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 decade, 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. In this decade long war on inventors, H.R.9 is the Google lobby's latest accomplishment. Not surprisingly, H.R.9 is not directed to fixing the fictional problem of "patent trolls." Instead, H.R.9 mounts its considerable damage on the patent system in general, specifically harming inventors and small patent-based businesses.

If this bill becomes law, inventors will not be able to enforce their patent rights against moneyed corporations like Google. However, moneyed corporations like Google 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, a patent cannot be enforced. 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

Most inventions are small in scope like cat combs, towel clips, hand tools, software devices, etc. Even though these inventions produce relatively small markets, they fuel most of our new jobs and economic growth. Because small markets have small revenue, these patents once stolen produce small damages. Prior to this decade long war on inventors, even small inventions could be enforced, however the recent increases in cost and risk has rendered a large portion of these patents unenforceable.

Post grant opposition procedures (PGO) created in the America Invents Act (AIA) invalidate patents at rates above 80%. Article III courts invalidate patents at similar rates under the undefinable "abstract idea" category of subject matter ineligibility. These factors conspire to radically increase risk that the patent can be invalidated. Today, inventors are losing more cases than at any time in the 225-year history of the U.S. patent system.

Over the last year, the courts have loosened the rules for fee reversal creating a *non-presumptive* Loser Pay system. If either party feels they have been the victim of frivolous litigation, they can petition the court for fee reversal. Currently fees are reversed in about 20% of patent cases. The point is that costs of litigating Loser Pay are recognized when one side petitions the court for fee reversal – not at the onset of litigation.

H.R.9 forces *presumptive* Loser Pay. That means that every case will litigate Loser Pay whether or not there was any frivolous litigation in the first place. This results in increasing the cost of every patent lawsuit even those without frivolous litigation by either party.

It's simple math, damages must exceed the cost of the case plus the cost of risk. If you increase the cost of the suit, damages must necessarily be higher to justify the suit. Unfortunately, the effect of raising cost or risk is to render thousands of patents unenforceable, thus severely damaging inventors and small companies.

Loser Pay Steals from Inventors and Gives to Corporations (like Google)

Moneyed corporations like Google will still assert patents against small businesses who dare to compete. This is because Loser Pay is not a big deal for a moneyed corporation. The added cost is but a rounding error in the greater scheme of their massive financials.

Unfortunately, small businesses will not be able to sue large corporations like Google for stealing their patents. If a small business asserts a patent against a moneyed corporation, not only is the patent at risk of invalidation, which is often the most important asset that company owns, but losing the case would likely bankrupt the small business. Loser Pay effectively transfers patent rights from inventors to large corporations, sadly, free of charge.

There are other negative consequences for small businesses, as most know nothing about patent litigation. If a small business **defendant** fights what they perceive to be an unreasonable case against them and loses, the loss would similarly bankrupt the small business.

Loser-Pay Creates Super Trolls

Today the risk that a patent will be invalidated with PGO and abstract idea challenges is ~80%, so most individual patents are too risky to enforce. However, a large portfolio overcomes that risk because ~20% will withstand the challenges, which encourages infringers to settle. Super trolls will mitigate Loser Pay risk by asserting large patent portfolios that encourage infringers to settle. Even if the super troll loses, they have the financial strength to absorb Loser Pay costs. Most inventors have only a few patents and limited financial resources, thus most will have few options other than selling to super trolls at low prices.

Joinder of "Interested Parties" Obliterates Investment in Technology 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 lose personal assets like their home in the event the business fails. Adding a joinder of investors to Loser Pay will eliminate investment in patent licensing. Without investors providing needed capital to enforce patent rights, it will be impossible for inventors to assert a patent against a patent thief.

Perversely, even if an investor invests in a business without any patents, but that business is in a technology field where patenting inventions is possible, there is joinder risk for the investor. This is because the invested company could later obtain a patent then enforce it and lose, which opens the investor to the joinder provision even though the investor never had any intention to invest in a patent lawsuit in the first place. This will destroy investment in startup technology companies.

Worse, inventors who sell patents and receive a portion of the licensing proceeds are also "interested parties." That means if the party who bought the patent asserts it and loses, the inventor can lose personal assets. This means that inventors will not sell patents for market value, which will terminate incentive to invent.

Joinder of interested parties makes inventors, patents and technology companies radioactive for investment.

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 small change has a hefty negative effect. A petitioner could effectively daisy chain PGR's by filing a PGR under one ground 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 ground they held back or bring it up in court. A patent thief 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 incorrectly defined, which could damage their case later. 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.

Customer Stay Increases Costs and Decreases Damages

H.R.9's Customer Stay provision allows customer stay to move up the supply chain to the last possible supplier. In complicated electronic devices such as smart phones, the customer is assumed to be the phone user. This provision allows litigation to be stayed against the phone user so that the company supplying the phone can handle the litigation. However, the company supplying phone is a customer of the company making the phone. The company making the phone is the customer of the company making a part of the phone that infringes. The company making the part that infringes is a customer of the chip manufacturer who makes the chip that infringes on that part. The supplier ends up being the lowest value participant in the entire supply chain thus minimizing damages. Worse, it is likely that this provision could trigger joint infringement issues between multiple suppliers on different continents and in different jurisdictions. All of this conspires to reduce damages, increase costs and increase risk.

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. This provision is targeted at inventors in its entirety by reducing the value of their patent.

We've been Googled

H.R.9, The Innovation Act, is not about innovation at all. Nor is it about the undefined patent troll. None of the provisions does anything to correct the Google lobby's fictional patent troll issue. Instead, it creates super trolls and transfers patent rights from inventors to large corporations like Google free of charge. It is an anti-innovation act and it is crony capitalism of the highest order.

If we pass H.R.9, we will wipe out the patent system for all except the moneyed and the powerful. This historic blunder will cost our economic advantage on the world stage. It is foolishness and it fixes nothing.

We are Going the Wrong Way

Small companies who receive demand letters or are sued for infringement complain that the high cost and risk of litigation forces them to settle even though they do not infringe. Inventors have a similar problem in that costs and risks have risen so high that most patents cannot be enforced at all. Both sides are pointing to high litigation costs and high risk as the core problem of the patent system.

H.R.9 increases costs. It increases risk. H.R.9 is fixing the wrong problem. We will be debating patent reform year after year unless we fix the right problem.

Strengthening patent rights will reduce litigation cost and risk, while creating certainty in a very uncertain market. This will drive capital to startup companies. Today we are losing companies at a higher rate than we are creating companies for the first time in our history. This deficit seems directly related to the curve of weakening patent rights over the last decade. Strengthening patent rights will help reverse that, thus creating jobs and growing our economy. We must *deGoogle*.

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