Speak up for the American Patent System

by Phyllis Schlafly

In extraordinary Senate-House coordination, the two Judiciary committees in the same week in July 2007 voted out a bill (S.1145 and H.R.1908) which, if it becomes law, will spell the end of America's world leadership in innovation. Called the Patent Reform Act, it is a direct attack on the unique, successful American patent system created by the U.S. Constitution.

As we've learned with "comprehensive immigration reform," we should all be on guard any time politicians patronize us with pompous talk about "reform" or "comprehensive." The so-called Patent Reform Act of 2007 is not reform at all; in one package, it betrays both individual rights and U.S. sovereignty.

It's no accident that the United States has produced the overwhelming majority of the world's great inventions. It's because the Founding Fathers invented the world's best patent system, which was a brilliant stroke of inspired originality when the Constitution was written in 1787, and still is stunningly unique in the world.

The uniqueness of the American system is that "inventors" are granted "the exclusive right" to their inventions "for limited times" (usually about 17 years) after which the invention goes into the public domain. Exclusivity was assured because our courts would uphold the inventor's patent against infringers, and the U.S. Patent Office would not disclose any information in a patent application **unless and until** the legal protection of a patent was granted.

So, prior to 1999, the U.S. Patent Office was required to keep secret the contents of a patent application until a patent was granted, and to return the application in secret to the inventor if a patent was not granted. That protected the legal rights of the inventor, who could then go back to the drawing board to perfect his invention and try again.

A mischievous congressional "reform" in 1999 authorized the U.S. Patent Office to shift to the Japanese and European practice of publishing patent applications **18 months** after filing **whether or not** a decision is yet made on granting a patent. "Publish" means posting online on the internet.

The U.S. Patent Office reports that it is now taking an average of 31 months to grant a patent! So, when the Patent Office publishes (*i.e.*, posts online) a patent application before a patent is granted, this gives patent pirates all over the world an average of 13 months (31 minus 18) to study detailed descriptions of virtually all U.S. patent applications, to steal and adapt these new American ideas to their own purposes, and to go into production.

Foreign governments, foreign corporations, and patent pirates are thus able to systematically "mine" U.S. patent applications and steal American-owned inventions.

By 2006, the U.S. Patent Office had placed 1,271,000 patent applications on the internet, giving access to anyone anywhere in the world. This foolish practice created a gold mine for China, Russia and India to steal U.S. innovations and get to market quickly.

Chinese pirates don't roam the high seas looking for booty but sit at their computers, scan the internet, and steal the details of U.S. inventions that the U.S. Patent Office loads online. This practice has become China's R&D program, and it is even more efficient than China's network of industrial and military spies.

The unconscionable delay in processing patent applications resulted when Congress diverted the fees paid by inventors into pork and other pet projects. That meant the Patent Office could not hire the additional examiners it needed to process the rising number of domestic and foreign patent applications, and so a massive backload built up.

What recourse does the inventor have? The 1999 "reform" law allows a patent application to be exempt from the publication requirement **if** the inventor agrees **not** to file a patent application in another country. But the default procedure is to publish.

If the other country infringes on the U.S. inventor's rights, the U.S. inventor must file his lawsuit in that foreign country. Other countries do not respect inventors' rights granted by the U.S. Patent Office, and China is a notorious thief of U.S. intellectual property.

The 2007 Patent "Reform" bill would delete this exemption and require publication of all patent applications 18 months after filing even though a decision

has not yet been made on granting a patent. The 2007 Patent "Reform" bill is a fraud because it does nothing to require or induce other countries to respect U.S. patents and because it makes U.S. inventors even more vulnerable to theft of their property.

U.S. policy has always been to grant a patent to the first one who actually invents something. But the proposed Patent "Reform" Act, sponsored by Senators Patrick Leahy (D-VT) and Orrin Hatch (R-UT) and Reps. Howard Berman (D-CA) and Lamar Smith (R-TX), would further reduce inventors' rights by replacing our unique and successful "first to invent" system with the foreign "first to file" system.

The U.S. now gives priority to the first one who actually invents something rather than to the first to file papers. The change to "first to file" would create a race to the Patent Office and would severely disadvantage the small and independent inventors who lack the resources of the big corporations.

First-to-file would be a windfall to the mega-corporations. First-to-file would invite an avalanche of applications from the big companies that have the resources to grind out multiple filings, and the small inventor would be lost in the shuffle.

The new Patent "Reform" bill offers yet another way for patent pirates to steal our technology. It's called post-grant review: a plan to make it easier to challenge patents during the entire life of the patent.

Still another provision of the new Patent "Reform" bill would shift decision-making about damages for patent infringement in such a way that the patent holders would get virtually no payment from infringers. This provision would increase litigation and limit the ability of independent inventors and small companies to enforce their rights or to win just compensation from those who infringe their rights.

The new Patent "Reform" bill would also transfer unprecedented rule-making authority to the Patent office. That's an abdication of congressional responsibility. The inevitable result would be the politicizing of the Patent Office.

Add it all up, and it is clear that the new Patent "Reform" bill is a big attack on the constitutional property rights of individual inventors and small enterprises, the very kind of entrepreneurs who give us our most important innovations. About a third of all U.S.-origin patent applications are filed by individual inventors, small companies, universities, and non-profit groups.

The common thread in the changes to be made by the new Patent bill is that they favor big companies like Microsoft and hurt individual and small-entity inventors.

Microsoft has thousands of patents, and recently argued that the free GNU/Linux operating system infringes over 200 of them. Microsoft wants to be able to use its huge patent portfolio to intimidate potential competitors, and at the same time it wants it to be easier to knock out individual patents.

While the real goal of the Patent "Reform" bill is to advantage big corporations over small and small-entity inventors, the "world is flat" globalists hide behind the mantra of the alleged need for "harmonization" and "consistency" to level the U.S. patent system with other countries. In introducing the new bill, Rep. Berman said it will "harmonize U.S. patent law with the patent law of most other countries." The explanation of the bill issued by Senator Leahy's office states that the bill's purpose is to eliminate "a lack of international consistency."

But since the U.S. system produces more important inventions than the rest of the world combined, there is no reason to legislate "consistency" with inferior foreign policies.

If Congress wants to do something constructive for our patent system, Congress should reinstate the rule that the Patent Office may not publish a patent application until a patent is granted, and if it is denied the application must be returned to the inventor with his secrets intact.

Congress should also give back to the Patent Office the flow of fees paid by inventors, which Congress took away in 1999 to spend on other projects. Then the Patent Office can hire more examiners and reduce its backlog of 800,000 applications.

Congress should put trade penalties on Communist China until it stops its notorious business of stealing our intellectual property.

The U.S. patent system is the vital factor in the technological lead that gives us the edge over competitors and enemies. We must not let the globalists and the lobbyists for multinational corporations destroy it.

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