# Patent Act Is Dangerous to U.S. Security

by Phyllis Schlafly May 20, 2011

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More and more dangerous effects of the proposed changes to U.S. patent law (S.23, H.R.1249) keep emerging, especially since the hearings failed to hear from any real inventors. The proposed bill is unconstitutional, an attack on our national security, and an offense against the rule of law.

By awarding patents to the First-to-File an application with the bureaucracy instead of to the First-to-Invent, the proposed bill will deprive inventors of their constitutional property right set forth in Article I, Section 8. U.S. law has always awarded patents to real inventors, not to paper-pushers.

An important letter sent to House Speaker John Boehner (R-OH) from the 15-member Inventors Network of the Capital Area describes how the proposed patent bill "threatens all individual and corporate Research & Development in America, the backbone of our national defense and economic security." Here is how this racket will work.

Inventors don't usually give birth to their inventions like the Greek goddess Athena, who was born fully grown and fully armed out of Zeus's head. The Wright Brothers required many experiments as they tried wings with different angles before they were ready to patent heavier-than-air flight.

The proposed patent bill will enable Chinese hackers to steal U.S. innovation secrets while they are in development, then file an application with the U.S. Patent Office under First-to-File, and thereby own new U.S. technology instead of merely stealing it. Owning the patents will enable China legally to take away ownership rights and profits from Americans who actually invent new technologies.

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Defense technologies would be a prime target of this threat. The First-to-File provision of the Patent Act would become the most effective weapon in China's arsenal and would threaten our national security in a new and ominously dangerous way.

National security expert Adam Segal testified before the House Foreign Affairs Subcommittee on Oversight and Investigations about the dangers from Chinese cyber espionage, massive theft and piracy, and the policy called "indigenous innovation," which requires technology transfer in return for market access. He said, "it is clear that the United States must do more to defend itself."

Since 1870, U.S. law has provided a grace period of one year between the date the invention is disclosed and the date the patent application is submitted. This grace period gives an inventor a year to perfect his invention, to sort out better from inferior features, to raise capital, to gather partners, and to field test the invention before the deadline for filing a patent application.

This grace period is very important to independent inventors, small companies and startups. It permits them to delay the costs of filing until the invention is evaluated, a decision is made as to whether it is worth spending money on, and investment capital is raised.

The proposed bill redefines the grace period in a way that is hostile to small inventors and small businesses because it states that any disclosure of the invention by anyone other than the inventor at any time, even within that first year, will bar the real inventor from getting a patent. Weakening the grace period thus poses an enormous risk to the most innovative sectors of our economy.

Another outrage of the proposed patent bill is the provision that subjects to expensive new litigation and retroactively attacks the patent on the check-clearing system which enables banks to return photo-images to their depositors rather than actual canceled checks. This new system saves the banks millions of dollars because they no longer have to truck the checks physically to other banks to be cleared.

This system was created by inventor Claudio Ballard, who received a patent for it, survived post-grant review, and won expensive court battles when he defended his patent against infringement by the banks. After all that, the new patent bill (ignoring the principle of res judicata -- the thing is already decided) sets up an unprecedented procedure to overturn the patent office and court decisions, giving the banks another chance to invalidate Ballard's patent.

A 15-page letter to Congress from Prof. Richard A. Epstein, the nation's foremost authority on property rights, explains how the "stacked procedures of Section 18" in the bill are designed to let banks use Ballard's invention without paying him for it. Epstein, who wrote the book on "Takings" under the Fifth Amendment, says Ballard deserves just compensation for the use of his patent.

Altogether, the proposed bill, mischievously called "patent reform," is a bad, dangerous and dishonest bill that must be defeated if we care about respecting the Constitution, inventors' property rights, and American leadership in innovation.