A SPEECH BY SENATOR BIRCH BAYH TO THE PATENT LAW ASSOCIATION OF CHICAGO

Thank you very much for inviting me to speak at your annual Judge's Dinner.

I am sure that you are aware as I am of the evidence that American innovation and productivity seems to be in the midst of a protracted, continuous slump. You are undoubtably aware that the number of patents filed by our citizens has been going steadily down while the number of U.S. patents granted to foreign inventors has been increasing. Foreigners now account for approximately 35% of all U.S. patents granted. Last year we faced a $6 billion deficit on the importation of manufactured goods. In 1970 West Germany replaced the U.S. as the world's largest exporter of manufactured goods. We are now being sorely pressed by Japan for holding on to second place.

To give you an idea where we stand in relation to our strongest competitors it is interesting to note that between 1973 and 1977 the annual growth rates of West Germany and Japan were 5.5% and 2.4% respectively. Our growth rate was 1.5% which not only trailed our most serious economic competitors but also was lower than that of France, Canada, Belgium, Denmark, Italy, and the Netherlands. The only major industrialized countries that we managed to beat were Sweden and England.

The productivity indexes for this year continue to indicate a problem. Our productivity for the first quarter was -3%, for the second quarter -2.2%, and for the third quarter a modest .1%.

Business itself has contributed to this trend because in many instances cautious corporate leaders demand to see an immediate return on investments

and view long range research and development as an uncertain risk that will show up in red on the ledgers. Japanese businessmen on the other hand, routinely plan their research and development 10 to 15 years in advance whenever possible and are willing to take risks that have paid off handsomely.

All of these trends have combined to create an open economic wound that is constantly bleeding dollars aborad. It affects us personally when we find double digit inflation chewing up the value of our hard earned dollars. I'm sure most of us have noticed that all too often the most modern, technologically advanced items in our stores have the name of a foreign country stamped onto them. In addition to fueling inflation this trend adds to our unemployment problem as what were once American jobs are drained off to foreign countries.

I have given this problem a lot of thought and have tried to examine those assets which enabled American ingenuity to become the envy of the world over the last half century and what we can do to recapture that leadership. There are of course many factors involved, but one area that comes up again and again as an American characteristic is our appreciation and reward of individual initiative, persistance, and genius. Many might say, well any society rewards this, but you will find that in the totalitarian societies which make up the majority of governments of the world the same creative genius is viewed with suspicion as a threat to the Government's power.

We have an excellent example of this spirit with us here tonight in the person of Mr. Marvin Camras, whom you have designated as your "Inventor of the Year." Mr. Camras' hard work has helped to revolutionize the American recording industry and has benefited millions by creating new jobs and enhancing our enjoyment of music. Throughout our history we have had individuals who were willing to go farther and work harder than the bare minimum required of them. I don't think that we have necessarily had more than our share of geniuses, but our societies' openness and freedom have allowed creativity to flourish while it was perishing in other lands. Soviet science today is very well adapted to "steel and concrete" projects, but even with a cut-back in our own research and development efforts, we remain years ahead of the Soviets in the creative scientific disciplines such as communications, medicine, transportation, and the many other factors which have given us our high standard of living. American creativity is not something that we can take for granted, however. If the factors which have allowed it to flourish are suddenly removed or left to wither through indifference, we will quickly be left behind by our international competition. Many other countries have closely studied our past accomplishments in order to overtake our leads in various fields. We simply cannot afford to stand still.

I have concluded that one very important part of our success in cultivating American creative genius was a strong patent system. A patent assures that the person who is willing to go a little farther and work a little harder than his neighbor will receive the recognition and rewards which are due if the invention is useful to society. Without patent

protection inventors want to hide ideas to prevent stronger rivals from stealing them away. I have heard that many needless deaths occurred in childbirth because the inventor of the foreceps kept their existence a closely guarded family secret.

I believe that it was Thomas Edison who said that invention is 10% inspiration and 90% perspiration. Other societies have found that without a strong patent system there is simply no incentive for working up this creative sweat. Virtually every country in the world, with the exception of the People's Republic of China, has some form of patent system to encourage innovation. The patent system is a trade-off society makes with the inventor that in return for disclosing new discoveries the Government will protect the inventor's right to the invention. A strong patent system is crucial if we are to maintain our fast dwindling lead over our foreign competitors and regain our prominence in markets that we have already lost. This is the reason that I have become an ardent supporter of the U.S. patent and trademark system.

The patent and trademark system suffers from many ills today which jeopardizes the Government's ability to uphold its end of the bargain that it makes with inventors. The Patent and Trademark Office has been seriously underfunded for a number of years. Not surprisingly this is reflected in the increasing pendency times for both patent and trademark applications and has prevented the Patent and Trademark Office from delivering the services to the business community that it needs and deserves.

I was also alarmed to discover earlier this year that from 2% to 28% of the patents <u>in every subclass</u> are missing from the files. This creates

unnecessary uncertainty over the value of any issued patent which can always be challenged on the basis that not all of the pertinent materials were considered before it was issued.

The Patent and Trademark Office has not been able to hire the staff that it needs, and has even been unable to fill the positions that have been vacated by examiners leaving office. All of these factors help to weaken our patent and trademark system and serve to discourage innovation by calling into question the worth of U.S. patents.

We have been addressing many of these problems. I attempted to add an additional $14 million to the 1980 Patent and Trademark Office budget. I have introduced S. 1679, the Patent Reexamination Act, which would allow the Patent Office to inexpensively reexamine most issued patents to determine their validity. Senator Dole and I introduced S. 414, the University and Small Business Patent Procedures Act,which would create a uniform Government patent policy for small business and university contractors. President Carter proposed similar legislation to both S. 414 and S. 1679 in his recent Productivity and Innovation Program.

Still, I believe we must do more to strike at the heart of the problem that besets us. The situation in the Patent and Trademark Office has reached crisis proportions. The feelings of frustration has led former Commissioners Ooms, Kingsland, Marzall, Watson, Gottschalk, Dann, and the recently resigned Donald Banner, to call for fundamental changes in the status of the Office in the Government bureaucracy. Indeed Commissioner Banner in his address to the American Bar Association in Dallas on August 11, 1979 said: "In my view we are faced with a slowly but steadily declining Patent and Trademark Office. Not only are we failing to make

the PTO a model office, we are failing to provide the necessary maintenance. If we do not promptly reverse this direction of movement, it shall soon be infected with an administrative dry rot condition, rendering it moribund." When someone like Donald Banner issues a clear warning of impending disaster like that, I for one think that it is high time for action. This dry rot must be cut out immediately!

Therefore, tonight I am announcing that I intend to introduce legislation this week to create an independent Patent and Trademark Office. I have held off announcing my intention until tonight because frankly I think that the Patent Law Association of Chicago agrees with my assessment that unless the Patent Office is allowed to speak for itself without being gagged by bureaucratic red tape at the Commerce Department we will continue to have our patent system rotting from indifference in spite of all of our efforts to cure the disease.

My bill will be quite simple. The Patent and Trademark Office will be removed from its present position at the bottom of the pile in the Commerce Department and will become an independent agency. As such the PTO will be able to function without constant meddling in its affairs. The bill will also create a 6 year term of office for the Commissioner of Patents and Trademarks and will require that any Commissioner be someone with widespread experience and understanding of the workings of the patent and trademark system. This bill will not create any new bureaucracy, but will insure that the Patent and Trademark Office is allowed to function as efficiently as possible. This fundamental change will elevate the status of the Patent and Trademark Office in the U.S. Government and will

be concrete proof that we are indeed serious when we say that we want a patent and trademark system second to none!

The Patent and Trademark Office's function is so specialized and technical that it really deserves to stand on its own without any other political or policy considerations affecting its workings. President Jefferson--who at one time experimented with abandoning the patent system--became an ardent supporter of the patent office and gave it a great deal of personal attention. As a prolific inventor he understood better than most the importance of the patent system to the innovative process.

President Lincoln, who was also a patent holder, remarked that the patent system added the fuel of interest to the fires of genius. Unfortunately, those flames are now flickering periously low!

The Patent Office has been under the auspices of the Departments of State, Interior, and finally Commerce in its history. This diversity of alignments underscores the obvious fact that because of its unique function the Patent Office really does not belong under any other agency. This becomes even more apparent when it is realized that the parent agencies have all too often ignored the Patent Office and have had little sympathy for its needs.

I became personally aware of the benign neglect of the Patent Office when I attempted to find out if the stories that I kept hearing about the situation at the Patent Office were really true. When the Commerce Department presented its budget request for FY 1980 I submitted a series of written questions on the needs of the Patent and Trademark Office. Obviously, the answers that I received had been drafted by someone in the Patent and Trademark Office because for the first time its real needs were listed

without adherance to the official Commerce Department line that "everything was just fine" or that "a study of the alleged problem was needed." I have been around Washington long enough to know that when a bureaucrat promises to study a problem and let you know what they find out you have a better chance of watching the World Series in Wrigley Field next year than of obtaining a meaningful answer.

I was satisfied that the needs of the Patent and Trademark Office were legitimate and as I have already mentioned, I proposed giving the PTO enough additional funding to meet its needs. The members of the patent bar did an excellent job of supporting my efforts in the Senate and the mood of the Appropriations Committee was becoming increasingly receptive. Unfortunately, the Commerce Department decided to oppose my efforts by saying that if any more money was appropriated there was a good chance that it would be misused. Again, the promise of a "study" was bandied about. The Congress did appropriate an additional $1.1 million for printing approved patents, but the unfortunate result was that another year was allowed to slip away without solving the total problem.

It is crucial if we are to shore up our patent and trademark system that the Congress be able to directly find out what its needs are without having the information filtered through layers of people who are unfamiliar with patent problems and policies. Ironicially, the President's Domestic Policy Review on Innovation and Productivity which was completed last week confirmed the need for upgrading the Patent Office.

The Patent and Trademark Office has been an orphan for too long. The present deterioration of our patent system is the logical result of a

lack of information on the real needs of the Office and a lack of sensitivity in the Department of Commerce to the importance of a competent, modern patent system. This is vital not only to the patent bar, but more importantly to the American business community which must depend on the strength of its patents to protect its investments and ideas.

The mood of the Congress has changed in its sensitivity to the patent system, and I predict that this Congress will see more patent-related activity than has occurred for many, many years. This is also an ideal time to address the larger issue of establishing an independent Patent and Trademark Office which is really the central issue. I am afraid that if we fail to take this fundamental step I could easily be back before you next year giving this identical speech. Frankly, I will need all of the help and support that you can give if this idea is to succeed.

I have found that the patent bar shares my belief that the need to preserve the innovative, pioneering spirit is absolutely critical to our continued successes as a society since you are so familiar with the needs of inventors. The challenges of the future can be faced and overcome if individual genius is allowed to flourish. Our history is solid evidence that our spirit has been more than equal to the challenges and the problems of the past. Our forefathers have passed onto us a legacy of daring and courage which must be safeguarded for posterity. This great gift is in danger of being lost now, but it need not be if we are willing to face up to the problem. The patent system is a clear test of our resolve to preserve the heritage of individual freedom and enterprise which has built this country. I am sure that you will join with me in preserving this legacy for the future generations.

Thank you