The Case Against Patents: Negative Perceptions About Patents, How They're Playing Out in the Law, and What It Means for Your Practice and Your Clients' Valuable Assets

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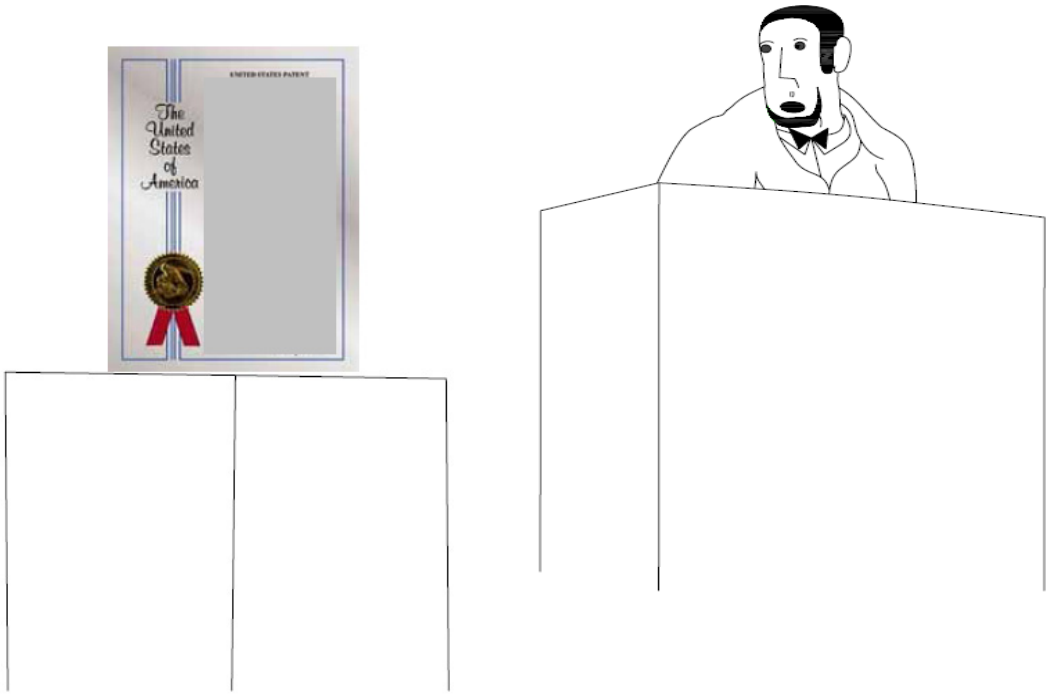

Everything you say can be used against you. Everything you don't say can be used against you. In fact everything will be used against you, including hearsay, innuendo, made-up stuff, lies and, negative inferences. And if that's not enough, we'll change the rules.

(i)

PREFACE

This presentation developed from a series of annual discussions with Minnesota CLE regarding topics and speakers for the Midwestern Intellectual Property Institute. Each year for a number of years, one of these authors has been on the planning committee for the Institute, and has discussed, as part of the background for planning, the growing negative trends and perceptions regarding patents. By chance, or destiny, shortly before the meetings started with respect to planning the 2008 Institute, in late December 2007 a public interest Brief for *Amici Curiae* was filed in the Eastern District of Virginia for case number 1:07CV846, (Tafas v. Dudas et al.) consolidated with case number 1:07CV1008 (SmithKline Beecham, et al. v. Dudas et al.) The basic assertion of the brief was that the public interest overwhelmingly supports the USPTO final rules published on August 21, 2007. The specific assertion was made that "the public interest will be well served by the Final Rules because they will help the USPTO curtail abusive behavior by exploitative patent applicants and improve patent quality." Among the many organizations on the brief was included the AARP. These authors were somewhat surprised to learn that in addition to advancing the interests of the retired with respect to insurance, availability of investment information, and advocacy with respect to the availability of health care, the AARP was involved in efforts to promote modification of the patent rules and regulations in a manner considered by many to be decidedly against strong US patent rights.

Given that the AARP boasts membership of 39 million, these authors began to wonder how deep and clear are the identifiable trends of negative perceptions toward patents and the patent system, beyond certain segments of industry and the Office of the Commissioner of Patents. These thoughts prompted the investigation presented here.

These authors do not profess to be historians or economists. They are practicing intellectual property attorneys such as you, who have chosen to see how strong a case can be made for negative perception trends. As you will see from the following, some interesting, thought-provoking information was collected. Our observations lead us to conclude that while the impact of innovation to the United States economy is increasing, negative perceptions with respect to patents are increasing as well. Efforts to turn the negative tide are warranted.

Acknowledgments

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I. A SUMMARY OF THE ISSUE

The United States patent system finds its roots in the U.S. Constitution. Per the U.S. Constitution, the U.S. patent system exists to promote the progress of science and useful arts.[1] This promotion of science and useful arts is typically asserted to be achievable by using a strong patent system rewarding innovators and encouraging investment in innovation. A strong system of well-defined patent rights can be an engine of innovation.

Intellectual property is receiving increased attention "because ideas and innovations have become the most important resources replacing land, energy and raw materials."[2] As recently as 2006, the President's Counsel of Economic Advisors estimated that a third of the market value of publicly traded U.S. corporations is attributable to intellectual property, with about a third of that value attributable to patents.[3] In his 2007 book, Alan Greenspan observed that he sees "no obstacle to intellectual property's share of GDP rising into 2030.[4]

It is reasonable to investigate whether the United States patent system is sufficiently strong and viable to serve as one of the basic institutions for protecting such assets.[5] An issue being asked here is: do current perceptions indicate that this increasingly important part of the United States economy is not viable?

II. NEGATIVE PERCEPTIONS ABOUT PATENTS

A. What was the AARP Doing on a Brief for *Amici Curiae* Concerning an Injunction Against Implementation of the Proposed New U.S. Patent Office Rules?[6]

Upon observing that the AARP was on a brief, the immediate thought was: why? To these authors, only two interests in the AARP regarding U.S. patents are apparent. The first is that many of the AARP members are highly invested in public corporations, the value of which are substantially, and increasingly, affected by the value of intellectual property rights.[7] Thus, the AARP could legitimately be interested in U.S. patent law and regulations designed to strengthen the value of U.S. patents specifically, and intellectual property generally, given its members' financial investments in publicly traded corporations.

On the other hand, given certain of its co-parties on the same Brief for *Amici Curiae*,[8] and given that the assertions of the patent bar and those filing the lawsuits were that the rules at issue

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[1] U.S. Const. art. I, § 8, cl. 8.
[2] Kenneth Cukier, *A Market for Ideas,* The Economist, October 22, 2005, p.3.
[3] Alan Greenspan, The Age of Turbulance: Adventures in a New World 495 (2007).
[4] Id.
[5] See J. Bessen and M. Meurer, Patent Failure: How Judges, Bureaucrats and Lawyers Put Innovators at Risk 2 (2008), hereinafter "Patent Failure"; A.B. Joffee and J. Leiner, Innovation and Its Discontents: How our Broken Patent System is Endangering Innovation and Progress, and What to do About It 8 (2004).
[6] Herein, the "New U.S. Patent Office Rules" and variations thereof refer to the rules published by the U.S. Patent and Trademark Office at 72 Fed. Reg. No. 161 (August 21, 2007). Among other changes, the new rules sought to: limit the number and timing of continuations; limit the number of RCE's; and limit the number of claims filed absent submitting substantial additional disclosure in the form of an examination support document.
[7] "It is almost certainly the case that intellectual property's share of the stock market value is much larger than its share of economic activity. Industries with disproportionately large shares of intellectual property are also the most rapidly growing industries in the U.S. economy." Greenspan, *supra* note 3, at 495.
[8] The other parties on the brief are the Public Patent Foundation; Computer and Communications Industry Association; Consumer Federation of America; Essential Action; The Foundation for Taxpayer and Consumer Rights; The

were in fact likely to have a negative impact on the value of intellectual property, it seemed reasonable to be skeptical of assigning these motives to the AARP.

It is apparent that the AARP's interest was specifically in weakening the U.S. patent system as a way of advancing its efforts to provide inexpensive pharmaceuticals to its members.[9] Obviously, the AARP's contention is based on the observation that generic, non-patented drugs are often less expensive than patented ones.

These authors have reached a conclusion that a 39 million member organization in the United States is specifically interested in seeing a weakening of the U.S. patent system to advance its cause of providing its members with lower cost access to technology. This 39 million member organization has access to substantial funds; state and federal lawmakers; and (as indicated by involvement with the amicus brief) the courts. The mere fact that the AARP is involved in "anti-patent" activities is itself quite troublesome.

B. The Apparent Ringleader on the Brief was the Public Patent Foundation: Why?

The first identified party on the brief is the Public Patent Foundation, i.e. "PubPat." In the brief, the Public Patent Foundation is characterized as representing "the public interest in the patent system . . . ." A visit to its website, www.pubpat.org, provides a general understanding of the organization and its motives. There, it is asserted that "undeserved patents and unsound patent policy harm the public, by making things more expensive if not impossible to afford, by preventing scientists from advancing technology; by unfairly prejudicing small businesses; and by restraining civil liberties and individual freedoms."

Each of the concerns of the Public Patent Foundation is no doubt a legitimate and, indeed, a laudable objective. Nevertheless, the assertions by the Foundation that most people "do not realize how significantly undeserved patents and unsound patent policy are assailing their health, their freedoms and their wallets"[10] appears to be crafted to incite distrust of a patent system that was established for the basic purpose of stimulating innovation and investment in innovation.

The asserted objectives of the Public Patent Foundation and others raise a key quandary. It is arguably indisputable that bad patents, i.e. invalid patents, nevertheless issued by the U.S. Patent and Trademark Office[11] can be an inhibition to competitive activity and lead to increased consumer costs. It is, however, also arguably indisputable that strong properly issued patents serve as stimulation to innovation and investment, strengthen the U.S. economy, and are of great significance. At issue, then, is the disagreement regarding the impact of the proposed (and now enjoined) new rules.[12] One group of parties asserts that it weakens the patent system entirely, with respect to providing strong, viable protection as a reward for innovation. Another group asserts that the reforms will reduce the number of invalid and, thus, anti-competitive patents.

Initiatives for Medicines, Access, and Knowledge; Knowledge Ecology International; Prescription Access Litigation; Public Knowledge; Research on Innovation; and The Software Freedom Law Center.

[9] In the amicus brief of Tafas v. Dudas, the AARP's interest is stated as being because "pharmaceutical companies' manipulation of the patent system has thwarted the entry of generics to the marketplace, thereby reducing access to affordable prescription drug treatments."

[10] See www.pubpat.org/About.htm

[11] Herein, the U.S. Patent and Trademark Office will be abbreviated as "the Patent Office."

[12] Tafas v. Dudas, 541 F. Supp. 2d 805 (E.D. Va. 2008); the decision to enjoin the new rules has been appealed to the Federal Circuit.

Assume, for the moment, that both groups are right. A reasonable argument can be made that any issued patent that is actually invalid will eventually be challenged and be held invalid, if it provides a substantial anti-competitive affect.[13] On the other hand, a failure to strongly protect actual innovation and investment in innovation will lead to deterioration in the viability of the U.S. economy, which is increasingly reliant upon "conceptual economic product."[14]

C. Who Else has Complaints with Patents and Why?

How widespread have the negative perceptions become? The authors think that a logical first place to look for an answer to this question is those places where people post their positions in modern America: Op-Ed articles in newspapers, blogs, and electronic media. As the following indicate, negative, and in some instances, vehement, perceptions about patents are not hard to find.

Negative views raised by commentators about the U.S. patent system are referenced as patent "ravings" or "railings." These can be sorted into categories, discussed below.

1. "Red Herrings"

Among the patent ravings reviewed, many relate to patents that do not fully justify the negative perceptions. That is, the existence of the patents about which the complaints are made does not appear to pose any societal problem. These are characterized as "red herrings."

(a) A first Group of Red Herrings--Fringe Patents

As is well known, the Patent Office issues patents pertaining to a wide variety of inventions. Certain of these patents will be referred to here as "fringe patents."[15] Fringe patents include such patents as: a patent on a peanut butter and jelly sandwich (U.S. Pat. 6,004,596); a method of using a backyard swing (U.S. Pat. 6,368,227); and a method of combing hair over a bald spot (U.S. Pat. 4,022,227). As reported in Patent Failure, critics of the U.S. patent system cite such fringe patents as evidence of poor patent quality.[16] These critics reach a wide audience, as the following show.

(i) In an editorial appearing in the July 24, 2005 Sunday edition of the Boston Herald, it is stated that "the nation's patent system is a mess," with the assertion being that "too many bad, even ridiculous, patents are being issued." The lead example identified in the editorial was the patent for a peanut butter and jelly sandwich on crustless bread, with the edges crimped together. The article even declares that the "Court of Patent Appeals [sic] has tilted the scales to favor patent

[13] While it may take several millions of dollars to invalidate a patent in some instances, it can be argued that unless a patent is having a substantially greater negative effect on the public through its existence, even though it may exist on the books as an invalid patent, it is not having a substantial anti-competitive effect. Alternately stated, if an invalid patent is in fact having such a great anti-competitive effect as to truly threaten segments of our economy, a competitor should be willing to put up sufficient funds to challenge the patent; and, if the patent, although invalid, does not have sufficient anti-competitive effect to warrant the cost of an invalidation proceeding, it is probably an invalid patent that is not causing a substantial problem.

[14] Cukier, *supra* note 2; see also Greenspan, *supra* note 3.

[15] Herein, we reference patents with titles or general subjects that may sound silly to the public as "fringe patents." These authors do not suggest that any of the patents identified as "fringe" is not a viable and useful patent for the owner. This is not the issue. The issue is that typically commentators cite such patents by title or general subject, with no assessment of claim scope. Further, the assertions always lack an economic impact analysis.

[16] Patent Failure, *supra* note 5, p. 3.

holders by almost ruling out 'obviousness' as a bar to a patent . . . ."[17] The Boston Herald editorial is a call to arms – society is being threatened by the peanut butter and jelly sandwich patent.

(ii) A similar demand for patent reform appeared on the editorial page of the May 3, 2007, Thursday edition of the St. Louis Post Dispatch.[18] This editorial starts with complaints about patents issued for an "intergalactic anti-gravity spaceship"[19] and for a method of "swinging on a swing sideways while yelling like Tarzan." The editorial states that courts should hold such patents invalid, to free America's true innovators from "the shackles of undeserved patents."

(iii) Another call to arms was raised in an April 8, 2006 editorial of the St. Louis Post Dispatch, again referencing a patent for a spaceship. After asserting that in the good old days, "patents were issued for proven material inventions like the light bulb,"[20] it was asserted that "Congress should ditch the perverse incentives of the Patent Office. The Office now gets paid more for granting a patent than rejecting one. Rejecting a patent is more time-consuming, because it generates appeals."

(iv) The complaints of critics with wide-audiences seem to go on without end. For example, the peanut butter and jelly sandwich patent was also cited as an example of "a system gone awry" in an editorial appearing in the May 22, 2006 edition of The New York Times. The now familiar call to arms was raised on the editorial page in The New York Times in the October 31, 2006 edition over patents on the tax code and a patent on pizza delivery. This editorial states that these patents "slow business activity to the pace of cold molasses."

The above is just a sampling. Articles criticizing the patent system for issuing such patents are widely distributed to the public. They are always made with humorous or satirical comments, directed toward one of the fringe patents, as a justification for slamming the U.S. patent system, the U.S. Patent Office, and patents generally. While the articles often turn attention in due course to more serious issues, the eye catcher is nearly always the "fringe patent." A characteristic of these articles is that they are devoid of any evidence that proves the asserted fringe patents identified have actually provided competitive injury or public injury; and, they are completely devoid of economic assessment. Further, they are always devoid of claim scope analysis and rely primarily on the title, or the general subject, of the referenced fringe patent in raising alarm. The pattern is that the editorial writer uses the mere identification of a fringe patent as proof of a dangerous and failed patent system.

Fringe patents are a major red herring to the issue. They are widely cited to illicit a fervent anti-patent feeling. It is questionable, however, whether they pose any significant injurious effect on commercial practices in the U.S. Simply put: if the patent has a substantial commercial value, then it is not a fringe patent. If it does not have substantial commercial anti-competitive impact, then its existence poses no real problem. It is reasonable, then, to characterize the fringe patents as red herrings in the arguments concerning the patent system, its viability, and its need for reform.

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[17] We believe most patent attorneys and patent holders would assert that the Federal Circuit has been doing just the opposite.

[18] This editorial was distributed further by the Copley News Service.

[19] U.S. Pat. 6,960,975

[20] These authors believe that it can easily be shown that "Fringe patents" have always been a part of the patent system, even in the time of the light bulb patent.

(b) The Second Type of Red Herring – Appeals to Public Paranoia[21]

The public is being moved by a variety of forces to an anti-patent position. The previous section briefly examined how fringe patents are being held up to justify patent reform. In this section, some instances of patent paranoia are reviewed.

(i) In The New York Times, on Sunday, March 19, 2006, the well-known author Michael Crichton presented criticism of patents under the title "This Essay Breaks the Law." He began with some assertions including that "elevated homocysteine is linked to B-12 deficiency, so doctors should test homocysteine levels to see whether the patient needs vitamins." Mr. Crichton alleged that he is not permitted to make that statement because a corporation has patented the fact.[22]

His contention was that "this may sound absurd . . . it is the heart of a case . . ." at that time being briefed to the Supreme Court. He was referring to the Metabolite case,[23] which was declared by him as being only one example of a much broader patent problem. His assertions were that there could be a future in which nobody could write a dinosaur story because he could have a patent covering such concepts.

(ii) Another example of patent paranoia is indicated by the "yoga" example. With the explosion of the yoga phenomenon has come related intellectual property interest in patenting yoga accessories and moves. Along with this has come criticism that this is taking an ancient knowledge and rendering it as the property of companies. In the article "Can you Patent Wisdom?" appearing in The International Herald Tribune, May 7, 2007,[24] the author, Suketu Mehta, observes people get upset when they hear reports, often overblown, of age old wisdom being stolen through the mechanism of intellectual property law. He acknowledges that the fears may be exaggerated, but also notes that they are widespread.

(iii) Another example is the basmati rice episode. Beginning in the late 1990's, a Texas company, RiceTec, began obtaining patent rights to certain basmati rice hybrids.[25] The resulting paranoia is reflected in an article by Charles Goldfinger appearing in the May 21, 2007 issue of *Science Business*, in the IP Digest section.[26] His observation was that besides the highly questionable "novelty" of the invention, "[b]y including [the] basmati name into the patent definition, RiceTec could claim wide-ranging rights over a traditional name, for which it did not acknowledge the origin or the originality, let alone the copyright. The practical impact of RiceTec's patent would be to jeopardise the prospects of Indian basmati rice suppliers seeking to export to the U.S. and other western countries."

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[21] The authors' concerns are with instances of raising paranoid reaction when the patent at issue does not justify heightened public concern. These authors are aware of the old adage "just because you're paranoid does not mean someone is not out to get you."

[22] Being nerdy patent attorneys, the authors, upon repeated reading of Mr. Crichton's article, cannot tell whether he is serious with his contention. The authors do not, however, expect the public, who would not have any substantial knowledge of patent law, to discern whether such an allegation by Mr. Crichton would have any basis in law whatsoever.

[23] Laboratory Corp. v. Metabolite Labs, 548 U.S. 926 (2006). In fact, after briefs were submitted to the Court, certiorari was dismissed as improvidently granted.

[24] https://www.nytimes.com/2007/05/07/opinion/07iht-edmehta.1.5596253.html (updated October 1, 2021)

[25] U.S. Pat. 5,663,484. A reexamination certificate issued on January 29, 2002. Among the amendments, as a result of reexamination, was a change to the title to remove the term "basamati," clearly to appease India.

[26] https://sciencebusiness.net/news/72228/The-story-of-the-basmati-rice-patent-battle

Assertions of the type made by Mr. Goldfinger, and widely distributed to the public, indicate a complete failure of understanding of the patent system. Of course, the historical basmati rice could continue to be sold, and of course, it could continue to be called basmati rice. The patent rights issued have no impact with respect to this and would pose no threat to it.[27]

While the above examples demonstrate the category of red herrings comprising paranoiac reactions to patents being used to incite negative public perceptions about patents, and ultimately populist demand for patent reform, the issue of patent paranoia is not limited to the traditional values and practices of the people of India, i.e. yoga and basmati rice.

(iv) Yet another example relates to the reaction toward patents concerning human genes. This is a central theme, for example, of Mr. Crichton's Op-Ed piece.[28] He contends that although the human gene exists in every one of us and is therefore a shared heritage, 20% of the genome is privately owned. He then argues that royalty costs now influence the direction of research in basic diseases, and often even the testing for diseases.[29] He concludes that barriers to medical testing and research are not in the public interest, and tries to instill fear that the reader may eventually be told by a doctor "oh, nobody studies your disease anymore because the owner of the gene/enzymes/correlation has made it too expensive to do research."

The patenting of "life" has led to other commentary raising concern, but often no authoritatively substantiated issue. For example in the article *Bad Patent, Evil Corporations and the Rise of Intellectual Imperialism,*[30] Mike Adams states that the ultimate goal of the corporations engaging in patenting such subjects is "complete ownership over the human race and everything of value on the planet."[31] In this article, the author admits that he is "not sure exactly how corporations and patents will play a role in the destruction of Western civilizations."

Paranoiac reactions to the patent system are not limited to those concerning life itself, ancient yoga practices, or food staples. Other subjects about which such paranoiac opinions have been published include: business methods patents and software patents, generally.

2. Areas of Possible Real Public Impact

The commentary referenced in the previous section does indicate there is a plethora of ways in which the public's paranoia of the patent system is being stimulated. In general, however, until enough members of the public are negatively affected by patents, the problems might be argued by some to be merely academic.[32] Unfortunately, there are examples of potential real public effect as discussed in this section.

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[27] Again, in many instances, the problem seems to be the title chosen for the patent. Apparently, for the basmati rice patent, the title of the patent was eventually changed to a less offensive title, see *supra* note 25. Because the title of a patent does not define its metes and bounds, it is hard to see how modifying the title addresses anything other than unfound paranoia.

[28] M. Crichton, *This Essay Breaks the Law*, The N.Y. Times, March 19, 2006. See text accompanying note 22, *supra*.

[29] Mr. Crichton offers no expert opinion, anecdotal evidence, or economic analysis to support this contention.

[30] www.naturalnews.com/z022755.html

[31] "If we continue to allow corporations to claim ownership over our money, our medicines, our seeds, plants and genes, then make no mistake about the outcome: we will all end up as worker slaves in an elitist plutocracy run by corporations." Id.

[32] These authors, however, believe the fact of public outcry is itself problem, whether or not the outcry is well-grounded.

(a) The Anthrax Scare

Closely following the September 11, 2001 attacks, while the U.S. public was still in a state of shock and fear, the episode of the anthrax laden letters began. This episode led to a demand for medicines, and it led to recognition that there was insufficient medicine available at the time to treat the general public. Speculation regarding patents inhibiting medicine availability was widespread, until it was eventually observed by the government that, if necessary, it could condemn patents for public use.

Recently, scientists Bruce Ivins, now deceased, was linked to the anthrax letters. In at least one publication, it was argued that Mr. Ivins may have stood to gain financially from massive federal spending after the anthrax scare, as a co-inventor on two patents for genetically engineered anthrax vaccine.[33]

This example demonstrates two potentially real justifications for some public alarm regarding patents: (i) not enough available patented medicine for a national crisis; and (ii) a motive to cause a health care crisis due to financial incentives relating to patents.

(b) The BlackBerry Scare

A second example is demonstrated by the Research In Motion situation. As observed by Jim Roposa in a March 22, 2006 article appearing in eWeek "a vital communication system was on the verge of being shutdown because the company that ran it was being accused of violating a patent."[34] According to Mr. Roposa, "we were saved from a BlackBerry blackout only when RIM finally paid NTP hundreds of millions dollars, essentially rewarding NTP for getting a bad patent through the system and using that patent to extort money from companies that actually innovate and make products."[35]

These examples are intended to remind the reader that criticisms of the patent system do not only arise around either "fringe" patents or paranoiac response to patent subject matter. They also arise when there is a perception in the public that the smooth operation of daily life or commerce is placed at risk. As this perception increasingly occurs, the demands for reform will become quite loud.

3. Pharmaceuticals and Medical Treatments

Pharmaceuticals and medical treatments are the hottest area of growing resentment of the patent system, as reflected by the AARP involvement in the Brief for *Amici Curiae* discussed above. Americans are increasingly frustrated with the perceived rise in the cost of pharmaceuticals and healthcare. No doubt, this is easily intensified by the number of politicians who state their willingness to take on "big pharma" and the healthcare industry once elected. As America ages, it can be expected that frustration with the costs of medical care will increase. This brings the AARP, with its 39 million members and growing, into the picture.

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[33] David Willman, *Suspect Stood to Gain from Anthrax Panic*, L.A. Times, August 2, 2008.

[34] Jim Rapoza, *RIM Isn't Sleeping with the Fishes; But the company clearly was the victim of patent extortion*, eWeek 62, vol. 23, no. 12; March 20, 2006.

[35] Mr. Rapoza provides no analysis proving the patent to have been "bad" other than that it inconveniences people, such as him, but he does say that the "patent system . . . essentially works like a protection racket."

The patent system is the scapegoat with respect to this issue. For example, in his June 22, 2003 editorial appearing in the St. Louis Post Dispatch,[36] Dean Baker argues that drugs are not expensive to produce; drugs are expensive because the government grants pharmaceutical companies patent monopolies to allow them to "fix prices."

D. What do all these complaints show?

The public demands for reform will increase as: (a) public concerns for the availability of medicines, medical treatments, and energy increases; (b) the percentage of the U.S. GDP which is related to intellectual property concerns generally, and patent rights specifically, increases; and (c) the distribution of patent rantings increases. In addition, fictional literature (books, movies, television) often reflect, and sometimes incite, public fears. The recent novel A Patent Lie by Paul Goldstein, reflects current public fears about patents. In the fact pattern of the novel, nearly all fears and anxieties of the patent system and corporate corruption are played out. What might happen if Michael Crichton's fears are wound into the subject of a movie thriller?

The trends in public perception are ignored at our own peril. As observed by Judge Paul Michel of the Court of Appeals for the Federal Circuit, in his address to the Harvard Law School Conference on intellectual property law, September 9, 2008, "the general press has now taken up the subject of patents, sometimes with little understanding, often with sensationalized stories, and usually relying on anecdotes rather than studies and context. With such elevated media attention has come interest by elected officials such as members of Congress, and now Presidential candidates. Soon campaign contributions in the presidential context may replicate those to representatives and senators that accompanied patent reform legislation in the last two years . . . . There is no reversing these trends, in my view."[37]

III. THE COURT DECISIONS AND COMMENTS REFLECT NEGATIVE PERCEPTIONS

First, the landmark 1966 U.S. Supreme Court decision of Graham vs. John Deere[38] is reviewed. In Graham, the Supreme Court laid out a logical test of obviousness evaluation under §103 as: defining the scope and content of the prior art; determining differences between the prior art and the patent claim at issue; and determining the level of ordinary skill in the pertinent art. Against this background, the obviousness or non-obviousness of the subject matter is to be determined. The Supreme Court also observed that in the event of a *prima facie* case of obviousness under §103, various secondary considerations should be reviewed such as commercial success, long-felt but unresolved needs, failure of others, etc.

These statements by the Supreme Court are fundamentally pro-patent. *Prima facie* evidence of obviousness should be considered overcome by real world evidence that suggests it may not have been so obvious to have made the invention.

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[36] Dean Baker, *Conservative and Liberal Think Tanks Agree: The New Proposals are a **Bad** Deal: Cutting Drug Costs is Simple: Eliminate **Patent** Monopolies*, St. Louis Post-Dispatch, June 22, 2003.

[37] http://www.cafc.uscourts.gov

[38] 383 U.S. 1 (1966).

Nevertheless, readers of the Graham decision will observe that after reciting the test and the import of looking at secondary consideration evidence, the Supreme Court set forth a further unstated test and model for courts to follow. In particular, the Supreme Court held Mr. Graham's patent invalid on its own initiative, and primarily based on a reference that had been cited and examined at the Patent Office, with no commentary at all with respect to the secondary consideration evidence, which must have been significant. That is, the Supreme Court did not remand to a lower court to review the secondary consideration evidence fully and critically, nor did the Supreme Court discuss that evidence itself. Rather, with its own judgment and understanding of the patent, the Court held the patent invalid, likely with hindsight.

With this, the United States Supreme Court created another underground test for validity of patents, namely: if the judge (or other validity finder) has a visceral reaction, with hindsight, that an invention is obvious, it should not hesitate to invalidate. Indeed, in the post Graham climate, patent invalidity was an increasing problem. This climate led, in part, to the formation of the United States Court of Appeals for the Federal Circuit.

In the early days of the Federal Circuit, as the Court was embarking on its mission of creating uniform application of patent laws in the United States, the patent environment in the courts was substantially pro-patent. This pro-patent environment in those days has led to such commentators as Bessen and Meurer[39] to comment that "patents might have worked reasonably well as a property system as recently as the 1980's; that is, on average the patent system delivered positive incentives to public firms."[40]

One of the themes of Bessen & Meurer in Patent Failure is that since the 1980's, predictability of patent principles has declined substantially and will continue, given the rate at which the Federal Circuit reverses District Court claim construction.[41] An explanation that has been offered for this failure is that the Federal Circuit is a centralized appellate court unchecked by competition.[42]

Consider the dissent of Judge Mayer (Judge Newman joining) in Phillips v. AWH:[43]

> This court was created for the purpose of bringing consistency to the patent field. . . . Instead, we have taken this noble mandate, to reinvigorate the patent and introduce predictability to the field, and focused inappropriate power in this court. In our quest to elevate our importance, we have, however, disregarded our role as an appellate court; the resulting mayhem has seriously undermined the legitimacy of the process, if not the integrity of the institution. In the name of uniformity, Cyber Corp. v. FAS Tech. Inc, 138 F.3d 1448 (Fed. Cir. 1998) (en banc), held that claim construction does not involve subsidiary or underlying questions of fact and that we are, therefore, unbridled by either the expertise or efforts of the district court. What we have wrought, instead, is the substitution

[39] Bessen & Meurer, *supra*, note 5
[40] Id. at p. 216-17.
[41] Id. at p. 228.
[42] Id.
[43] 415 F.3d 1303 (Fed. Cir. 2005).

> of a black box, as it is so pejoratively has been said of the jury, with the black hole of this court.

As evidence of the trend of negative perceptions of patents in the courts, consider the following decisions: Texas Digital v. Telegenix, 308 F.3d 1193 (Fed. Cir. 2002); Festo Corp v. Shoketsu, 72 F.3d 857 (Fed. Cir. 1995); McKesson v. Bridge Medical, 487 F.3d 897 (Fed. Cir. 2007); PharmaStem Therapeutics v. Viacell Inc., 491 F.3d 1342 (Fed. Cir. 2007); and Gentry Gallery v. Berkline Corp., 134 F.3d 1473 (Fed. Cir. 1998).

Nevertheless, Federal Circuit Judge Michel believes that the Federal Circuit has a role to play in reform, and, presumably, one that is toward the better. In his September 9, 2008 address,[44] in listing the players in patent reform, Judge Michel observed:

> There is, in my view, however, one that is missing: the role of the Court of Appeals for the Federal Circuit. After all, the Supreme Court can only decide a couple of patent cases even in a banner year. And, many important patent issues can be so obscure as to discourage generalist judges from addressing them. The rest, necessarily are left to us. We have the expertise and the will to resolve doctrinal problems. What we lack is mainly the opportunity.

IV. THE PATENT OFFICE REFLECTS NEGATIVE PERCEPTIONS

The U.S. Patent Office is sensitive to the negative perceptions. The Commissioner for Patents, John Doll, recited to one of these authors that at one point he learned of a fringe patent that was issued to a major U.S. patent holder. The Commissioner believed the patent to be ridiculous and not the type of patent that this particular major U.S. patent holder should have been pursuing. The Commissioner ordered a reexamination, and he described calling that patent holder and asking it to withdraw the patent, which it did.

The contention here is not that the Patent Office is, in fact, anti-patent. Rather, the contention is that it is clear that the Patent Office is sensitive to assertions of public outrage and pressure for its decisions in granting patents. Thus, the current Commissioner, looking for a way to react to these perceptions and to show concern, is engaged in two predicable trends of activity: (i) criticizing and even threatening[45] patent attorneys; and (ii) presenting extensive calls for reform through the rule-making process.[46] The approach being used is heavy-handed, short-sighted, and risky. It suggests a strategy to the effect that "we are going to reform you, by gum, even if it kills both of us."

The reform efforts are destabilizing industry. In his article *Surviving the Patent Shake-up,* Eric Sherman, writing from an industry perspective, observes:

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[44] Judge Michel, *supra*, note 37.

[45] Kevin Noonan, *New Rules, New Threats: More on the Office of Enrollment and Discipline*, January 14, 2008; www.patentdocs.net/2008/01/new-rules-new-t.html

[46] Some of proposed reforms include: ensuring fewer patent applications; requiring more prior art disclosure but limited in amount; and requiring prior art searching.

> The normally staid patent world has been roiling of late with Supreme Court decisions, attempts to significantly alter the way patents are processed and evaluated, and even major proposed legislative changes to the entire patent system. Taken together, these could literally remake the entire patent process. Entire industry competitive landscapes could shift, affecting the value of products and even corporations. What seems to be the stuff of legal journals might play out in the boardroom of virtually every corporation. CEO's who push the issue off on lawyers risk seeing their companies' futures come up all lemons in a high-stakes game.[47]

In general, the corporate world is at risk, the risk being caused by the various efforts at reform in the Patent Office and the courts.

> Companies have approached product and service development and exploitation literally based on hundreds of years of precedent and decades of experience with patent rules and regulations. With this much stability, why are there attempts to change the system? Because the patent process has run amok. An ever-growing application backlog delays many patent grants by years, which weakens protection for products and technology and slows market entry.[48]

Unfortunately, the authors believe the reforms may not achieve the desired speed, but the reforms will affect the security of business investments.

V. THE ACTUAL PROBLEM OF PATENT QUALITY IS NOT BEING ADDRESSED BY THE REFORMS

Are there actual problems with patent quality? Of course. The problems with patent quality are inherent in this field, which is at the interface of innovation and law.

If, as suggested above, the patent system was working well in the 1980's, developments since the eighties should be examined. By the end of the 1980's, intellectual property was becoming of heightened interest to corporate executives, perhaps due to the press surrounding the awards of large judgments in patent lawsuits. Greater emphasis was being place on acquisition of rights and patent enforcement. This acquisition of patent rights occurred without good corporate grounding in the metes and bounds of those rights. The patent industry grew very rapidly in that time frame.

Fueled by demand, the need for patent attorneys exploded, as did the workload at the U.S. Patent Office. This increased demand meant hiring of many new patent writers as well as many new patent examiners. Unless the new examiners and new patent writers were very highly trained before being put into a position to substantially affect the direction of projects, on average quality could well be expected to suffer. Also, even today, many corporate executives prefer to hire the

[47] Erik Sherman, *Surviving the Patent Shakeup*, Chief Executive .net, July/August 2008, July 23, 2008.
[48] Id.

lowest priced patent writer available for creating the definition of that corporation's major assets. This preference for cheap patents, too, will inherently lead to a reduction in quality.

Quality reduction was accelerated by the direction of technology innovation at the time. Various industries expanded substantially, in areas being where even highly experienced patent writers had relatively little technical experience with claim definition, for example: biotechnology; nanotechnology; computer and software technology, etc. Further, examination at the Patent Office of these emerging technologies was challenged by claim scope and § 112 concerns.

With no fault on anyone's part, these factors alone justify a conclusion of reduction in patent quality in the 1990's.

Also, during the 1990's, there were movements toward specialization in intellectual property practice. This specialization tended to separate patent attorneys into litigators and prosecutors. Within patent prosecution, there became increasing specialization in technology. As patents were increasingly written by attorneys having little or no experience in issues of litigation, it was inescapable that they would be less able to withstand the scrutiny of the adversarial process.

Further, if the propensity in the courts for finding inequitable conduct in the absence of intent[49] continues, good, skilled patent writers will be chased from the profession. Simply put, any person who currently engages in patent writing and prosecution risks loss of license as patents are brought through litigation. Moreover, as more fraud is declared by the courts, the public outcry against patents, and the asserted "criminals" who prosecute them, will increase.

Of course, a major problem is that the suggested reforms do not address patent quality issues because they do not address the causes.

VI. SUMMARY

1. Patent quality reduction has been occurring.

2. Populist demands for patent reform, whether well-considered or not, will increase.

3. Reform may be needed to appease the populist demands.

4. The reform efforts proposed address neither the causes for the quality reduction nor the populist demands.

5. As to the populist demands for reform, and noting that many are not well-founded, we need to ensure that government representatives and the population at large understand how critical patent protection is to U.S. economy. Efforts can be made in lobbying to government representatives and educational campaigns (marketing) for the public.

6. Industry says the patent reform most needed is reduction of pendency. The reduction of pendency, however, must not destabilize patent investments. The Patent Office has offered no proposal that satisfies these requirements.

[49] Of course, the law requires "intent to deceive," but the courts are willing to infer intent with no more evidence than knowledge of the prior art and failure to cite it.

7. If reducing pendency while ensuring stability of patent investment is not accomplished, the U.S. patent system will not be able to protect investment in emerging technologies, and the U.S. economy will suffer.

Fasten your seatbelts; it's going to be a very bumpy ride