

## **'First to file' is threat to job creation**

By Henry R. Nothhaft - 02/25/11 01:06 PM ET

Isn't it about time Congress stopped passing laws without knowing what impact passage will have on our economy? Here's a case in point: the most dramatic of the "patent reform" provisions Congress is now considering, namely, the switch from granting patents to the "first to invent" to the "first to file."

When a Congressman asked experts during a hearing last week about the impact of "first to file" legislation on the U.S. economy, the sobering answer was "No one knows."

Here's what I know: this change will cripple job creation in the United States and lead to even more economic advancement from our overseas competitors.

How do I know? As a Silicon Valley entrepreneur and CEO for more than 35 years, I have built five startup businesses into market leaders—from the first public email and data network (Telenet) to the first smartphone with social-networking capability (Danger). My companies have created more than 6,000 jobs while returning \$8 billion to investors.

As multiple studies have discovered—including one from the Kauffman Foundation—small startups are the source of all net job growth in this country.

Key elements of patent reform legislation under consideration in Congress would, in fact, weaken startups and inhibit their job creation powers by ending our nation's historic practice of giving a patent to the first person to invent a new technology and give it instead to the first to file a patent application for it.

A "first to file" system may prove beneficial to established corporations like my own, which are financially and professionally better situated to quickly file patent applications and thereby beat smaller, less sophisticated inventors and startups. But is that good for the U.S. economy? Without patents, most entrepreneurs cannot attract the venture funding they need to scale up R&D, hire people and commercialize their new products and medical advances for society.

Proponents of "first to file" argue that this bill will harmonize the U.S. patent system with those of Europe and Japan, paving the way for a unified patent system worldwide.

I like harmony - who doesn't? But if ever there was a case to be made for American exceptionalism - for going our own way in the world - it's in the field of patent law.

That's not just my opinion. It was the opinion and decision of America's founders.

When devising our government, they studied European patent systems, and noted a tendency to reinforce the wealth and prerogatives of elites rather than the welfare and productive capacity of the whole of society. At the time of the U.S. revolution, patent fees were 10 times the per capita income of British citizens.

That type of system wasn't just an affront to the founders' democratic instincts. The United States had no industry to speak of, and was dependent on imports. If our young nation was

to industrialize and survive, some way had to be found to unleash the creative and productive potential of America's only asset - its enterprising and independent-minded citizenry.

That's why the founders very deliberately (historians B. Zorina Khan and the late Kenneth Sokoloff say "quite self-consciously") constructed a patent system to do what none had ever done before: unleash the inventive genius and entrepreneurial energy of the common man.

The first patent law in 1790 set patent fees to a level any ordinary citizen could afford - less than 5 percent of the rate in Britain. They also restricted patents to the "first and true inventor" rather than a corporate entity or anyone who got to the patent office first. And by other means as well - including allowing anyone applying for a patent to do so postage-free - they created a patent system that encouraged innovation on a mass scale.

The result? Only 13 years after the first patent law was enacted by Congress, America had surpassed Britain - until then the leader of the industrial revolution - in the number of new inventions patented, even though Britain still had twice our population. By 1865, the per capita patenting rate in the United States was three times that in Britain.

As historians Sokoloff and Naomi Lamoreaux wrote: "Observers attributed much of [America's] rapid technological progress to its distinctive patent system. Quite revolutionary in design at inception, the U.S. patent system came to be much admired for providing broad access to property rights in new technological knowledge. These features attracted the technologically creative, even those who lacked the capital to directly exploit their inventions."

The secret of America's success wasn't some "Yankee ingenuity" gene in our hereditary stock. It was a patent system geared to the needs of entrepreneurial innovators that enabled the United States to become the most powerful economy on earth. This astonishingly successful preference toward entrepreneurs in our patent system may be threatened by a first-to-file system, about which we know very little.

When Canada shifted to a first-to-file system in 1989, researchers noted that it "skewed the ownership structure of patented inventions toward large corporations and away from small businesses."

And that would be a very bad outcome. As Kauffman Foundation economist Tim Kane noted, "When it comes to U.S. job growth, start-up companies aren't everything. They're the only thing."

America is the world's most innovative nation. Why risk that by weakening the incentives for startups?

*Henry R. Nothhaft is chairman and CEO of Tessera, a semiconductor miniaturization firm, and the author with David Kline of "Great Again: Revitalizing America's Entrepreneurial Leadership," to be published by Harvard Business Press in June, 2011.*