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## Industry Giants Want To Weaken Our Patent System

If you're a seasoned or aspiring inventor, you should be concerned about the current attack that large patent-intensive corporations are making on our venerable patent system, which has effectively protected the intellectual property of inventors for more than two centuries. Indeed, the so-called Patent Reform Act proposes major changes to

the law governing how patents are obtained and enforced. Ironically, these changes are being promoted by the most powerful and prosperous high-tech corporations, which came to power based on the patent system as it now stands.

In mounting their full-scale invasion of the territory protected by U.S. patent laws, the patent Goliaths continue to amass political support that, if not effectively challenged, will lead to an unwarranted degradation of the legendary patent system established by the U.S. Constitution.

**WHAT'S WRONG WITH THE ACT?** • Perhaps the most egregious legislation proposed by the act is the mandating of apportionment in all situations. More specifically, the court is required to calculate what is "the economic value properly attributable to the prior art, and other features or improvements, whether or not patented, that contribute economic value to the infringing product or process."

In addition to the complete impracticality of implementing this approach as noted by Chief Judge Paul R. Michel in his letters to the Judiciary Subcommittee, the result is a clear reduction in the reasonable royalty to the disadvantage of the patent owner and a great advantage to the licensee, who has already been found by the court to be infringing a valid patent.

Indeed, the irony of this result is distressing. It is basically compulsory licensing. Under the proposed legislation, in the absence of an injunction, the court-determined infringer now gets the court to force the patent owner to license it on terms that are unacceptable to the patent owner.

**REASONABLE ROYALTIES** • Under current law, a patent owner who has won on patent infringement and validity is entitled to damages and in no event less than a reasonable royalty. Well-established case law determines reasonable royalty by considering what an infringer would pay to a willing licensor in a hypothetical market-based business negotiation, which assumes the patent is valid and infringed.

The case law has identified 15 practical business factors (aka Georgia Pacific factors) that are considered in determining an appropriate reasonable royalty. The courts look at all the factors and consider which are relevant for the particular fact situation and what weight the factor(s) should be given to reach a fair market-based business result in the hypothetical negotiation.

Even the lethargic U.S. Department of Commerce (DOC) has vigorously opposed most of the sweeping changes proposed by the act as the DOC explained in its recent 11-page letter to House Judiciary Subcommittee Chairman Howard Berman, a lead sponsor of this misguided legislative effort.

"While the appropriateness of damages awards in a number of patent cases may be subject to debate, DOC does not believe that a sufficient case has been made for a legislative provision to codify or emphasize any one of more factors that a court must apply when determining reasonable royalty rates," the letter says.

**TIME TO TAKE A STAND** • If enacted, the Patent Reform Act will dramatically weaken the patent system, sound the death knell to the current venture capital system, and trigger a dramatic decline in the ability of the U.S. to compete around the world. Indeed, this legislation will strip the U.S. of its richest source of innovation, namely the individual inventor. It will also further embolden the Goliaths, whose next attack will be on the anti-trust laws, which then would be the only remaining limitation on their exercise of their monopoly powers.

Having successfully influenced legislators on both sides of the aisle in both chambers of the legislature to vote to weaken our patent system, the Goliaths now cynically describe the act as "bipartisan" and "bicameral." The only way this juggernaut can be checked is by every entrepreneurial company encouraging its people and investors to call and write to their legislators to register their shock and dismay at what is being proposed.

Our legendary patent system is fair and continues to work well. It may need some fine tuning to improve patent quality, for example, but it does not need the major changes that the Goliaths are seeking to impose. Indeed, the U.S. Patent Office is a treasure and key strength of the patent system, which should be the focus of continuous improvement. The Goliaths should not be allowed to manipulate the system to entrench their dominance over entrepreneurial companies and individual inventors. ☞

**DAN LECKRONE** began his career as a trial lawyer. Before founding *Technology Properties Limited (the TPL Group)*, he served as vice president of *Memorex International*, general counsel domestic of *Memorex Corp.*, and a "time-shared" chief legal officer for a host of technology-based startup companies in Silicon Valley.