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- [Blog Briefing Room](#)
- [Twitter Room](#)
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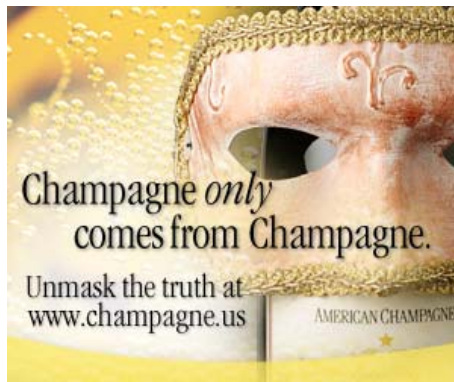
## Don't pit one part of economy against another

By Rep. Don Manzullo (R-Ill.) - 06/22/09 02:07 PM ET

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Our patent system has fostered great inventors including Samuel Morse, Thomas Edison, Alexander Graham Bell and the Wright Brothers — Americans who changed the course of history and commerce. But despite this impressive track record, some argue that the United States should harmonize its patent system with Asia and Europe when they haven't produced as many innovations as America. Could it be that our current patent system is better at protecting innovation?

I have had serious concerns with previous patent reform efforts. I have successfully worked with the House Judiciary Committee to develop lower fees for small inventors and protect them from the premature release of their patent. Unfortunately, contentious issues in patent reform keep re-emerging.



Members of Congress should not be forced to choose between constituents in various economic sectors on an issue as complex and important as patent reform, especially during a recession. Rather than repeating failed tactics from the 110th Congress, the House and Senate Judiciary committees should strive for real consensus. To achieve

balanced patent reform, several key issues must be addressed:

- Damage awards for infringement should not be artificially curtailed to diminish the overall value of patents.
- Serial challenges to valid patents must be prohibited.
- The U.S. Patent and Trademark Office (PTO) must continue to award patents to the first inventor of a product, not to the first person to file a patent application.

These three principles would allow patent reform to equitably benefit all sectors by enhancing, rather than undermining, innovation and job creation.

In its current deliberations, the House seems to forget past lessons. The Patent Reform Act of 2009 (H.R. 1260) is virtually the same bill as the Patent Reform Act of 2007 (H.R. 1908). I oppose the 2009 bill, just as I opposed its

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predecessor, because it harms important economic sectors — manufacturers, universities, independent inventors, small innovative technology companies, venture capitalists, labor unions, and others — that spur much of America's innovation. This is bad policy any time, but particularly during a recession.

Unfortunately, our foreign competitors recognize the pending patent reform legislation would threaten American patent protections. In 2007, one of China's leading IP experts published a paper expressing bafflement that the U.S. would consider weakening its patent protections. Yongshun Cheng, former senior judge and Deputy Director of the IP Division of the Beijing High People's Court, noted that the bill was "friendlier to the infringers than to the patentees in general as it will make the (U.S.) patent less reliable, easier to be challenged and cheaper to be infringed."

The Senate has taken a different approach. In the Senate Judiciary Committee markup of S. 515, Chairman Patrick Leahy (D-Vt.) and others crafted a compromise that removed language to artificially lower the value of damages paid for infringement of patents in the federal courts. The committee instead introduced a "gatekeeper" function to give better instructions to juries on patent infringement cases. Thus, the Senate bill preserves and codifies the 15 factors to consider when determining damage infringement awards established in the landmark 1970 Supreme Court decision *Georgia-Pacific v. United States Plywood*.

Unfortunately, the Senate bill still shares some problems with the House legislation. Both bills set up a post-grant challenge system that will allow larger companies to engage in serial administrative challenges against smaller innovators. Foreign entities could even challenge next-generation American technology or energy companies at the PTO in post-grant challenges, dangerously undermining long-term U.S. competitiveness.

Luckily, solutions to these post-grant problems are relatively easy and include limiting the duration of challenges to a year, requiring stronger estoppel measures to prevent collusion, and preserving a presumption of patent validity in administrative challenges. Sen. Jon Kyl (R-Ariz.) has similar ideas on the post-grant issue I hope to see incorporated into both the House and Senate patent legislation.

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Another problem shared by both bills is a shift to "first to file" from a "first to invent" system in deference to the small inventor. According to the Office of Advocacy at the Small Business Administration, small businesses provide 13 times more patents per employee than large patenting firms. The U.S. patent system stands alone in the world in

giving inventors deference in patent filings. Can you imagine deferring to anyone else? No provision in this legislation means more to universities, small businesses and independent inventors than halting this proposed change.

I hope that high-tech industries will work with those of us dedicated to small businesses and manufacturers to find common ground on this issue. Let's work together to strengthen American industries rather than pit one segment of our economy against the other. As in 1999 and 2004, let's tackle consensus issues like Patent and Trademark Office efficiency, patent pendency, and patent quality. Let's work together to reform the system, rather than take actions that

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Manzullo is the co-founder and co-chairman of the House Manufacturing Caucus. He has been awarded the Aerospace Industry Association's Wings of Liberty, the National Association of Manufacturers Award for Manufacturing Legislative Excellence, and the National Federation of Independent Business Guardian of Small Business Award. He has received several endorsements from the U.S. Chamber of Commerce. He was also named Legislator of the Year by the International Franchise Association in 2005, and he received the Champion of Small Business Development by the Association of Small Business Development Centers. In 2004, The Manufacturer magazine called him "Mr. Fix-It."