Hostile Environment for Inventors Harms the Economy

The United States patent system is under a lethal attack by large multinational corporations who benefit from weak patent protection. Congress, the administration and the courts have been misled by these multinational corporations, and are changing law in ways that wipe out inventors under misguided patent reforms. As a result, a primary foundation of the great American economic engine is crumbling. If we do not act, we will all pay dearly for this historic blunder.

In the last decade, the patent system has been turned on its head. Inventors are now villains called "patent trolls" simply because they assert their hard-earned patent rights against corporations who steal their inventions. A crafty theme has emerged suggesting that our national innovation ecosystem is somehow fostered by corporate piracy of inventions. Infringing corporations, who only a few short years ago were considered "patent thieves", are today considered our innovators. Many of those same infringing corporations created this false “patent troll” narrative with fabricated information by engaging high-powered lobbyists and public relations firms to hijack the airwaves with loud attacks on inventors thus driving over a decade of continuous patent reform. This highly vocal concoction of myth, media and money has silenced all other voices.

It is inventors, small patent-based businesses, research labs and universities (collectively – inventors) that suffer the brunt of patent reform damage. Most inventors lack a means of voicing their objections due to lack of organization, funding, knowledge or experience. Many are just too busy inventing new markets to pay attention. For most, the damage remains unknown until they attempt to bring their inventions to market and then find it impossible protect their invention in the market it created. Thus, lawmakers and courts do not hear their objections and continue with more and more damaging reforms. The 2015 Congress wants more patent-killing reforms.

Patent driven innovations cure deadly diseases, solve world energy problems, defend freedom, entertain us, and improve things we already use. They also fuel most of our job creation and create much of our national wealth. However, reforms to date have dramatically harmed all of those economic and social benefits. Today, patents can take 10 years or more to be granted by the Patent and Trademark Office (PTO). New laws have created alternate ways to invalidate issued patents at rates

1 See http://www.independentinventorsofamerica.org/proposedlegislationfinal.pdf
above 75%.4 The Supreme Court has thrown the definition of what can be patented into chaos – it is now unknown.

In the last two years, the gross value of patent sales is down 83%, the number of patents sold is down about 50%, and the average price per patent is down about 55%.5 Today, public companies risk massive patent asset write-downs 6 – collectively, these companies may be forced to write down trillions of dollars in patent assets from their books.7 Asset write-downs on this scale have the potential to crash the economy and send us into yet another recession.

New patent suits have dropped by as much as 40% in one year.8 Most of that drop is in software,9 a very important American industry. All of this is happening in the U.S. while other countries, like China, strengthen their own patent systems to grow their economies.10

Not surprisingly, more U.S. companies are going out of business than are starting up for the first time in American history.11 We are killing the very engine that made the United States the greatest economic power in history.

Perhaps we should take a closer look at what we are losing.

The Patent Act of 1790, only the third Act of Congress, granted patents to “he, she, or they” at a cost that even a pauper could afford.12 At a time when women and blacks could not own property, both could own patents... and both did. In 1809, Mary Kies became the first woman patentee for her invention related to weaving straw hats. In 1821, Thomas L. Jennings became the first black patentee by inventing a method of dry scouring clothes. Granville Woods, the “Black Edison”, patented dozens of

4 See supra at 8
5 See http://www.ipwatchdog.com/2014/12/11/is-the-patent-market-poised-for-rebound-in-2015/id=52593/ A quote from Richard Baker, a senior IP licensing executive who is on the Board of LES, “the dollar value of patent sales are down 83% and the number of patents sold is down about 50%, and this is just in the last two years, but the most striking piece of data is that the average price per patent has gone down about 55%. So you a dramatic drop in value.”
8 See http://www.law360.com/articles/585536/new-patent-suits-drop-sharply-from-last-year
9 See DECEMBER 2014/JANUARY 2015, WWW.MANAGINGIP.COM, Software patent lawsuits plummet after Alice. This report contains parts 1 and 2 in a series of in-depth articles by Managing IP covering recent trends in patent litigation.
railroad related inventions in the late 19th century. During the 1800's, some 3,300 women patented 4,196 inventions and many made their living by licensing their inventions. The U.S. patent system leveled the field for all regardless of race, gender or economic status.

The U.S. patent system fueled the greatest economic expansion in the history of man, propelling America to lead the world in virtually every technology revolution from potash processing to the several we are in right now. The U.S. patent system is a core American ideal enshrined in the Constitution itself. It creates value not only to individuals, but also to the economy overall bringing innovations that create national wealth, improve our quality of life and provide an abundance of jobs.

To understand why so much damage has occurred, it is necessary to understand what a patent is. Article I, Section 8, Clause 8 of the U.S. Constitution is the foundation of a patent in the United States:

“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”

It wisely created two important constructs, which are now being destroyed. An Exclusive Right, written clearly in plain English is the right to injunctive relief against an infringer, and a Presumption of Validity, implied by the nature of the clause and written into black letter law is the belief that the legal system will uphold the Exclusive Right. These two constructs were the true genius of the U.S. patent system. Together they created an investment grade asset that could be bought, sold and collateralized for investment, and this created a secondary market for patent assets. A traditional U.S. patent enabled the marriage of capital, invention and people that fueled the creation of new companies and thus an abundance of jobs and a healthy, growing economy.

The Exclusive Right makes elephants dance. Large corporations must innovate faster than their competitors innovate, and faster than a multitude of independent inventors, or else they risk losing the

13 See http://www.biography.com/people/granville-t-woods-9536481
15 The national value of our collective patent assets was illustrated in Microsoft v. i4i. Amicus briefs. Some argued the economic losses to the economy might enter the trillions of dollars and disrupt capital markets.
16 See U.S. Const. art. I, § 8, cl. 8; see also Carl Schenk, A.G. v. Norton Corp., 713 F.2d 782, 786 n.3 (Fed. Cir. 1983) (“The patent right is but the right to exclude others, the very definition of ‘property.’”); Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637, 643 (1947) (stating that the patent right “carries for the statutory period ‘a right to be free from competition in the practice of the invention’ . . . [and] [t]hat exclusive right, being the essence of the patent privilege, is . . . of the same dignity as any other property which may be used to purchase patents”).
17 See 35 U.S. Code § 282 - Presumption of validity; defenses
19 See Dubilier, 289 U.S. at 186 (“Though often so characterized, a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. The term monopoly connotes the giving of an exclusive privilege for buying, selling, working
opportunity of a new market. This fuels the innovation race that America has been running for over 200 years, which is one of the top reasons we lead the world in virtually every technological revolution since potash production.

For any asset to attract capital investment there must be a reasonable way to project its future value. A future value provides investors with some assurance that their investment will be returned. In the case of patents, the *Exclusive Right* establishes a market value that is directly related to the value created by the patent. Therefore, an investor can reasonably estimate the future value of the patent by estimating the future size of the market it creates, making a patent an investable asset.

The *Presumption of Validity* prevents elephants from trampling other dancers. A patent known by all to be legally valid and enforceable compels potential infringers to deal with the inventor before infringing on the patent. While law can establish a *Presumption of Validity*, the courts must act affirmatively to uphold it. If the courts do not, potential infringers assume that the *Exclusive Right* will not be enforceable, and they will infringe without dealing with the inventor. With a weak *Presumption of Validity*, investors have no assurance that the investment will be returned, so few will invest. If an inventor cannot generate capital investment, it is nearly impossible for the inventor to commercialize the invention and create jobs.

The U.S. patent system created other attributes common to all other property rights. A patent’s ownership can be transferred from one person to another. When ownership transfers, its *Exclusive Right* and *Presumption of Validity* transfer with it, thus enabling a secondary market for patent assets. This means a patent can be used as collateral to attract capital investment because a subsequent owner can enjoy the same *Exclusive Right* and *Presumption of Validity* that the previous owner enjoyed.

The true genius of the U.S. patent system was that a patent standing on its own was an *investment grade asset*, which created a secondary market because a patent could be bought, sold, and used as collateral. The secondary market therefore ensures that inventors can get a return for the hard work or using a thing which the public freely enjoyed prior to the grant. Thus a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge.

---

20 See generally 35 U.S.C. §§ 154, 261 (2010) ("[P]atents shall have the attributes of personal property."); see also Patlex Corp. v. Mossinghoff ("Patlex I"), 758 F.2d 594, 599-600 (Fed. Cir. 1985) ("[P]atent property rights, necessarily including the right ‘to license and exploit patents’, fall squarely within both classical and judicial definitions of protectable property . . . [and] the right to exclude . . . is implemented by the licensing and exploitation of patents."); affirmed in part and reversed in part on rehearing ("Patlex II"), 771 F.2d 480 (Fed. Cir. 1985); Consolidated Fruit-Jar Co. v. Wright, 94 U.S. 92, 96 (1877) ("Inventors are a meritorious class. They are public benefactors. They add to the wealth and comfort of the community and promote the progress of civilization. A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions.").

and money they put into the invention, which encourages inventors to apply for patents, thus closing
the loop so the patent system can “promote the Progress of Science and useful Arts” as the U.S.
Constitution requires.

That describes the spectacular success of the United States patent system for the first 216 years. Much
has changed since 2006; that success will not happen in the future unless we change it back.

Congress, the courts and the administration have damaged both the Exclusive Right and the
Presumption of Validity in several critical ways. Today, patents can hardly attract capital investment and
inventors cannot get a return on the hard work and money that goes into the invention. This is killing
the patent system and as a result, bringing severe damage to our economy overall.

- In 2006, the Supreme Court in eBay v. MercExchange \(^{22}\) effectively eliminated the Exclusive
  Right. The result is that an inventor cannot exclude others from using their invention because
  injunctive relief is now highly restricted. Without the Exclusive Right, better positioned
  companies build products with no concern for patent rights. Once a patented invention is
  widely infringed, a patent that is incapable of injunctive relief is also incapable of attracting
  investment to practice the invention. If they steal the invention, they keep the market.

  A forced license is the only remaining remedy with an arbitrary value set by a court. Estimating
  a patent’s future value becomes a game of chance and few investors outside of Vegas will risk
  their money on game of chance.

  Since eBay, potential infringers find it advantageous to steal the invention, saturate the market
  with infringing products, and then litigate the inventor into oblivion or capitulation with an
  arbitrary settlement. Indeed, attorneys advise their infringing clients to do exactly that.\(^ {23}\)

- The Supreme Court weakened the Presumption of Validity with a string of cases leading to Alice
  process, machine, manufacture, or composition of matter”\(^ {24}\) is patentable subject matter, the
  courts legislated that an “abstract idea” is not eligible. Nobody can define an “abstract idea” in
  concrete terms leaving a trail of incoherent case law. Lower courts try to rationalize prior
decisions by the Federal Circuit and the Supreme Court that are themselves inconsistent. The

\(^{22}\) See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (“That test requires a plaintiff to demonstrate: (1) that
it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that
injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is
warranted; and (4) that the public interest would not be disserved by a permanent injunction.”)
\(^{24}\) See 35 U.S.C. §§ 102, 103 (2010). Of course, other criteria for patentability must be met, among them the
threshold requirement that the invention or discovery be eligible for patent protection under 35 U.S.C. § 101. See
Federal Circuit has the final say on the validity of a patent, so any decision by a lower court will be appealed. However, there is a deep multifaceted split among Federal Circuit judges, so whether a patent is valid or not is wholly dependent on which three judges are drawn. It is not determined by any law or logic... it is a multimillion-dollar crapshoot.

- In 2011, Congress passed the America Invents Act (AIA) and destroyed the Presumption of Validity by created new post grant opposition (PGO) procedures, among other damaging provisions. Prior to the AIA, a patent had a strong Presumption of Validity in black letter law. Only an Article III court (under the Judicial Branch of government) could invalidate a patent. This was done in an adversarial process. A showing of clear and convincing evidence, the highest standard in U.S. law, of a failure to meet statutory requirements of patentability was required. The burden to prove this failure was on the party seeking to invalidate the patent. Only a party to the suit could ask a court to invalidate the patent.

The AIA changed all that by flipping each construct upside down. A PGO presumes a patent invalid. A PGO is initiated by showing the lowest level of evidence in U.S. law - more likely than not. An Administrative Law Judge (under the Executive Branch of the government) presides over a process to re-validate the patent under a “broadest reasonable interpretation” of the claims. The burden to prove again that the patent is valid is placed on the inventor. A PGO turns patent law on its head.

PGO’s were established with the clear purpose of increasing the probability that a patent will be found invalid. Today, PGO’s invalidate patents at rates near 75%. There is no longer any Presumption of Validity in practice and the cost of proving and reproving the patent valid is an enormous and often unsurmountable burden on the inventor. Just one PGO, costing the

---

25 http://en.wikipedia.org/wiki/Leahy-Smith_America_Invents_Act
26 Previous papers we called these procedures post issuance procedures or PIP’s. Post grant opposition procedures is a more commonly used term. Other terms are PTAB procedures and generically used post grant review. There seems no standard so we decided on the most commonly used in our opinion for this paper.
28 See supra at 26
30 Senator Jon Kyl, Remarks at Executive Business Meeting of the Senate Judiciary Committee (Mar. 31, 2009), available at http://judiciary.senate.gov/webcast/judiciary03312009-1000.ram; (“[T]he patentee is at a distinct disadvantage where the only alternatives are to pay the costs associated with an opposition proceeding or forgo his rights under the patent. The repugnance of such a quandary needs no explanation.”); Anthony H. Handal, ReExamination: Some Tactical Considerations—A Private Practitioner’s Viewpoint, 9 AIPLA Q.J. (1981) (“[I]t is possible that a number of patents might be lost solely due to the inability of the patent holder to financially deal with the problem.” “Like other forms of action under the patent law, the new reexamination procedure is susceptible to substantial misuses.”); see also Interview by the Reexamination Center with IP lawyer Taraneh Maghamé (Oct. 12, 2009) (noting opportunities for requesters to abuse the reexamination system and explaining that “[s]uch abuse
petitioner around $20,000, can cost the patent holder as much as $750,000. Few investors will help an inventor because the risk of losing is extraordinarily high leaving the inventor with no access to money. This highly unfair and unjust process allows an infringer can win on that reason alone.

Any non-party can petition the PTO for a PGO, and that non-party can remain anonymous. In fact, several new companies were founded for the sole purpose of initiating PGO’s against third party patents. Often, these companies engage in extortion-like activities asking for licenses that they can sell to infringing companies or a cut of a settlement with an infringer in exchange for dropping the PGO. The same large multinational corporations who lobbied to pass the AIA, which created the PGO procedures in the first place, fund many of these companies.

- The AIA forced patent suits against similarly situated infringers to be filed separately. Independent of that, courts sometimes transfer patent cases to jurisdictions closest to the infringer, even where the case was originally filed in the appropriate venue. These factors combine to create the very real possibility that separately filed cases can be re-assigned to different geographically dispersed courts each requiring local counsel and each with potential to produce conflicting decisions on the validity of the same patent. This increase in risk and cost severely damages the ability to enforce a patent.

- A patent can take more than 10 years of examination at the PTO before it is granted. In one case, a patent application has been in examination for almost 40 years. A patent term begins on the filing date and end 20 years later. Most of the time lost in examination is not added to the backend of the patent. It is just lost altogether. Many patents lose a large percentage of their life due to PTO delays.

---

31 See supra at 26
32 See https://www.eff.org/files/2014/05/29/hacking_the_patent_system.pdf
33 See http://www.therecorder.com/home/id=1202678962497/Trolls-Taste-Own-Medicine?mcode=1202615733861&curindex=0&slreturn=20141119235938
35 See http://www.irondome.com/
36 One of the authors has patents pending more than 12 years.
38 See 35 U.S.C. § 154 (setting the patent term as 20 years from the date on which the application for the patent was filed).
A PGO can take 18 months to complete. During this time, it is generally not practical to sue additional infringers. Therefore, even more patent life is lost than that already lost in the examination of the patent.

Moreover, PTO delays create a perverse incentive for potential infringers to incorporate patent-pending inventions into current product offerings and saturate the market long before an inventor has an enforceable asset.

When you add all this up, strong incentives have been created to steal patented inventions, massively commercialize them, and then, if caught, litigate the inventor into oblivion or capitulation. These risks act together to profoundly degrade the investment value of patent assets thereby inhibiting investment in new technologies.

The effects are real and are playing out right now. In the last two years, the gross value of patent sales is down 83%, the number of patents sold is down about 50%, and the average price per patent is down about 55%.

In yet another report, from July 1 to October 31 of 2014, the period immediately following Alice Corp v. CLS Bank, there has been a 28% drop in patent lawsuits compared to the same period in 2013. Other reports show as much as a 40% drop in patent lawsuits since 2013. This drop hits hardest in two critical areas.

First, 88% of that decrease is attributed to NPE’s or so-called “patent trolls”, which are defined as patent holders who do not commercialize an invention, but instead license the invention to others who commercialize it. While this definition encompasses individual inventors, patent-based businesses, research labs and universities, it also encompasses entities that acquire patents and enforce them. These NPE’s are the secondary market for patent assets and a critical part of the patent economy. Inventors can sell their patents directly to NPE’s so they can continue inventing. Alternatively, inventors can leverage patents for capital investment to build a company. If the company fails, the patent is often sold on the secondary market so the investors can get the investment returned. Obviously, the secondary market is critical to funding the new companies that bring the next big technology to market, thus driving our economy and creating jobs. Damaging it not only harms inventors, but it also harms the economy overall.

---

40 See http://www.ipwatchdog.com/2014/12/11/is-the-patent-market-poised-for-rebound-in-2015/id=52593/ A quote from Richard Baker, a senior IP licensing executive who is on the Board of LES, “the dollar value of patent sales are down 83% and the number of patents sold is down about 50%, and this is just in the last two years, but the most striking piece of data is that the average price per patent has gone down about 55%. So you a dramatic drop in value.”
41 See supra at 11
43 See supra at 11

US Inventor
Independent Inventors of America
Second, the number of software patent lawsuits filed was down 42% in the period from July 1 to October 31 of 2014 compared with the same period in 2013.\textsuperscript{44} Therefore, the drop in lawsuits directly affects software patents more than any other technology. Software inventions are everywhere from your personal computer to your refrigerator and from your car to your tennis shoes. Software is a primary area of innovation for everything made today whether that innovation is the actual product or an enhancement to a product, or it is the software that controls how the product is engineered, manufactured, distributed, financed, marketed, sold and serviced. It is one of the greatest American industries and one in which we lead the world. The software industry created 3.65 million U.S. jobs and contributed $526B to our GDP in 2012, and it is growing at 50%.\textsuperscript{45} Software innovation will likely continue for decades and perhaps will never end.

Whether we continue to lead the world in software, or we are displaced by China is now uncertain. In stark contrast to the U.S., China and the rest of the world have been strengthening the Exclusive Right and the Presumption of Validity for patents in their respective countries.\textsuperscript{46} These positive changes are stimulating innovation in those countries and growing their economies. The U.S., unfortunately, is going in the opposite direction. We are weakening patent protection. Today, we have more companies going out of business than starting up for the first time in our history. If we continue down this anti-patent road, the U.S. will no longer lead. China will.

Congress, the administration and the courts all see that the patent system as broken. They are right. It is broken. But not for the reasons they think it is broken. The facts have been hijacked by the loud impermeable voices of those who benefit from weak patent rights. Those negatively affected, the inventors and the American public, cannot get a word in edgewise. If we continue to enact broad changes under the misguided “patent troll” arguments, we can expect even greater damage to our economy and our standing in the world.

We must go the other way. We must stop the further weakening of the U.S. patent system. Congress must pass laws negating the effects of eBay vs. MercExchange so that a patent is again an Exclusive Right. The Presumption of Validity must also be restored by eliminating PGO’s and other provisions of the AIA. The misguided “abstract idea” category of patentable subject matter must be eliminated altogether. Lastly, the PTO must be fully funded and better managed.

Without these changes – setting it back to what it was just a decade ago – we will become like all other countries – unexceptional. Someone else will lead future technology revolutions. Perhaps that country will be China and our generation will be known for the greatest blunder in history.

\textsuperscript{44} See supra at 11
\textsuperscript{45} See The U.S. Software Industry As an Engine for Economic Growth and Employment, Robert J. Shapiro, September 2014
\textsuperscript{46} See supra at 12
<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Address</th>
<th>City, State, Zip</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paul Morinville</td>
<td>Inventor, Entrepreneur and Managing Director, US Inventor</td>
<td>3290 Ridge Road</td>
<td>Highland, IN 46333</td>
<td>512-294-9563</td>
<td><a href="mailto:Paul@Morinville.net">Paul@Morinville.net</a></td>
</tr>
<tr>
<td>Randy Landreneau</td>
<td>Inventor, President of Independent Inventors of America</td>
<td>PO Box 2273</td>
<td>Clearwater, FL 33757</td>
<td>727-744-3748</td>
<td><a href="mailto:RL@CompleteProductDevelopment.com">RL@CompleteProductDevelopment.com</a></td>
</tr>
</tbody>
</table>