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PENNIES FOR THOUGHTS: HOW GATT FAST TRACK HARMS AMERICAN PATENT APPLICANTS

TESTIMONY OF HON. DANA ROHRABACHER
SUBCOMMITTEE ON COURTS & INTELLECTUAL PROPERTY
COMMITTEE ON JUDICIARY
REGARDING H.R. 359 AND H.R. 1733
NOVEMBER 1, 1995*

Our nation's founding fathers knew the importance of inventors and their ideas.¹ Thomas Jefferson was a technologist;² a visit to Monticello reveals the products of his mind and of his imagination. Benjamin Franklin is renowned, even today, for his contributions. Thomas Paine, in *The Rights of Man*, said "though man may be kept ignorant, he cannot be made ignorant."³ These men valued knowledge as an end in itself.⁴ Knowledge, they knew, was a necessary condition for liberty. These men also shared the belief that the most effective way to guarantee progress was to respect and to protect new inventions. To that end, they created a patent

* Editorial note: This Article was adapted from Hon. Rohrabacher's testimony before the Subcommittee on Courts & Intellectual Property, Committee on Judiciary, Regarding H.R. 359 and H.R. 1733 on November 1, 1995. Since the substantive writing of this Article, H.R. 359 was voted down in the Subcommittee by a vote of 12-2. H.R. 1733 was revised and included in another bill, H.R. 3460, which was approved unanimously by voice vote without objection in the Subcommittee and in the full Judiciary Committee.

¹ See Ruth L. Gana, *U.S. Science Policy and the International Transfer of Technology*, 3 J. TRANSNAT'L L. & POL'Y 205, 217 (1994) (noting founding fathers' purpose in creating patent system was to increase public welfare); see also THE FEDERALIST NO. 12, at 91 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing importance placed on inventors' role in "common well being" of our country); Mark A. Baker & Andre J. Brunel, *Restructuring the Judicial Evaluation of Employed Inventor's Rights*, 35 ST. LOUIS U. L.J. 399, 399 (1991) (same).

² See, e.g., Dana Rohrabacher & Paul Crilly, *The Case for a Strong Patent System*, 8 HARV. J.L. & TECH. 263, 270 (1995) (noting many of nation's founding fathers were technologists); see also Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1263 (1984) (noting that "Americans' affair" with technology dates to founding fathers).

³ THOMAS PAINE, *THE RIGHTS OF MAN*, PART THE FIRST 513 (Philip S. Foner ed., 1995) (1791).

⁴ See *supra* notes 1-2 and accompanying text (noting founding father's desire for knowledge).

system which was second to none.⁵ Their vision helped America out-compete its old-world rivals and become the great and the prosperous nation we know today. Even after World War II, facing competition from Third World nations paying wages of 25 or 50 cents an hour, we have continued to out-compete every other country on the planet.⁶

The United States is successful because it has maintained a technological lead on the world.⁷ It is technology and knowledge that have given us the competitive edge throughout our Nation's history. It is not that the American people are necessarily willing to work harder or are more intelligent than people of other countries. If you look at American history however, there is a difference. The United States is the country that developed the telegraph,⁸ the telephone,⁹ and the reaper, which revolutionized the harvesting of crops.¹⁰ Further, the United States transformed the steam engine, originally developed by the ancient Greeks, into an engine for progress and prosperity.¹¹

It is not a coincidence that America has been a tremendous source of invention and that America is the only country in the world to include patent protections in its Constitution.¹² The American people believe in individual freedom, which guarantees each of us the right to control our own destiny, to think, to speak,

⁵ See, e.g., *Application of Bergy*, 596 F.2d 952, 958 (Cust. & Pat. App. 1979), *aff'd sub nom. Diamond v. Chakrabarty*, 447 U.S. 303 (1980). "[T]he Constitutionally-stated purpose of granting patent rights to inventors for their discoveries is the promotion of progress in the 'useful arts.'" *Id.*

⁶ See David M. Trubek, *Protectionism and Development: Time for a New Dialogue?*, 25 N.Y.U. J. INT'L L. & POL. 345, 349 (1993) (discussing low wages paid in developing countries).

⁷ See, e.g., Michael J. Doane, *Green Light Subsidies: Technology Policy in International Trade*, 21 SYRACUSE J. INT'L L. & COM. 155, 155 (1995) (noting America's role as technology and science leader); Bradley K. Steinbrecher, *The Impact of the Clinton Administration's Export Promotion Plan on U.S. Exports and High-Technology Equipment*, 15 U. PA. J. INT'L BUS. L. 675, 678, 689 (1995) (same).

⁸ See LEWIS LEE, *THE TELEGRAPH: A HISTORY OF MORSE'S INVENTIONS AND ITS PREDECESSORS IN THE UNITED STATES* 1-3 (1993) (discussing Morse's invention of telegraph).

⁹ See generally FREDERICK HOUK LAW, *MODERN GREAT AMERICANS: SHORT BIOGRAPHIES OF TWENTY GREAT AMERICANS* 8-9 (1969) (noting Alexander Graham Bell's invention of telephone).

¹⁰ See HERBERT NEWTON CASSON CYRUS HALL McCORMICK: *HIS LIFE AND WORK* 26-47 (1971) (discussing McCormick's invention of reaper).

¹¹ See ERIC ROBINSON, *JAMES WATT AND THE STEAM REVOLUTION* (1969) (discussing Watt's invention of steam engine).

¹² U.S. CONST. art. I, § 8, cl. 8. Our Constitution provides in relevant part: "Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." *Id.*

to worship and to raise families in ways that we wish. We believe that property, including intellectual property, should be respected and protected as a matter of right.¹³ Technology and freedom are different sides of the same coin in America, both are representative of the ideals by which we have remained prosperous.

Patent protection is absolutely crucial to the success of the United States. The current debate in the Congress over the direction of the patent system will have an enormous impact on this nation's economic future. Literally, billions of dollars of royalties are at stake.¹⁴ More importantly, our view of America is at stake. Will we continue to be a nation which rewards and protects the ideas created by Americans? Will we maintain our commitment to progress and to the independent mind? Or will we abandon these ideals and allow inventors to be ripped off by those who simply do not want to pay as much in royalties?

I, along with a majority of the House of Representatives, voted for "fast-track" authority for the GATT agreement.¹⁵ This provided the Administration with the right to negotiate GATT. The implementing bill, suggested by the Administration, would be presented to Congress; it would then be up for one vote.¹⁶ It was all or nothing; we could not vote to amend what was presented to us.¹⁷ This arrangement had two purposes: (1) it meant that the trade negotiators could hash out all the details and develop the

¹³ See John C. Lindgren & Craig J. Yudell, *Protecting American Intellectual Property in Japan*, 10 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 31 (1994) (discussing intellectual property rights as one of "America's greatest assets").

¹⁴ See Rohrabacher & Crilly, *supra* note 2, at 266 (citing Interview with Allen Richmond, Manager of Patent and Licensing for Phillips Petroleum which discussed patent law change impact on U.S. economy); Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 254 (1995) (discussing increase in world exports by 235 billion dollars annually due to GATT Agreement).

¹⁵ See 19 U.S.C. § 2902 (e)(1) (1995) (applying fast-track to GATT); see also Harold Hangju Koh, *The Fast Track and United States Foreign Policy*, 18 BROOK. J. INT'L L. 143, 143-44 (1992) (noting goals of fast-track voting include increased negotiating credibility); Straight, *supra* note 14, at 236 n.121 (discussing elements of fast-track process).

¹⁶ See Koh, *supra* note 15, at 143-45 (discussing fast-track voting procedures); see also James M. Grant, *Jurassic' Trade Dispute: The Exclusion of the Audiovisual Sector from the GATT*, 70 IND. L.J. 1333, 1365 n.7 (1995) (same); C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 132 (1994) (discussing fast-track procedure in regard to NAFTA).

¹⁷ See Natalie R. Minter, *Fast Track Procedures: Do They Infringe Upon Congressional Constitutional Rights?*, 1 SYRACUSE J. LEGIS. & POL'Y 107, 107, 112-14 (1995) (discussing fast-track procedure as well as corresponding limitations on congressional authority); Straight, *supra* note 14, at 236 n.121 (discussing congressional inability to amend fast-track legislation).

best agreement for America; and, (2) it also implied that nothing would be included in the GATT implementing bill that was not required by the actual agreement.

Sadly, Congress and the American people have been defrauded and betrayed. The GATT agreement states that each country has *at least* 20 years of patent protection from the time of filing of a patent application.¹⁸ Countries were free to add extensions if desired. The United States could have merely set a term of 20 years from filing or 17 years from grant, whichever was longer.¹⁹ This arrangement would have been consistent with the status quo in America for over a century, would have protected inventors and would have been completely consistent with the GATT agreement.²⁰ In fact, such a term was in existence for an interim period of seven-and-a-half months, until June 8, 1995. In the weeks before June 8, the Patent Office was overwhelmed with tens of thousands of applications from inventors who did not wish to lose their guaranteed 17 years of protection.²¹

I personally feel betrayed that the GATT agreement did not include a term of 17 years from grant or 20 years from filing. I voted for the GATT fast-track authority. GATT did not require our country to diminish the patent protection enjoyed by our citizens.²² This 20-year-from-filing term was placed in the implementing legislation in hopes of passing this major change in patent law with neither full debate nor full scrutiny.²³ I was denied the right even to review the language of the proposed legislative

¹⁸ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods [hereinafter TRIPS], 19 U.S.C. § 3511 (d)(5) (providing that patent protection be at least 20 years); David Nimmer, *GATT's Entertainment: Before and Nafta*, 15 LOY. L.A. INT'L & COMP. L.J. 133, 141-46 (1994) (discussing patents under TRIPS).

¹⁹ See *Patents, Copyrights and Trademarks, 1994: Hearings Before the Subcommittee on Patents, Copyrights, and Trademarks*, 103d. Cong., 2d Sess. (1994) (statement of Gary L. Griswold, Chief Intellectual Property Counsel for 3M and Vice President of Intellectual Property Owners) (discussing IPO preference for 20-year term).

²⁰ See TRIPS, *supra* note 18 (indicating that 20-years-from filing or 17-years-from grant would be consistent with TRIPS agreement).

²¹ Kenneth Parks et. al, *U.S. Patent Term Developments*, 2 J. PROPRIETARY RTS. 32 (Feb. 1995). Michael Kirk, Patent Commissioner and Lehman's Deputy Commissioner, has indicated that as a result of the bill that has passed, applicants who file applications after June 8, the date on which the legislation goes into effect, could be faced with shortened patent terms. *Id.*

²² See TRIPS, *supra* note 18 (outlining requirements of GATT).

²³ See Jon Choy, *Washington and Tokyo Parry Over Patents*, 5 JAPAN INSTITUTE OF AMERICA REP. 199 (Feb. 4, 1994) (noting that Sec. of Commerce Brown announced on that 20-year term would become effective on Jan. 21, 1994); *Patents, Economics and Law*, (BNA), at A16 (Jan. 26, 1994) (same).

change until shortly before the vote was scheduled. As it turned out, the Administration was forced to a stand off and the vote was delayed, which provided us with more time. Ultimately GATT passed, with the 20-year-from-filing term which could not be eliminated by amendment under the fast-track rules. Today, it is the law of the land.²⁴

Before GATT, when the 17-year-from-grant term was the law, if an American inventor applied for a patent, no matter how long it took the Government to issue that patent, the inventor still owned that patent for 17 years.²⁵ If the Patent Office took five or ten or fifteen years to issue the patent, it didn't matter, because the inventor and the investor still had 17 years of protection guaranteed to them. That measure was an important part of our country's commitment to protect and to nurture the genius of its people.²⁶

The GATT law dramatically changes that commitment. The change is designed to appear of little consequence. In fact, it appears to elongate the time of patent protection, because now, when an inventor's patent is issued immediately, the inventor will have 20 years of full protection rather than 17 years. The change would be beneficial, if patents were issued immediately, but they are not. Almost every patent representing a technological breakthrough has waited years and years to be issued by the Patent Office.²⁷ Under the new law, the microprocessor patent would have re-

²⁴ See 35 U.S.C. § 154 (1988), as amended by Uruguay Round Agreements Act, Pub. L. No. 103-465, §532, 108 Stat. 4809, 4982-83 (1994). The implementing legislation provides in relevant part: "subject to the payment of fees under this title, such grant shall be for a term beginning on the date in which the patent issues and ending twenty years from the date in which the application was filed in the United States or . . . from the date on which the earliest such application was filed." *Id.*; *Legislation: Trips Implementation Bills Spark Controversy at Joint Hearing*, PAT., TRADEMARK & COPYRIGHT J. 414, (BNA), No. 1192 (Aug. 18, 1994) (noting "fast-track" procedure to which Congress agreed, permitted only up or down vote on legislation without possibility of amendment); cf. *Conferences: Copyright Office Registration Reforms and Restoration Procedures Are Aired*, PAT., TRADEMARK & COPYRIGHT L. DAILY, (BNA), at D4 (May 19, 1995) (noting copyright attorney Jon Baugharten's argument that "fast-track" procedures kept copyright restoration drafts out of public eye, but that private sector was not excluded from participation).

²⁵ See 35 U.S.C. § 154 (1988). Before GATT, the applicable patent term provided that "[e]very patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, . . . of the right to exclude others from making, using, or selling the invention throughout the United States." *Id.*

²⁶ See John G. Byrne, Comment, *Changes on the Frontier of the Intellectual Property Law: An Overview of the Changes Required by GATT*, 34 DUQ. L. REV. 121, 121-25 (1995) (providing brief history of intellectual property law and GATT dating back to founding fathers).

²⁷ See Jeanne Saddler, *GATT Proviso Stirs Ire of Inventors and Their Backers*, WALL ST. J., Oct. 5, 1994, at B2 (noting that laser patent took twenty years to issue).

ceived three years, not 17 years, of patent protection.²⁸ The polypropylene patent, which the Patent Office issued after 27 years of delay, would have had no protection.²⁹ Many small biotechnology firms are based on one or two key patents which they own but which commonly take six, eight or ten years to issue.³⁰ The biotechnology companies will be severely hurt by the new term.

What does this change mean? The new law means billions of dollars that should be going into the bank accounts of American inventors and American investors will now be going into the bank accounts of multinational and foreign corporations. Further, the new law means that technology created and developed by Americans will be used against us by our competitors since real patent protection will be reduced. In short, it is one of the greatest rip-offs to inventors and to investors in American history. This is a crime, which the perpetrators will get away with unless we act.

We have to admit that some of the people who voted for and who supported the 20-year-from-filing term probably honestly believe that it will have a positive effect in stopping submarine patents³¹ and in harmonizing our patent laws with those of other countries. It is true that the United States, Japan and Europe have different types of patent laws. We have different laws to protect our other rights as well: freedom of speech, freedom of religion, and freedom

²⁸ See *Gatt Legislation Weakens Patent Protection*, USA TODAY, Nov. 30, 1994, at 10A (reporting twenty years from filing weakened U.S. patent protection because many new technologies take ten years or more to issue).

²⁹ See *Standard Oil Co. v. Mentedison*, 494 F. Supp. 370 (D. Del. 1980), *aff'd*, 664 F.2d 356 (3d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (providing indication of litigation preceding issuance of polypropylene patent); Ronald S. Chisum, *The Harmonization of International Patent Law*, 26 J. MARSHALL L. REV. 437, 455 (1993) (discussing crystalline polypropylene patent as illustration of thirty year delay in issuing).

³⁰ See *Legislators: House Panel Examines Bills on Patent Law Reforms*, 51 PAT., TRADE-MARK & COPYRIGHT J. 80 (BNA) No. 1253 (Nov. 16, 1995) (noting statement by patent agent of large biotechnology firm that patent office delays for biotechnology patents are notorious); Yusing Ko, Note, *An Economic Analysis of Biotechnology Patent Protection*, 102 YALE L.J. 777, 800 (1992) (noting that extended monopolies enable small biotechnology firms to contribute greatly to biotechnological inventions because of enormous size as well as clear focus).

³¹ See Joanne P. Chandler, *The Loss of New Technology to Foreign Competitors: U.S. Companies Must Search for Protective Solutions*, 27 GEO. WASH. J. INT'L L. & ECON. 305, 323 (1993-1994). Submarine patents are described as pending for several years, but due to the secrecy of the applications, subsequent applicants are unaware and waste time and money in futile pursuits only to loose out to original applicants in the end. *Id.*; cf. Saddler, *supra* note 27 (reporting that submarine patent problem is addressed by GATT).

of the press.³² The United States prides itself that we have stronger protections of our rights than do other countries.

However, Bruce Lehman, head of our Patent Office in the United States, apparently has decided that harmonization of patent laws is an important issue in and of itself. Therefore, he has agreed to this change in our patent law. This was done in agreement with the Japanese, who have wanted to make this and other changes in our patent law for many years.³³ The agreement with the Japanese Patent Office had to be enacted by Congress, and Lehman had to find a way to enact this major change, so he worked to slip it into the GATT bill. What did Bruce Lehman, our negotiator, looking out for American interests, get in return for eliminating certain patent protections in our country? In exchange, United States inventors receive two months more than we initially had, to file a Japanese language translation of a patent application.³⁴

This deal reflects an almost criminal naivete. To cover up this absurd acquiescence to Japanese interests, we have witnessed underhanded tactics being used and misinformation being spread about Capitol Hill. Last August, Mr. Lehman claimed in testimony that there were 627 submarine patents issued 20 years after filing. He said these delays were caused by inventors who intentionally delayed the issuance of their patent until the market matured and their return on investment was maximized.³⁵ We have received a report from the Patent Office on those 627 patents. The report stated that 68% of those patents were under secrecy orders and for that reason were delayed. That means the government had ordered the technology in those patents be kept secret for national security reasons. Of the remainder, some patents had been included erroneously and a large number had been delayed by Patent Office orders for divisionals. How many were really "sub-

³² U.S. CONST. amend. I.

³³ See Robert W. Pritchard, *The Future is Now — The Case for Patent Harmonization*, 20 N.C. J. INT'L L. & COM. REG. 291, 301 (1995) (discussing U.S. Patent Commissioner Lehman's negotiations with Japan).

³⁴ *Id.*

³⁵ See generally *Legislation: GATT Bill Clears House with Major Intellectual Property Law Reforms*, 49 PAT. TRADEMARK & COPYRIGHT J. 95 (BNA) No. 1206, at 95, 95 (Dec. 1, 1994) (explaining that because of lag time between application and patent issuance, provision was inserted in GATT implementing legislation extending patent term if delayed by government secrecy order).

marine" patents? It is impossible to know, but it could not have been more than a mere handful.

Patent Commissioner Lehman has said that the average patent application takes 19 months to be processed.³⁶ This statistic is misleading, to say the least. First, it includes routine abandonments which may take only a few weeks. Further, it includes inconsequential and trivial patent applications, which never produce royalties. Since the figure does not include re filings, it is not relevant to the issue of how long it takes from original filing to actual issuance, which is of primary concern.³⁷ Most importantly, breakthrough patents almost always take longer than "average" to be processed because they are more novel and more complex.³⁸ Mr. Lehman has never, despite many opportunities, addressed any of these concerns. Nor has he recanted his irresponsible statement of last August that he knew of 627 "submarine" patents, two-thirds of which turned out to be under secrecy orders from our government.³⁹ To this day, the Patent Office still has not given us the information we need, that is, the time it takes for breakthrough patents to be processed from the time of the ancestor filing date. I have asked the General Accounting Office to determine these statistics from the Patent Office. They will provide the answers for us, since apparently Mr. Lehman cannot.

This situation must be resolved and inventors' rights must be restored. I have authored legislation, H.R.359, to restore the patent rights of the American people. Senate Majority Leader Dole

³⁶ See *Joint Hearings on S.2368 and H.R. 4894 before the Senate Judiciary Subcomm. on Patents, Copyrights and Trademarks and the House Judiciary Subcomm. on Intellectual Property and Judicial Administration*, 103d Cong., 2d Sess. (1994) (statement of Bruce A. Lehman Assistant Secretary of Commerce and Commissioners of Patents and Trademarks). Mr. Lehman stated that by September 30, 1994, the average time for the Patent Office to dispose of a patent application will be approximately 19.6 months. *Id.*

³⁷ See Rohrabacher & Crilly, *supra* note 2, at 264-66. Inventors face time delays, as well as problems with the Patent Office's optimistic statistical compilations. *Id.* The compilations fail to take into account applications which require three or more successive filings, adding years to the average time to issue. *Id.*

³⁸ See Daniel J. McConville, *Intellectual Property Gains Respect*, *INDUSTRY WK.*, Mar. 7, 1994, at 33. (explaining that under current U.S. patent system breakthrough inventions remain "in limbo" for decades before approval).

³⁹ See Rohrabacher & Crilly, *supra* note 2, at 268. Congressman Rohrabacher notes that Donald Banner, former Commissioner of Patents under President Carter, revealed in a telephone interview that 257 of the alleged "submarine" patents were owned by the U.S. government and were probably delayed by secrecy orders. *Id.* He further surmised that the remaining 370 may have had similar restrictions. *Id.*; *Banner Questions Accuracy of Lehman Congressional Testimony*, 9 *BIOTECH PATENT NEWS* (1995). The reliability of the current patent commissioner's congressional testimony is questioned by Donald W. Banner, the former commissioner. *Id.*

has sponsored the same legislation in the Senate, S.284, and I commend him for his commitment to inventors. Senator Dole has led the effort in the Senate and is succeeding in shepherding the bill through a difficult senatorial process.

H.R.359 and S.284 are really quite simple. Both establish a patent term of 20 years from filing or 17 years from grant, whichever is longer. That is exactly the language that should have been included in the GATT implementing legislation. These bills also contain a clause which will cause the publication of a patent application if an inventor attempts to delay the process after five years. Many industry people have real concerns about submarine patents and inventors who allegedly rip-off corporations by playing the system and by filing endless continuations in the Patent Office. I have bent over backwards to help them because my only concern is maintaining 17 years of protection for American patent applicants. I have stated time and time again in meetings with congressional leaders and industry representatives that I would include anything that will solve the submarine patent problem in my legislation, as long as we maintain 17 years worth of protection. I am still waiting for a compromise. Frankly, I have come to suspect that the submarine patent issue is a cover being used by those who advocate a weaker patent system because they respect big-money multinational corporations more than they do the creative individual.⁴⁰ Mr. Lehman typified this attitude when he was quoted in the *New York Times* saying that his opponents were nothing but "weekend hobbyists."⁴¹ Last week, in testimony before a subcommittee of the International Relations Committee, he repeated that remark. No wonder Mr. Lehman negotiated away American patent rights with such abandon.⁴²

⁴⁰ See Andrew Pollack, *U.S. Changes Patent Law to 20-Year Term*, S.F. CHRON., Jan. 24, 1994, at C10 (highlighting story of individual whose efforts earned millions for corporate investors).

⁴¹ See Sabra Chartrand, *Facing High-Tech Issues, New Patents Chief is Reinventing a Staid Agency*, N.Y. TIMES, July 14, 1995, at 21 (quoting Bruce Lehman); Dana Rohrabacher, *Patent Office Owes Inventors Protection*, N.Y. TIMES, July 20, 1995, at 22 (criticizing Bruce Lehman's attitude for failing to protect inventor's fundamental intellectual property rights).

⁴² See David Friedman, *The World/Trade; A Policy That Punishes American Ingenuity*, L.A. TIMES, Nov. 19, 1995, at 2. The article articulates that "Lehman and Brown had exchanged U.S. patent revisions that gutted protection of the most complex, time-consuming and thus potentially lucrative American inventions—and handed the multinationals the early access to U.S. technology development they had long craved—in return for only the most trivial administrative concessions from Japan." *Id.*; accord Pollack, *supra* note 40, at C10 (describing benefits Bruce Lehman received from Japanese in negotiations).

Independent inventors are the creative engine of our economy.⁴³ It is both ironic and sad that IBM opposes a minimum guaranteed patent term. In fact, their company is based on the work of independent inventor, Herman Hollerith, who invented the tabulating machine and started the company that eventually became IBM.⁴⁴ It is equally appalling to see the large automobile manufacturers oppose H.R. 359, when independent inventors have contributed so much to that industry, such as Francis Davis' power steering invention and H.F. Hobbs' automatic transmission.⁴⁵ Apparently, these companies would prefer not to pay to use the ideas of such brilliant minds.⁴⁶

H.R. 359 has 197 sponsors (as of June 1, 1996, this number had expanded to 208), including myself. It is supported by a broad coalition of groups. The National Venture Capital Association supports the bill, because a minimum guaranteed term will allow them to predict the value of a new invention. Universities support H.R. 359, because they are producing thousands of new, basic ideas which are creating whole new industries in this country. Small businesses support H.R. 359, because many of those companies are based on one or two successful patents. Moreover, biotechnology companies support a minimum guaranteed term. Most biotechnology patent applications take five to ten years to be processed.⁴⁷ AMGEN and the industry group BIOCUM are each submitting testimony to this hearing.⁴⁸ I urge you to listen to their arguments. Without strong patent protection, these groups

⁴³ See Friedman, *supra*, note 42, at 2 (asserting attributes of American ingenuity as well as invention).

⁴⁴ See Rowland Aertker, *Big Blue: An Insider's View*, BYTE, Aug. 1995, at 45. Aertker explains the history of technologies at IBM. *Id.* He notes Herman Hollerith's punched card machines which he developed to tabulate the 1890 census. *Id.*; David Bowen, *Snickerdoodle Dandy*, INDEP., Feb. 25, 1996, at 5. Mr. Hollerith was the founder of the Tabulating Machine Company, which later became IBM. *Id.* He developed a device that used holes punched in tape, a primitive computer, in order to automate the U.S. census. *Id.*

⁴⁵ See Jim Murray, *What's His Line? Hobbs Hides it Well*, L.A. TIMES, Apr. 26, 1985, at 1 (noting that Hobbs invented first automatic transmission marketed in England in 1930's).

⁴⁶ See Friedman, *supra* note 42, at 2. "Giant multinationals like GM and IBM don't compete with new ideas; they try to dominate and stabilize markets with their size and distribution capabilities." *Id.*

⁴⁷ See Dan L. Burk, *Probing Transgenic Human Embryos: A Nonuse Cost Perspective*, 30 Hous. L. Rev. 1597, 1623 (1993) (stating that patent applications for biotechnology applications may take several years to get through patent office); Mark Crawford, *Patent Claims Buildup Haunts Biotechnology*, SCI., Feb. 12, 1988, at 723 (claiming companies must wait about 2.5 years before examiner looks at application in addition to another 25.3 months before decision regarding patent is made).

⁴⁸ See *Patent Bills: Hearings on H.R. 359 Before the Subcomm. on Courts and Intellectual Property of the House Comm. of the Judiciary*, 104th Cong., 1st Sess. (1995) (testimony

will be spending their money to defend their rights in the Patent Office and in the courts instead of developing their ideas into new products.

There is alternative legislation called the Patent Application Publication Act.⁴⁹ That bill proposes to publish *all* patent applications 18 months after they have been filed.⁵⁰ The publication occurs regardless of whether the patent has been issued and the technology protected, or whether the inventor has tried to delay the issuance of a patent. No matter what the circumstances, every application would be published under H.R. 1733.

It should be obvious that publication will lead to piracy of American technology by large corporations here in the United States as well as foreign interests. This legislation proposes that we let the world know the secrets of our technological creativity before the patents have been issued to protect them.

This was another Japanese demand that Bruce Lehman agreed to in order to fulfill his ideological commitment to harmonization between our countries.⁵¹ Under H.R. 1733, we are, in effect, going to hang a huge neon sign out in front of the Patent Office that says: "Come and steal our technology. Here is something of value; Come and copy it." H.R. 1733 must be defeated. Its advocates fully realize the effect of publication. The bill is officially called the Patent Publication Act of 1995, but in letters to Members of Congress, its proponents use innocuous terms to describe the bill, calling it "Patent Term Extensions" and sometimes not even mentioning the term "publication" at all. The bill's provisions for patent term extensions are unworkable and bureaucratic. The bill relies on the idea that the Patent Office will take responsibility for any delays caused by it and grant appropriate extensions. Such an approach is simply naive.

of Diane Gardner, patent agent, Molecular Biosystems, Inc.) (supporting H.R. 359 as well as 17 year term limits for patents).

⁴⁹ H.R. 1733, 104th Cong., 1st Sess. (1995).

⁵⁰ *Id.*

⁵¹ See e.g., *Oversight Hearing on the Patent and Trademark Office Including Testimony on the "Patent Term and Publication Reform Act of 1994": Hearings on S.1854 before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. 18 (1994) (testimony of Harold C. Wegner, Professor of Law and Director, Intellectual Property Law Program, George Washington University National Law Center) (commenting on automatic publication at 18 months as great benefit caused by Lehman in pursuit of harmony in reforms of Japanese Patent system).

Both the 20-year-from-filing term and 18-month publication of patent applications diminish patent protections. Together, they eliminate an important competitive advantage that America has enjoyed for over 200 years; the strongest patent system in the world. More than that, these changes are a direct attack on intellectual property rights, which should not be infringed. As I would not want the government to take away your land or your possessions, I do not want the government to take away your intellectual property.

As we enter a new technological age, our government is destroying our greatest asset, the creative genius of our people. We are giving it away for a feather-headed notion that we will achieve global harmonization of patent rights that will operate in good will.

Imagine if we told the American people that we desired to achieve global harmonization of individual rights, including our freedom of speech and freedom of religion. Suppose further that we had a government official contracting a deal with Singapore giving those rights away saying: "The American people will just have to give up these rights because they are too individualistic in our effort to achieve global harmonization of human rights. We need to make sure that wherever a person goes, everyone will enjoy the same level of human rights." Naturally, the American people would vehemently object.

It is up to us to carry on the tradition of Jefferson and Franklin and the creative minds which provided us the Constitution, individual liberty, and strong intellectual property rights. Those men spoke of freedom. They talked about the dignity of the common man. They said that we would be a society so prosperous that even the common man could own the product of his labor, and could live in peace and harmony with his family.⁵² Tyranny would not reign in America because we believed in freedom and in individual rights. Part of that freedom and those individual rights is the right of people to control their own creations. It is a precious right and is as important to our society as any of the other rights we have enjoyed for so long.

⁵² See Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 Wis. L. Rev. 1305, 1337 (discussing steadfast recognition of Jefferson's vigorous protection of rights of expression as well as equality, premised in large part on individual dignity).

We have allowed an unelected official, Patent Commissioner Bruce Lehman, to make deals with the Japanese which will diminish the rights of the American people.⁵³ Are we supposed to accept his *fait accompli*? This tragedy cannot stand.

⁵³ See Nancy J. Linch & John E. McGarry, *Patent Procurement and Enforcement in Japan—A Trade Barrier*, 27 GEO. WASH. J. INT'L L. & ECON. 411, 412 (1994) (stating that U.S. grants protection to Japanese inventors but Japanese do not reciprocate, thereby frustrating ability of U.S. companies to obtain and enforce meaningful patents); Don G. Costar, *First-to-File Patenting is Unconstitutional*, ELEC. ENGINEERING TIMES, Aug. 21, 1995, at 30 (asserting that Commissioner Lehman was "misguided" in signing deal with Japanese to shorten protection of American patents in exchange for two month grace period before Japanese interpretation); Monty Koslover, *Patent Policy*, L.A. TIMES, Dec. 4, 1995, at 4 (characterizing Commissioner Lehman's dealing with Japanese as "scandalous" and arguing deal favors Japanese on patent protection while undercutting American technological superiority).

