

The Demise of the U.S. Patent System

Editor's Note: This article was penned by a Patent Owner with nearly 40 years of USPTO patent and Federal Court experience. He wishes to remain anonymous and at Protect American Innovation we are proud to post it on our website.

Let's provide some clarity on the root cause of the demise of the US Patent System— it is the constant changing of the rules of a valid patent. Historically, a private property right, be it real estate, an automobile, etc., are grandfathered under the existing laws at the time, versus new laws. In other words, you own a home and a new law is enacted for tile roofs. You are exempted (grandfathered) and are not required to re-roof your home, only new homes. In the case of patents, a famous example is the U.S. Supreme Court ruling if a patent is abstract. That of course is the ALICE decision of a few years ago. Since then hundreds of patents have been found invalid. And hundreds more are probably not being enforced as it is a near hopeless situation having a patent that was written under one set of rules then invalidated under a new set of rules. That is THEFT.

Unfair Rules Changes

Imagine a football or baseball game in which the rules are changed during the game. That is exactly what has been happening in the patent world. The 'game' being the 17-year life of the patent. In the past the pace of change was gradual, but in the last two decades, Congress and the courts are making rules changes more frequently. And as a result, the inventor doesn't know how to 'write' his patent. When a patent is issued it must meet all the requirements as detailed in the Manual of Patent Examining Procedure (MPEP). So, that patent should be adjudicated based on the laws in force on that date. Meaning the patent applicant has met all the requirements. But then for the courts to rule a year or so later that a patent must have explained some aspect or must have some diagrams or whatever, is totally unfair.

If it was an isolated instance, that would be one thing, but it's the Congress and courts that keep changing the rules (requirements). **How in the world is a patent applicant supposed to anticipate a change in the law five years in the future?** To me this is outright theft, forcing the patent owner to then defend against some rule change that he was never apprised of.

Failings of the America Invents Act

In 2012 Congress enacted the America Invents Act (AIA) which allowed infringers to challenge patents at the patent office, leading to serial attacks of endless challenges. among other changes that a patent owner then had to face. **That was not part of the 'bargain' when the patent applicant filed for his patent or had it issued.** Had the patent owner known of such restrictions, (prior to 2012) he or she may or may not have even filed in the first place. Sort of a "Bait & Switch" process in which the patent owner is the victim. Since a patent has a limited life of 17 years, this grandfather clause would not burden the goals of patent development, but it would be a fair way for inventors and investors to have confidence in the patent system.

Need for the Grandfather Clause

The 'Grandfather' clause simply holds the patent applicant to the laws in effect at time of issue of patent. It is so simple it defies how anyone could argue with the solution. **This would restore confidence in the U.S. patent system and increase venture capital confidence.** A patent could of course still lose in court (non-infringement or invalid), but at least the 'playing field' would be fair. Another advantage of the Grandfather clause would be reduction of litigation because there would be fewer cases filed in view of patent law changes after a patent issued. For example, hundreds of ALICE cases would have been avoided just in the past few years. Hence, less burden on the courts and judges.

I filed my first patent in 1980 and have seen this merry-go-round of courts and Congress change patent requirements to the detriment of patent owners. In summary, just tell me what the rules or requirements are and I will follow the rules, but don't change the rules once my patent issues because it is then a kiss of death.