AIA'S PATENT IMPACT UPON SMALL BUSINESSES

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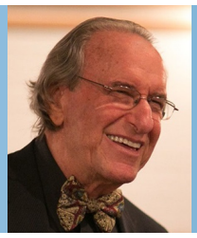

Well-funded corporations and corporate litigants have generally enjoyed considerable advantages when it comes to obtaining and fighting over US patent rights. Some might argue that to think otherwise would suggest naïveté. And yet, to some, the Leahy-Smith America Invents Act (AIA) carries those advantages to new and higher levels.

Prior to the AIA's coming into effect, small businesses and individual inventors were able to rely upon the ability to prove priority of inventorship, without having to enter a costly and critical race to the US Patent and Trademark Office (USPTO). Corroborated markings on a restaurant napkin could serve as evidence that an inventor conceived his invention prior to others. Under pre-AIA law, even if a subsequent inventor filed a patent application at the USPTO before him, a small inventor who filed without delay thereafter would be able establish in Interference Proceedings that he was entitled to the patent on this invention.

The 'first-to-file' provision of the AIA has radically altered the patent landscape for individual inventors and small businesses. Not only does it fail to protect the ability of a small inventor with limited funds to win a race to the USPTO, but it rewards established corporations with the resources that enable them to win those races. The 'little fellow' who requires time to gather the resources to consult a patent attorney and to file a patent application is at a significant disadvantage.

Let's not forget where US patent rights originated. The framers of the US Constitution recognised that incentivised inventors would be able to provide the country with innovations that could make it the envy of others. The Constitution basically provides inventors with a 'deal', under which, in return for a limited and lawful patent monopoly within which to get rich, the creations of inventors would become known to all and would eventually enter the public domain.

Thomas Alva Edison is an often-cited example of an inventor whose creations and developments became available for all to enjoy, in return for his having been granted more than a thousand patents.

In the absence of the patent system, some believe, Edison's inventions might never have become reality if he believed that others would be able to 'rip him off' without recourse. Acquiring patents provided him with the security needed to invest the considerable time and energy needed into creating.

Others hold a contrary view, believing that creative people such as inventors indulge in creating for the inner personal psychological rewards the process provides. In fact, some believe that innovators involve themselves in the creative process because they cannot help but do so. They are viewed as being 'driven' by an insatiable and sometimes compulsive need to create.

Suffice to say that perhaps creators may be motivated by one or more combinations of the above. More important, whatever these motivations may be, the patent system provides innovators with a way to protect their inventions against others' misappropriating their patentable contributions without penalty.

"THE 'FIRST-TO-FILE' PROVISION OF THE AIA HAS RADICALLY ALTERED THE PATENT LANDSCAPE FOR INDIVIDUAL INVENTORS AND SMALL BUSINESSES."

A patent holder will enjoy a lawful monopoly period which expires 20 years from his or her earliest effective filing date. Infringers of these patent rights will be subject to possible court-ordered damages and an injunction. This right to exclude others from practising patented inventions is an extraordinarily valuable one. Many millions of patents have been issued by the USPTO and the patent offices of other countries to those interested in availing themselves of this valuable property right. The technology explosion in areas such as software and computer-controlled products and processes is motivating many more applicants to seek patents.

As observed by Christopher Banys in his Congressional testimony, as submitted in November 2013 and posted in December 2013:

> "Inventing is not for the faint of heart. An inventor has to be willing to risk years of toil in obscurity for the chance at a breakthrough. She then risks her finances spending tens of thousands of dollars and many years prosecuting her patent in the US PTO ... where the invention is scrutinised by a technical expert before being issued." http://banyspc.com/patent-reform-the-innovation-act-will-stifle-innovation-hurting-inventors-start-ups-and-small-businesses

Some patent attorneys are willing to join with small businesses and individual inventors in declaring that the first-to-file provision of the AIA has simply caused an unfair and unequal playing field. ■

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