POLITICAL COMMENTARY

Innovation and Policy Collide

New patent legislation is a step in the wrong direction for our country

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With the recent passage of the America Invents Patent Reform Act of 2011, federal policy is now ripping apart the very thing that it purports to mend: innovation.

The deep pockets of international law firms specializing in patent law, along with large multinational corporations, won out over objections from, well, the rest of us.

The negative ramifications for small businesses, entrepreneurs, independent inventors and technical professionals cannot be overstated.

The primary cause for alarm is the change from a "first-to-invent" to a "first-to-file" system for granting patents. This change radically favors large corporations with well-established internal patenting procedures, in-house patent attorneys and deep pockets so that they can file for a patent multiple times for a single invention, at every stage of development.

Until now, small businesses were protected under the rule of "prior art" logbooks providing evidence of "first-to-invent."

Furthermore, the practice of a private disclosure one-year grace period to file gave time to validate marketability of the invention prior to raising investment capital. This has been a pillar of America's success in innovation because not as well-funded innovators had a better chance to compete by filing a single time for a well-developed invention.

There is no doubt that this change will substantially increase the filing costs and will result in small-business innovators losing the race to the patent office.

There is also little doubt that individual inventors will have a much tougher time protecting their ideas as they shop for partners, collaborators and investors.

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Proponents claim that "first-to-file" brings the U.S. into harmony with the practices of most other patent-granting nations in the world. And that is a benefit … how? The National Association of Patent Practitioners said it best: "America's patent system has always focused on the needs of inventors, not bureaucracies. For 200 years, it has demonstrated its singular ability to foster and grow the country's small-business inventors, to help America achieve its status as the global leader in technological innovation and job creation. Changing U.S. patent law to be like the less-successful patent systems of Europe and Asia cannot be regarded as positive 'reform.'"

But wait! There's more. The authors of this legislation did not stop there in gutting America's culture of innovation by "the little guy." In addition, a new extension of post-grant review processes provides additional tools for a well-funded patent infringer to destroy the startup business patent holder. Expanded discovery and multiple oppositions could easily exhaust the startup's financial resources long before the infringement suit would be heard in federal court. From an investor's point of view, this unknown greatly increases the risk and will likely result in less investment in small-business innovations.

Innovation is an almost fragile, inter-related cycle that can be easily broken. Innovation is rooted in the evolution of a creative idea.

The evolution of a creative idea produces inventions. Inventions provide plentiful opportunities. Opportunities produce economic growth … along with more creative ideas. Innovation thrives on interaction, borrowing existing concepts, give-and-take and information sharing.

Everything about this legislation is the antithesis of these principles. Instead, it provides an incentive—some would say an imperative—for people to keep their inventions secret.

Certainly, our patent laws needed some updating, primarily to address the huge three-year backlog of patent applications. But this legislation got it wrong, very wrong. **KCB**

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