Statement on Patent Reform Bill (SR 1145)

March 17, 2008

The proposed patent reform is fundamentally misguided. Even if well intended, it is essentially a reactionary effort to reduce the risk of infringement litigation from an emerging and transitory class of non-operating patent holders. However, the proposed reform is not appreciative of the ability of these new patent threats to adapt. The proposed reform was not drafted with meaningful consideration of long term negative repercussions on US global competitiveness and innovation.

The economics of the developing marketplace for IP as well as a multitude of secondary market effects is not well understood by the advocates of change. The proposed legislation is not fully reflective of the recent and significant decisions of the Courts (eg. ebay or KSR) addressing the more relevant economic effects of a growing aggregation of patented inventions in modern goods and services. Consider the following:

- The problem as stated is not large and those advocating reform actually receive a direct net benefit from a generally recognized increase in patent value. Total damages or royalties collected by Patent Licensing & Enforcement Companies (P-LECs or 'trolls') is small (well less than $10B annually) as compared to the newly recognized value of patents generally. Estimates are that IP contributes more than $5.5 TRILLION to the US economy each year. Ironically, the largest beneficiaries of this newly recognized patent value include the very companies advocating reform.

- Elimination of 'weak' or 'improperly issued' patents will not reduce the litigation risk. Indeed, P-LECs will simply adapt, acquire and assert from the remaining population of 'higher quality' patents. The likelihood of large damage awards attributable to P-LECs which hold through all appeals will arguably increase!

- The proposed reform, if passed, will defer and decrease the market value of patents. This will have significant negative efforts vis-à-vis new venture investment in technology. It will also put US patent owners at an incremental disadvantage to their foreign counterparts. The recent and overwhelming opposition to patent reform by America's labor unions is notable in this respect.

The US economy has completely inverted in the last quarter century. Company value is driven (80%) by intangibles today. Twenty five years is a short period to reflect a change from an industrial age to an innovation age. The market is working quickly to catch up and we must be patient or we risk stalling our most important engine of growth at a time when it will benefit our global competitors the most.

James E. Malackowski, Founder and CEO, Ocean Tomo, LLC
Gregory Fossedal, Co-Founder and CEO, Freedman's Financial
Keith Grzelak, Chairman, Intellectual Property Policy Committee, IEE