



## Software Freedom Law Center

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The Honorable Patrick J. Leahy, Chairman  
Committee on the Judiciary  
United States Senate  
433 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Arlen Specter  
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Dear Chairman Leahy and Ranking Member Specter,

I write on behalf of the Software Freedom Law Center, a 501(c)(3) charitable foundation incorporated in New York State and providing free legal services to non-profit technology producers, to express our concern about the current provisions of S.1145 §5, which appear to eliminate recourse to the US Patent Office by way of ex parte requests for reexamination of patents by members of the public. Ex parte re-examination is the sole effective means whereby the public interest can be protected against long-standing erroneous determinations by the PTO that can have far-reaching deleterious social effects. Making use of the ex parte re-exam process, we and our partner counsel have been able to abate serious and damaging interferences with the public's freedom in a number of areas, including:

- Preventing duplicative repatenting of fundamental inventions in biotechnology by research institutions attempting to impose tolls on all continuing research in crucial fields by illegally extending the term of basic "toolchain" patents in such areas as genetic cotransformation and human stem cell research;
- Preventing pharmaceutical companies from illegally extending the patent lifetime of essential drugs through obvious non-novel manipulations of molecules (crystallization, for example), redistributing to themselves billions of dollars from patients and employers who pay health insurance premiums;
- Preventing illegal intimidation and restraint of trade in the market for software used in higher education.

In these and other areas, the public interest harmed by the erroneous award of a long-term monopoly on an idea may be so dispersed as to make the expensive attempt to secure judicial determination of the patent's validity impossible for public-interest organizations. The risks of retaliation—and the attractiveness of cozy settlements for the division of ill-gotten royalties—may keep other commercial parties from securing the public interest in the pursuit of their own private gains. Only the availability of a quick, inexpensive, administrative opportunity to present to the PTO an overwhelming case for the withdrawal of an erroneously-issued patent allows us to protect the public interest at manageable cost. The positive returns to society of our activity have been six orders of magnitude greater than the cost, which is as favorable a return on investment as any administrative policy measure can ever hope to achieve.

We urge you to reconsider the current state of S.1145, and not to eliminate one of the most useful tools civil society possesses to defend itself against greed and sophisticated rent-seeking at the expense of the Patent Office and the public. Patent reform at the expense of patent re-examination is reform that only a patent abuser could love.

Sincerely yours,

Eben Moglen  
President and Executive Director  
Software Freedom Law Center