Only Congressional Patent Reform Can Restore Constitutional Rights

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Nov 12, 2024

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Encouraged and abetted by free riders who would benefit unfairly from others' work, well-intentioned lawmakers and judicial activists have compromised the U.S. patent system, threatening America's prosperity and national security. But we have the chance to reverse this trend by supporting two bills that will be debated this week in the Senate Judiciary Committee.

Recent actions to minimize the rights of inventors to their own work has opened the door for China and others to usurp America's role as the world's innovation leader in critical and emerging technologies. The clear intent of America's Founders to protect the fruits of intellectual labors as private property in the Constitution could not be plainer. In Federalist Paper No. 43, President-to-be James Madison described intellectual property, or IP, as "a right of common law".

Yet over two-plus centuries, many politicians, bureaucrats, and judges have tended to over-think the plain language of the Constitution and made it harder, not easier, for authors and inventors to own their own work. The present moment, when IP rights are denied, dismissed, infringed, and invalidated with shocking insouciance and impunity, is no exception.

Back on Track

Fortunately, the bipartisan duo of Senators Chris Coons (D-DE) and Thom Tillis (R-NC), leading the Senate Judiciary Committee's IP subcommittee, are acting with co-sponsors to restore constitutional intent to patent law. Expeditious congressional approval and enactment of the Patent Eligibility Restoration Act (PERA) and Promoting and Respecting Economically Vital American Innovation Leadership (PREVAIL) Act would be a vital step toward restoring the property rights of inventors. An Executive Business Meeting to consider and potentially move forward with these two bills, as well as

the Inventor Diversity for Economic Advancement (IDEA) Act, is scheduled for this Thursday in the Senate Judiciary Committee.

PERA will clarify that discoveries in cutting-edge areas such as artificial intelligence, biotechnology, medical diagnostics, and quantum computing are eligible for U.S. patents, overthrowing a series of poorly considered Supreme Court decisions written between 2012 and 2014 that have been construed by lower courts to deny inventors their patent rights. PERA will keep U.S. researchers – and research dollars – from fleeing to Europe, Japan, and China where patent eligibility rules have not wandered from the path of common sense.

Historically, U.S. patents have been available for any new and useful process, machine, manufacture, or compound of matter "made by man." The qualifier meant that abstract ideas, natural phenomena, and laws of nature could not be patented. The common sense understanding was that the use of gravity to drop a bomb, for instance, could not be patented. A new and useful mechanism to guide that bomb, however, should not be ineligible simply because the bomb remains subject to the pull of gravity.

The PREVAIL Act addresses unintended consequences from the 2011 America Invents Act, which created the Patent Trial and Appeal Board (PTAB). The PTAB was intended to offer a more affordable and streamlined dispute resolution alternative to costly patent litigation in federal courts.

In practice, rather than contract with inventors and pay appropriate royalties for the use of patented innovations, many deep-pocketed technology adopters are choosing to infringe instead of license. Taking advantage of the PTAB, they gang up to pick apart an inventor's patent one claim at a time through repeated and redundant

challenges. The result is that under current rules an inventor can never enjoy quiet title to their patent. For small inventors in particular "affordable and streamlined" has meant unrelenting and bankrupting.

Some inventor advocates don't believe that PERA and PREVAIL go far enough to overcome the gauntlet that patents are forced to run. They're right. Congress should take up the Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive (RESTORE) Patent Rights Act of 2024, too, giving patent owners back the injunctive relief that is the only real remedy to continued IP theft. Without injunctions, a patent infringer can continue to make and sell products that rely on unlicensed IP, just as if the police couldn't force a burglar to leave your home.

Let's Restore Common Sense

These problems have emerged in large part because policymakers and courts have over-thought and over-complicated the patent system. The constitutional clause empowering Congress to establish private property rights for mental labors was a positive affirmation of the importance the Founders attached to such rights. Perversely, this clause has been read by many as a negative statement limiting IP rights to a tortured standard of genius or inventiveness that judges made up from whole cloth.

America enjoys innate advantages in technological leadership due to the strength of our private property rights, capital markets, and research and development ecosystem. When buttressed by the rule of law to enable risk-taking, these strengths make America uniquely capable of driving technology breakthroughs. It is up to Congress to restore common sense to the patent system so that future generations

of Americans enjoy the same constitutional advantages the Founders secured to us who have gone before them.

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