

The Dawn of our Patent Futures

Heather Frey
University of Hawai'i at Mānoa
USA

The plethora of topics touched on by United States' patent law makes a discussion of its futures an overwhelming challenge. This provocation is exacerbated by the current discourse surrounding patents, which either focuses on the subject area being patented¹ or the processes involved in obtaining a patent.² These approaches are symptoms of the common evolutionary theory known as punctuated equilibrium. According to this theory, “we go through vast periods of stasis in which the status quo rules, and then once in a great while, profound disruption occurs” (O’Brien 2012). U.S. patent law has been a great example of this evolutionary theory from the political landscape. U.S. patent law has remained one of the most fundamentally intact federal statutes since its inception in 1790, and just as the theory claims, the status quo has prevailed for over 210 years, which has been accomplished by growing the roots of the original law through defining the processes required in filing and excluding as well as identifying patentable subject matter over centuries of implementation. In 2011, a “profound disruption occurred” in the form of the Leahy-Smith America Invents Act. The futures of patent law in the U.S. now hinge on the social, legal, and corporate interpretations and implementation of this new revision. The follow scenarios are three possible futures for US patent law.

Scenario A

In scenario A, research and design (R&D) companies have rejected the Leahy-Smith Act and have opted into an open licensing form of patenting their inventions. By granting license to competitors an individual company increases their overall likelihood of developing a new or improved technological breakthrough while keeping costs low and increasing profit margins for all parties involved. This practice is known as free licensing. This practise corresponds to an evolutionary step in the patent law and its effect on innovation. This research arose from the notion that too tight of patent protection actually hinders innovation and in fact was seen as the cause of an age dominated by corporate patent monopolies in the early 21st century. A practical example of free-licensing in action is this: a hardware manufacturer sees many firms working to improve software that runs on it's equipment. Because there is a greater probability of success and a shared financial burden, the hardware manufacturer is more likely to invest in improved technology of their own. Which in turn makes the software improvements more profitable for the R&D firms. In this scenario, it

does not make any difference to the hardware manufacturer which software firm succeeds in making the improvement. The hardware manufacturer is concerned only that an effective improvement happens in a cost efficient manner. In sum, the significant characteristics of this scenario are that patents are routinely licensed by developers in exchange for royalties. But free-licensing is strictly an invitation to compete in a healthy, market-building environment. Innovators are not collaborating or information sharing, rather they are sharing the burden of R&D costs while still receiving their percentage of the profits made in the end. It is key to remember that in this scenario independent research lines are crucial for the separate companies. These companies are sharing the initial costs and the later profits, but still act as separate R&D teams.

Scenario B

Due to financial cuts at universities from 2010-2014, It happens in this scenario that patent protections are increasingly granted to R&D firms and universities, in a joint manner. This proves a cost effective method of knowledge-sharing through collaborative mechanisms such as patent pools and tela-collaboration networks. These types of collaborative research methods are not new to innovators in the patent market. During the 1970s a sewing machine conglomerate chose to pool their patents with those of one of their competitors when they realized the demand for innovation from the public and the lack of progressive design from its internal R&D teams. This success lead to investigation into other examples of collaborative patent ownership. The unique characteristics of this scenario are that these R&D teams are integrated at every level and are seen as mentoring each other along the way to discovery. This collaboration also allows for multiple avenues to address social attitudes towards newly released technology. Having both the private firms and the public universities working together allows for the research to seep into social markets earlier and more frequently. Which in turn creates a natural gage for how slow or fast the research will be accepted by these markets.

Scenario C

After a few decades of implementing the Leahy-Smith Act there is a rising number of companies who publicly advertise themselves as patent banks. Due to the changes in patent law since the 2011 law, the world of patenting has taken center stage in the US business market. Since a majority of investors lost a great deal of confidence in the stock market during the economic fall of 2009, they were searching for new 'safe havens' for their investments. The new patent laws of 2011 allowed for a fully developed currency to be made of patents themselves. These companies that touted themselves as patent banks share their patent portfolios with their clients, who in return share the financial burden of patent application. This shared investment by companies and individuals gives them the funds needed to push R&D along while filing the proper paperwork on all patents possibly related to this new/improved invention. In this scenario patents no longer revolve around innovation, but rather depend upon the speed at which the funding for the patents can be obtained. The patent becomes valuable to these investors once it is granted 'pending' status. Then the exclusionary principle can be enforced and suits can be brought against those

who are infringing upon the patent holder's rights. Although the patent banks and their investors profited heavily from these new laws, the government itself suffered tremendously due to the increased demand on the US Patent and Trademark Office.

Correspondence

Heather Frey
University of Hawai'i at Mānoa
1500 Jackson street #812
Dallas Texas 75201
Email: hfrey@hawaii.edu

Notes

- 1 Biotechnology, specifically genetics, has been trending in popularity over the last three decade. For more information on this area, consult: *Patent Reform for Life Science*. January 31st - February 1st, 2012. (American Conference Institute). New York, NY.
- 2 One of the best resources for analyses of this phenomenon is: *A Review of the American Invents Act and Its Impact on the USPTO*.16, December 2012. (Birch, Stewart, Kolasch & Birch, LLP and CONNECT). San Diego, CA.

References

- O'Brien, Jeffrey M. (2012, September 28). The great stem cell dilemma. *CNN Money*. Retrieved October 1, 2012, from <http://tech.fortune.cnn.com/2012/09/28/stem-cell-business/>

