



NSBA Opposes Patent Reform Proposal

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In a rare display of bipartisan, bicameral cooperation, the *Patent Reform Act of 2007* (*H.R. 1908* and *S. 1145*) were introduced simultaneously on April 18, 2007 in an effort to provide the first substantial overhaul of the U.S. patent system in 50 years. While recognizing that certain aspects of America's patent system may be in need of updating or reform, the small-business members of the National Small Business Association oppose the specifics of this particular effort.

Background

H.R. 1908 was introduced by Reps. Howard Berman (D-Calif.), chair of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, Lamar Smith (R-Texas), and Rick Boucher (D-Va.), and co-sponsored by twenty-one additional representatives. On July 18, the House Judiciary Committee approved—by voice vote—an amended *H.R. 1908*, and on Sept. 7, the full U.S. House of Representatives passed an amendment in the nature of a substitute of the bill in a 220-175 vote.

S. 1145 was introduced by Sens. Patrick Leahy (D-Vt.), chair of the Senate Committee on the Judiciary. It is co-sponsored by Sens. Robert Bennet (R-Utah), Larry Craig (R-Idaho), John Cornyn (R-Texas), Mike Crapo (R-Idaho), Orrin Hatch (R-Utah), Ken Salazar (D-Colo.), Chuck Schumer (D-N.Y.), Gordon Smith (R-Ore.), and Sheldon Whitehouse (D-R.I.). *S. 1145* was approved by the Senate Committee on the Judiciary on July 19, in a 13-5 vote—with the understanding that work on the bill was not yet complete and that it would later be amended.

Outlook

The outlook for further Senate action is unclear, but Senate Majority Leader Harry Reid (D-Nev.) previously indicated a desire to bring the measure to the floor in the near future, possibly as early as February. A draft committee report on *S. 1145*, by Sen. Leahy, already has been informally circulated. The comprehensive and methodical report seems aimed at setting the stage for congressional action in the coming year.

With Sen. Leahy expected to propose a manager's amendment (which could be coordinated with the House bill), any bill considered by the full Senate is expected to differ somewhat from the version that the Senate Judiciary Committee approved in July. Nonetheless, many of the provisions outlined in the report simply have been carried over from earlier drafts.

NSBA Position

NSBA opposes this proposal, and the patent reform legislation already passed by the House of Representatives, due to its failure to take into account the unique needs of small-business innovators. While *S. 1145* includes a multitude of major provisions that

specifically disadvantage small-business innovators, the following provisions are of chief concern:

First-to-Invent to First-to-File Conversion

Despite the appeal of international harmonization, America's unique patent system—and its singular ability to harness and protect the country's small inventors—has played a fundamental role in helping it achieve its status as the global leader in technological innovation.

The first-to-invent patent system has been a major mechanism for the dynamism of small business innovation. It guarantees that carefully and well-developed inventions are patented and at much less expense to the patentee than in first-to-file countries.

While the National Academy of Sciences report recommends reducing international inconsistencies in patent law, it also recognizes that, "Continuing high rates of innovation suggest that the patent system is working well and does not require fundamental change."

Post-Grant Patent Challenges and the Broad Expansion of USPTO Powers

Administrative decisions such as those outlined in *S. 1145* are more susceptible to lobbying and backroom maneuvering than judicial review. Furthermore, it is not evident that it is in the best interests of America's most-vulnerable innovators to grant broad rulemaking authority to the USPTO.

This attempt at broad patent reform could be potentially devastating to America's most productive yet vulnerable innovators. The effect this legislation would have on America's entrepreneurs has not been appropriately examined, and NSBA urges very careful consideration before the Senate moves forward.

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