Patent Reform as Implemented in the America Invents Act: “Leahy-Smith” ≈ “Sarbanes-Oxley”

Senate Staff Briefing
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by Gary Lauder
Intro

• My name is Gary Lauder & I’m a venture capitalist (Lauder Partners LLC)
  – Have invested about $500M in VC over past 26 yrs.
    • In > 75 companies and > 50 VC funds
  – Not a lawyer
  – Co-inventor on a dozen patents

• Survey: Audience composition

• Grateful you all are here
My Expertise

• How VC’s consider what to invest in
  – The role that patents (issued & apps) play in that
• Over the past 4 years, studying PRA/AIA
• Sympathetic to senators having too much on plate to fully analyze issues
• Surprised that congress did not look into the other side of this issue
Various lines of reasoning

- Pros & Cons of the bill itself
  - Best, but complex & time-consuming
- Who’s for & against it (Argumentum ad Verecundiam = Argument by Authority)
- Process defects (e.g. exclusion of small companies/inventors)
- Political blowback (what happens when affected parties find out about the bill)
  - Pissed-off public & centimillionaires
Who’s against it

• Individuals (notable ones)
  – Judge Paul Michel: Retired early from his lifetime appointment to lobby against this bill
  – Every famous living inventor:
    • Dean Kamen (Insulin pump, stents, Segway, etc.)
    • Ray Damadian (MRI)
    • Steve Perlman (QuickTime, WebTV, OnLive & more)
      – He was the one to have alerted me to this issue in 2007
  – Patent attorneys (many)

• Trade organizations ...
  – Before getting to those, let’s talk about JOBS
Jobs (not Steve)

• Kauffman Foundation study found that all net new US jobs came from startups
• Large companies are net jobs EXPORTERS
• Jobs are always important, but more so now
• Startups are harmed by this bill
• Therefore it will have an adverse jobs impact
• Proponents claims that this would create 200K jobs is unsubstantiated and suspect
Trade Organizations Against

- National Venture Capital Association (NVCA)
  - I’m a member
- US Business and Industry Council (Kevin Kearns)
- National Small Business Association (NSBA)
- Institute of Electrical and Electronics Engineers (IEEE)
- National Association of Seed and Venture Funds (NASVF)
Other groups opposed

- Angel Venture Forum
- Patriotic Veterans, Inc.
- Family-Pac Illinois
- American Civil Liberties Union (ACLU)
- American Innovators for Patent Reform
- American Institute for Medical & Biological Engineering
- America Invents Act 2011 Organization
- American Medical Association
- CONNECT
- Eagle Forum
- International Federation of Professional and Technical Engineers
- IP Advocate
- The National Association of Patent Practitioners
- The National Congress of Inventor Organizations
- Patent Office Professional Association
- Private Investors in Entrepreneurial Endeavors (PiPAC)
- The Professional Inventors Alliance
- The Small Business Coalition on Patent Legislation
- The Union of U.S. Patent Examiners
Process defects

• Tens of millions spent lobbying FOR the AIA
• Senate hearings excluded SMB & inventors
  – Derelict neglect of duty to seek out other side of story
• Head of PTO lobbied for these changes at IBM
  – Continued to do so inside administration in violation of administration’s revolving door rules
  – Paraded around the few small business people he could find to pretend it was good for small businesses
  – Same w/Louis Foreman (inv. promotion scammer)
Another process defect: lies

• Too many to enumerate all
• Misrep: need FTF since small co.’s can’t afford interference proceedings.
  – >99.9% of patents don’t have interferences
  – >99.9% of inventors will have burden of applying early and often when they can ill afford it
  – Replaced with an even more expensive proceeding: derivation (theft).
    • Even less likely to prevail
Cons of the bill itself: FTF

• Worst effect is companies between age 0-1
  – Often still individual inventor then
• FTF creates much greater risk of theft
• Overseas advice: apply prior to talking to anyone (investors, customers, potential empl.)
• Changing threatens our unique open innovation system
• Enormous boon to Cybercriminals (stolen IP has much more value)
Grace period

• Public use or offer for sale => prior art
• = trip-wire to lose patents. Worse than any other country.
• Can come back to bite years later when patent is asserted.
• Investors can’t rely on patent system since can’t know whether inventor might have publicly used or offered for sale.
Post-grant review

• Another means of enabling infringers to oppress companies that can’t afford to defend
• The main reason the NVCA opposes it
• 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
Harmonization

• So much would remain different that not a meaningful savings %.
  – Disharmonizes in some ways.

• Patent system is not working for small companies in Europe

• Angel + VC investment in the USA is 10X Europe’s
  – They should adopt our system, not vice versa
Conclusion/Epitaph

• This bill will be yet another nail in the coffin of VC in America
  – It has declined by 10X 2000-2010 & by 4X 2007-10
• More than 10% of our GDP comes from VC-backed companies
• Leahy-Smith America Invents Act will develop the same pejorative meaning as Sarbanes-Oxley, which passed 99-0 in Senate.
• “When all think alike, no one thinks very much.”  – Walter Lippman
Thank you for your attention

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