STATEMENT OF REP. JOHN CONYERS, JR.
Courts, the Internet, and Intellectual Property Subcommittee
Hearing on H.R. 2795, the "Patent Act of 2005"
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I am an original cosponsor of this legislation because I believe we need to make major changes to the patent system. At the same time, however, I do have concerns with several of the provisions in the bill.

At the outset, it is important for our economy to harmonize our patent system with those of other countries. To this end, we should establish a system that awards the patent to the first-inventor-to-file. We also should make it easier for third parties to challenge patents after they have issued as long as the process has some finality to it.

Other sections, however, will require continuing discussions. I have not heard anyone deny that there are too many 'bad' patents out there, patents that are overbroad or that the Patent and Trademark Office should have been denied as being obvious. Owners of such patents file infringement suits and receive either damages or injunctions for patents that never should have been issued. This drives up costs not only for businesses but also for consumers. To address this, we are faced with two options.

Because of problems in a few industries, there are proposals that we make it more difficult to enforce patents. I fear, however, that this could disproportionately affect smaller patent owners, who would have a more difficult time in establishing harm from infringement if damages but not an injunction were awarded.

In terms of scope, this approach may be too broad. It would affect owners of not just overbroad patents but also those that are entirely legitimate. It also would affect not just the industry in question but every industry that is vital to our economy, from biotechnology to software to high-tech. Finally, it could discourage investment and research into new drugs and technologies, as investors would not know whether any resulting patents would ultimately be enforceable.

The second option, which I believe deserves greater consideration, is to prohibit such patents from issuing in the first place. Such an approach would help avoid infringement and related litigation costs altogether. It also would ensure against the issuance of injunctions for patents that should not have been granted without affecting the rights of legitimate patent owners.

One proposal to accomplish this is to allow patent examiners to review more than just officially published documents. Patent examiners must be able to consult information that tells whether an application describes something that is not really new, even if that information was not a patent or a journal article. I would hope we can all agree that the PTO should be able to consider a wider variety of such prior art than it is currently permitted.

We also need to revisit the standard that is used to determine whether an application describes something that would be obvious to people in the field. Even if an invention was not clearly explained somewhere, the concept of it may be too obvious to merit patent protection, and we should make that clear to the PTO and to the Federal Circuit. These two ideas, among others, could drastically cut the number of bad patents being issued and drive down costs for all of us without harming valid patent owners, large and small.