

June 19, 2007

Will Congress Slam Small Inventors?

By Ann Therese Palmer

Steve Wren is the kind of yeoman inventor that the drafters of the Constitution had in mind when they commanded Congress to write a patent law "to promote the Progress of Science and useful Arts." In exchange for publishing patents and sharing their knowledge, little guys like Wren got exclusive rights to the use of their ideas for 20 years. The system helped make the U.S. the innovation capital of the world.

But by the time Wren applied for his patent, he discovered that the Patent and Trademark Office had become a bureaucratic swamp. "It was hell," he says.

After eight years of playing Trivial Pursuit with patent examiners, Wren was awarded patent No. 6055514 for a computer-based marketing system. But his hopes of building a business are in tatters; he still awaits approval of three other patents, which he says he needs to proceed. "Over 100 funding sources have turned me down or told me to come back once I get my patents," he says.

You might expect Wren to cheer a bill that is advertised as the biggest patent reform in 50 years-and a cure for the system's ills. Not quite. All he sees is "reform" that only a corporate titan could love. "It doesn't address the concerns of small-business owners like me, much less help us," he says.

The proposed legislation would make life more difficult for entrepreneurs by rewriting the rules for getting patents, making them more vulnerable to challenges, and limiting damages when they are infringed. "The bill leaves the little guy out in the cold," says Jerry Mitchell, holder of six patents and president of the Midwest Entrepreneurs Forum in Glen Ellyn, Ill. John Neis, managing director of Venture Investors (ventureinvestors.com) in Madison, Wis., says that by raising uncertainty over patents, the law will chill investment in the kind of small firms on which the U.S. depends increasingly for new technology (see "[The Return of the Lone Inventor](#)," *FSB*, March, 2005, fsb.com). "The patent system is the major reason we have a successful innovation-based economy," he says. "The proposed reforms undercut what drives that."

Nobody doubts that the system is troubled. The backlog of pending patents is approaching a record 800,000, and average approval time has stretched to 31 months. For 15 years Congress siphoned off a chunk of PTO fees, which now run about \$1.7 billion annually. Patent quality has suffered as overburdened and underpaid examiners have granted protection to broad and seemingly obvious business-process "inventions," such as Amazon.com's checkout cart for online shopping.

Patent litigation is too common and too costly. The proposed bill, sponsors say, will cure these problems by improving patent quality. As a result, "the bill will reduce meritless lawsuits," says Representative Lamar Smith (R-Texas), who is co-sponsoring the bill. "It will help small inventors, high-tech firms, and everyone in-between."

The problem is that in the guise of addressing common concerns, the legislation favors corporate interests over independent inventors. It starts by replacing the uniquely American "first to invent" rule with "first to file," which is used in Europe and Japan. First to invent gives you time to fully develop a concept and still be confident of winning a patent, if you can prove you hatched the idea first. By contrast, first to file "would create a race to the courthouse that big companies with their legions of staff experts will always win," says Alexander Poltorak, CEO of General Patent (patentclaim.com), a Suffern, N.Y., patent-enforcement firm.

Adopting the foreign model moves U.S. policy in the wrong direction, says Jere Glover, executive director of the Small Business Technology Coalition, which opposes the bill. "Our patent laws make America stand out as pro-inventor and pro-entrepreneur," he says.

Today a new patent is presumed valid if it goes unchallenged for 12 months. The bill would broaden post-grant review and allow challenges at any time through a new administrative procedure at the PTO. It's designed to cut legal bills by avoiding court but would multiply challenges and raise costs for patent owners, says Bryan Lord, general counsel of AmberWave Systems Corp. (amberwave.com), a Salem, N.H., semiconductor-materials startup. His legal bills would rise "substantially," he predicts.

How the courts compute damages in infringement cases would also change. Payments would be based on the economic value of the patented invention, not of the overall product-no matter how critical that part is. Had that rule been in place in February when Microsoft was assessed \$1.52 billion in damages (based on total sales of computers with infringing code), the award would have been vastly reduced. The legislation also raises the bar for a patent holder to prove willful patent violation, which since 1800 has triggered treble damages-a deterrent to infringers. With shrinking penalties, there is less incentive to agree to licensing patents and more temptation to cheat. "In effect, the new rules would lower costs for big companies like Microsoft and Intel and reduce their risk of being socked with major judgments," says Poltorak.

That's no accident. The bill is largely the work of the Coalition for Patent Fairness, a group backed by Microsoft, Intel, Dell, and other high-tech and Wall Street companies and represented by lobbying powerhouse Patton Boggs. The Microsoft group is opposed by another big-business lobby, the Coalition for 21st Century Patent Reform, representing pharmaceutical companies, multinationals such as GE, and some tech companies such as Motorola. Both groups favor first to file but agree on little else. Producing hardware and software that rely on hundreds of patents, Microsoft and its allies are highly exposed to patent suits and spent years lobbying for limits. They got nowhere under Republican leadership, which sided with Big Pharma-companies whose livelihood can depend on a single patent and are leery of losing any protection. In the Democratic Congress, the legislation has won bipartisan support in both houses.

(The Commerce Department, which oversees the PTO, has asked the sponsors to reconsider the bill's limits on damage awards and has raised questions about the extended review period, among other concerns.)

Where are the leading small-business lobbies? The National Federation of Independent Business is taking no stand, because its data indicate that only 4.7% of small-business owners have patents. The board of the U.S. Chamber of Commerce split over the proposed legislation, leaving it "aggressively neutral," says Chris Merida, public affairs and congressional director. The closest small business has come to being heard was at a March hearing of the House Small Business Subcommittee, which has no role in crafting the legislation. Neis and Lord testified against the bill, but the event drew little attention, spurring Lord to launch his own lobby, Innovation Alliance, which has 100 members and has urged lawmakers to approach patent reform more cautiously.

Some small tech companies do support the reform bill. Mitch Gross, CEO of software maker Mobius Systems (mobius.com), testified for it in March. Patrick Sweeney, president and CEO of Odin Technologies (odintechnologies.com), a maker of radio-frequency products, says he supports it because some reform is better than none. That's not good enough for veteran inventor Peter Tice, who spent years winning a voicemail patent-and more years defending it against phone giants. "I kept going because I believed in the patent system," says Tice, 70, of Lindenhurst, Ill. "I knew if I could get it to work, I could protect it from people who might try to steal it. If this legislation had been on the books then, I wouldn't have. Period."