

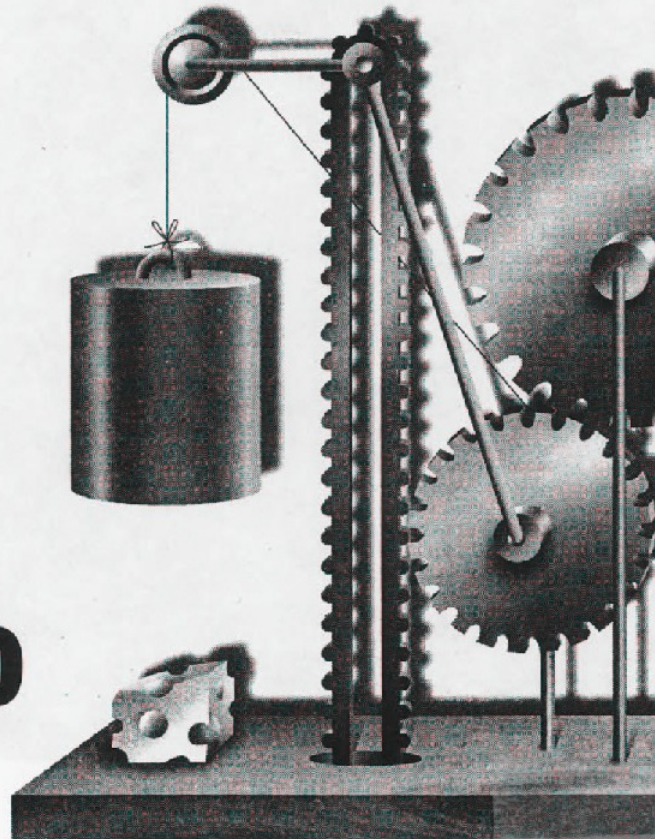
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## BUSINESS FORUM

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A controversial Supreme Court decision has inventors and their lawyers buzzing. But patents are still the best way to . . .

# Protect the better mousetrap



By Daniel W. McDonald

The economy has slowed. Profits are down. The stock market has tumbled.

Meanwhile, some lament that the courts are limiting the scope of patent protection. Under such circumstances, corporations cutting expenses must be cutting back on patent protection and enforcement, right?

Wrong. The number of new utility patents granted in the United States (to both U.S. and foreign companies) has increased more than 150 percent, from 65,771 in 1981 to 167,608 in 2002.

A record number of patent lawsuits, 2,505,

The author

Daniel W. Mc-

from someone else's patented invention that does not copy the literal words of the patent, so long as the differences are insubstantial. How this requirement will play out in the courts remains uncertain, but it does show that the Supreme Court embraces the importance of patents and is sympathetic to the difficulty in drafting patents to describe inventions when the only tools available are words. The court recognized, "If patents were always interpreted by their literal terms, their value would be greatly diminished."

The good news from the Festo decision is that it demands that courts properly balance the need to fairly protect patented innovation against the need to ensure that patents are not overextended, which could stifle innovation.

### Patent history

Today's pro-patent envi-

United States and some courts were particularly hostile to patents. Indeed, the Eighth Circuit Court of Appeals, which includes Minnesota, used to be called the "patent graveyard" because it found the vast majority of patents brought before it to be obvious and thus invalid.

This changed in the early 1980s with the creation of the Federal Circuit as the nation's only court to handle patent appeals. This added predictability to the law and, more important, the avowal that U.S. patent law required that worthy patents be enforced.

The rejuvenation of the patent system since then has been dramatic both nationally and locally. Minnesota is now a leader in innovation and patents, and ranks among the top 10 federal court districts in the country for patent lawsuits filed. Patent holders won in Minnesota courts in 67 percent of cases decided; the national

you can't have it both simple and fair."

The Supreme Court has recognized that fair balancing of the competing interests requires a case-by-case evaluation, not a rigid rule that provides certain answers at the price of unfairness.

Moreover, innovators have several tools at their disposal to ensure their inventions are fairly protected. Patents can be "reissued," for example. Under this procedure, a patent's scope may be broadened if the application to reissue is filed within two years of the patent's issue date, and if the broader scope is supported by the description provided with the original application.

This process allows inventors who discover a competitor skirting around the edge of their patents to review and amend their patents to fairly cover their invention.

An inventor may also keep a second application alive even

evade the literal first patent.

To be sure, be carefully prosecuted. Changing terms of court statutory changes. Companies have shied from patents like court cases, emphasizing quantity, they do so at risk that any in might not receive deserved.

The Supreme Court gives holder patent holder against a competitor around the litigation, even in