

WAKE UP CALL TO PATENT REFORM

Industry and University Inventors Align



At a glance the Manufacturing Alliance on Patent Policy (MAPP) and the National Small Business Association (NSBA) may not seem to be organizations with many commonalities with university faculty inventors, but in fact, they do share one major issue: that of patent reform. MAPP is an ad-hoc coalition of manufacturers, while the NSBA is a long-standing nationally recognized organization. But both are applying their influence to Congress to forestall the current patent reform proposals for much the same reasons that concern IP Advocate.

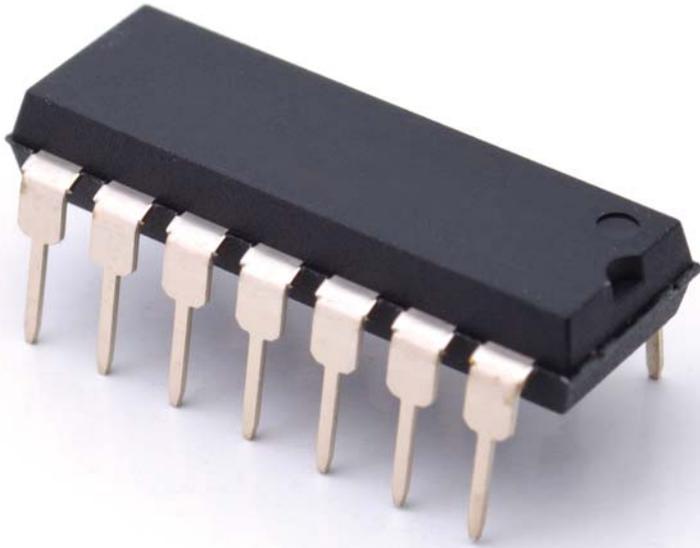
Different aspects of the proposed legislation alarm these factions, and although they are not operating as a united front, they are wielding some influence as forces mutually opposed to reform. Perhaps this pressure will succeed in halting a third consecutive attempt at reforming a much maligned patent system by means of questionable reform.

For the NSBA, who represents small business, academic researchers and independent inventors, the change to a “first to file” system is troubling. Our founding fathers, Jefferson and Franklin among others, were inventors and sought to protect individual creativities in their drafting of our nation’s system of government. Filing a proper patent application can be a time-consuming process and a costly one as well depending on retention of legal counsel, prior art searches and other hurdles. Independent and academic inventors would be unduly hampered by this change and the only beneficiary would be large corporations who already have sizeable advantages in the world of patents.

This change would impact more than lone inventors and non-corporate researchers. It would mean a step-back in innovation within the U.S. as well as an associated injury to economic progress. Although the rest of the world utilizes the first-to-file protocol, the U.S. was and still remains a nation of innovators. “Because everyone else does it” has never been a position embraced by Americans and should not be in this case either.

A major consideration for both is any weakening of patent protections, such as the limitation on damages based on apportionment and willfulness. Strong patents are of critical importance to manufacturers as their system of business is underscored by protection on the products, devices and components they make. Huge costs are associated with the machining and production of even the smallest components and lessening the enforceability of a given patent would mean the loss of the capital invested to develop it, the jobs assigned to produce it and the contribution to our economy by its production.

If damages are limited, infringers could become blasé or even intentional about violations. The notion of apportionment and willfulness are also problematic. Apportionment addresses the relative percentage of an infringing component for a product or service. However, the percentage an individual patent contributes to the whole may or may not be reflective of the investment required to create the original intellectual property. Property ownership matters and should be enforced unilaterally. The relative percentage of abuse should not be a mitigating factor in an enforcement or infringement charge. This should be of the greatest concern to universities and their researchers as their innovations rely on partnerships that often profit from only the IP participation.



In contrast, a vocal supporter of the current reform proposals is the high-tech industry. With their industry evolving so rapidly, reducing the time from concept to reality can make or break a company. Additionally, hundreds or thousands of components in a single device means an equivalent number of patents to contend with and the potential infringement if not careful. Their concerns are understandable, but should they not be responsible to ensure that every patented piece of their products are properly licensed? Reducing their responsibilities instead of their accountability seems an incorrect proposition to serve the demand for speed to market.

Surprisingly, small businesses, more so than large, tend to litigate to protect their patents out of necessity. Often, the fate of a small concern may rest on the weight of even a single patent, so vigorous defense is a must. If infringers are protected by the new patent reform in a decreased penalty for their illicit activities, any number of small businesses could be in business no more.

In his New York Times small business blog, You're the Boss – The Art of Running a Small Business, Case Western Entrepreneurial Studies professor Scott A. Shane wrote, "...smaller damages would most likely motivate large companies to infringe on start-up companies' patents since the potential of large damages is one of the key deterrents to patent infringement." Shane then recommends viewing the film A Flash of Genius for an example. If you haven't seen it, the movie tells the story of Robert Kearns, the inventor of the intermittent windshield wiper, and how Ford Motor Company and other car manufacturers blatantly infringed his invention.

Universities and their faculty inventors face enough challenges already without adding avoidable litigation to the mix. Technology transfer offices are not prepared for additional complexities of IP ownership, much less ones that could lessen the long term value and market results if the proposed patent reform comes to fruition.

Another area where MAPP and NSBA overlap is in opposition to the expanded post-grant review process. Essentially, a patent could be granted that could then be challenged by any number of parties for any reason for an expanded length of time. This would unnecessarily weaken the strength of an issued patent. This also exacerbates the challenges in bringing an innovation to market. If alleged co-claimants are allowed to muddy the waters based on weak allegations, it can be more costly for small business interests and delay processes to an extent that even large manufacturing interests are overburdened.

For MAPP, the appeal to leadership is based on their position that the current reform measure could cause the loss of an estimated 300,000 manufacturing jobs and reduce investment in R&D by \$66 billion. Two-thirds of the value of manufacturers is their intangible assets, which include its patents. Devaluing these would spell disaster for the collectives that make up this industry.

With the U.S. economy on the brink of recovery, can we afford a potential misstep of this magnitude?

The NSBA's cause may resonate even closer to home. Small businesses employ roughly one-half of the private work-force, drive one-third of U.S. export value and create three-fourths of new jobs in the U.S. With big businesses out-sourcing and off-shoring, small business has become the bread and butter of the American work force and economy and a fertile ground for start-ups who often develop out of the academic environment.

Although the first two attempts at patent reform failed, with a different make-up in Congress, the fate of U.S. intellectual property is very much up in the air. MAPP favors reforms originating from the U.S. Patent Office while NSBA wants to see less drastic reform issued by Congress. Yet special interest groups with deep pockets could yet derail the long-term best interests of our nation and push through the decidedly one-sided patent reform now on the legislative agenda.

As pressure is mounting over the fight for patent reform, the end result may yet be another year of no reform, and the prolonging of the flaws that in the U.S. patent system. What is interesting to note, however, is what corporate factions are for or against reform and the unlikely alliances that have emerged from this debate.



IP Advocate presents below research compiled by legislative watchdog site www.MAPLight.org whose mission is "Illuminating the Connection" between money and politics. They have tracked contributions from the following groups who support or oppose the current Senate Bill 515 "Patent Reform Act of 2009".

SPECIAL INTERESTS OPPOSED TO S.515

Telephone/Communications
Energy, Natural Resources/Environment
Alternate Energy Production
General Business Associations
Small Business Associations
Pro-Business Associations
Education, Schools & Colleges, Medical Schools
Welfare & Social Work
Republican/Conservative
Christian Conservative
Lobbyists & Public Relations
Plastics/Rubber Processing
Office Machines
Non-Profits
Churches/Clergy & Religious Organizations

SPECIAL INTERESTS SUPPORTING S.515

Agricultural Chemicals
Residential Construction
Construction Equipment
Telecommunications
Computer Manufacturing/Services
Data Processing/Computer Services
Defense
Major Oil/Gas Producers
Power Plant Construction/Equipment
Commercial Banks & Holding Companies
Venture Capital
Real Estate Agents
Financial Services/Consulting
Food & Beverage Products/Services
Health Professionals
Health Care Products
Manufacturing
Household Cleaners/Chemicals
Glass Products
Textiles/Fabrics

