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Comments on the SUCCESS Act

Introduction

US Inventor is a non-profit association of inventors devoted to protecting the intellectual property of individuals and small companies. We represents our 13,000 inventor and small business members by promoting strong intellectual property rights and a predictable U.S. patent system through education, advocacy and reform. US Inventor was founded to support the innovation efforts of the “little guy” inventors, seeking to ensure that strong patent rights are available to support our efforts to develop our inventions, bring those inventions to a point where they can be commercialized, create jobs and industries, and promote continued innovation. Our broad experience with the patent system, new technologies, and creating companies, gives us a unique perspective on solving the challenge of increasing participation of underrepresented classes in the United States patent system.

As the USPTO seeks to understand how to improve the number of women, minorities, and veterans who attain patents, and how those patents will affect aforementioned individuals, we urge the office to closely examine the experience of independent inventors like ourselves and consider improving the enforceability of those soon to be issued patents. The experience of women, minorities, and veterans who attain patents will closely model the experience of all independent inventors and small business owners. Additionally, we offer the comments from independent inventors since Congress has repeatedly expressed its interest in hearing from all underrepresented classes and stakeholders in the patent system.

The current system virtually precludes success for underprivileged classes who hold patents. Women, minorities, veterans, along with all small businesses and independent inventors, after attaining patents, are unable to achieve fair licensing agreements with large institutions, and if their ideas are stolen by similar large companies with deep pockets, the patents holders are incapable of footing the enormous legal bill with slim likelihood of success.

Instead of providing a chance for underrepresented and underprivileged individuals to move up the social ladder, involvement in the patent system is more likely to drag them into unwinnable battles that will drain their life savings and leave them utterly destroyed. It is crucial that the legislative recommendation from the USPTO at the conclusion of the SUCCESS Act Study include protections for independent inventors that restore to them enforceable exclusive rights as promised in the patent grant.

Answers to Federal Register Notice Questions

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(1) What public data are available to identify the number of patents applied for and obtained by women, minorities and veterans?

We are not aware of any public data, but we can utilize our network of several thousand inventors to facilitate surveys to gather this data.

(2) What public data are available to assess the social and private benefits that result from increasing the number of patents applied for and obtained by women, minorities, and veterans, as well as small businesses owned by these groups?

We recommend the Democratization of Invention by Zorina Khan. Professor Adam Mossos also has published works relevant to this question.

(3) What social and private benefits would you identify as resulting from increasing the number of patents applied for and obtained by women, minorities, and veterans?

In its current form, the Patent System unfortunately provides no benefit to patent holders and often proves detrimental to the livelihood of inventors. The experiences and opinions of inventors represented by US Inventor tell a bleak story. We, the very individuals who believe that innovation is the foundation of a successful and developing society, that intellectual property rights are what allowed the United States to be the leader in innovation for so many years, we who want to share our ideas to make the world a better place, cannot recommend in good faith that anyone, especially those of underprivileged classes, file for a patent with the USPTO.

U.S. Representative Hank Johnson, Chair of the U.S. House Subcommittee on Courts, Intellectual Property, and the Internet was exactly right when he said in his opening statement at the Oversight of the U.S. Patent and Trademark Office hearing on May 9, 2019,

“A strong patent system requires clear rules, which lead to *reliable patent grants* that attract the investment needed to turn a patentable innovation into a marketable product or service.”
(<https://judiciary.house.gov/legislation/hearings/oversight-us-patent-and-trademark-office>)

Patents, as currently issued by the USPTO, are not reliable and therefore cannot attract the investment needed. That is a serious issue that must be addressed but is only the beginning of the nightmare for inventors. Inventors who do not yet understand the detrimental effects of recent changes to the patent system, find ways to fund their invention independently. This often means pulling money from retirement or college funds, borrowing from family members, and mortgaging property. If a product is finally brought to market, that should be when things finally start to improve, but it only launches the inventor into the next battle. Established companies will want to use the inventor's product, and due to the state of the patent system, it is far more efficient for the company to simply steal the idea and beat the inventor in court than to work out a licensing agreement. The infringer simply has to stretch out the legal battle until the inventor runs out of money.

To further afflict the inventor, the infringer will often file for an *Inter Partes* Review. According to the *2017 AIPLA Report of the Economic Survey*, the estimated mean cost of a post- grant proceeding through

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appeal runs at \$450,000. Since there is no monetary compensation for prevailing patent holders in the PTAB, the cases cannot be taken on contingency, so it is up to the inventor to fund the trial in its entirety. How many underrepresented and underprivileged individuals under consideration through the SUCCESS Act will be able to fund even a single IPR? Even if they are able to fund the review, their chance of surviving is almost nonexistent with incomprehensibly high PTAB invalidation rates.

Attempting to enforce a patent is so expensive and has such a low chance of success that inventors are only successful if their patent is never infringed upon, in which case, they never needed to file for a patent at all. Encouraging women, minorities, and veterans to attain patents with the patent system in its current state is irresponsible at best.

(4) What social and private benefits to small businesses owned by women, minorities, and veterans would you identify as resulting from increasing the number of patents applied for and obtained by those businesses?

If Congress will implement the legislative recommendations herein to restore reliable exclusive rights to inventors, then broad participation in the patent system will reap untold benefits. That is a primary factor that made us the most innovative and wealthy nation in history. In America from 1790 to 2006 anyone could be an inventor and hold reasonably enforceable rights to their technologies. Today, only the wealthiest corporations can afford to enforce a patent. Lack of enforceability has had a chilling effect on licensing opportunities for inventors, as prospective licensees have learned that their competitors do not respect the patents. Many inventors have struggled to obtain reasonable terms for licenses or have had license terminated or breached because of inability to enforce the patent rights against a third party. Worse are the many cases where a well-heeled competitors absconded with an invention and driven an inventor-founded operating company out of business.

Once reforms are implemented to restore respect for patent rights, inventors of all means will again engage and have access to capital to develop and commercialize new technologies. Society and the United States will benefit from a bounty of innovation that will improve our standard of living and international competitiveness.

(5) Should the USPTO collect demographic information on patent inventors at the time of patent application, and why?

Response pending.

(6) To what extent, if at all, do educational and professional circumstances affect the ability of women, minorities, and veterans to apply for and obtain patents or to pursue entrepreneurial activities?

Response pending.

(7) To what extent, if at all, do socioeconomic factors facilitate or hinder the ability of women, minorities, and veterans to apply for and obtain patents or to pursue entrepreneurial activities?

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Socioeconomic factors are the distinguishing factor between independent inventors, including women, minorities, and veterans, and large corporations. Recent changes to the patent system like the AIA have had the unintended consequences of making success through U.S. patents only possible for the powerful and rich. For hundreds of years, the U.S. Patent System provided an opportunity for anyone, regardless of race, class, or background, to compete in the established market. An inventor would release their work for the public to learn from, and in exchange would receive “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States of America or importing the invention in to the United States of America.” Those exclusive rights are currently only attainable for wealthy and politically influential entities.

(8) What entities or institutions, if any, should or should not play an active role in promoting the participation of women, minorities, and veterans in the patent system and entrepreneurial activities?

US Inventor is willing and qualified to assist.

(9) What public policies, if any, should the Federal Government explore in order to promote the participation of women, minorities, and veterans in the patent system and entrepreneurial activities? Are there any public policies that the Federal Government should not explore?

The PTAB has created chaos in the patent system and has upended the reliability of patents. The USPTO should not be working against inventors. Even if an inventor is in the very small minority who retains their patents after a PTAB trial, the issues of gang tackling, serial attacks, and business models such as those that use surrogates to challenge patents without having time bar limitations means that a patent can never truly be depended upon. Validity of inventor-owned patents should be tried exclusively in Article III courts, unless agreed to by the patent owner.

In the 2006 eBay decision, the Supreme Court held that in most circumstances a patent cannot prevent an infringer from using the invention. The inventor has no say in who gets to use the invention and what they do with it. The inventor cannot determine the price, quality, brand, features, materials, factory location, working conditions, environmental sustainability, or any other concern on his own invention. Indeed, the inventor is compelled to grant the infringer a license for a royalty amount determined by the court. The *eBay* decision should be overturned, and the court should issue an injunction ordering the infringer to stop using the invention until they have obtained a license negotiated in good faith with the inventor.

Current law limits most inventors who win in court to only a “reasonable royalty”, which in many cases does not cover legal fees and is too little to serve as a deterrent against large corporations with deep pockets. Large corporations simply ignore patents, knowing that few inventors can afford the millions of dollars and many years required to enforce their patents in court. In the rare case that an inventor survives the legal gauntlet, the infringer usually is ordered to share only a small percentage of their profits with the inventor while keeping the rest for themselves. Without penalties infringing is much more profitable as a business strategy than inventing. To restore fairness and respect for patents, infringers should not be allowed to keep their profits made from someone else’s invention.

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(10) What action could USPTO take to address the participation of women, minorities, and veterans in the patent system and entrepreneurial activities?

The PTO should establish procedures to ensure they can rely on their issued patents and that they are not challenged within the agency after grant.