US Inventor
Fighting to Get Our Patent Rights Back

The PATENT Act = the Innovation Act, Only Worse (Googled Again)

The Patent Act Creates a Patent System without Inventors

Over the last decade, Google and other patent pirates 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. For the first time in U.S. history, inventors are villains and patent thieves are heroes. Their decade long war on inventors has now led to S.1137, the PATENT Act, the latest accomplishment of Google's anti-inventor lobby. **Not surprisingly, S.1137 is not directed at fixing Google's claimed "patent troll" problem. Instead, it destroys inventors and small patent-centric businesses, while exempting big business from the carnage.**

If S.1137 becomes law, inventors will lose the last thread of legal protection and thus will not be able to protect their patents against moneyed corporations like Google. However, these goliath corporations will be able to assert their patents against small businesses, except with even more devastating consequences. S.1137 is full-bore crony capitalism catering to primarily to big tech and now other big businesses. It is a direct attack on our economy and our job creation engines.

Today, Inventors Don't Stand a Chance

Today, the effects of the America Invents Act (AIA), policies implemented by the Patent and Trademark Office (PTO) and multiple court decisions, have radically increased cost and risk of trying to defend a patent, and reduced potential damages. Post Grant Opposition procedures (PGO) created by the AIA invalidate patents at rates above 80%. Federal courts invalidate 78% of challenged patents under the indefinable, judicially legislated "abstract idea." *Ebay v MercExchange* extinguished a patent's exclusive right, even though a patent is constructed in the Constitution as nothing but an exclusive right. Now, if a big company steals a patented invention, they pretty much keep it. Then, *In Re Seagate* removed the last remaining disincentive to steal patents, treble damages for willful infringement.

These factors have rolled out a red carpet for patent thieves by increasing cost and risk for inventors while decreasing damage awards. In fact, inventors are now losing more cases than at any time in the 225-year history of the U.S. patent system. Not surprisingly, today almost no attorneys are accepting contingency cases and there are no investors to help inventors protect their inventions.

It is becoming a CEO's fiduciary duty to shareholders to pirate patented inventions, then use their vast financial and market power to saturate markets with the stolen invention as fast as possible.

S.1137, the PATENT Act, strips patent rights from inventors in the same way as H.R.9, the Innovation Act.

The only bill before congress that attempts to correct this historic blunder is S.632, the STRONG Patents Act.

S.1137, The PATENT Act, inflicts exceptional damage on any patent holder. Yet, to quell the biggest source of opposition, universities, pharmaceutical companies, GMO companies and other special interests are exempted

from the most harmful provisions. Even as independent inventors and small patent-based businesses are the least able to financially deal with this damage, we are not exempted from the butchery.

The Google TechNet lobby has all but wiped out the patent system for inventors and small businesses, but the beast is still hungry. Without question, we've been *Googled* and, this time, a few Senators seem to think we should be GMO'd and Drugged, too.

Loser-Pay – Full Blown Crony Capitalism – Big Business Carve Outs

S.1137 proposes a non-presumptive loser-pay regime, which implements a stealth pre-litigation bonding requirement called "certification," and a joinder provision, which pierces the corporate veil by passing losses onto "interested parties," aka investors.

S.1137 exempts Pharma, GMO, universities and other powerful industries while the politically powerless are left tied to the railroad tracks. This is a brazen attempt at eliminating protections for every day Americans and passing their property to large moneyed corporations free of charge.

Loser-Pay – Bonding Kills Inventors with Pay to Play costing Millions of Dollars Up Front

S.1137 requires a "certification" of the ability to pay the infringer's legal costs in the event the inventor does not prevail in defending his patent. This "certification" will force bonding, even before due process, while the outcome of the case remains unknown. While all the big players, like Google, Monsanto and Pfizer, are exempt, inventors are guilty until proven innocent.

With inventor loss rates as high as 90%, the upfront cost of a bond will be the defendant's full suit costs, which can be more than $5 million. This bonding requirement will instantly increase the cost for inventors to prohibitive levels, wiping out their access to the courts.

Only the party bringing suit is required to bond, but not the infringer, who may still wind up owing substantial damages. Should this not apply to both sides? How does it help fix the Google lobby's troll issue other than to make all suits impossibly expensive for all but the exempted political cronies?

Loser-Pay – "Joinder" Obliterates Investment in Startups

S.1137 is unprecedented in that it pierces the corporate veil to enforce loser-pay to "interested parties" - the investors who provide needed capital so inventors can produce new technologies and protect their patent rights. No investors are willing to lose personal assets like a home should the business fail. Thus, adding a joinder of investors to loser-pay will instantly eliminate the necessary ability to acquire investment to help defend a patent. This will make it impossible for inventors who aren't independently wealthy to assert a patent against a big corporation who steals an inventor's property rights.

S.1137 exempts certain investors from loser-pay joinder as long as the company is not considering patent assertion at the time of the investment. ***This provision reveals a critical lack of knowledge and understanding about how early stage investment and the secondary market for patent assets works.***

A patent is a property right. Just like any property right, patents play a critical role reducing risk, bolstering profitability, and attracting investment. That was the entire idea behind the U.S. patent system. Simply stated, a patent can help repay the investment even if the company fails.

The investor has two ways to monetize patents from a failed entity. One is to assert the patent. The investor will likely need to capitalize the lawsuit, which opens the investor to loser-pay joinder and bonding, and thus defeats the purpose of the provision. The other solution is to sell the patent to someone else who can monetize the patent. The infringers who destroyed the small company by pirating the invention and massively commercializing it will not be interested in purchasing the patent. After all, they get to keep the market they just stole with or without the patent. Because of joinder and bonding, there will be very few small assertion companies or investors.

The few remaining entities willing to purchase patents will be super trolls with the financial strength to absorb extreme high risk. They will buy patents in an unprecedented buyer's market.

S.1137 will further devalue patents on the secondary market to near zero. This will flow upstream and destroy the ability of a patent to drive capital to new businesses, thus slowing job growth and impairing our economy.

S.1137 carves out universities, food products, GMO manufacturers, cosmetics, veterinary products, biological products and drug companies. **These carve outs make clear that damage caused by S.1137 is extreme even for large moneyed companies.** Considering the difference in financial scale, this damage is extremely fatal for small entities. Why not carve out independent inventors and small businesses – those in the most vulnerable financial position and those who create most of the new inventions and jobs in this country?

Eliminating Estoppel Perpetuates Litigation Driving Inventors into the Abyss

Under current law, a Post Grant Review (PGR) prohibits the petitioner from later arguing "*any ground that the petitioner raised or reasonably could have raised during that post-grant review*." S.1137 strikes "*or reasonably could have raised*." This small change has a hefty negative effect on inventors defending their patents. A petitioner could effectively daisy chain PGR's by filing an initial PGR under one ground while holding back other grounds until the first PGR is completed. If the large company, looking to essentially steal the patent, does not get the desired result, they can file another PGR under new ground, or assert it in court later. Each PGR, while costing a mere $20,000 to file, can cost the inventor between $300,000 and $1,000,000 to defend against, and it burns three years of the patents life. Such piracy could drive the inventors cost into the stratosphere and the entity wishing to infringe will win on this alone.

Enhanced Pleadings and Limited Discovery Increase Risk and Cost

Again big pharma and big GMO are exempted from both pleadings and discovery provisions. 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 ensure that no term is adversely defined. In addition to making it possible for infringers to get off the hook over hair splitting definitions, this hurts both sides as pretrial settlement demands will go up substantially to cover the costs of reverse engineering, subject matter, and testifying experts, which could cost hundreds of thousands of dollars or more.

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

Again big pharma and big GMO are exempted. The Customer Stay provision allows an end-user or retailer to stay litigation so that it can be passed to the supplier or manufacturer supplying the infringing product. The problem arises when the supplier or manufacturer is overseas, as is often the case in today's global economy. In many cases, the infringing product is manufactured with parts made in different countries with each part contributing to the overall infringement. It is likely that this provision would trigger joint infringement issues between multiple suppliers and manufacturers on different continents and in different jurisdictions resulting in chaotic litigation with reduced damages, increased costs and increased risk. This provision is dipping into tensions between global manufacturing and distribution of infringing products and nationalistic patent laws. Changing patent law can only address what goes on in our country and not the rest of the world, which is very dangerous and will bring wildly unpredictable results.

Paul Morinville ★ US Inventor ★ www.USInventor.org
3290 Ridge Road ★ Highland, IN 46333
(512) 294-9563 ★ paul@usinventor.org

We've been *Googled*, GMO'd and Drugged

Neither S.1137 nor H.R. 9 is about innovation at all. They are about stopping patent assertion against a handful of politically connected corporations who have engaged in massive intellectual property grabs. None of the provisions does anything to correct the Google lobby's fictional patent troll issue. Instead, this proposed legislation creates super trolls and openly transfers property rights from inventors to large corporations like Google, Monsanto and Pfizer. These bills are anti-innovation and crony capitalism of the highest order.

If we pass S.1137 or H.R. 9, we will wipe out the patent system for everyone except the moneyed and powerful. This historic blunder will cost America its economic advantage on the world stage.

This legislation is sheer foolishness and it fixes nothing.

Congress Is Going the Wrong Way and Wiping Out the Patent System

Small businesses who receive demand letters or are sued for infringement complain the high cost and risk of litigation forces them to settle even though they do not infringe. If that is true, high cost and high risk encourages frivolous litigation, thus high cost and high risk is the real problem.

Inventors and patent-centric businesses share that problem - costs and risks have risen so high that most patents cannot be protected. Both sides are pointing to high litigation costs and high risk as the core problem of the patent system.

However, it is important to understand that S.1137 increases costs, increases risk and reduces damages on both sides. **S.1137 is fixing the wrong problem.** Congress will be debating patent reform year after year unless we fix the right problem.

Strengthening patent rights by returning a patent to its Constitutional meaning – an exclusive right – will deter infringement and encourage licensing or purchasing valuable patented technologies. These patented inventions will be purchased by the end consumer from a licensee or owner of the patent and hence they will not infringe. Since we cannot legislate morality, there will still be bad actors who sue small companies frivolously. However, if we take steps to reduce litigation costs and restore settled expectations, companies will be able to fight nefarious suits.

Today we are losing companies at a higher rate than we are creating companies for the first time in our history. Patents are now being abandoned because government policy has made them worthless. This deficit is directly related to weakening patent rights over the last decade. Strengthening patent rights will reverse these unfortunate trends thus driving capital to startup companies, creating jobs and raising wages for everyone.

Paul Morinville ★ US Inventor ★ www.USInventor.org
3290 Ridge Road ★ Highland, IN 46333
(512) 294-9563 ★ paul@usinventor.org