U.S. Senate Needs to Rethink Patent "Reform"

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SENATE NEEDS TO RETHINK PATENT "REFORM"

The House narrowly passed a patent reform bill (H.R. 1908) on September 7 and sent it to the Senate. One important amendment delayed indefinitely the shift of the U.S. patent system from the first-to-invent to the first-to-file system. The Department of Commerce had objected to making such a change without first negotiating a grace period with the European Union and Japan to protect American inventors.

Protecting American inventors, whose innovations have made the United States the envy of the world, must remain the focus of the patent system as was intended when the Founding Fathers wrote the protection of intellectual property into the Constitution. Unfortunately, the intent of this "reform" bill is to weaken the law's protection of inventors. Rep. Howard Berman, the California Democrat who sponsored the bill, made this intent clear. His press release, issued last July when the bill came out of the House Judiciary committee, states that the legislation is designed to, "deter abusive practices by patent holders, provide meaningful, low-cost alternatives to litigation for challenging patent validity and harmonize U.S. patent law with most other countries." The bill makes the infringement of patents easier, and lessens the penalties if caught.

The bill is backed by Microsoft and other major IT firms who dominate their markets and don't want to be bothered checking who owns the technology they have grabbed and used. Microsoft lost a $520 million award to Eolas Technologies and the University of California in 2003 for patent infringement. In another case, it had a $1.5 billion judgement overturned on appeal this last August, but faces a retrial. On September 17, Microsoft lost a court appeal in Europe, and while patents were not the issue, the words of European Commissioner Neelie Kroes could be applied to the patent debate: the case "sends a clear signal that super-dominant companies cannot abuse their position to hurt consumers and dampen innovation." Rather than change its bullying behavior, Microsoft would rather lobby to change the law.

H.R.1908 is opposed by the biotech and pharmaceutical industries, smaller domestic manufacturers, many Fortune 100 companies (e.g., Caterpillar, Corning, Milliken), major research universities, the U.S. Patent and Trademark Office, the Department of Justice, the Department of Commerce, the National Venture Capital Association, the Patent Office Professional Association (i.e., the patent examiners), and many labor unions. In addition, the Bush Administration issued a statement of policy opposing "limits on the discretion of a court in determining damages adequate to compensate for an infringement. Making this change to a reasonably well-functioning patent legal system is unwarranted and risks reducing the rewards from innovation." The patent "reformers" want to lock-in minimalist awards for infringement, and not allow judges to apply penalties more in line with the true scale of their transgression.

Related to this question of limited court discretion is a new apportionment scheme for reducing damage payments for infringement to only a fraction of the value of the product being marketed. The idea seems to be to define away damages, making infringement -- the stealing of someone's else's idea – a winning financial strategy. The law is to become a matter of calculation rather than integrity.

Another key issue is the post- grant review provision, which allows patents to be challenged even after they have been granted. Patent holders are thus denied clear ownership, which inhibits their ability to proceed with commercialization or attract needed venture capital. In Germany, the system contained in H.R. 1908 produces triple the legislation of our current system. Such expanded legal costs favor deep-pocket corporations over smaller firms and inventors. If the aim of patent reform is to reduce the volume of litigation (as "reformers" claim), allowing post-grant challenges is clearly not the way to go.

Another of the bill's direct threats to American intellectual property is the mandatory publication of patent applications on the Internet before a patent is granted. The historical U.S. system – under which patent applications were either granted and published, or rejected and returned to the applicant unpublished for further improvement – was a superior system. It protected intellectual property and trade secrets. In 1999, the United States "harmonized down" to the European and Japanese systems, under which applications are published on the Internet after 18 months – whether or not a patent is granted. An opt-out clause was retained for Americans not filing patent applications in foreign countries – which about 40 percent of patent applicants use. H.R.1908 eliminates the opt-out provision, making publication mandatory. Considering it takes an average of 33 months to receive a patent, publishing the invention's details after only 18 months is a windfall for pirates, especially in China. The U.S. Trade Representative's Office has stated that intellectual property theft by the Chinese is at "epidemic" levels. Why make it easier? Indeed, why "harmonize down" to the level of lax foreign laws instead of forcing them to "harmonize up" to U.S. levels of intellectual property protection?

There are other objectionable provisions of H.R. 1908 – including its weakening of protections afforded patent holders under U.S. trade laws that prevent foreign pirates from exporting their stolen wares in the United States. Section 337 of U.S. trade law protects American companies from foreign intellectual property pirates in precisely this way. Yet the effect of the new "reform" bill on Section 337 has never been considered by the current Congress.

The question remains: With so many challenges facing the nation currently, why is an ill-advised and poorly drafted patent bill being rushed through Congress? Intellectual property is the main asset of U.S. corporations, accounting for some 70 percent of corporate

wealth – an almost exact reversal of the situation 30 years ago, when most corporate wealth was in physical and not intellectual assets. H.R.1908 favors the business model of the Big IT corporations to the exclusion of almost all other business models – especially those of domestic manufacturers. The IT megafirms dominated Congressional hearings, with the voices of other business, university and scientific interests largely shut out. This is no way to approach an issue that can have a dramatically negative impact on America's growth engine, i.e., innovation

The bullying tactics of Microsoft and its ilk are well known, and have been condemned by courts in both the United States and Europe. There is a far greater national interest in the promotion and protection of innovation across the economy. Congress should not "reform" the patent system just to benefit one corporate sector – especially a sector whose desire to weaken the protection of other people's intellectual property for its own gain is fundamentally illegitimate. The Senate needs to make major changes in the House passed version of H.R. 1908 (essentially rewriting it), or drop the entire" reform" effort by simply killing the counterproductive House bill.

There is no urgent to need to change a patent system that has served the nation so well. And in fact, the system has ben reformed many times in the past 50 years – by Congress itself, by Supreme Court decisions, and by rule-making changes introduced by the Patent Office. We need to allow these changes to settle in and see how they affect the patent system before uprooting it entirely with the proposed reform bill. It is better to have no "reform" bill than one that weakens the system's support for innovation and progress.

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