

The Impact of Fee-Diversion on the Innovation Economy

By Gary Lauder, Lauder Partners

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The impact of the Patent and Trademark Office (USPTO) not being able to keep ALL of its fees has large adverse ramifications both inside the PTO and in the larger economy. Many of the complaints about our patent system are caused by today's fee-diversion. This document's purpose is to summarize those for the benefit of Senators considering the **Coburn Amendment**.

History of broken promises regarding fee-diversion (why the present bill doesn't fix the problem):

If one looks at this web site created by the Innovation Alliance:

<http://bit.ly/IAHistoryLesson>

It says in part:

"Eleven years ago today, the Appropriations Committee beat back a floor amendment that sought to address patent fee diversion. The floor amendment was opposed by the then-CJS Subcommittee Chairman who assured the House, "**The fees that are generated by the Patent Office are not used for any other agency or any other purpose. They remain in that account to be used in succeeding years. We are not siphoning off the Patent Office fees for other expenditures.**"

Over \$300 million had been diverted from the U.S. Patent and Trademark Office over the previous two fiscal years and \$120 million would be diverted during FY2000, the very year in which the Subcommittee Chairman gave these assurances."

The rest of that short document is worth reading.

Justice delayed

The inability to predictably grow revenues and accommodate unexpected growth in applications and other PTO demands has prevented the PTO from taking important steps to carry out its mission better. Specifically: it needs to hire & retain talented people (esp. examiners) and modernize its IT infrastructure. If the AIA passes, it will also have substantial new responsibilities (e.g. Post-Grant Reviews (PGR)) which will require additional monies to pay for. Passing the AIA without fixing the fee-diversion problem will only worsen the 3+ year backlog of patents waiting to be examined and it will start a new queue for PGR and other studies, initiatives and tasks called for by the AIA.

Errors of omission & commission

Many of the common complaints about our patent system have lack of PTO funding as the root cause. The inability to pay well has led to high turnover, and lower skill levels. This has resulted in patents being granted on things that they should not have been. This often results in unnecessary lawsuits or license fees taken unjustly. The opposite problem exists as well, but is not publicized: patents that should have issued, but did not. The costs of that type of mistake is less well known, but it results in company failures and investors not making money on their investments.

Venture capital and angel capital drying up

Whether a company does not get its patents in time due to long pendency, or due to the wrongful denial of patent issuance, the net result is that the success of the company is hampered, and investors fail to profit from the investment. This results in investors shifting investments from risky pioneering innovations that rely on patents to safer bets that don't transform our economy as much. The money raised by the venture capital industry has shrunk by 10X since 2000, and 4X since 2007 (as measured to 2010). Patents denied have been a factor in this.

Delayed patent issuance can lead to more “troll” suits

Another effect of patents being issued too late is that often the company is finished/over/done by the time they issue. Had the patent issued quickly as they did only 20 years ago, the company could have thrived. This means that the patent may be the only asset worth selling. Selling just a patent and not an operating business is what leads to “patent troll” lawsuits. Operating companies are much less likely to sue non-competitive companies than licensing entities — which are often called “trolls.” In other words, had the patent issued sooner, it would have led to less troll-like behavior.

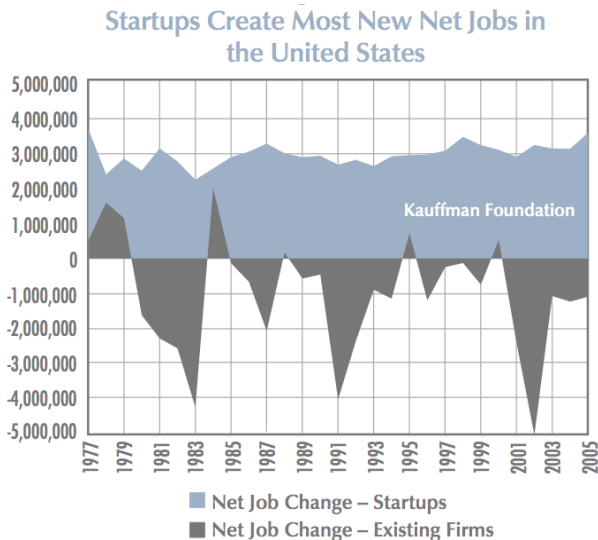
Immateriality of the treasury's gains

Over the past 20 years, about \$1B has been diverted from the PTO to the treasury. Had all of that been diverted in just one year, it would have increased our federal revenues by 0.04%. Divided by 20 years, that's 0.002%. It's immaterial to federal revenues and it's a tax on innovation — the very activity that most governments are striving to encourage. Foreign economies that lack robust VC & angel investors (i.e. everywhere else) spend vast sums subsidizing innovation without much success.

Start-ups are the source of ALL net new jobs in the USA*

They often depend on patents to raise capital and to succeed. HR.1249 will harm start-ups either way, but with fee-diversion in place, it will be way worse. All effects on jobs from HR.1249 will be delayed effects that will be felt several years hence. In the most optimistic scenario, it will take years to work through the patent backlog.

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Source: Business Dynamics Statistics, Tim Kane

About the author:

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More perspectives on this bill are at: <http://bit.ly/patentreform>

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*Source: <http://bit.ly/KauffmanStudy>