H.R. 1249, the Patent bill—a job killer, destructive to American innovation

Issue 1. H.R. 1249 bill does *nothing* to address the key problem in the patent system—the underfunding of the Patent and Trademark Office. The PTO is funded entirely by fees paid by applicants, with no taxpayer contribution. PTO fee levels are set for cost-recovery. However, for most of the last 20 years, Congress has appropriated to the PTO less than its fee collections—and the PTO's backlog today reflects almost precisely the amount of work that would have been covered by the withheld fees. S.23, the bill the Senate passed in March, gained majority support because of Sen. Coburn's amendment to end this fee diversion. In contrast, H.R. 1249 is essentially identical to current law—it will permit continued fee diversion, and the Super Committee makes it a near certainty. If H.R. 1249 *does* ***nothing*** *to address the single biggest problem in the patent system*, why pass it?

Issue 2. Section 18 is a favor to the big banks: it sets up a special procedure for challenging validity of patents directed to business methods, under a weaker standard than any other kind of patent. This is bad for two reasons:

- Do we want to set a precedent that certain classes of patents can be singled out? This is an invitation to other countries to do the same for pharmaceutical or software patents, or for other technologies for which the United States is the dominant exporter. It's a killer of American jobs.
- Does Congress want to be on record as giving the big banks another bailout?

Issue 3. ***All net job creation for the last 30 years comes from startups***, yet this bill takes away the key features of today's patent law that allow startups to flourish in the U.S. The bill's replacement provisions are similar to other countries' laws that squelch startups, with some added variations that are even more onerous:

- The bill creates a major "disharmonization" on the single issue that affects the most patents, the "prior art" cutoff date for obviousness. The bill sets a cutoff date that is 18 months different for the U.S. than for any other country. The bill's cutoff date ***selectively disadvantages U.S. inventors*** relative to inventors in other countries. This is a recipe for export of America's R&D jobs.
- The bill does not "harmonize" with the law of any other country. "Close but not identical" creates almost no benefit. For example, among European countries, where a treaty brings the countries' laws very close to each other, an attorney in one country is unable to opine on a patent from another country, even if the words of two countries' patents are identical, because small differences in law are sufficient to defeat an attorney's ability to opine. Because the bill leaves relatively large discrepancies in place, the bill's cost savings are tiny, and will be dwarfed by transition costs. This bill does not "harmonize" enough to achieve any meaningful efficiency—it's a job killer.
- The bill takes away the primary characteristics of today's law that fosters American startups, and replaces them with provisions that benefit large companies. Today's grace period (particularly today's § 102(a) prong, which is ***entirely*** removed by the bill) lets an inventor go out and talk to people, to find investors and partners, to get a business going, before draining funds to the patent lawyers. It lets an inventor get through the trial-and-error of R&D before draining funds into patents on inventions that turn out to be duds. In contrast, in Europe, an inventor is totally locked down, and cannot talk to ***anyone*** outside the company until all patent applications are filed. This is fine for big integrated companies, it's totally unworkable for entrepreneurs and small companies that need to partner with an investor or strategic partner. It takes away the legal options that enable disruptive innovation, and replaces them with lock-ins for market incumbents. Europe has almost no startups, and this is a key reason. This part of the bill is a job killer.
- The language is ambiguous, and constitutionality is suspect. Years of litigation will lead to commercial uncertainty. The bill is a job killer for everyone except patent litigators.

Issue 4. The new bill repeals all of the requirements that inventors and attorneys act "without deceptive intention" when dealing with the Patent Office. How can ***permitting*** "deceptive intention" be good for the system?

Issue 5. The bill gives the PTO the power to set fees to penalize complex inventions. Today's law sets fee levels that increase proportionally to the Patent Office's costs of examining applications. The Patent Office has long sought to limit the complexity of patent applications—the PTO proposed a statutory change in 2003 to have fee levels rise far faster than examination complexity, and proposed regulations in 2006-09 that would have capped the complexity of the inventions that could be patented. The statute should not give the PTO discretion to discriminate against complex inventions. This is a job killer.