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Patent reform: One giant step backwards?

BY DALE L. CARLSON

Philosopher George Santayana's sage words: "Those who cannot remember the past are condemned to repeat it," ring as true today as they must have when he wrote them in 1905. The words aptly apply to the ineptly titled "America Invents Act," S. 23 and H.R. 1249, currently meandering through Congress.

Perhaps President Barack Obama is preparing for the day when he can sign the bill into law. That day is likely to bring woe to patent practitioners and users of the patent system alike, and particular woe to small inventors and startup businesses that collectively drive our nation's economy.

As perchance an omen of tumultuous times ahead, Obama was seen holding a copy of Aldous Huxley's *Brave New World* at the Bunch of Grapes book shop during his recent summer idyll on Martha's Vineyard. Written in 1932, Huxley's tome depicts a distorted social order, ushered in by the darkness of the Holocaust, in which science, technology and the media are collectively used to control human behavior.

U.S. patent law is rooted in incentivizing inventors to innovate in, among others, the fields of science and technology. The current patent reform initiative is steeped in media jargon promising job creation for America at a time when jobs are desperately needed. Unfortunately, there's no data to support this promise. Indeed, all empirical evidence points to the likelihood that this patent reform will result in job destruction.

It goes without saying that Congress has the power, working in concert with the president, to reform or deform the patent system as we know it. In short, its members can change the patent laws of our nation in a manner that would reframe the social order pertaining to patents for better or for worse.

Giles S. Rich and Paul Rose, co-authors of the 1952 Patent Act governing our nation today, opined on the differences. They concluded that patent reform should be adopted if, and only if, the proposed changes increase the incentive force associated with our patent system.

A key incentive provided by our patent system is the incentive for inventors to disclose their invention in a patent application in exchange for the possibility that they may achieve a patent grant in return. The subsequent publication of the patent application serves to inform the public about the invention, and thus enables others, including competitors, to build upon it. The net result of this incentivization is to promote "the Progress of the



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Useful Arts" as mandated by Article 1, Section 8, clause 8 of the Constitution.

Certain provisions of the patent reform bill will have the ill effect of disincentivizing small inventors and startup companies from using the patent system in the first instance. One provision would award the patent to the first person to file a patent application on the invention, rather than the one who is actually the first to invent. Another provision would eliminate the "grace period" that has traditionally provided a safe haven to allow an inventor to get his or her invention "off the ground" without forgoing the opportunity to patent it. The net result is to change the social order for patenting in a manner that selectively demotivates small inventors and startups.

There is no reason to believe that such changes will benefit society as a whole. To the contrary, the proposed changes will work to society's detriment by disincentivizing inventors who fear that they can't possibly win a race to the patent office and can't properly vet their invention with others before filing. In short, these changes will discourage these inventors from disclosing their invention in a patent application.

Discouraging disclosure of inventions undermines a key incentive of our patent system, namely the incentive to disclose, and thereby undermines the patent system as a whole by inhibiting third-party access to information about those inventions, thus slowing down the rate of innovation.

Another proposal in the patent reform bill would adopt the European-style opposition protocol--ambiguously described in the bill as "post-grant review." Such a protocol is analogous to the inter partes re-examination form of post-grant review that is already available under the existing U.S. patent law. The fact that a European-style opposition procedure was adopted by Japan, China and South Korea two decades ago, and was subsequently abolished in each of those countries within a decade, should be enough to give Congress and Obama pause.

The call for the United States to adopt a European-style opposition procedure is not new. It was bandied about back in the late 1980s during the Reagan era, as a bargaining chip in trilateral talks among Europe, Japan and the United States in an effort to "harmonize" their patent systems. The United States chose not to harmonize and did not adopt such a system then. Unfortunately for Japan, it did. Our nation needs to recall that history now.

At this critical juncture in the patent reform debate, the salient questions are: Why would a country that is a world leader in inventiveness change its patent system to comport with that of a European protocol that has been tried and shown to fail elsewhere? Why adopt "first to file," and eliminate the "grace period" for filing, in the absence of evidence that doing so will improve the inventiveness of our nation's inventors, which it clearly won't?

So far, Obama's term in office has been unremarkable, to say the least. The reasons, for what can be described as an abject failure of leadership, are set forth in Drew Weston's Aug. 7, 2011 opinion piece in *The New York Times* entitled "What Happened to Obama?"

Mindful of Huxley's warning about our "new world," we can only hope that Obama, if not Congress, will reflect upon the likelihood that a patent reform initiative that has been tried, and found to fail in other countries, should not be adopted because it is likely to fail here. Likewise, a patent reform initiative that demotivates inventors with limited means should not be adopted because it is the antithesis of the incentive system that our patent system was established to provide. Both initiatives would deform our patent system, rather than reform it.

If neither Congress nor Obama respond to the risk posed by the patent reform bill, Huxley's apocalyptic vision of control over human behavior via manipulation of ownership of science, technology and the media may become a reality sooner than we think. Under those circumstances, history will have all the more reason to discredit Obama's term in office.

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