15 February 2011

The Honorable Robert Goodlatte, Chair
Subcommittee on Intellectual Property, Competition, and the Internet
Committee on the Judiciary
U.S. House of Representatives
B-352 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte,

IEEE-USA applauds Congress' continued work to address the problems in the U.S. patent system and we appreciate your efforts to reach compromises between stakeholders. Before a bill emerges in the House, we wish to express our concern with several provisions that have appeared in the new Senate bill – S. 23, *The Patent Reform Act of 2011*. IEEE-USA—a 210,000-member unit of the Institute for Electrical and Electronic Engineers, the world's largest professional organization for the advancement of technology—shares these concerns with other organizations also representing technical employees and small companies.[1] We believe that as currently written, S. 23 could directly harm the American businesses which create American jobs, and cause additional backlog in the already-overwhelmed U.S. Patent Office (PTO).

Rather than pursuing questionable reforms such as those that appear in S.23, we urge you to turn instead to a bill that would command immediate and universal support—a bill that adequately funds the PTO and allows the PTO to retain the fees that it collects.

Two recent studies by the Kauffman Foundation and economists at the U.S. Census Bureau tell us that "*startups aren't everything when it comes to job growth. They're the only thing*."[2] Startups are responsible for *all* net job creation since 1977 and the U.S. patent system is key to startup formation. Investors depend on strong patent protection for assurance that "the next big thing" will generate profits for the innovator who turns a raw idea into a marketable product, and that large competitors will not appropriate those ideas. Without strong patent protection, the risks of doing something new simply will not be worth it, and formation of the startups that create *all* new jobs will be sharply reduced. Investors have thousands of investment

[1] International Federation of Professional and Technical Engineers, AFL-CIO & CLC letter to Senator Leahy (http://www.ifpte.org/downloads/news/manager/41c.pdf); American Institute for Medical & Biological Engineering position statement (http://www.aimbe.org/wp-content/uploads/2010/11/Patent-Reform-Position-Statement-09-v2.pdf); National Small Business Association letter. August 5, 2009 (http://www.nsba.biz/docs/09PatentS515.pdf).

[2] Tim Kane, *The Importance of Startups in Job Creation and Job Destruction* (http://www.kauffman.org/uploadedFiles/firm_formation_importance_of_startups.pdf); John C. Haltiwanger, Ron S. Jarmin & Javier Miranda, *Who Creates Jobs? Small vs. Large vs. Young* (http://www.nber.org/papers/w16300).

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opportunities and if the features of our patent system that are most important to startups are changed, those investors will go elsewhere.

IEEE-USA is concerned that the weakened grace period of the first-to-file provision of S.23 will sharply increase costs and reduce the utility of the patent system for small companies. While Section 2 of S. 23 reflects the way market incumbents and large multinational firms manage their patent portfolios, it *takes away the options* that small companies and startups *use and need*.

The grace period in the current law gives companies a year to raise capital, to assemble strategic partners, and to field test before filing a patent application. Current U.S. patent law allows companies one year to sort good inventions from bad before significant resources must be committed to the patent process. The grace period allows companies to make good business, patenting, and investment decisions during the most difficult part of an invention's lifetime–the early stage transition from the lab to commercialization. In contrast, the proposed weak grace period of S.23 forces early, often multiple, filings, before good information is available. This is disastrously wasteful for small companies and startups. Large multinationals make limited use of the options available under current U.S. law, but their approach isn't the only approach and the bill removes options that are essential to small companies.

Further, the pressure for early filing will result in a flood of applications. The only analyses of real empirical data that we know of analyzed data from the Canadian and European patent offices, and found that under a first-to-file system, U.S. inventors will need to file nearly twice as many applications as they file today.[3] This will impose enormous costs in terms of time drained from inventors, and flood the PTO with approximately 150,000 more applications per year. The PTO has stated that they expect no increase in filings, not on the basis of any analysis of data. We fear that the PTO intends to use the bill's fee-setting authority to control filing rates.

IEEE-USA is also deeply concerned that the post-grant review provisions in the Senate bill not be allowed to depart from the carefully-crafted compromise in last year's Senate Manager's Amendment (S. 515, March 2010). While we continue to have deep reservations about the ability of the PTO to staff the proceedings without increasing backlogs elsewhere in the PTO, the compromise seems a fair *substantive* balance. We would oppose any tipping of that balance.

Our 200 year-old patent system has a proven track record of nurturing new companies that create high paying jobs, the key contributors to economic recovery and U.S. competitiveness in the global markets. While not perfect, U.S. intellectual property protection, more than any other, has protected the investments of our innovators and entrepreneurs, and contributed to our leadership among world economies.

What the system needs is a well-funded Patent Office. We urge you to focus your energies on the problem that is universally recognized to lie at the heart of every symptom of concern to the

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[3] David Boundy and Matthew Marquardt, *Patent Reform's Weakened Grace Period: Its Effects On Startups, Small Companies, University Spin-Offs And Medical Innovators* (http://journals.lww.com/medinnovbusiness/Fulltext/2010/06010/Patent_Reform_s_Weakened_Grace_Period__Its_Effects.6.aspx).

innovation community—adequate funding for the PTO, and allowing the PTO to retain the fees that it collects. IEEE-USA believes S.23 does not address what we believe to be most harmful to patent quality—the funding and operational issues within the PTO that affect the cost, quality and latency of patents. We would be pleased to meet with you to outline our concerns. If we can be of any assistance, or if you have any questions, please do not hesitate to contact Erica Wissolik at (202) 530-8347 or e.wissolik@ieee.org.

Thank you for supporting entrepreneurs and small businesses in the United States.

Sincerely,

Bruce E. Hayden
2011 Chairman, IEEE-USA Intellectual Property Committee