US Inventor

Fighting to Get Our Patent Rights Back

We've been *Googled* – H.R.9, The Innovation Act

H.R.9 creates a Patent System without Inventors

Over the last 8 years, Google and others have spent hundreds of millions of dollars to lobby Congress and produce an ingenious "patent troll" narrative, which distorts the reality of invention in America. H.R.9 is the Google lobby's latest accomplishment. Curiously, H.R.9 is not directed to fixing the fictional problem of "patent trolls." Instead, H.R.9 simply mounts its considerable damage on the patent system in general, specifically harming inventors and small patent-based businesses.

If this bill becomes law, inventors and small businesses will not be able to enforce their patent rights against moneyed corporations, like Google for example. However, moneyed corporations will still be able to enforce their patents against small businesses with even more devastating consequences to those small businesses.

Patent litigation is about risk and cost versus reward. If risk or cost is too high in relation to reward, an inventor or a small business cannot enforce a patent. This bill creates enormous risk and cost, and consequently it creates a patent system without inventors.

Indeed, we've been *Googled*.

Loser-Pay Kills Inventors, Feeds Trolls and Enriches Large Corporations

For the last two years, inventors have lost the large majority of patent cases. Post grant opposition procedures (PGO) created in the America Invents Act (AIA) invalidate patents at rates above 75%. Article III courts invalidate patents at similar rates under the undefinable "abstract idea" category of subject matter ineligibility. Today, inventors are losing more cases than at any time in the 224-year history of the U.S. patent system.

Loser-Pay places potentially millions of dollars of risk on any inventor who dares enforce patent rights. Most inventions are small in scope like cat combs, towel clips, hand tools, software devices, etc. While small, these patents fuel most of our new jobs. With the odds of losing so high, Loser-Pay makes it impossible for almost all inventors to enforce their patent rights against patent pirates.

An infringement suit can cost millions of dollars for each side. Prior to the AIA, even small inventions could be enforced. With the huge increase in inventor losses due to the AIA and the undefinable "abstract idea," only inventions with an exceptionally large damages can be enforced. Its simple math, damages must exceed the cost of the case plus the cost of risk.

Loser-Pay dramatically increases risk by adding the potential of paying millions of dollars in extra costs if the case is lost. That means that the scale of potential damage must increase enough to absorb that increased risk. In most cases, the damages bar is too high to overcome the risk, in turn making the vast majority of patents unenforceable by inventors.

Patent enforcement is already today a game of kings. Loser-Pay makes it a game of gods. Risk of losing can be managed by asserting multiple patents, leaving inventors with few options other than selling to patent aggregators like Intellectual Ventures at low prices. H.R.9 will create super "trolls" who assert the majority of patents after acquiring them from inventors in a buyer's market.

However, Loser-Pay has its advantages. Moneyed corporations, like Google for example, can still assert patents against other corporations for cross-licensing and marketing purposes, and of course, against small businesses who dare to compete. It is not a big deal for a moneyed corporation because Loser-Pay is but a rounding error in the greater scheme of their massive financials.

Unfortunately, small businesses will not be able to sue large moneyed corporations. If a small business asserts a patent against a moneyed corporation, not only is the patent at risk of invalidation, which could be the most important asset that company owns, but the loss would undoubtedly bankrupt a small business altogether.

There are other unintended consequences for small businesses, as many know little about patent litigation. If a small business defendant fights what they perceive to be an unreasonable case against them and lose, the loss would similarly bankrupt a small business.

Collecting Loser-Pay fees from Investors Ends Investment in Patent Related Startups

H.R.9 proposes unprecedented law to pierce the corporate veil applying Loser-Pay to "interested parties" otherwise known as investors. Few investors are willing to accept the risk of losing personal assets in the event the business fails, whether that business is patent related or otherwise. Given the high costs of patent litigation, without investors providing needed capital to enforce patent rights, the patent system is not available to inventors and small businesses.

Shrinking Post Grant Review (PGR) Estoppel Perpetuates Litigation

Under current law, a PGR prohibits the petitioner from later arguing "*any ground that the petitioner raised or reasonably could have raised during that post-grant review*." H.R.9 strikes "*or reasonably could have raised*." This seemingly small change has a significant effect. A petitioner could effectively daisy chain PGR's by filing a PGR under one grounds while holding back other grounds until the first PGR is completed. If they do not get the result they want, they can file another PGR under the grounds they held back or bring it up in court. An infringer could drive the inventors cost into the stratosphere and win by that alone.

Enhanced Pleadings and Limited Discovery Increase Risk and Cost

Enhanced pleadings require an element-by-element comparison of the patent to an infringing product. These claim charts are a critical litigation tool that will be litigated for the adequacy of the complaint, and then litigated again as new documents are unveiled in discovery. If discovery is limited, these claim charts will be litigated yet again after full discovery. Inventors will hire technical experts and attorneys to comb through every word to ensure that no term is defined incorrectly, which could damage their case later. Tens of thousands of dollars will be added to the cost of launching a suit. In addition to making it possible for patent pirates to get off the hook over hair splitting definitions, this hurts both sides as pretrial settlement amounts will go up substantially to cover this cost, which could reach hundreds of thousands of dollars.

The trial judge is the closest to the case and legislating how that judge manages cases will severely restrict the trial judge's ability to bring a fair solution for all parties.

Patent Term Adjustment Devalues Patents

H.R.9 would eliminate any patent term adjustment for a delay created by the USPTO (a request for continued examination (RCE) or an appeal). This provision would unfairly reduce the patent term of a large number of issued and pending patents – some by a decade or more, and a few would be eliminated altogether. Moneyed corporations have thousands of patents so losing time on some of them is made up in volume. Conversely, most inventors have only a few inventions so losing time deals severe damage to the enforceability of their inventions. This provision is targeted at inventors and small businesses in its entirety.