

# Patent Reform 2011 Will Hurt America's Small Inventors and Economy

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- A recently passed Senate bill S.23, <sup>i</sup> has been promoted vigorously by major multinationals corporations and Wall Street; <sup>ii iii</sup>
- 'Patent Reform' will disproportionately prejudice small inventors and businesses; <sup>iv</sup>
- businesses with > 500 employees create less the 10% of new jobs;
- and are much more likely to ship jobs overseas; <sup>v</sup>
- but, small businesses (< 500 employees) create all net new jobs; <sup>vi</sup>
- and are much less likely to ship jobs overseas;
- yet 'small entities' (<500 employees) receive less than 25% of US patents <sup>vii</sup> <sup>viii</sup> and this is steadily declining; <sup>ix</sup>
- yet over the past 4 or 5 years Congress Patent Reform hearings have had numerous witnesses from 'big business' and Wall Street, but virtually no independent inventors or 'small businesses' witnesses; <sup>x</sup>
- except for somewhat smaller PTO fees, small inventors are subject to the same rules as major corporations who are the proponents of this legislation;
- small inventors are faced with 'unfair relative' costs and risks relative to the big companies like Microsoft, IBM or Intel; this of itself is unfair;
- there is a much greater 'relative' burden on small inventors for 'reexaminations' and litigation because of the huge costs and risks involved;
- it currently takes 3 to 4 years to get a patent issued by the PTO which can cost \$10 thousand up to \$100 thousand for one patent;
- and, there can be an unlimited number of reexaminations and infringement suits... for the entire life of the patent;
- each reexamination can take 2 or 3 years; and "...Some have *estimated that the average cost of an interference proceeding is \$600,000, which can present a substantial barrier to smaller players...*;" <sup>xi</sup>
- ex parte reexaminations are even brought by parties anonymously, encouraging harassment of small inventors;
- adding yet another 'post-grant review' process to existing multiple review processes makes little sense and disproportionately cause unnecessary delays for small inventors;
- litigation can take 3 to 5 years, and can cost \$1, \$5, \$10 million or more;

- in the past few years there have been a series of court cases which make enforcement of patents by small inventors much more difficult and encourage big companies to intentionally infringe patents;<sup>xii</sup>
- protection of property is one of the foundations of a democracy, and patents are the only form of 'personal property'<sup>xiii</sup> subject to so many challenges and so much uncertainty;
- these multiplicity of challenges and uncertainty as to the value of patents, inhibit innovation, drive away investment capital for innovation, and distract the inventor from creating new inventions and the businessman from growing his company;
- the sum total is it unfair to small inventors and businesses, stifles innovation, slows economic growth and makes America weaker globally; and,
- does not "...promote the Progress of Science and useful Arts...;"<sup>xiv</sup>
- small inventors, entrepreneurs, and small businesses request an opportunity to be heard in the Senate and House Judiciary Committees, the House Small Business Committee and the Senate Small Business and Entrepreneurship Committee

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<sup>i</sup> S.23 "America Invents Act of 2011;"

<http://www.ipo.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=28748;>

<sup>ii</sup> Letter from America's Small Businesses, Start-up Entrepreneurs, Independent Inventors, and Technical Professionals to Senate Majority Leader, Harry Reid, February 23, 2011; <http://www.patentbaristas.com/wp/wp-content/uploads/2011/02/Small-Biz-Inventors-Empl.pdf>;

IEEE-USA Letter to Patrick Leahy, 15 February 2011; <http://www.ieeeusa.org/policy/policy/2011/021511a.pdf>;

National Small Business Association (NSBA) Letter to Senator Harry Reid, February 15, 2011; [http://www.nsba.biz/docs/patent\\_reform.pdf](http://www.nsba.biz/docs/patent_reform.pdf);

Letter to Patrick Leahy and Charles Grassley, 15 February 2011 from Retired Chief CAFC Judge, Paul Michele and President of IFP&TE AFL-CIO; <http://www.ifpte.org/downloads/news/manager/41c.pdf>;

Patent Deform Act of 2011: Approved by Senate Committee, by Dale B. Halling, State of Innovation, Patents and Innovation Economics; <http://hallingblog.com/2011/02/08/patent-deform-act-of-2011-approved-by-senate-committee/>;

"The Patent Act Is A Cheat On Americans," by Phyllis Schlafly, Eagle Forum; <http://www.eagleforum.org/column/2007/oct07/07-10-31.html>;

Patent Reform: The Senate Makes Its Move, by Manus Cooney and Marla Grossman, American Continental Group, March 7, 2011; <http://ipwatchdog.com/2011/03/07/patent-reform-the-senate-makes-its-move/id=15688/>;

"The Rush to a First-to-File Patent System in the United States: Is a Globally Standardized Patent Reward System Really Beneficial to Patent Quality and Administrative Efficiency?" 7 Minn. J. L. Sci. & Tech. 757-775 (2006), by Brad Pedersen; <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=7+Mi>

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[nn.+J.L.+Sci.+%26+Tech.+757&srctype=smi&srcid=3B15&key=2b867160a53444a997b8704c51378664;](http://www.fedregister.gov/search/advsearch.html?query=patent+reform&start=1&end=10&srctype=smi&srcid=3B15&key=2b867160a53444a997b8704c51378664)

"The debate over patent reform dates back to a 2004 National Academy of Science report that made several recommendations for modernizing the patent system and the PTO. Traditionally, changes to the patent code were relatively modest and were driven by established and esteemed patent-focused associations like IPO and AIPLA. But, in 2005, a powerful subsection of larger companies from the information technology industry ("IT") saw an opportunity to advance their interests and convinced Congress to include measures in patent reform legislation that would have rewritten the laws around how patents are enforced." Patent Reform: The Senate Makes Its Move, by Manus Cooney and Marla Grossman, American Continental Group, March 7, 2011; [http://ipwatchdog.com/2011/03/07/patent-reform-the-senate-makes-its-move/id=15688/;](http://ipwatchdog.com/2011/03/07/patent-reform-the-senate-makes-its-move/id=15688/)

These large multinationals and banking interests have set up 'front organizations' with very nice-sounding names to try to disguise who is in fact pushing for this legislation and the real reasons behind it. They include:

Intellectual Property Owners Association;

[http://www.ipo.org/AM/Template.cfm?Section=Corporate\\_and\\_Law\\_Members&Template=/CustomSource/MembershipListing/index.cfm&Type=CORP;](http://www.ipo.org/AM/Template.cfm?Section=Corporate_and_Law_Members&Template=/CustomSource/MembershipListing/index.cfm&Type=CORP;)

Coalition for Patent Fairness Membership; [http://www.patentfairness.org/learn/who/supporters/;](http://www.patentfairness.org/learn/who/supporters/)

Coalition for 21st Century Patent Reform; [http://www.patentsmatter.com/about/coalition.php;](http://www.patentsmatter.com/about/coalition.php)

<sup>iii</sup> Despite enormous money and effort expended by the biggest IT firms and Wall Street only one bill in seven attempts has gotten through the House over the past 6 years. The previous Congressional attempts to reform the Patent Act and the fate of each bill are:

111th Congress: S. 515 (Patent Reform Act of 2009: Dead);

<http://www.govtrack.us/congress/bill.xpd?bill=s111-515>

111th Congress: S. 610 (Patent Reform Act of 2009: Dead);

<http://www.govtrack.us/congress/bill.xpd?bill=s111-610&tab=summary>

111th Congress: H.R. 1260 (Patent Reform Act of 2009: Dead);

<http://www.govtrack.us/congress/bill.xpd?bill=h111-1260>

110th Congress: S. 1145 (Patent Reform Act of 2007: Dead);

<http://www.govtrack.us/congress/bill.xpd?bill=s110-1145>

110th Congress: S. 3600 (Patent Reform Act of 2008: Dead);

<http://www.govtrack.us/congress/bill.xpd?bill=s110-3600>

110th Congress: H.R. 1908 (Patent Reform Act of 2007: Passed House);

<http://www.govtrack.us/congress/bill.xpd?bill=h110-1908>

109th Congress: S. 3818 (Patent Reform Act of 2006: Dead);

<http://www.govtrack.us/congress/bill.xpd?bill=s109-3818>

<sup>iv</sup> Patents, Innovation and Jobs, A Congressional Briefing: "Harmonizing" The U.S. Patent System with Europe and Japan: The Effect on the Small Inventor, by Pat Choate, The U.S. Business and Industry Council, 2011, Washington, D.C.;

<sup>v</sup> IBM Lays Off 1000's in US While Offshoring 1000's of Jobs, MARCH 2, 2010;

[http://open.salon.com/blog/mick\\_arran/2010/03/02/ibm\\_lays\\_off\\_1000s\\_in\\_us\\_while\\_offshoring\\_1000s\\_of\\_jobs;](http://open.salon.com/blog/mick_arran/2010/03/02/ibm_lays_off_1000s_in_us_while_offshoring_1000s_of_jobs)

Intel, HP chiefs praise offshore outsourcing, 22 Oct 2003, by Yvonne Guzman, News Editor, SearchCIO.com; [http://searchcio.techtarget.com/news/933144/Intel-HP-chiefs-praise-offshore-outsourcing;](http://searchcio.techtarget.com/news/933144/Intel-HP-chiefs-praise-offshore-outsourcing)

Why the next phase of offshoring may interest you, By Howard Baldwin, Microsoft Corp.;

[http://www.microsoft.com/midsizebusiness/business-goals/business-operations/offshore-outsourcing-benefits.mspx;](http://www.microsoft.com/midsizebusiness/business-goals/business-operations/offshore-outsourcing-benefits.mspx)

Microsoft to outsource legal work to CPA Global, February 18th, 2010;

[http://coreadvisor.com/globalwise/2010/02/18/microsoft-to-outsource-legal-work-to-cpa-global/;](http://coreadvisor.com/globalwise/2010/02/18/microsoft-to-outsource-legal-work-to-cpa-global/)



Total Utility, Plant and Reissue (UPR) Grants (FY)*	140,15 9	143,68 1	165,50 0	170,63 8	162,21 6	173,06 5	170,63 7	152,08 8	164,11 5
Large Entity Grantees - Percent of Total Patent Grants	71%	71%	72%	73%	76%	77%	76%	76%	77%
Small Entity Grantees - Percent of Total Patent Grants	29%	29%	28%	27%	24%	23%	24%	24%	23%

× Patent Reform; Hearings on Patent Reform (109th, 110th, 111th Congresses) Witness Lists; IPOA; <http://www.ipo.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=21553>; For sample of very mixed support and opposition to Patent Reform by Senate Judiciary Committee witnesses, see: Patent Reform Act of 2009 (S. 515) Senate Judiciary Committee Witness Testimony, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP; <http://www.finnegan.com/2009PatentLawReform/>;

"The patent bill on which the full Senate will soon vote had a grand total of two hours of hearings in the 110th Congress and another two hours in the 111th Congress. Opponents of the legislation were neither invited nor allowed to testify. Neither were inventors or representatives of inventors, independent research institutes, university technology officials nor small entity businesses. In the opening days of the 112th Congress, even these token hearings were not held. The mark-up of the patent bill in the Senate consumed 58 minutes, and included time devoted to a review of a list of candidates for federal judgeships." E-mail Feb 24, 2011, Dan Leckrone, TPL Group, San Jose, CA; [www.tplgroup.net](http://www.tplgroup.net);

House Subcommittee on Intellectual Property, Competition and the Internet; Hearing on: "Crossing the Finish Line on Patent Reform – What Can and Should be Done;" Friday 2/11/2011; Witness List: David Simon, Chief Patent Counsel, Intel; Carl Horton, Chief Intellectual Property Counsel, General Electric; The Honorable Paul Michel, Former Chief Judge, U.S. Court of Appeals for Federal Circuit; [http://fnsq.net/transcript\\_fin.htm?id=20110211t2385&nquery=&query=&from=](http://fnsq.net/transcript_fin.htm?id=20110211t2385&nquery=&query=&from=); Note also that all three witnesses are affiliated with IPOA which is run by the large multinationals; [http://www.ipo.org/AM/Template.cfm?Section=Corporate\\_and\\_Law\\_Members&Template=/CustomSource/MembershipListing/index.cfm&Type=CORP](http://www.ipo.org/AM/Template.cfm?Section=Corporate_and_Law_Members&Template=/CustomSource/MembershipListing/index.cfm&Type=CORP)

Note: Although there has testimony by major universities, they do not necessarily represent the interests of independent inventors, sense universities typically have large budgets and staffs, and are often closely associated with and receive funding from major corporations for research, etc. Also, it is felt that patent legal practitioners, i.e. lawyers, do not necessarily represent independent inventors, sense they earn their livings from a costly patent application and enforcement process.

<sup>xi</sup> "...expensive and lengthy interference proceedings that are often ineffective. Some have estimated that the average cost of an interference proceeding is \$600,000, which can present a substantial barrier to smaller players..;" H.R. 1908 — Patent Reform Act of 2007 (Rep. Berman, D-CA) PRELIMINARY ASSESSMENT, Republican Study Committee 9/4/07; [http://rsc.jordan.house.gov/UploadedFiles/lb\\_090707\\_patentreform.pdf](http://rsc.jordan.house.gov/UploadedFiles/lb_090707_patentreform.pdf);

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For a discussion of the problems of 'post-grant review' and 'reexaminations see; THE FAILURE OF S.515 DRAFT BILL TO ADDRESS THE PGR PROBLEM, 2 March 2010, by Daniel E. Leckrone, The TPL Group; [http://www.tplgroup.net:8080/pdf/The\\_Failure\\_of\\_S515\\_Draft\\_Bill\\_Memo.pdf](http://www.tplgroup.net:8080/pdf/The_Failure_of_S515_Draft_Bill_Memo.pdf); Lighting Up America's "Innovation Assassin" Problem, March 28, 2010, By Dan Leckrone; Tech News Arizona; <http://technewsarizona.com/Article.aspx?d=20100328&t=1835>;

The Use and Abuse of Patent Reexamination Sham Petitioning Before the USPTO, by Raymond A. Mercado, April 26, 2010, Columbia Science and Technology Law Review, Vol. 12, pp. 93-159, 2011; [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1554061](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554061);

Statement of JUDGE PAUL R. MICHEL (Ret.), Before the Subcommittee on Intellectual Property, Competition and the Internet, February 11, 2011; <http://www.tplgroup.net:8080/pdf/Statement%20of%20Judge%20Paul%20R%20%20Michel%20Ret%20020911.pdf>;

June 5, 2007 letter from F. James Sensenbrenner to The Honorable John Conyers, Chairman, House Committee on the Judiciary; [http://www.aai-usa.org/patent\\_reform/letters\\_to\\_congress/james\\_sensenbrenner\\_06\\_05\\_2007.html](http://www.aai-usa.org/patent_reform/letters_to_congress/james_sensenbrenner_06_05_2007.html);

xii "In the next decade...expect to see at least another two-fold increase in patent litigation...as a result of the greater ease with which an accused infringer can now file suit for declaratory judgment,...*MedImmune Inc. v. Genentech Inc.*, 127 S. Ct. 764 (2007) ...an accused infringer may be more willing to sue for declaratory judgment of invalidity in light of the Supreme Court's *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007), which may make it easier to prove obviousness, and in light of *eBay Inc v. MercExchange*, 126 S. Ct. 1837, which makes it much more difficult...to obtain an injunction." Expect Twofold Increase in Patent Litigation, By Todd R. Miller, EE Times, 09/24/2007; <http://www.my-esm.com/showArticle.jhtml?articleID=202100936>; In addition there is *In re Seagate*, 497 F. 3d 1360 (Fed. Cir. 2007) which will make 'willful' infringement more difficult to prove.

xiii 35 U.S.C. 261 "Ownership: Subject to the provisions of this title, *patents shall have the attributes of personal property.*" (emphasis supplied); [http://www.uspto.gov/web/offices/pac/mpep/documents/appxl\\_35\\_U\\_S\\_C\\_261.htm](http://www.uspto.gov/web/offices/pac/mpep/documents/appxl_35_U_S_C_261.htm);

"A patent for an invention is the *grant of a property right* to the inventor, issued by the United States Patent and Trademark Office." (emphasis supplied); USPTO Website; <http://www.uspto.gov/web/offices/pac/doc/general/#patent>;

"The inventor is one who has discovered something of value. *It is his absolute property.*" at 424 "...exclusion may be said to have been of the very essence of the right conferred by the patent, as *it is the privilege of any owner of property* to use or not use it, without question of motive... the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee. " (emphasis supplied) at 430; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 52 L.ed. 1122 (1908); <http://supreme.justia.com/us/210/405/case.html>; "If he see fit he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own...*His title is exclusive, and so clearly within the constitutional provisions in respect of private property* that he is neither bound to use his discovery himself nor permit others to use it." (quoting *Heaton-Peninsular v. Eureka*, 77 Fed. 288, 294, 25 C.C. A. 267 (Sixth)" (emphasis supplied) at 90; *Bement v. National Harrow Co.*, 186 U.S. 70, 46 L. ed. 1058 (1902); <http://supreme.justia.com/us/186/70/case.html>;

xiv "The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;" The United States Constitution, Article I. Section 8, Clause Eight; <http://topics.law.cornell.edu/constitution/articlei#section8>;