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Playing a Dangerous Game With Job Creation

By Henry R. Nothhaft

As hearings on patent reform opened in the House of Representatives March 30, Americans were treated to a rather ironic spectacle.

Representatives of some of the largest companies in the world testified that the [new patent reform bill](#) will enhance job creation in America. Yet the one and only group that actually creates all new job growth in the U.S. and could challenge those claims — i.e., startup entrepreneurs and small businesses — was not invited to speak.

Too bad. Because if only Congress and the American people could hear the voices of entrepreneurs, they might learn how key elements of this new patent reform bill will in fact enrich the giant technology multinationals at the *expense* of American job creation.

Take the patent bill's plan to end our nation's 221-year-long practice of granting a patent to the "first and true inventor" and give it instead to those who get to the patent office and file their applications first — usually those with large financial and legal resources.

The problem with replacing "first to invent" with "first to file" is not simply that it tramples upon the core American belief in merit which holds that the person who actually invents something first ought to own the rights to it. This measure will also reduce a patent system [expressly designed by the Founders](#) to serve small business inventors into one in which Big Business has the advantage and entrepreneurs are shut out. This cannot help but stifle job creation and undermine U.S. technological and economic leadership in the world.

Why? Because as multiple studies [old](#) and [new](#) confirm, only small startups create new industries and the millions of jobs that go with them. Indeed, over the last century, virtually every new industry was launched not by a big established firm but by entrepreneurial innovators.

There are the auto and aircraft industries, rocketry, acrylics, the radio industry, the television industry, power steering, the helicopter, cellophane, air conditioning, instant cameras, magnetic recording, fluorescent lighting, radar, safety razors, stainless steel, and more recently, the semiconductor, computer, software, biotech, and Internet industries that underlie the modern global economy. And that's just a partial list.

All these industries were created by startups, many of whom used their precious patents to secure funding from venture investors — and then used that funding to hire the people needed to develop the new products, services and medical cures that constantly refresh U.S. prosperity.

As a high-tech entrepreneur and CEO for more than 35 years, I have seen this process first hand. In fact, our "first to invent" patent system with its accompanying grace period enabled several of the startups I built into market leaders to ration their limited resources for only the most crucial patenting needs, creating thousands of new jobs as a result.

Most entrepreneurs will tell you the same thing. Steve Perlman, for example, holds 200 issued and pending patents and his inventions are found in most computers and mobile devices today. He explained his opposition to "first to file" in a letter to Senator Dianne Feinstein last month during Senate hearings on the patent reform bill.

"A large part of invention," Perlman explained, "is trying out a vast number of ideas (such as Edison with thousands of light bulb filaments, or the Wright brothers with many wing shapes)." He cited as an example his own company's invention of MOVA Contour, an Academy Award-winning visual effect used to alter the Brad Pitt character's appearance in the 2008 movie "The Curious Case of Benjamin Button."

"In total, about 100 inventions were conceived over the five years of development, but only six inventions were actually used in the final system and those are the only inventions for which we filed patents," Perlman explained. He insisted that the "first to invent" patent system gave his firm the time not only to determine which were the best inventions to pursue without squandering the firm's precious resources, but to secure venture funding as well.

Under the proposed "first to file" system, however, large firms with billion dollar R&D budgets will be able to flood the patent office with a tsunami of applications, becoming in effect "patent factories" and clogging an already-backlogged patent office even further. Patent office director David Kappos has already conceded that even the current backlog results in "jobs not being created, life-saving drugs not going to the marketplace, companies not being funded."

How much worse will it get under "first to file?" Hard to say, but it's sure to worsen the patent office backlog and sound the death knell for thousands more promising startups.

Proponents of "first to file" argue that "harmonizing" America's patent system with those of Europe will lead to efficiencies. Perhaps, but one has to ask: At what cost? Put another way, How many of the great new industries of the last century were invented in Europe?

Not many, if any. That's because the corporate-dominated innovation environment in Europe is very different than the entrepreneur-centered innovation ecosystem in America.

As Brad Pedersen and Vadim Braginsky observed in the [Minnesota Journal of Law, Science & Technology](#), "The U.S. patent system, with its first-to-invent standard and lower costs ... enables and encourages participation at the grassroots level by players who do not necessarily have any significant market presence or financial resources."

"In contrast," the authors note, "the European Union patent system with its first-to-file system and its higher costs primarily exhibits characteristics of a centralized innovation reward system. [Its aim] is to lower the adoption costs for new innovation by encouraging the [incumbent] players to improve and expand their technologies."

I'm all in favor of world harmony, but let's not forget that America developed the most successful economy in the world precisely because we went our own way in 1790 and created the world's first and only democratized patent system. Indeed, "much of [America's] rapid technological progress [was due] to its distinctive patent system," noted economic historians Naomi Lamoreaux and the late Kenneth Sokoloff. "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 capital."

Isn't this the kind of meritocracy that America is all about? Why should we change a system that has worked astonishingly well for over two hundred years?

I submit that we can live with the minor inefficiency of different patent systems in the world. What we cannot live with is any change in our system that would undermine the proven wellsprings of American job creation and prosperity — small start-ups and independent inventors.

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