developed this bill in a highly deliberative manner, using

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many past bills as the foundation for the provisions, I do not want to suggest that it is a ``perfect'' solution. This bill is merely the first step in a process. Thus, I remain open to suggestions for amending the language to improve its efficacy or rectify any unintended consequences. Furthermore, there are a host of issues or varied approaches to

[[Page E775]]

patent reform which are likely not even covered by the bill but may be considered at a later time. I hope to work with the many cosponsors and the diverse industry, university and inventor groups to reach further consensus as we move this bill towards final passage.

As I have said previously, ``The bottom line in this is there should be no question that the U.S. patent system produces high quality patents. Since questions have been raised about whether this is the case, the responsibility of Congress is to take a close look at the functioning of the patent system.'' High patent quality is essential to continued innovation. Litigation abuses, especially ones committed by those which thrive on low quality patents, impede the promotion of the progress of science and the useful arts. Thus, we must act quickly during the 110th Congress to maintain the integrity of the patent system.

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