

November 6, 2007

The Honorable Patrick J. Leahy  
Committee on the Judiciary, Chairman  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Arlen Specter  
Committee on the Judiciary, Ranking Member  
United States Senate  
711 Senate Hart Office Building  
Washington, DC 20510

Dear Chairman Leahy:

The venture capital industry appreciates your continuing efforts to enact comprehensive patent reform legislation that rewards inventors for their innovation. As you know, the venture capital community is the primary funding source for emerging technology and life-sciences companies—in 2006 alone the industry committed \$25.5 billion towards innovative companies. The Patent Reform Act of 2007, S. 1145, as reported out of the U.S. Senate Committee on the Judiciary includes several improvements that address the concerns of emerging companies but we believe additional changes are needed.

Venture backed companies need strong patents, and want to reduce litigation from nuisance suits. Small, emerging growth companies strive to commercialize innovation, often disrupting a marketplace of entrenched interests. Defending against infringement is disproportionately burdensome for small venture backed companies while the benefit of infringing relative to the cost is disproportionately attractive to large companies. Based on the collective input from the undersigned venture capital firms representing both high tech and life sciences investors, we propose the following modifications in an effort to enact patent reform that is balanced and protects innovators.

The issue of awarding damages based on a “patent’s specific contribution over the prior art” has been a major point of contention among stakeholders. We suggest a different approach that would maintain the current multi-factored analysis and define limited circumstances in which apportionment may apply. We recognize that in some cases where the patented component is an insignificant basis for market demand, damages may be based solely on the market value of the patented component. Additionally, we support including procedural safeguards that seem to enjoy broad support from other stakeholders.

Furthermore, we maintain strong concerns that the creation of a new proceeding within the U.S. Patent and Trademark Office to permit extended administrative challenges of validly-issued patents could improperly question the reliability of an emerging company’s intellectual property, often the core asset. S. 1145 would allow third parties an alternate venue to repeatedly challenge a patent, using lower evidentiary requirements, throughout the patent’s life. We support the approach in the House with one fixed post-grant opposition and an enhanced *inter partes* re-examination.

We also are concerned that the legislation does not curtail the “inequitable conduct” defense. The present legislation codifies the current intent standard but lowers the standard of materiality to a prima facie case of unpatentability. We propose codification of a standard of clear and convincing evidence, and a two-pronged test that specifies knowing and willful

deception regarding material information and an objective standard for determining whether a claim would have issued absent the misconduct.

Improving the quality of the patent system is critical to our nation's innovation leadership. Moreover, we strongly support patent reform that is balanced and keeps in mind that defending against infringement is disproportionately burdensome for small venture-backed companies, while the benefit of infringing relative to the cost is disproportionately attractive to large companies.

We look forward to continuing to work with you and colleagues towards reaching the goal of enacting fair and reasonable reform for all parties.

Sincerely,

**Kleiner Perkins Caufield & Byers, CA**

**DCM, CA**

**New Enterprise Associates, MD, CA**

**Battery Ventures, MA**

**Matrix Partners, MA**

**Prolog Ventures, MO**

**ARCH Venture Partners, IL, WA, TX**

**Technology Partners, CA**

**Levensohn Ventures Partners, CA**

**Polaris Venture Partners, MA - WA**

**Novak Biddle Venture Partners, MD**

**VSP Capital, CA**

**U.S. Venture Partners, CA**

**Warburg Pincus, NY, CA**

**Three Arch Ventures, CA**

**The Vertical Group, NJ, CA**

**Alloy Ventures, CA**

**Boston Millennia Partners, CA**

**Venture Investors, WI**

**Split Rock Partners, MN, CA**

**Investor Growth Capital, Inc., NY, CA**

**Gary Blonder, Morgenthaler, CA, OH**

**QuakerBioventures, PA**

**Thomas, McNerney & Partners, CT, MN**

**UV Partners, UT**

**Delphi Ventures, CA**

**Prospect Ventures Partners, CA**

**Pappas Ventures, NC**

**Enterprise Partners, CA**

**Lauder Ventures, CA**

**vSpring Capital, UT**