President Trump, Make Our Patent System Healthy Again

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"In addition to Making America Healthy Again, President Trump should make the patent system healthy again, e.g., by appointing as the new USPTO Director someone not in any way beholden to any particular industry or sector but instead keenly aware that innovation coming from the human mind must be encouraged."

With Robert Kennedy, Jr. making the rounds in Congress for his confirmation as head of the Department of Health and Human Services, many institutions do not like what he has to say about the American food industry, the agriculture industry, the pharmaceutical industry, the fast-food industry and more. Incoming President Trump has stated that the health of our nation is something that must be addressed, and Kennedy feels that something has to be done regarding the many special interests profiting from decades of maltreatment, malnourishment and malpractice against the American people.

Decades of Neglect

Our patent system is also suffering from the effects of decades of neglect by the Supreme Court, Congressional subterfuge, and relentless attacks by the tech industry, hell-bent on undermining the patent system for their own gain. To Big Tech, it is easier to manipulate the law than tolerate a robust patent system that rewards all innovators. They want to eliminate the competition early on, whether by litigation or Congressional lobbying, keeping the patent system unfair and unhealthy.

Even though patent rights are laid out in the Constitution and a key part of our success as a nation, for the last two decades the Supreme Court has nonetheless crippled those rights. The Court, indeed, has trouble appreciating the value of patent rights, and seem to neither comprehend nor care about the importance of a viable and healthy patent system to our society.

For example, the injunction right had long been a powerful inventor right. Akin to laws regarding trespass and theft, an inventor can invoke their exclusive rights to stop another person or company from taking or using the patented technology. Even though this injunctive right was nearly absolute for patent owners, two decades ago the Court diminished the right, in essence saying that, before stopping the trespasser or thief, we should hear them out, even though they took something without authorization. This excuse for thievery is manifest in the Court's more recent *Google v. Oracle decision*, a copyright infringement case, where the Court rather creatively and quite wrongfully redefined what was protectable to the point of valuelessness, exculpating the direct misappropriation or theft of Oracle's intellectual property.

The Virus Spreads

Worse, the Court has participated in the undermining of the patent system by not clarifying their own misguided law. Section 101 of the Patent Act was once a very minor statute, a coarse filter, i.e., almost all inventions were eligible to enter the patent process, which already included strong measures to weed out weak or vague inventions. Indeed, applicants for patents were rarely denied entry outright because the inventions were too "abstract" since the other strict requirements of novelty, nonobviousness and other constraints would easily handle this. But modern technologies have become quite abstract and they are getting more so,(e.g., AI), and some companies,

primarily tech companies, directed their attacks, like a virus, at this innocuous intake statute, infecting the Supreme Court with the abstraction virus.

Through their *Mayo* and *Alice* decisions, the Supreme Court Justices wrestled with the idea of abstraction but could not capture it. Like obscenity, you know it when you see it but cannot adequately define this elusive quality. Yet, the Court nonetheless unmoored the historically narrow abstraction test to now apply to all innovations, and the Federal Circuit has slavishly followed suit, applying the Court's statements in a manner almost uniformly hostile to patents. Akin to making Quantum Mechanics apply to large objects, physical devices can be blithely categorized as an abstraction and thereby not patentable. Indeed, even vehicle improvements have been deemed an abstraction under this doctrine. The virus has spread.

By not treating this abstraction virus in any subsequent decision (or inoculating us from this pernicious viral view), and despite over a decade of begging by the patent bar for clarity, all of innovation has been exposed, subject to the vagaries of this infernal infestation. For example, many critical therapeutics and therapeutic treatments, by virtue of the Court's loose abstraction analysis, are now deemed too abstract and unpatentable. Software, AI and many physical devices are often subject to this ill-treatment. Much of America's cutting- and bleeding-edge innovation is almost *per se* unpatentable, regardless of the value of the technology to society. China and Europe, however, do not have this illness, and many innovations rejected here are fully patentable there, with R&D moving there. Since the Supreme Court refuses to elaborate and correct the damage they have done, providing medicine as it were, they are to blame.

A Self-Inflicted Epidemic

Congress is also to blame. In 2011, the America Invents Act (AIA) was shoved down the throats of Americans like a large pill. At that time, the legislation proposed had many flaws, e.g., multiple patent challenges were permissible without end. But the tech industry, then aided foolishly by biopharma, pushed the bill through and President Obama signed it into law. Tech companies were very pleased because they now had another venue to attack patents and take technologies.

For example, in addition to federal district court, which governed most patent challenges for over 200 years, the AIA allowed direct challenge of any patent through a new administrative court created within the United States Patent & Trademark Office (USPTO), i.e., the Patent Trial and Appeal Board (PTAB). Very quickly after its institution, the PTAB judges were likened to "death squads" since the great majority of patents litigated there were invalidated. Since the Supreme Court's *Mayo* and *Alice* decisions, the anti-patent epidemic has grown, and the value of patents diminished.

With patents often being the only assets in startup companies, it is disheartening that the patent system has been reconfigured by the Court, Congress, and big tech, to attack itself.In a way, our own antibodies are attacking our creations and ingenuity is suffering. This undermines the entire patent paradigm.

The Cure

In addition to Making America Healthy Again, President Trump should make the patent system healthy again, e.g., by appointing as the new USPTO Director someone not in any way beholden to any particular industry or sector but instead keenly aware that innovation coming from the human mind, whether an individual inventor or corporate employee, must be encouraged. A large amount of innovation, indeed usually the most creative, comes from the small

inventor community—the same small inventor community that has been shafted by the Court, Congress and Big Tech for a long time.

A big part of making America Great Again is encouraging American innovation and allowing all inventors to fairly participate in the patent system, not just well-funded companies. Our Founders were wise to promote innovation through a patent system but we have lost our way. With some new laws and good appointments, President Trump can Make America Patent Again, helping all Americans, and the world, with our unique American originality, ingenuity and inventiveness.

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