Patently Absurd

Or How to Go From the World's Best Patent System to Worst-Than-Most in One Easy Step

by Gary M. Lauder
Managing Partner, Lauder Partners (bio at end)

July 11, 2011

This is an updated and expanded version of an identically-named article I published on the Huffington Post on 3/7/11.[1]

Alternative title: "Creating the 'Good Old Days*'"

When I talk with fellow Silicon Valley entrepreneurs, inventors and investors about patent reform, the universal response is "What's that?" They are unaware that the patent landscape — which has helped make the USA into the most innovative country on the planet — is about to tilt in favor of the large companies that have representation in Washington. This topic is unknown to most Americans due to its complexity — and therefore difficulty — in reporting on it (or even writing a succinct Op-Ed on it).

Among the reasons that I care about this is that if the bill in congress becomes law, it will make it much harder for inventors & entrepreneurs to use the patent system, and will therefore render many companies unattractive as investments. This is not just about investing and profiting; it is about moving society forward through innovation, which usually requires substantial investment. Not all innovations rely on patents — most notably software and internet companies usually don't — but many of the innovations that we want to bring about do rely on patents. These include green/clean-tech, medical/biotech, materials, devices, etc.

Eric Severide famously said "Most problems begin as solutions." Patent Reform resembles that remark. Most people agree that our patent system has problems. The logic of this bill seems to be: "Something must be done! This is something that can be done, therefore let's do it." Unfortunately, the problems that people want to see fixed are largely unaddressed in the bill (e.g. software patents, trolls (boogeyman), patent office delays in processing patents, etc.). The "somethings" that this bill addresses are mostly negligible problems, but will result in adverse unintended consequences for our innovation ecosystem.

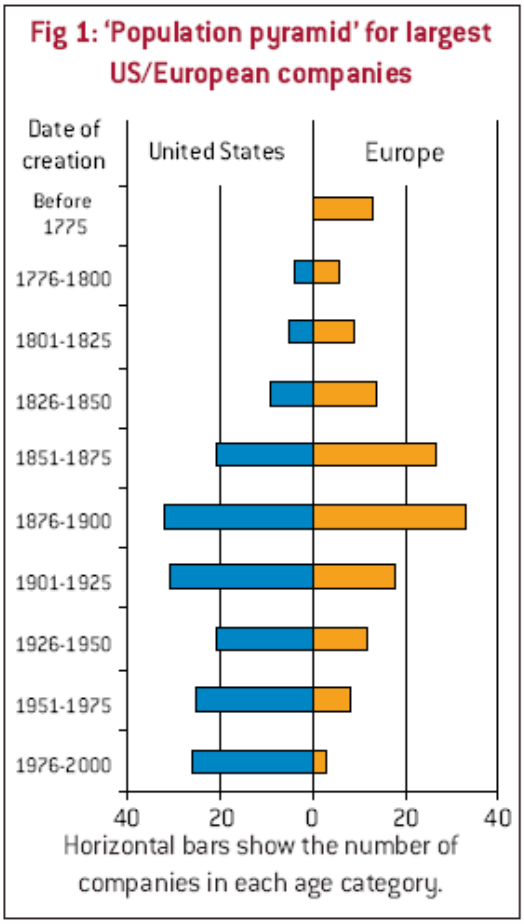
---

[1] http://www.huffingtonpost.com/gary-lauder/patently-absurd-or-how-to_b_832703.html

* The "good old days" are times in the past when things were better. It comes about when things get worse. "Reforming" our patent system in these ways would make many things worse.

On March 8th, 2011 the Senate passed S.23, the America Invents Act. Its main proponent, Senator Patrick Leahy (D-VT), says that we are the last industrialized nation using the antiquated subjective First-to-Invent (FTI) system, instead of the First-to File (FTF) system, which awards the patent to the first one to submit an application, rather than the one who can prove having invented it first. Isn't it odd that ours is old, subjective and different, yet we are the world's leader in innovation?

Speaking of old…



Source: Bruegel, based on FT Global 500 ranking of the world's largest listed companies, 30 September 2007.

The graph shows how many of the FT Global 500 companies are in each age category for 2 of the continents. It shows that the US has many more young companies among its largest. While our patent system may be old, our companies are not. I believe this is partly a result of incumbent European companies having greater power over start-ups compared to US counterparts. The existing US patent system is one of the enablers of newer companies to establish themselves. [Source: www.bruegel.org]

Assertions that the existing laws are antiquated fail to recognize that there have been many bills modifying the laws over the past 60 years[2], and that court rulings have also caused a great deal of patent reform, particularly in the past 6 years.[3] Most notably, the Supreme Court's eBay decision made it much harder to get an injunction, which has caused settlements to trend downwards ever since. Despite that fact, and the facts that the amount of patent litigation as a % of active patents has not changed in two decades, the patent reform movement has gained a life of its own.

Canada shifted to FTF in 1989, and a 2009 study[4] found an "adverse effect on domestic-oriented industries and skewed the ownership structure of patented inventions towards large corporations, away from independent inventors and small businesses." The EU, which has had FTF for a while, last month declared an "innovation emergency"[5] due to how far behind us they are falling in innovation and R&D investments. It's not working for them.[6] There is even a movement afoot among small businesses in the UK and Germany to try to change their system to be more like ours!

This attempt to conform to other countries is called "harmonization," which is a melodious word for "succumbing to peer pressure." We tell our children not to do so when we know it's wrong. So should we. In reality, the FTF part of the bill harmonizes with no other law as it creates a system of bars and exceptions that no nation had experienced before. There remain substantial differences, such that the claimed benefits of cost-reduction of obtaining foreign patents would not materialize. This bill "improves" so much on foreign law that it would make getting patents even harder here than overseas. For example, this potential law changes the grace period such that it bars receiving a patent for inventions that were publicly used or offered for sale prior to filing. This rule, had it been in place then, would

---

[2] See Appendix A, p.17, http://www.patenthawk.com/blog_docs/CPF-Patent%20Reform%20Act%20Analysis%2010-30-2007.pdf in The Patent Reform Act of 2007: Responding to Legitimate Needs or Special Interests?
The "Patent Fairness" Issue: An Analysis by Pat Choate, Ph.D.

[3] Dennis Crouch Testimony, "Review of Recent Judicial Decisions on Patent Law" in House Judiciary IP Subcommittee, March 10, 2011
http://www.patentlyo.com/patent/2011/03/patent-reform-in-the-house-of-representatives.html

[4] "Does it Matter Who Has the Right to Patent: First-to-Invent or First-to-File? Lessons from Canada" April 2009, NBER Working Paper No. w14926
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1394833#%23

[5] "EU warns it lags behind in global innovation race" in Seattle Times, 2/1/11
http://seattletimes.nwsource.com/html/businesstechnology/2014097347_apeueuinnovation.html

[6] "Europe's missing yollies" by Reinhilde Veugelers on 25th August 2010
http://www.bruegel.org/publications/publication-detail/publication/430-europes-missing-yollies/

have prevented the Wright brothers from receiving their patent on their airplane due to its public use at Kitty Hawk five months before the Wrights filed for the patent.[7] It is unconscionable that our government would intentionally establish trip-wires to eliminate the patentability of legitimate inventions in this way, and it's bizarre that they would make it more draconian than foreign laws.

Under current law, we have what's called a "grace period." That is the one-year between public disclosure and the time by which the inventor must file the application. This enables entrepreneurs to present to investors, share plans with potential hires, or exhibit at trade shows during that time without concern that such acts would either preclude a patent or enable someone else to poison the well so that no one can get a patent. Under FTF, if someone else finds out about your invention, and if they apply first, they can win. Overturning that result requires proving that they derived their idea from yours. This would be almost impossible to prove since there is inadequate right to discovery. What's most scary to me is that this creates strong financial incentives for usurping patent rights by hacking and industrial espionage, which is starting to be done purely for selling to others for profit.[8] It has also recently started to be state-sponsored by China as demonstrated by Google and the Palantir/Dalai Lama cases. Through the new mechanisms of this new law, competitors could destroy nascent companies by using their own information against them. The flip side of the problem is that it will put a chill on the normal open discourse that occurs today between innovators, investors and customers.

The FTI regime was established in the constitution: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (Article I, Section 8, Clause 8). An inventor is defined as the first to CREATE an invention, not the first to FILE the forms. Overcoming a constitutional challenge may require legislators to

---

[7] http://bit.ly/Grace-Period-USA , http://www.garson-law.com/blog/2011/03/america-invents-act-clears-u-s-senate-on-to-the-house/ , http://www.patentlyo.com/patent/2011/04/fixing-the-first-inventor-to-file-one-year-grace-period-provision-of-the-patent-reform-bills.html, http://journals.lww.com/medinnovbusiness/Fulltext/2010/06010/Patent_Reform_s_Weakened_Grace_Period__Its_Effects.6.aspx
The bill's Grace Period language is quite confusing. Compare the bill (p. 5-9) of http://pub.bna.com/ptcj/HR1249VotedJun23.pdf with the existing law: http://www.uspto.gov/web/offices/pac/mpep/documents/appxl_35_U_S_C_102.htm The proponents created a deception that takes advantage of the confusion to state that the bill means the opposite of what it really says. The colloquies on this claim the bill means the opposite of what it actually says. Courts hold that the bill always supersedes the colloquies.

[8] "Cybercriminals target corporate data," 3/28/11 http://www.tgdaily.com/security-features/55037-cybercriminals-target-corporate-data

engage in Orwellian doublespeak to redefine "inventor" or perhaps the concept of time embodied in "first" will be spread out to deem the same year as being "simultaneous." All scholarly publications on this[9] have cast doubt on FTF in the USA without amending the constitution. The multi-year uncertainty of a constitutional challenge to this is yet another concern.

One of the great benefits of our FTI system is that inventors can refine and improve their inventions in private prior to filing for it. Under FTF, one should file early and often on each idea, however impractical it later proves to be. That burden falls disproportionately on smaller companies for whom patenting expenses are material. This will increase the workload of the Patent and Trademark Office (PTO), which will exacerbate their delays in processing patents. Those delays are probably the worst problem of the PTO. It now takes about twice as long to get a patent than it did 20 years ago. One cause has been fee-diversion by Congress to cover the national deficit. If ever there was an innovation tax, this is it. Ironically, one of the selling points of this bill to reduce those delays, when all that is needed is to lay off their revenue. A simple bill to forswear taking the PTO's money would be universally accepted. Such a bill was proposed, but this bill's proponents swatted that down in order to keep that provision in this bill as the main desirable part.

Fee Diversions From the USPTO

[9] http://www.rearden.com/public/090413_First_to_File_scholarly_papers_in_last_10_years-1.pdf , http://www.noonhr1249.org/scholars.php, http://law.unh.edu/assets/pdf/idea-vol50-no3-glenn-nagle.pdf

In 2010, the PTO budget was $2.3B, so over the last 6 years, fee diversion has only been 0.5% of their budget, so there are also other forces at work in causing the delays.

The present bill also expands the rights for third parties to initiate "post-grant review." PGR will enable incumbents to tie up small companies in expensive litigation that they usually don't have the financial resources to support. Such powers can and will be abused to turn a patent grant into a liability of having to defend the patent.[10] This will result in patents being abandoned and a power shift from innovators to incumbents as exists in Europe and Japan, the main countries with whom we are supposed to harmonize. While PGR has some legitimate benefits in that it enables bad patents to be challenged and potentially expunged, it also has tremendous potential for abuse as has occurred overseas where legitimate patents are continuously challenged to defer issuance — and when the company can't afford it, prevent issuance.

It is rare that Democrats and Republicans can agree on anything, so when they do, such moments would normally be worth celebrating. Unfortunately, this one is scary. During the six years that the Senate Judiciary Committee deliberated patent reform and held hearings, they did not call any small company inventor or individual inventor. The one inventor that the House counterpart heard, Dean Kamen, was vehemently against the patent reform that was being proposed.[11] They call them "hearings," but it's clear that few are listening. Senator Feinstein is one of the few who listened, and offered an amendment[12] that would have struck FTF and solved many of the above issues, but it lost by 87-13. When S.23 passed the senate, it did so by a margin of 95-5, which is reminiscent of Sarbanes-Oxley's passage by 99-0-1. SOX has cost our economy many times more than the frauds that had led to its creation. This is one of the reasons why it is said that Congress does two things well: nothing and overreact. This episode is also a reminder of Walter Lippmann's quotation: "Where all think alike, no one thinks very much."

If harmonization were actually occurring in this bill, it would be harmonizing with the less innovative economies of Europe and Japan, not the more competitive and growing economy of China. China is not likely to harmonize according to recent reporting.[13] The patent reform bill of 2007, which the current bill closely resembles,

---

[10] http://ipwatchdog.com/2011/07/10/torpedoing-patent-rights/id=18022/ http://www.eetimes.com/electronics-news/4082768/-Patent-Assassins-ad-stirs-reform-debate

[11] http://judiciary.house.gov/hearings/pdf/Kamen090430.pdf

[12] http://www.patentdocs.org/2011/03/senator-feinstein-opposes-the-first-to-file-provisions-of-s-23.html , http://patentdocs.typepad.com/.a/6a00d83451ca1469e2014e5fa01757970c-pi

[13] WSJ, 2/2/11: U.S. Firms, China Are Locked in Major War Over Technology http://online.wsj.com/article_email/SB10001424052748703439504576116152871912040-lMyQjAxMTAxMDEwMjExNDIyWj.html

was analyzed by the Deputy Director of IP division of Beijing High People's Court, Senior Judge, and he found that that the bill "... is friendlier to the infringers than to the patentees in general as it will make the patent less reliable, easier to be challenged and cheaper to be infringed. It is not bad news for developing countries, which have fewer patents. Many of the Chinese companies are not patent owners in the U.S. market and their products are often excluded from the market because of patent infringement accusations. This bill will give the companies from developing countries more freedom and flexibility to challenge the relative US patent for doing business in US and make it less costly to infringe." [14]

In early 2010, one of my portfolio company founder/CEO's, Steve Perlman, was invited to present for one hour with a colleague — Tim Casey, a patent attorney representing a small company that is developing non-invasive glucose monitoring — to a bunch of house and senate staffers. Unbeknownst to them, their slides were shared in advance with a representative of Johnson & Johnson who spoke both before them AND after them and took up most of their time…prior to handing out laminated cards listing how to vote and misrepresenting the positions of Steve and Tim. (It has been captured on video if anyone is interested). The point is that small companies are no match for the maneuvers of large companies who have controlled this process and continue to. The day before passage of the bill in the Senate, there was a private Senate-based "stakeholder meeting" that only included the bill's proponents. Critics such as the Innovation Alliance, which has members such as Qualcomm, were not invited.

The absence of viewpoints from small companies — America's largest contributors of new jobs[15] — being present around the negotiating table is the main reason why this bill is so bad. Cass Sunstein, who — ironically — is a member of the Obama administration, wrote a book titled Why Societies Need Dissent. A summary of it stated "good choices are unlikely to be made by a society that stifles dissent. In an engaging analysis, Sunstein examines studies of three related phenomena: the human desire to conform to group norms, group decision-making processes and the tendency for groups to polarize — that lead to the suppression of dissent. This suppression in turn results in the loss of accurate information and competing arguments, which are the basis for rational and effective decision-making." In his more recent book, Going to Extremes: How Like Minds Unite and Divide, the theme continues: "…explores the nature of group decision making, largely expounding on

---

China's Drive for 'Indigenous Innovation' - US Chamber of Commerce on China: A Web of Industrial Policies
http://www.uschamber.com/reports/chinas-drive-indigenous-innovation-web-industrial-policies

[14] http://www.reformaia.org/sites/default/files/071107-China%20Intellectual%20Property%20News_Certified-1.pdf

[15] http://www.kauffman.org/newsroom/kauffman-foundation-analysis-emphasizes-importance-of-young-businesses-to-job-creation-in-the-united-states.aspx

his contention that homogenous groups of like-minded people tend to adopt more extreme positions than groups with a diversity of opinions." The suppression of opposition has characterized all aspects of this process, so it is not surprising that the result will trade away that which was valuable to those not represented — and society as a whole.

In the last decade or so, certain industries have found patents to be more of a liability than an asset. Software and internet companies are particularly vocal in this arena. IBM is now mostly a software company, and Microsoft always was. They have both been very active for years advocating patent reform. There are legitimate concerns that software companies have in this area, but I suspect that they can best be addressed by internal PTO processes to crowd-source for prior art and be vigilant about obviousness. The current approach of making patents harder to get and of lesser value is not a true solution and is a classic case of throwing the baby out with the bathwater.

The Obama administration espoused some wonderful ethical principles[16] on the day it took office. In particular, it committed that all employees entering government agree to the "Revolving Door Ban" which stipulates "I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." That does not seem to have stopped a key advocate of patent reform from IBM, David Kappos, from being appointed to head the Patent and Trademark Office (PTO) or from continuing to lobby on behalf of patent reform.[17] A Politico article[18] outlined this and Microsoft's former lobbyist, Marc Berejka, being appointed to senior role in the Department of Commerce, which controls the PTO, thereby enabling them to continue to pursue their prior agenda from within the administration. That article does not discuss former Commerce Secretary, Gary Locke's extensive ties[19] to Microsoft. Senator Leahy's state's largest employer is IBM, but that is not as dispositive of ethical breach as the Commerce/PTO connections are. I have no doubt that these people mean well for America, but their view of what's best for America has been distorted by having seen it from only one perspective for so long.

---

[16] Shutting The Revolving Door - Executive Order on Ethics Commitments by Executive Branch Personnel on January 21, 2009
http://www.whitehouse.gov/21stcenturygov/actions/revolving-door

[17] David Kappos's testimony to Senate Judiciary Committee in favor of patent reform while representing IBM on 3/10/09:
http://judiciary.senate.gov/pdf/09-03-10Kappostestimony.pdf
He has advocated for patent reform continuously since taking office in violation of his ethics agreement.

[18] "Critics Raise Concerns at Commerce" in Politico on 11/2/09
http://www.politico.com/news/stories/1109/29002.html

[19] "Gary Locke and Microsoft" in Knowledge Ecology International on 9/7/10
http://keionline.org/node/968

The opposition to patent reform is today mostly a bunch of startup inventors, small business entrepreneurs and venture capitalists who are volunteering their time purely out of passion for the preservation of this amazing innovation ecosystem. This is in stark contrast with the army of lobbyists that the Washington Post wrote about.[20] To put it in perspective, a few years ago, Intel's point person on patent reform told me in a conversation that they had spent about a half billion dollars defending and settling patent lawsuits over the prior 5 years. Over that time, sales were approximately $100B. So the expense they hope to reduce was only 0.5% of sales, and they won't eliminate that, only reduce it…maybe. For the large companies that are buying this legislation, it is about cost reduction. For entrepreneurial innovators, patent reform is an existential threat.

The role and importance of patents goes way beyond what can be quantified in lawsuits and settlements. Patents help organize markets even without the parties threatening each other or even talking. Potential new market entrants are discouraged from entering by anonymous due diligence that reveals risks of competing. In particular, they act as a check against normal human machismo and overconfidence that leads companies to say "what do we need them for? We can do that ourselves!" In the absence of the dose of fear that patents create, theft of other's innovations ensues[21], and often too many competitors emerge. Over-investment leads to huge losses later, so patents also help steer investors away from overly competitive markets. Conversely, patents encourage companies that wish to enter a market to buy the companies with patent protection such that their investors are more likely to profit and then want to reinvest again.

Larger companies who would like to buy a patent-protected new-entrant often try to minimize the price that they may pay (as well as potential competitive risk if they don't succeed in acquiring) by obtaining patent coverage of their own and minimizing the coverage of the new-entrant via the various office proceedings available (and post-grant review is one) or litigation. FTF creates a large shift from fear of the new entrant ("we better buy them") to "we can get a patent on it first and it will be many years and millions in litigation that they can't afford before they prevail," which is the way it is in most of the world with whom this bill supposedly harmonizes. Consequently, when evaluating the shift from FTI to FTF, it's important to not dwell on the 50-100 cases per year of interferences and instead look at the shift in behavior of imitators — of which there are many many more than there are

---

[20] "Patent reform measure ignited fierce lobbying effort" in Washington Post on 3/27/11
http://www.washingtonpost.com/capital_business/patent-reform-measure-ignited-fierce-lobbying-effort/2011/03/25/AFzD9VkB_print.html

[21] For a graphic example, see the movie or book Flash of Genius, by John Seabrook. History is rife with examples of thefts from inventors. Some of the famous ones were RCA/Sarnoff's theft of radio from Armstrong and TV from Farnsworth. Many others exist.

innovators. It is also the case that imitators have vastly more resources to bring to bear.

The allegation that FTF would cause a behavior change is not only a theoretical argument since that is the way the rest of the world does it. Just last month (5/11):

> The U.K.'s patent system is "broken," a group of small and medium-sized businesses said in a letter to Prime Minister David Cameron.
>
> The letter, sent May 5, was signed by 32 companies that are members of Small Medium-sized Entity Innovation Alliance. In the letter, the organization said most small businesses in the U.K. "know only too well the failure of the patent system and have given up."
>
> They claimed that their country offers "no effective means of patent enforcement" in the home country and no assistance for overseas patent enforcement.
>
> They claim that large companies like the patent system "just the way it is" and that they will have more influence in patent reform.
>
> Physicist Stephen Hawking, the director of research at Cambridge University's Center for Theoretical Cosmology, is the patron of the organization.
>
> A message from Hawking to the organization was posted on the SMEIA website May 5. In that message, Hawking noted that "patent theft is one of the big issues" faced by small companies. He noted that "my illustrious predecessor Galileo Gallilei had his design for a compass stolen by his one-time protégé."
>
> Hawking said that Galileo described the theft as "worse than murder," depriving the victim of "honor and merited glory" obtained "from studies, hard work and long vigils."[22]

Under current law, if two parties both file for the same invention, and the second to apply believes themselves to have invented it first, that party can initiate an interference proceeding (priority contest). They are expensive (≈ $500K), rare (only about 50-100 cases per year (0.01% of applications filed per year)) and typically only fought between big companies. Proponents of the bill contend that:
1) inventors have almost never prevailed against a prior filed patent,
2) that they are expensive and small inventors can ill afford them,
3) that small inventors gain by eliminating uncertainty by filing first.
When this is said, you know the person is either disingenuous or is simply parroting the party lines of someone else who is (as the New York Times did in its editorial of 3/8/11[23]). Taking these points one at a time: on #1, as stated previously, the point isn't to win the interference; it's for everyone to know that the real inventor

---

[22] http://www.bloomberg.com/news/2011-05-09/smeia-red-hat-google-adidas-pepsico-intellectual-property.html

[23] "Patents, Reform and the Little Guy" Editorial in New York Times on 3/8/11 http://www.nytimes.com/2011/03/08/opinion/08tue3.html

ultimately can in order to discourage attempted theft—which exists under our present system and would worsen under FTF.

On #2: Since the actual numbers of cases are so small, they are not a problem for real inventors, but the fact that they are available encourages the right behavior. Furthermore, interference proceedings would be replaced by derivation proceedings (in which an inventor who believes that someone else's patent was actually copied (derived) from the original inventor) which would be even more expensive and much harder to bring absent the right of discovery to enable one to search the files of the imitator to prove they copied. It is much easier to prove to the PTO from one's own records what one's invention date was. Can you imagine trying to bring such a case on an applicant from China? Or perhaps on someone who obtained the ideas via a hacking?

On #3: the main uncertainty that small inventors want is to minimize the risk of theft. Everyone is willing to live with the risk that someone else thought of it first. Small inventors also want to minimize their patent expenses and to defer incurring them until it has raised capital, established that customers would buy the product, refined the product, etc. Big companies are OK with FTF since they can apply early and often, but doing so is a difficult burden for small companies. In the UK, the standard advice is to apply for patents prior to talking with investors or customers, which typically costs $5-10K…which is one of the reasons that it's not working for them. Proponents of the bill often cite that the filing fee for a provisional application is only $110, so the FTF burden is small. This ignores the fact that experienced patent counsels always advise that those filings are almost worthless and that it does not make sense to apply with anything less than a fully prepared patent, and the lawyers' fees dwarf the PTO filing fees.

Even if this bill were no worse than our current one, the uncertainty that all this change creates and the need to re-establish a whole new body of case law is problematic. Were it to go through, it would change the foundation of our existing patent laws that have been litigated — and therefore clarified — over many years. Only 5% of patent suits go to trial. Those are the ones where the plaintiff and defendant disagree about how the court would rule. With all this change comes increased uncertainty, and therefore more parties choosing to litigate. Uncertainty discourages investment. It is ironic that the last place we need this innovation is in our laws that govern innovation.

The rhetoric is that patent reform is about jobs, but the reality is that there is no legitimate reason given for why it would accomplish that. In fact, the evidence points to the opposite. The Kauffman Foundation's studies[24] found that small companies are the primary driver of new job growth in our economy, yet this bill

[24] http://www.kauffman.org/newsroom/kauffman-foundation-analysis-emphasizes-importance-of-young-businesses-to-job-creation-in-the-united-states.aspx

harms small companies and claims that it will help the economy. It is opposed by the National Small Business Association,[25] the National Venture Capital Association,[26] and many other organizations,[27] but that does not seem to matter enough to the powers that be. One reason is that they are not hearing from constituents.

It is extremely hard to succeed as an inventor and entrepreneur, but America has created the most fertile ground in the world for doing so. Maintaining that fertility enables Schumpeter's "creative destruction" to reshape our world for the better. Patents confer power and protection to the otherwise powerless — not those incumbents who have sufficient market power to crush new innovative entrants. Customers prefer established companies they know, not upstarts. The same is true for hiring, renting property and most other transactions that start-ups have to compete for. We should do all we can to increase the chances of their success. All of the companies that are advocating for patent reform were once start-ups, but most of their founding entrepreneurs are long gone and what they went through has been forgotten.

In a decade or two when the post-mortem is written, it will be hard to disaggregate the relative contributions to our decline attributable to:

1) changes in patent law, judicial interpretation, PTO procedures & delays,
2) our declining public education and the rest of the world's rising education quality,
3) other countries developing to the point that entrepreneurs don't need to come to the USA to succeed,
4) Sarbanes-Oxley making it more expensive and annoying to go public,
5) options expensing,
6) FDA conservatism and sloth,
7) immigration policy,
8) the forced separation of research analysts from investment banking,
9) decimalization of stock trading, and
10) the myriad other forces that tilt the ecosystem against technology entrepreneurship. Since it's multifactorial, it's important to fight any steps in the wrong direction whenever and wherever they arise.

The above problems are complex — as are most aspects of intellectual property law — but they are solvable. If we do not appreciate the recipe for how we became preeminent in innovation, then we will lose the important ingredients. Private funding of innovation is one. Venture capital raised by funds has already shrunk by

[25] http://www.nsba.biz/patent-reform.shtml
[26] http://nvcatoday.nvca.org/index.php/policy/nvca-sends-letter-on-house-patent-reform-bill.html
[27] http://en.wikipedia.org/wiki/H.R._1249#Organizations_against

70% since 2007[28], and are likely to shrink further if this bill becomes law. The innovation economy is a delicate ecosystem that should be operated on with a scalpel, not a machete. The law of unintended consequences has not been repealed,[29] and congress should impose on itself the Hippocratic Oath to "first do no harm."

This raises the natural question: why is Congress doing this? The answer is that Congress is responding to the ones who can afford to lobby, and not bothering to seek the opinions of entrepreneurial inventors — for whom the patent system was created over 200 years ago by a single sentence in the Constitution. Patents in England back then were used primarily for maintaining monopolies and status quo among the elite and the guilds, so the founders of our country intentionally designed it to do the opposite: encourage innovation by the common man. This design has done well for America up until now. Whether that will continue going forward is in Congress's hands.

On 3/8/11, the Senate passed their bill, S.23. On 4/14, the House Judiciary Committee passed their bill, H.R. 1249, which is worse than the house bill. On 6/23/11, the house passed it with 70% voting in favor of it despite having removed the one aspect that all interest groups thought was good: elimination of fee diversion. It is expected to come to the floor of the Senate in mid-July, so I encourage you to communicate your views to senators, the administration and others whom you feel should care. Useful resource for finding members of the house:
http://www.bipac.net/lookup.asp?g=pipac
http://www.reformaia.org/

Gary Lauder has been a venture capitalist with Lauder Partners for over 25 years. He is a co-inventor of a dozen patents. Bio at:
http://www.lauderpartners.com/bio_gary.html

Gary@LauderPartners.com

Other references:
http://www.rearden.com/public/110319_Patent_Reform_Isnt_1.pdf
http://en.wikipedia.org/wiki/America_Invents_Act

I wrote this last summer, so it's about the older bill...which the house version resembles more closely than the Senate one:

---

[28] See page 20 of NVCA Yearbook:
http://www.nvca.org/index.php?option=com_docman&task=doc_download&gid=710&Itemid=317

[29] "Two Views of Innovation, Colliding in Washington," NY Times, 1/13/08, By John Markoff: http://www.nytimes.com/2008/01/13/business/13stream.html?_r=1

http://journals.lww.com/medinnovbusiness/Fulltext/2010/06010/Venture_Capital__The_Buck_Stops_Where_.4.aspx
Patent system reforms could squeeze out start-ups:
http://www.jsonline.com/business/118475979.html
http://www.patentdocs.org/2011/04/boundy-on-patent-reform.html
http://www.patents4life.com/2011/04/h-r-1249-voted-out-of-committee-no-grace-period-for-you/
http://inventivestep.net/2011/04/15/grace-period-in-america-invents-act/
http://gametimeip.com/2011/04/07/patent-reform-boosters-invent-facts-to-combat-real-arguments/
http://gametimeip.com/2011/03/04/can-we-have-an-intellectually-honest-patent-reform-debate-in-the-house/
http://www.patenthawk.com/blog/2011/04/america_invents_but_congress_p.html
http://www.generalpatent.com/house-representatives-releases-details-its-patent-legislation