A Closer, Evidence-Based Look at 'Patent Quality' Advocacy

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The Patent Infringer Lobby has ramped up banging the drum about "patent quality." They dedicated a week-long campaign to questioning "patent quality," which its constituents regard as a huge problem.

Advocates have taken advantage of the vacuum left after U.S. Patent and Trademark Office (USPTO) Director Andrei Iancu left the building.

Patent "Assertions" of a Different Sort

Anti-patent advocates are exploiting the new dynamic of Senator Patrick Leahy, coauthor of the America Invents Act (AIA), who now chairs the Senate Intellectual Property Subcommittee. Leahy recently did the Infringer Lobby the favor of holding a hearing on this subject.

Key takeaway: "Patent troll" scaremongering and that narrative's flimsy evidentiary basis is alive and well and back in use with a vengeance by those who don't respect patents.

Claims of "weak patents," assertions about "patent trolls," defending the Patent Trial and Appeal Board (PTAB) as a "faster, cheaper" necessity—it's deja vu all over again, circa 2011.

But the facts don't support the "patent quality" narrative.

Evidence-Based Perspectives

However, conservative thought leaders are giving an evidence-based perspective on the necessity of reliable patents, meaningful patent rights and how our patent system suffers from "reforms."

It's clear: The Infringer Lobby has diminished patent rights. And weakened U.S. patents aid and abet China.

How Weakened Patents Benefit China

The House Republican Study Committee (RSC) has focused on the U.S.-China competitiveness battle. RSC identifies reliable intellectual property as key to U.S. success in cutting-edge technology leadership.

RSC's "Maintaining U.S. Tech Supremacy Through IP Protection" notes that, in addition to PTAB, "a number of issues form an incentive structure that strongly disadvantages small inventors and independent IP creators. The Supreme Court's decision in *eBay v. MercExchange* effectively ended meaningful injunctive relief to patent holders in cases of infringement. *Oil States Energy Services v. Greene's Energy Group* and the more recent *Google v. Oracle* devalue patents and make investment in startup companies more difficult and riskier. The narrowing of patentability cuts off avenues of innovation in fields such as medical research and computer-implemented inventions, especially when taken in comparison to the EU and China."

As RSC's paper explains, China's broader strategy "is predicated upon the ability to steal IP from America, replicate it in China, force usage of the Chinese-made good within China, then sell a heavily subsidized Chinese variant of the stolen IP abroad, undercutting the market for the IP creator. When done repeatedly, especially targeting economic sectors in which the U.S. is dominant, such as avionics and medical research, this tactic can constitute a strategic level threat to both the U.S. economy and national security."

The Infringer Lobby loves its offspring, the PTAB and inter partes review (IPR). Every PTAB patent invalidation makes easy pickings for China. The invalidated patent's owner has lost property rights and the ability to defend the IP. Private property now becomes prior art. China may freely take the invention, commercialize it, and ship products for American consumers to buy.

The RSC examines the PTAB and IPRs in a backgrounder, "The Patent Trial & Appeal Board and Big Tech." This paper observes that "in seeking to curb patent trolling, the AIA created a prime environment for another form of abuse with our patent system." It notes the frequent flyers at PTAB are Apple, Samsung, Google and Microsoft. "Additionally, the costs of PTAB trials are often prohibitively expensive for small businesses and lone inventors. The average AIA trial costs roughly half a million dollars." The paper continues:

[L]arge corporations, especially those in the business of utilizing other entities' IP (such as computer programs and apps), realized that they have an advantage in the PTAB system. This is due to the low standard of proof and inapplicability of the statutory presumption of validity that federal courts must apply. This structure facilitates companies that want to make use of already patented IP to browbeat and barrage small IP holders with PTAB challenges. Statistics regarding PTAB adjudication bear this out. Between 2012 to 2020, 62 percent of PTAB's 3,414 final written decisions determined that all challenged patent claims were unpatentable, 18 percent found some claims were unpatentable, and a mere 20 percent found all claims were patentable.

Infringers and Implementers vs. Innovators and Entrepreneurs

A CATO Institute article, "Why Big Tech Likes Weak IP," casts light on what's behind the Infringers Lobby's assertions. Southern Cal Law Prof. Jonathan Barnett discusses the business models of those companies for which others' IP is a cost or barrier. Hence their systematic practice of predatory infringement (also known as "efficient infringement") and benefits from weak patents.

Barnett notes "the relative unimportance of patents for firms that specialize in mostly everything else that is required to convert R&D into products and services that deliver value to end?users. For large, integrated firms with established market positions, various types of evidence indicate that, outside the biopharmaceutical and related life sciences industries, patents are generally not the leading tool used to capture value on innovation."

For IP-centric innovators small and large, enforceable exclusivity is vital. Barnett continues: "For firms that are smaller in size or have not integrated into the production and distribution stages of the technology supply chain, a robust patent portfolio is likely to be a critical predicate for entering into joint ventures and other relationships with potential sources of capital and commercialization expertise. This predicament reflects what is sometimes known as Arrow's Paradox (originated by Nobel economics laureate Kenneth Arrow): it is impossible to transact over an innovation without disclosing it but, in doing so, the counterparty's willingness to pay falls to zero because it can now replicate the innovation freely."

Weak IP, what the Infringers Lobby advocates, advantages incumbents such as Big Tech and disadvantages innovators and entrepreneurs. "[W]eak?IP environments are hospitable for large, integrated firms that maintain internal markets for financing and conducting R&D and then embed the resulting intellectual output in goods and services for the end?user market," explains Barnett. "By contrast, strong?IP environments enable entry by smaller firms that specialize in R&D and monetize the resulting intellectual outputs through external relationships with third parties. This organizational distortion matters because larger firms tend to excel in incremental and process?related innovation that refines existing technologies while smaller firms tend to excel in product innovation that challenges existing technologies."

History is on Inventors' Side

George Mason Law Professor, Adam Mossoff, an affiliate of the Heritage Foundation, exposes the underlying, destabilizing false narrative of the Infringers Lobby. For instance, Mossoff analyzes an 1878 case, *McKeever v. United States*, where a patent owner sued the U.S. Army for buying and using his patented cartridge boxes without permission. Mossoff's Heritage report, "The Constitutional Protection of Intellectual Property," examines the Takings Clause analysis the Court of Claims undertook. The patent-infringing government agency asserted that the case involved a government-issued privilege rather than private property:

First, the McKeever court analyzed the text of the Copyright and Patent Clause to understand whether the Framers adopted in the Constitution the English Crown's personal privilege and thus incorporated the limitations of this personal privilege, such as its being unenforceable against the sovereign if the sovereign used the patent without authorization. The court noted that the plain text of the Copyright and Patent Clause—the use of the terms 'right' and 'exclusive,' the absence of the English legal term 'patent,' and the absence of an express reservation in favor of the federal government—evidenced a fundamental break between English and U.S. patents. In other words, the property right in a U.S. patent issued by the federal government is fundamentally different from the personal privilege in an English patent bestowed by the Crown.

Mossoff's close examination of the historical record regarding patents as private property is nothing short of withering and well worth reading. (Perhaps the errant Supreme Court will do so and apply it for a course correction.) In *McKeever*, writes Mossoff, the Court of Claims's "conclusion that McKeever's patent was 'property' secured under the Takings Clause of the

Fifth Amendment—prohibiting the U.S. Army's use of his patented cartridge boxes without payment of just compensation—the *McKeever* court was not writing on a blank slate. It repeatedly cited and relied on numerous decisions throughout the 19th century by the Supreme Court and lower federal courts that patents are protected as 'property' under the Constitution. This is likely the reason why, after the federal government's appeal of the decision, the Supreme Court summarily affirmed the *McKeever* court in which 'no opinion was delivered or report made.'"

End the False Narratives

Debates over "patent quality," the effects of weakening our patent system and our patents, and how best to ensure innovation, entrepreneurship and U.S. industrial competitiveness versus China — based on home-grown innovation leadership in emerging technologies — deserve better than false narratives.

Debates over important issues deserve better than false narratives. "Patent quality," the effects of weakening our patent system and our patents, how best to ensure innovation, entrepreneurship and U.S. industrial competitiveness versus China, and how to bolster home-grown innovation leadership in emerging technologies stand among the top issues deserving better than false narratives.

Honest advocates, lawmakers and those involved in the U.S. economy will decry those who make up "facts" to fit their narrative. The nation deserves debates that are evidence-based, truthful and trustworthy.