Harvard Law School Conference on Intellectual Property Law

Chief Judge Paul R. Michel

September 9, 2008

Patenting inventions and enforcing patents on those inventions is becoming destabilized. The statutory right to obtain a patent and to enforce it are both under attack, and from many from diverse directions. Some want to expand patenting, others to shrink it. Some want to weaken enforcement while others would at least retain it as is. In both legislative proposals and litigation positions, representatives of different industry groups demand different changes in the law and its application. Meanwhile, the Patent and Trademark Office has attempted its own changes from present practice by issuing expansive rules packages that shift burdens of time, effort, and cost from examiners to applicants. As if the situation were not already fractured and fragmented enough, professors propose two types of patents, gold-plated and tin-plated patents as well as examination inputs by everyone with a

computer. The general press has now taken up the subject of patents, sometimes with little understanding, often with sensationalized stories, and usually relying on anecdotes rather than studies and context.

With such elevated media attention has come interest by elected officials such as members of Congress, and now presidential candidates. Soon campaign contributions in the presidential context may replicate those to representatives and senators that accompanied patent reform legislation in the last two years. Will those with the largest PAC's be able to buy the patent system of their dreams? Perhaps the process has become too politicized. When, I ask, did we ever before see patent policy discussed publicly by presidential campaign advisors? Next, we may see potential Federal Circuit nominees being touted or trashed in the media in advance of any vacancies. But, there is no reversing these trends, in my view.

In today's global economy, foreign competitors of American companies also take great interest in the policy debate here over

patents as well as application of law in specific cases. Our court's website often gets more hits from abroad than from here. Foreign competitors can already expropriate U.S. patented innovations, piggy-backing on United States investment and research, everywhere except in the United States itself. If in the future they can also sell or import here with reduced risk of paying adequate damages and injunctions, they can be expected to do so. Will our innovative and research-based companies be the losers? Will technological innovation move offshore as so many manufacturing jobs have? Perhaps the balance of technological advantage will soon tip toward emerging giants such as India and China, established giants such as Japan, and middle-weight contenders such as Korea, Taiwan, and Singapore.

The majority of you in this room come from innovative U.S. companies, mostly smaller and newer firms. The United States, fortunately, has thousands of such companies. Yet the patent reform debate, so far, has been dominated, it seems to me, by only a dozen very large companies, mostly in Silicon Valley and

on Wall Street. Will you not want to participate too when the legislative jousting resumes next February?

Many others in this room represent companies either before the PTO or in the courts. But private practitioners were almost entirely missing from the witness lists in the last Congress. Instead, Chief Patent Counsels and general counsels of a few giant firms dominated the hearings as well as the "stakeholders' meetings" held by staff. But who knows better how the system works for most companies than those who represent the thousands of companies who went largely unrepresented in the last Congress? You should, I submit, be heard, for the system as reformed simply has to work for all, not just the few.

During this conference, you will hear two expert panels on Supreme Court patent law adjustments and one on patent reform legislation. Whatever one thinks of the recent patent decisions of the Supreme Court, everyone can agree that its process is utterly transparent and settled. When cert. is granted in a landmark patent case, numerous amici as well as the parties file briefs.

Often the government participates at the merits stage, and even more often at the certiorari stage. Consequently, all sides are heard and share equal access. In the legislature, however, the process has been anything but transparent. According to reports, hundreds of private meetings were held between individual congressman and the CEO or General Counsel of the mammoth firms that most wanted radical changes in the statutory law of patents. No records exist. Assertions made therefore could neither be verified or rebutted.

This very conference illustrates a process that is fairer and more reliable. After all, the panels are balanced; all assertions are out in the open and subject to debate and disagreement. Written submissions are equally available to all. I must applaud Harvard Law School and the conference organizers, particularly my friend Bill Lee and Professor William Fisher who this afternoon will have the last word.

Your agenda for today is as impressive as the moderators and panelists. The topics are surely well selected. There is, in my

view, however, one that is missing: the role of the Court of Appeals for the Federal Circuit. After all, the Supreme Court can only decide a couple of patent cases even in a banner year. And, many important patent issues may be so obscure as to discourage its generalist judges from addressing them. The rest, necessarily, are left to us. We have the expertise and the will to resolve doctrinal problems. What we lack is mainly the opportunity. Why for example did it take a full decade to revisit State Street? Because no one asked us to until recently. The same can be said of the central issue decided in KSR. It was never simply presented to us in a petition for en banc treatment. Oddly, we receive over a hundred a year. Yet few raise such fundamental issues as eligible subject matter under §101, or the Teaching-Suggestion-Motivation test, or the proper methodology for assessing requests for the permanent injunction, or barring them, future damages.

I doubt that the advocates consider our court lacking diversity of views and backgrounds. Surely, we have in-depth

knowledge of the patent doctrine, especially its more problematic areas. Surely, we have the responsibility. Surely we have the will as in recent en bancs such as Phillips, Seagate, Egyptian Goddess, and Bilski.

Why than do we so rarely get these sorts of issues presented in en banc request? I don't know the answer. But I submit to you all that if such petitioners were more strategic and more imaginative, our court could do its part to make the patent law better for everyone.

What are the gaps? Well, most petitions allege conflicts in the law without real analysis beyond convenient quotes from past decision, which we derisively refer to as "cite bites". Most challenge our result more than our reasoning. Few plumb the depths of the Supreme Court precedent. Almost none discuss practical impacts, empirical evidence or public policy. It is almost as if advocates assume every rule, test, and standard ever articulated even in dicta is both binding and are immutable. But they are not.

You in the room know the problems better than anyone. Why not raise them? Then, we can and will act. Thank you!