

Who Owns Good Ideas?

Dave Boyer

Patent law is falling behind in the growing 'idea economy,' argues one critic who warns that the coming assault by lawyers will inhibit innovation.

The field of intellectual property at times looks decidedly empty-headed. Witness the California writer who sued David Brinkley over the title of the veteran newscaster's memoir, *Everyone Is Entitled to My Opinion*. Turns out the Californian had copyrighted the phrase and sued for infringement. Brinkley's publisher paid the royalties.

Or take the British mathematician who discovered and copyrighted a repeating geometric pattern -- and then sued Kimberly-Clark for putting the design on its quilted toilet paper. Or the man who successfully claimed a patent on two large prime numbers that can be used in a program to encrypt e-mail.

Seth Shulman, author of *Owning the Future*, says these admittedly extreme examples reveal a system of intellectual-property law out of whack with the times. And, he argues, the U.S. Patent and Trademark Office seems increasingly inadequate to stem the flood of cunning intellectual-property lawyers and greedy inventors capitalizing on a new wave of ideas.

Throughout most of American history, the U.S. patent system has worked this way: An inventor conceives a useful widget, such as a fragrant tablet that turns the toilet bowl blue; then the government grants him a patent to protect his invention from copycats for a limited time. Officials at the Patent and Trademark Office claim the process still works.

But Shulman says the overmatched Patent Office is expanding inventors' ownership rights from traditional gizmos to intellectual concepts. This new "idea economy" includes patents for a surgical technique that doesn't require sutures, gene therapy to treat immune deficiencies and even manmade life forms. Furthermore, inventors no longer put themselves through the same painstaking trial and error as did Thomas Edison in obtaining 1,093 patents.

Why should anyone care, besides patent lawyers? According to Shulman, developments in the "knowledge economy" left unchecked, will inhibit innovation, increase prices and "widen even further the disparity between the haves and have-nots" He foresees a world in which dying patients are denied care because of legal disputes about medicines -- a world in which an athlete who perfects a newfangled slam dunk could collect royalties from imitators.

"The problem is much bigger than just the Patent Office doing a bad job" says Shulman. "Self-interest is pushing against this legalistic system of patents. It's a fight over whether we will allow the fruits of our public investment to enrich a few people or make a system that supports our rhetoric about equal opportunity."

Todd Dickinson, acting commissioner of the Patent and Trademark Office, calls Shulman's premise alarmist. "We constantly check ourselves and are very sensitive to making sure that the breadth of the patent protection is consistent with the law," says Dickinson.

But Shulman can rattle off numerous, often bizarre examples to prove his point -- such as the dispute involving Petr Taborsky, who ended up on a chain gang in an ownership dispute over cat litter. Taborsky was an undergraduate research assistant at the University of South Florida, studying a claylike substance that absorbs ammonia -- a sought-after scientific breakthrough for

cat boxes worldwide. The young scientist accidentally discovered that the clay absorbed more ammonia after it was heated to 800 degrees. Because the research sponsor had not asked Taborsky to investigate the properties of cat litter on the surface of Mercury, he considered the discovery his own and sought to patent it.

University officials, angered that Taborsky was trying to claim private ownership rights for research funded by a corporation, charged him with theft of school property for stealing two notebooks containing data. A jury convicted him and he was to serve his three-and-a-half-year sentence for the felony on a chain gang. He was paroled early for good behavior.

Shulman thinks the case is emblematic of the "ambivalence in our society about a researcher's right to his or her ideas." Dickinson of the Patent Office calls such examples "minor" claiming that the vast majority of inventors are neither greedy or exploited. "There are few people who are more interested in the advancement of technology than inventors" he says. "This country is great in many ways because of the innovative spirit those inventors represent" The office employs more than 450 Ph.D.s. "We have as well-trained a patent-examining corps that has ever existed in the world."

Nevertheless, asserts Shulman, patent examiners are outgunned and in some cases outsmarted by corporate lawyers who gain too many concessions on patents involving computer software, for example. Greg Aharonian, publisher of Patnews, a patent-news service, claims that more than 50 percent of software patents issued already were in use.

"I feel for the Patent Office," Shulman says. "They're chronically playing catch-up. They have a terrible time keeping examiners -- they can always earn more in private industry"

Where Shulman fails short, by his own admission, is in offering solutions to the gathering crisis. "We need to set limits somewhere, but I don't know exactly where" he says. "Public input is what's really required. It's a policy issue. Congress is the natural place to look at it ..., but you could also establish a lot with executive orders."

Not only are we in danger of creating futuristic monopolies, according to Shulman, but we're apparently in danger of hearing the self-proclaimed father of the Internet, Vice President Al Gore, lecture on the subject if he becomes president. "This is the absolute Al Gore issue" Shulman says. "He's the perfect guy to recognize the problem."

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