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Patent Reform Act Proposal: Real Reform or Gift to Big Business

Stephen Wren

July 26, 2007

All this talk of a need for patent "reform" is but a red herring fabricated by a handful of large tech firms as a diversion away from the real issue...that they have no valid defense against charges they are using other parties' technologies without permission. The objective of these large firms is not to fix the patent system, but to destroy it or pervert it so only they may obtain and defend patents; to make it a sport of kings. Patents are a threat against their market dominance. They would rather use their size alone to secure their market position. Patents of others, especially small entities, jeopardize that. For example, the proposed change to eliminate the use of injunctions would only further encourage blatant infringement. Any large company would merely force you to make them take a license. They would have little to lose. Everything would be litigated to death -if a small entity can come up with the cash to pursue. That's what these large multinationals are betting against. This legislation is regressive, not progressive.

Sadly, some legislators and other parties have been duped by these slick firms and their well greased lawyers, lobbyists (some disguised as trade or public interest groups), and stealth PR firms. Don't be surprised to find the Washington lobbyist scandal spreading into the patent reform proceedings.

While some of these large firms pushing for reform such as Intel may own a lot of patents, the fact is more often than not they find themselves as defendants in patent cases. Many of their patents neither they or anyone else use. For them patents

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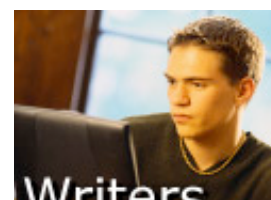
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exist mostly for defensive use.

Actually, even the present threat of injunction is not sufficient to deter would be infringers. Just look at the Blackberry case. RIM had to have known they were infringing or likely so and yet they still held out to the bitter end. They took the nuclear option and guess what...they got nuked. If anything, we need harsher penalties to force large aggressive firms into thinking twice before thumbing their nose at small patent holders. I recently noticed one country is considering jail time for infringers. That sounds like a great solution to me. "Don't bother to pack boys, we've got your suits all ready...pinstripes!"

The problem is that companies who are using your technology aren't so genteel as to stop using it merely because you politely ask them to do so. Invention is rough and tumble. The fact is, a patent is merely a right to sue someone to not make your invention without permission. Unless you have the will and money to sue them, they will turn a deaf ear. Unless you have a good patent, you will not get the money. It's sad, but it's the reality of business. All this talk about patentees gaming the system with bad patents is then a hoax. Why do these detractors never identify these supposed bad patents? Surely if they exist they can be identified?

If anyone is gaming the system, it is large multinationals. After losing in court they coerce the Patent Office into conducting a reexamination on the patents they have been found guilty of infringing. That is pure abuse of process!

The fact is, there is no systematic abuse of the patent system by patentees which would require an overhaul of the system. To the contrary, there is a reason why the patent system works the way it does. We didn't get here by accident. That's because of past abuse of the system by large companies who used their wealth to give inventors the run around and make a sham of the system. Take a look at the RCA/Armstrong case of years ago on FM radio. RCA ruined Armstrong with a legion of attorneys. They so destroyed Armstrong and made a mockery of the patent system that he committed suicide. Check out Tom Lewis's "Empire of the Air", chapter 10, p313 and p356. Part of RCA's outrageous conduct was to string Armstrong along making him think they were interested in his invention only to copy his work and file patent applications of their own. Later they then entered into an interference against him at the patent office -a fraudulent act. RCA committed similar abuses of the patent system against electronic television inventor Philo Farnsworth. See "The Boy Who Invented Television" by Paul Schatzkin.



As to the quality of patents; based on court rulings of the last several years, roughly half of all litigated patents are upheld in court. That's pretty balanced and suggests there is no problem with patent quality. Further, seldom do cases ever make it to trial as the parties settle out of court. The facts do not support the contention that there is a patent quality issue. Still, with almost half a million patent applications filed each year a few are bound to be issued that shouldn't. However, rarely are they ever an issue because you can't enforce them without money and you won't get the money unless you have a good patent. Keep in mind it costs the patent holder about as much in a patent suit as it does the accused infringer. Investors are not stupid. If they don't have confidence in your patent, they will not invest. It's that simple. Bad patents do not get funded.

If there is a problem with the patent system, it is not that patents are issued too hastily but rather that many are issued too slowly. Witness the current backlog and pendency. I for example have applications with a pendency of 15 years! In one instance it took 3 years just to get a first office action. With this kind of pendency by the time an inventor gets their patent their technology is of no value. That is the problem everyone should be focused on -not this imaginary issue of patent quality trumped up and propped up by large multinationals as a way to stifle innovation and further cement their market control. Can you say "monopoly"?

Further, certain large multinationals speak of the need for harmonization. Why is that necessary? If others are backward would we want to modify our system just to match theirs? When one looks at the efficacy of patent systems throughout the world the US patent system has produced far more innovation than those of other countries over the last several decades. If anything, other countries should be changing their systems to get inline with ours. Rather what's going on is these large multinationals and those they have duped are using specious arguments to get what will benefit them personally. The rest of the country be damned.

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All this is then not about present abuse of the system by inventors or a need for patent reform, but rather systematic past and present abuses by large companies. Witness the present conduct of firms like RIM in using the courts to drag out a final verdict. The judge in that case remarked about how delays frustrate justice. Also, look at the exploitations and predations of Medtronic.

Even worse; not only is there no need for reform, but the proposed changes will actually damage our functional system. The proposed changes:

- 1) Increase the costs to small entity patent holders, often by at least an order of magnitude.
- 2) Shift costs from large corporate infringers to the small entity.
- 3) Open new causes for large entities to litigate.
- 4) Open our patent system to a multitude of patent system abuses common in Japan which very much favors big companies.
- 5) Delay the possibility of start-ups obtaining investment capital by effectively increasing pendency.
- 6) Increase the power and potential abuse of such power by the USPTO which has become increasingly politicized.
- 7) Lowers the potential recovery for a patentee by at least one to two orders of magnitude.
- 8) Will not decrease the role of attorneys or litigation, but rather will increase their role and legal expenses in a multitude of ways.
- 9) Will lead to much higher filing rates for patents which will further bog down the USPTO.

When corporate America agrees to not use our inventions without consent, American inventors and small entities will agree to stop suing them.

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