Hatch's Attack on Inventors' Constitutional Rights

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Fast track for NAFTA expansion, Most Favored Nation status for China, and foreign aid are all issues that pit the internationalist ideologues and multinationals against grassroots Americans and small business. But the issue that marks this division most clearly is the Ominous Patent bill (oops, the Omnibus Patent bill), S. 507.

The United States has produced more than 90 percent of the world's inventions because our patent system is superior to every other country's. Other countries that want to steal or copy our technology, and the multinationals that want to curry favor with foreign markets, are demanding that we change our system.

Senator Orrin Hatch's sponsorship of this bill is one more instance of his puzzling lurch to the left, along with collaborating on Kennedy KidCare and expediting Clinton's liberal court nominees. Hatch has rushed a slightly amended S. 507 through his Judiciary Committee.

Senate Small Business Committee Chairman Kit Bond (R-MO) is circulating a Dear Colleague letter pointing out that, even as amended, S. 507 will "jeopardize the value, certainty and protection of the American patent, threatening the ability of independent inventors and small businesses to continue their incredible work." Here is why:

(1) Hatch's bill would greatly expand the procedures for reexamination of all existing patents, making it much easier for foreign and domestic corporations to challenge a patent immediately and invalidate patents already issued. This would dramatically decrease the existing rights of all current U.S. patent holders.

Challenging and defending a patent are very expensive processes. Forcing the inventor to defend his patent in a second examination puts a very costly burden on inventors and small businesses and would be a significant advantage to deep-pocket corporations. As Senator Bond explains, this "will destroy the certainty of a patent that is critical for the small guy to attract investors."

(2) Hatch's bill would undercut our whole patent system by creating a new defense for patent infringers called "prior use." This would exempt from the payment of royalties an infringer who asserts he was using the idea before it was patented, thereby diluting the U.S. patent holder's constitutional "exclusive right."

Small businesses that have spent time and money creating a new idea and bringing it to market would thus have the value of their patent dramatically reduced. The advantage would shift to the big firms that poach on the ideas of individuals, then use large legal resources to avoid the patent process and the payment of royalties.

(3) Hatch's bill would change the patent office from a government agency to a corporation with an outside board of directors and employees excluded from civil service. Hatch's big-business bias is painfully obvious: the text of S. 507 actually states that the directors shall include "individuals" (in the plural) with "achievement" in "corporate finance and management."

In his amendment, Hatch agreed to allow one member of the board to be an independent inventor; but, as Senator Bond points out, no space is reserved for a small-business representative. Hatch's gesture is tokenism, and it certainly does not protect inventors' rights.

The bill would even allow corporations to influence the patent office through "gifts" (a.k.a. bribes). Hatch bragged in his press release that he "accommodated the Administration" by "fend[ing] off the unjustified but politically appealing attacks on the corporation's gift provision."

(4) Hatch's S. 507 as originally introduced would have eliminated our traditional rule that all patent applications remain secret unless and until a patent is actually issued. Although the amended S. 507 now includes a limited exception for U.S. inventors willing to forgo applying for a foreign patent, early publication was and is the primary goal of the extraordinary lobbying effort to change our patent system being made by the Japanese, the multinationals and the Clinton Administration.

Senator Bond accurately points out that the initial secrecy about an invention is "the cornerstone of our patent system" because it preserves the property right of the inventor until he gets his legal rights recognized in a patent. Publication of the details of an invention before a patent is issued would set it up to be stolen by infringers and copycats all over the world who are, as Bond says, just "waiting around for American ideas to take to market."

The game plan of the lobbyists for the foreigners and multinationals is to use the newly created corporation, with a board dominated by big-corporation types, to accomplish the same goal through regulations that never go through Congress.

Last year, FDA Week exposed that Patent Commissioner Bruce Lehman had made a deal to give the Chinese the entire U.S. patent data base on magnetic tapes, including five and a half trillion characters of information with technical drawings and chemical formulations. Americans have to pay to get this data, but Lehman wanted to give this multi-million-dollar American asset free to the Chinese.

Senator Bond says that S. 507's changes in our patent system would have "enormous consequences." Indeed, they would. The consequences are all bad, and S. 507 has no redeeming value.