

Opinion: Patent reform will remove the brakes from innovation

By Ed Black
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After six years of trying, legislation to reform a seriously dysfunctional patent system is again under consideration. Balanced patent reform is needed now more than ever so that the incentives for inventors to innovate don't detract from others' ability to build on previous inventions so they that can boost our troubled economy.

Under Dan Leckrone's view of the world (Mercury News, March 9), any limitation on the power of patents encourages "stealing," reduces the incentive to invent and reduces jobs in this country. However, the only credible cost-benefit analysis to date shows the opposite is true.

The current patent system's benefits outweigh its costs in the pharmaceutical and chemical sectors. In pharmaceuticals, patents are critical to protecting large investments on a per-patent basis. But in other sectors, the present system functions as a tax on innovation. In IT, resources have been expended to build up huge portfolios of patents, most of which have little value in themselves but which collectively hold out some promise of defensive use or licensing potential.

Patents are not ordinary assets; they are options to litigate. While patent lawyers and other intermediaries benefit directly from the scope and scale of IT patents, that volume represents potential liability for companies that market useful products.

Most patents belong to others, and the sheer volume obscures the patent landscape, limits the ability to evaluate patents and inevitably leads to inadvertent infringement.

Only 100 patent infringement cases go to trial each year, but that's the very tip of the iceberg. Controversies over patent scope and coverage are widespread. Some 3,000 patent lawsuits are filed each year, and Chip Lutton of Apple testifies that for every lawsuit filed, he receives another 25 letters claiming infringement. Settlements may happen before or after filing. Companies have to take into account that verdicts are unpredictable, that damages may be large, and that patent litigation is extremely costly.

An IT product can involve thousands of possibly patentable inventions, and real innovation requires major investments in design, code, integration, testing, manufacturing and marketing as well. It would add to patent incentives if patentees could hijack additional value that they didn't create, but what creates economic value is genuine innovation, not a lottery system for patent applicants. The provision on damages in the current reform legislation ensures that damages are limited to what the inventor actually contributes.

As a tech trade association that represents both patent holders and users, we support the patent reform bill and even wish it went further. Eventually, we must address the need for higher standards, so we don't have the plague of trivial patents obscuring and blocking the use of high-quality technology. The only real solution is to raise the basic standard of what is a patentable invention. This would drastically reduce the backlog at the Patent and Trademark Office, as well as the growing liability that confronts innovators in the private sector.

Presently the threshold standard of invention is

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keyed to what the person of ordinary skill would find obvious. But there is only a limited role for ordinary skill in today's intensely competitive global economy, and American leadership today depends on extraordinary, not ordinary, abilities and achievements. At least in the IT sector, the patent system needs to be recalibrated to support the extraordinary, rather than cranking out options to litigate.

Ed Black is president and CEO of the Computer and Communications Industry Association. He wrote this article for the Mercury News.

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