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Hostile Environment for Inventors Harms the Economy

The United States patent system is under a lethal attack by large multinational corporations who benefit from weak patent protection. Congress, the administration and the courts have been misled by these multinational corporations, and are changing law in ways that wipe out inventors under misguided patent reforms. As a result, a primary foundation of the great American economic engine is crumbling. If we do not act, we will all pay dearly for this historic blunder.

In the past decade, the patent system has been turned on its head. Inventors are now villains called "patent trolls" simply because they assert their hard-earned patent rights against corporations who steal their inventions. A crafty theme has emerged suggesting that our national innovation ecosystem is somehow fostered by a permissionless ecosystem where speed and market power cover up corporate piracy of inventions. Infringing corporations, who only a few short years ago were considered "patent thieves," are today successfully portraying themselves as our innovators. Many of those same infringing corporations created this false "patent troll" narrative with fabricated information[1] by engaging high-powered lobbyists and public relations firms to hijack the airwaves with loud attacks on inventors, thus driving over a decade of continuous patent reform.[2] This highly vocal concoction of myth, media and money has silenced all other voices.

It is inventors, small patent-based businesses, research labs and universities (collectively – inventors) that suffer the brunt of patent reform damage.[3] Most inventors lack a means of voicing their objections due to lack of organization, funding, knowledge, relationships or experience. Many are just too busy inventing to pay attention. For most, the damage remains unknown until they attempt to either commercialize or license their inventions and then find it impossible protect their invention in the market it created. Thus, lawmakers and courts do not hear their objections and continue with more and more damaging reforms.

Patent driven innovations cure deadly diseases, solve world energy problems, defend freedom, entertain us, and improve things we already use. They also fuel most of our job creation and generate much of our national wealth. However, reforms to date have dramatically harmed all of those economic and social benefits. Today, patents can take 10 years or more to be granted by the Patent and Trademark Office (PTO). Secret PTO programs can delay pioneering inventions indefinitely without

[1] See http://www.independentinventorsofamerica.org/proposedlegislationfinal.pdf, page 6
[2] See http://www.opensecrets.org/news/2011/02/google-facebook-lead-new-generation/
[3] See http://thehill.com/blogs/congress-blog/technology/204995-patent-reform-legislation-will-hurt-the-american-inventor

informing the inventor.[4] New laws have created alternate ways to invalidate issued patents at rates above 75%[5] and have made it extremely difficult and risky for inventors to enforce patent rights. The Supreme Court has thrown the definition of what can be patented into chaos – it is now unknown. The net effect of patent reform to date has been to rip the floor out from inventors for the benefit of large moneyed corporations who steal inventions.

In the last two years, the gross value of patent sales is down 83%, the number of patents sold is down nearly 50%, and the average price per patent is down about 55%.[6] New patent suits have dropped by as much as 40% in one year.[7] Most of that drop is in software inventions,[8] a very important American industry that feeds innovation in every other industry.

Today, public companies risk massive patent asset write-downs[9] – collectively, these companies may be forced to write down trillions of dollars in patent assets from their books.[10] Asset write-downs on this scale have the potential to crash the economy and send us into yet another recession. All of this is happening in the U.S. while other countries, like China, strengthen their own patent systems to grow their economies. [11]

Not surprisingly, more U.S. companies are going out of business than are starting up for the first time in American history.[12] We are killing the very engine that made the United States the greatest economic power in history.

Perhaps we should take a closer look at what we are losing.

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[4] See https://www.scribd.com/doc/249032641/SAWS-FOIA-Response

[5] See supra at 10

[6] http://www.ipwatchdog.com/2014/12/11/is-the-patent-market-poised-for-rebound-in-2015/id=52593/ A quote from Richard Baker, a senior IP licensing executive who is on the Board of LES, "the dollar value of patent sales are down 83% and the number of patents sold is down about 50%, and this is just in the last two years, but the most striking piece of data is that the average price per patent has gone down about 55%. So you a dramatic drop in value."

[7] See http://www.law360.com/articles/585536/new-patent-suits-drop-off-sharply-from-last-year

[8] See DECEMBER 2014/JANUARY 2015, WWW.MANAGINGIP.COM, Software patent lawsuits plummet after Alice. This report contains parts 1 and 2 in a series of in-depth articles by Managing IP covering recent trends in patent litigation.

[9] See http://www.journalofaccountancy.com/Issues/2005/Nov/ValuingIpPostSarbanesOxley.htm

[10] See http://www.i4ilp.com/court/2011-03-17%20AmiCOUR%20IP%20Group%20Amicus%20Brief.pdf

[11] See http://english.sipo.gov.cn/news/official/201402/t20140226_907949.html and http://www.managingip.com/Article/3384964/China-patents-How-specialised-courts-will-affect-patent-cases.html and CHINA'S IQ (INNOVATION QUOTIENT) TRENDS IN PATENTING AND THE GLOBALIZATION OF CHINESE INNOVATION, REUTERS September 2014

[12] See http://www.washingtonpost.com/business/on-small-business/more-businesses-are-closing-than-starting-can-congress-help-turn-that-around/2014/09/17/06576cb8-385a-11e4-8601-97ba88884ffd_story.html

The Patent Act of 1790, only the third Act of Congress, granted patents to "he, she, or they" at a cost that even a pauper could afford.[13] At a time when women and African Americans could not own property, both could own patents… and both did. In 1809, Mary Kies became the first woman patentee for her invention related to weaving straw hats. In 1821, Thomas L. Jennings became the first African American patentee by inventing a method of dry scouring clothes. Granville Woods, the "Black Edison", patented dozens of railroad related inventions in the late 19th century.[14] During the 1800's, some 3,300 women patented 4,196 inventions and many made their full living by licensing their inventions.[15] The U.S. patent system leveled the field for all regardless of race, gender or economic status.

The U.S. patent system fueled the greatest economic expansion in the history of man, propelling America to lead the world in virtually every technology revolution from potash processing to the several we are in right now. The U.S. patent system is a core American ideal enshrined in the Constitution itself. It creates value not only to individuals, but also to the economy overall bringing innovations that create national wealth, improve our quality of life and provide an abundance of jobs.[16]

To understand why so much damage has occurred, it is necessary to understand what a patent is. Article I, Section 8, Clause 8 of the U.S. Constitution is the foundation of a patent in the United States:

> "*To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*"

It wisely created two important constructs, which are now being destroyed. The *Exclusive Right*,[17] written clearly in plain English, is the right to injunctive relief against an infringer, and the *Presumption of Validity,* implied by the nature of the clause and written into black letter law, is the belief that the legal system will uphold the *Exclusive Right*.[18] These two constructs were the true genius of the U.S. patent system. Together they created an *investment grade asset* that could be bought, sold and collateralized for investment, and this created a secondary market for patent assets.[19] The secondary market provided a financial outlet ensuring that inventors and investors could get a return on their hard

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[13] See Patent Act of 1790, Ch. 7, 1 Stat. 109-112 (April 10, 1790) The First United States Patent Statute CHAP. VII. -- An Act to promote the progress of useful Arts.(a) Section 1 and 2

[14] See http://www.biography.com/people/granville-t-woods-9536481

[15] See The Democratization of Invention: Patents and Copyright in American Economic Development, 1790-1920, by B. Zorina Khan, 2005, Cambridge University Press

[16] The national value of our collective patent assets was illustrated in Microsoft v. i4i. Amicus briefs. Some argued the economic losses to the economy might enter the trillions of dollars and disrupt capital markets.

[17] See U.S. Const. art. I, § 8, cl. 8; see also Carl Schenk, A.G. v. Nortron Corp., 713 F.2d 782, 786 n.3 (Fed. Cir. 1983) ("The patent right is but the right to exclude others, the very definition of 'property.'"); Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637, 643 (1947) (stating that the patent right "carries for the statutory period 'a right to be free from competition in the practice of the invention' . . . [and] [t]hat exclusive right, being the essence of the patent privilege, is . . . of the same dignity as any other property which may be used to purchase patents").

[18] See 35 U.S. Code § 282 - Presumption of validity; defenses

[19] See http://cpip.gmu.edu/2013/12/09/the-history-of-patent-licensing-and-secondary-markets-in-patents-an-antidote-to-false-rhetoric/

work and money. U.S. patent acts as a magnet enabling the marriage of capital, invention and people. It is the patent with only two simple constructs, the *Exclusive Right* and strong *Presumption of Validity,* that fueled the greatest expansion of knowledge and economy in history. One has to ask… How can that really work if it is so simple?

The *Exclusive Right* makes elephants dance.[20] Large corporations must innovate faster than their competitors innovate, and faster than a multitude of independent inventors, or else they risk losing the opportunity of a new market. This fuels the innovation race America has been running for over 200 years, which is one of the top reasons why the United States has led the world in virtually every technological revolution since potash production.

For any asset to attract capital investment there must be a reasonable way to project its future value. A future value provides investors with some assurance that their investment will be returned. In the case of patents, the *Exclusive Right* establishes a market value that is directly related to the value created by the patent. Therefore, an investor can reasonably estimate the future value of the patent by estimating the future size of the market it creates, thus making a patent an investable asset.

The *Presumption of Validity* prevents elephants from trampling other dancers. A patent known by all to be legally valid and enforceable compels potential infringers to deal with the inventor before infringing on the patent. While law can establish a *Presumption of Validity*, the courts must act affirmatively to uphold it. If the courts do not, potential infringers assume that the *Exclusive Right* will not be enforceable, and they will infringe without dealing with the inventor. With a weak *Presumption of Validity*, investors have no assurance that the investment will be returned, so few will invest. If an inventor cannot generate capital investment, it is nearly impossible for the inventor to commercialize the invention and create jobs.

The U.S. patent system created other attributes common to all other property rights.[21] A patent's ownership can be transferred from one person to another. When ownership transfers, its *Exclusive*

[20] UNITED STATES v. DUBILIER CONDENSER CORP., 289 U.S. 178 (1933) ("Though often so characterized, a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. The term monopoly connotes the giving of an exclusive privilege for buying, selling, working or using a thing which the public freely enjoyed prior to the grant. Thus a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge.").

[21] See generally 35 U.S.C. §§ 154, 261 (2010) ("[P]atents shall have the attributes of personal property."); see also Patlex Corp. v. Mossinghoff ("Patlex I"), 758 F.2d 594, 599-600 (Fed. Cir. 1985) ("[P]atent property rights, necessarily including the right 'to license and exploit patents', fall squarely within both classical and judicial definitions of protectable property . . . [and] the right to exclude . . . is implemented by the licensing and exploitation of patents."), affirmed in part and reversed in part on rehearing ("Patlex II"), 771 F.2d 480 (Fed. Cir. 1985); Consolidated Fruit-Jar Co. v. Wright, 94 U.S. 92, 96 (1877) ("Inventors are a meritorious class. They are public benefactors. They add to the wealth and comfort of the community and promote the progress of civilization. A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions.").

Right and *Presumption of Validity* transfer with it, thus enabling a secondary market for patent assets. This means a patent can be used as collateral to attract capital investment because any subsequent owner can enjoy the same *Exclusive Right* and *Presumption of Validity* that any previous owner enjoyed.

The true genius of the U.S. patent system is illustrated when a patent standing on its own becomes an *investment grade asset* and is bought, sold, and used as collateral on the secondary market.[22] The secondary market returns the inventor's investment to the inventor. The investor on the secondary market is assured of a return on their own investment because the patent can be sold again on the secondary market or enforced with all of the same rights that the original inventor enjoyed. Because a patent can be bought, sold or collateralized, infringers know that even an inventor who is financially restrained can get capital necessary to compete in the market with a product, or to enforce patent rights against the largest infringers. All of this conspires to assure inventors can get a return for the hard work and money they put into the invention, which encourages inventors to disclose their inventions by applying for patents and enabling others to build upon the invention. Thus, the patent system can "*promote the Progress of Science and useful Arts"* as the U.S. Constitution requires.

These two simple constructs describe a U.S. patent, which enabled the spectacular success of the U.S. patent system for the first 216 years of our history.

However, these constructs have been vividly altered since 2006. Congress, the courts and the administration have damaged both the *Exclusive Right* and the *Presumption of Validity* in several critical ways. Today, patents can hardly attract capital investment and inventors cannot get a return on the hard work and money that goes into the invention. This is killing the patent system and as a result, bringing severe damage to our economy overall.

- In 2006, the Supreme Court in *eBay v. MercExchange*[23] effectively eliminated the *Exclusive Right*. The result is that an inventor cannot exclude others from using their invention because injunctive relief is now highly restricted. Without the *Exclusive Right*, better positioned companies build products with no concern for patent rights. Once a patented invention is widely infringed, a patent that is incapable of injunctive relief is also incapable of attracting investment to practice the invention. If they steal the invention, they keep the market.

[22] See Ronald J. Mann and Thomas W. Sager, Patents, Venture Capital, and Software Startups, 36 Res. Pol'y 193 (2007) (finding significant correlation between patenting and, among other things, rounds of financing, total investment, late-stage financing, firm longevity).

[23] See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) ("That test requires a plaintiff to demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.")

A forced license is the only remaining remedy with an arbitrary value set by a court. Estimating a patent's future value becomes a game of chance and few investors outside of Vegas will risk their money on game of chance.

Since eBay, potential infringers find it advantageous to steal the invention, saturate the market with infringing products, and then litigate the inventor into oblivion or capitulation with an arbitrary settlement. Indeed, attorneys advise their infringing clients to do exactly that.[24]

- The Supreme Court weakened the *Presumption of Validity* with a string of cases leading to *Alice Corp v. CLS Bank* in July 2014. While the Patent Act of 1952 states that "***any*** new and useful process, machine, manufacture, or composition of matter…"[25] is patentable subject matter, the courts legislated that an "*abstract idea*" is not patent eligible. Nobody can define an "*abstract idea*" in concrete terms leaving a trail of incoherent case law. Lower courts try to rationalize prior decisions by the Federal Circuit and the Supreme Court that are themselves inconsistent. The Federal Circuit has the final say on the validity of a patent, so any decision by a lower court will be appealed. However, there is a deep multifaceted split among Federal Circuit judges, so whether a patent is valid or not depends largely on which three judges are drawn. It is not determined by any law or logic… it is a multimillion-dollar crapshoot.

- In 2011, Congress passed the *America Invents Act* (AIA)[26] and destroyed the *Presumption of Validity* by creating new post grant opposition[27] (PGO) procedures, among other damaging provisions. Prior to the AIA, a patent had a strong *Presumption of Validity* in black letter law. Only an Article III court (under the Judicial Branch of government) could invalidate a patent. This was done in an adversarial process. A showing of *clear and convincing evidence*, the highest standard in U.S. law, of a failure to meet statutory requirements of patentability was required. The burden to prove this failure was on the party seeking to invalidate the patent. Only a party to the suit could ask a court to invalidate the patent.

  The AIA changed all that by flipping each construct upside down. A PGO presumes a patent *invalid*. A PGO is initiated by showing the lowest level of evidence in U.S. law - *more likely than not*.[28] An Administrative Law Judge (under the Executive Branch of the government) presides

[24] SLAYING THE TROLL: LITIGATION AS AN EFFECTIVE STRATEGY AGAINST PATENT THREATS, Jason Rantanen, 2007. http://172.218.224.236:8080/pdfs/Rantanen%20%282007%29%20-%20Slaying%20the%20troll.pdf

[25] See 35 U.S.C. §§ 102, 103 (2010). Of course, other criteria for patentability must be met, among them the threshold requirement that the invention or discovery be eligible for patent protection under 35 U.S.C. § 101. See generally Bilski v. Kappos, 130 S.Ct. 3218 (2010).

[26] http://en.wikipedia.org/wiki/Leahy-Smith_America_Invents_Act

[27] Previous papers we called these procedures post issuance procedures or PIP's. Post grant opposition procedures is a more commonly used term. Other terms are PTAB procedures and generically used post grant review. There seems no standard so we decided on the most commonly used in our opinion for this paper.

[28] See http://www.uspto.gov/aia_implementation/bpai.jsp "An inter partes review may be instituted upon a showing that there is a reasonable likelihood that the petitioner would prevail with respect to at least one claim

over a process to re-validate the patent under a "broadest reasonable interpretation" of the claims. The burden to prove again that the patent is valid is placed on the inventor. A PGO turns patent law on its head.[29]

PGO's were established with the clear purpose of increasing the probability that a patent will be found invalid.[30] Today, PGO's invalidate patents at rates near 75%.[31] There is no longer any *Presumption of Validity* in practice and the cost of proving and reproving the patent valid is an enormous and often unsurmountable burden on the inventor.[32] Just one PGO, costing the petitioner around $20,000, can cost the patent holder as much as $750,000.[33] Few investors will help an inventor because the risk of losing is extraordinarily high, in turn leaving the inventor with no access to money. This highly unfair and unjust process can permit an infringer to succeed against an inventor based on access to money alone.

Any non-party can petition for a PGO, and that non-party can remain anonymous. In fact, several new companies were founded for the sole purpose of initiating PGO's against third party patents.[34] Often, these companies engage in extortion-like activities asking for licenses that they can sell to infringing companies or a cut of a settlement with an infringer in exchange for dropping the PGO.[35] [36] The same large multinational corporations who lobbied to pass the AIA, which created the PGO procedures in the first place, fund these companies. [37]

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challenged." "A post grant review may be instituted upon a showing that, it is more likely than not that at least one claim challenged is unpatentable."

[29] See http://www.venable.com/10-reasons-every-defendant-in-patent-litigation-should-consider-inter-partes-review-04-23-2014/

[30] See supra at 29

[31] http://www.ipwatchdog.com/2014/12/10/toxic-asset-the-gradual-demise-of-the-american-patent/id=52571/

[32] Senator Jon Kyl, Remarks at Executive Business Meeting of the Senate Judiciary Committee (Mar. 31, 2009), available at http://judiciary.senate.gov/webcast/judiciary03312009-1000.ram; ("[T]he patentee is at a distinct disadvantage where the only alternatives are to pay the costs associated with an opposition proceeding or forgo his rights under the patent. The repugnance of such a quandary needs no explanation."); Anthony H. Handal, Re-Examination: Some Tactical Considerations—A Private Practitioner's Viewpoint, 9 AIPLA Q.J. (1981) ("[I]t is possible that a number of patents might be lost solely due to the inability of the patent holder to financially deal with the problem." "Like other forms of action under the patent law, the new reexamination procedure is susceptible to substantial misuses."); see also Interview by the Reexamination Center with IP lawyer Taraneh Maghamé (Oct. 12, 2009) (noting opportunities for requesters to abuse the reexamination system and explaining that "[s]uch abuse takes the form of serial reexaminations of the same patent . . . or the filing of non-meritorious requests for reexamination"), at http://www.maghamelegal.com/uploads/The_Reexamination_Center_Executive_Interview_-_Taraneh_Maghame.pdf.

[33] See supra at 29

[34] See https://www.eff.org/files/2014/05/29/hacking_the_patent_system.pdf

[35] See http://www.therecorder.com/home/id=1202678962497/Trolls-Taste-Own-Medicine?mcode=1202615733861&curindex=0&slreturn=20141119235938

[36] See http://interpartesreviewblog.com/curious-case-new-bay-capital-llc-virnetx-inc/

[37] See http://www.irondome.com/

- The AIA forced patent suits against similarly situated infringers to be filed separately. Independent of that, courts sometimes transfer patent cases to jurisdictions closest to the infringer, even where the case was originally filed in the appropriate venue. These factors combine to create the very real possibility that separately filed cases can be reassigned to different geographically dispersed courts each requiring local counsel and each with potential to produce conflicting decisions on the validity of the same patent. This increase in risk and cost severely damages the ability to enforce a patent.

- A patent can take more than 10 years of examination at the PTO before it is granted.[38] In one case, a patent application has been in examination for almost 40 years.[39] A patent term begins on the filing date and ends 20 years later.[40] In addition, a patent cannot be asserted for past infringement in most cases. It is a wasting asset and highly time sensitive. However, most of the time lost in examination is not added to the backend of the patent. It is just lost altogether. Many patents lose a large percentage of their life, and therefore a large percentage of their value, due to PTO delays.

  A PGO can take 18 months to complete. During this time, it is generally not practical to sue additional infringers.[41] Therefore, even more patent life is lost than that already lost in the examination of the patent.

  As early as 2006, the PTO enacted a secret program called the Special Applications Warning System (SAWS).[42] SAWS targets for secret examination patent applications that are "controversial and/or newsworthy" including "applications of pioneering scope" or "applications which would potentially generate unwanted media coverage," among other categories. No information is given to an applicant about SAWS, the application's induction into SAWS, or what the applicant can do to move the application to closure, and SAWS can tie up a patent indefinitely. While all of the SAWS categories are disturbing, delaying an "application of pioneering scope" is antagonistic to the very purpose of the U.S. patent system.[43] If the applicant "is a startup trying to get traction against an established player, they may not get

[38] One of the authors has patents pending more than 12 years.
[39] http://www.patentlyo.com/patent/2014/01/hyatt-v-uspto-three-generations-of-poor-examination-are-enough.html
[40] See 35 U.S.C. § 154 (setting the patent term as 20 years from the date on which the application for the patent was filed).
[41] See http://www.iplitigationcurrent.com/2014/07/21/new-guidance-from-the-federal-circuit-on-motions-to-stay-litigation-pending-a-ptab-proceeding/
[42] See https://www.scribd.com/doc/249032641/SAWS-FOIA-Response
[43] http://www.uspto.gov/about/index.jsp "Under this system of protection, American industry has flourished. New products have been invented, new uses for old ones discovered, and employment opportunities created for millions of Americans. The strength and vitality of the U.S. economy depends directly on effective mechanisms that protect new ideas and investments in innovation and creativity"

funding because they don't get the patent in place. It favors the entrenched incumbent in that space over the person with perhaps breakthrough technology."[44]

When you add all this up, strong perverse incentives have been created encouraging corporations to steal patented inventions, massively commercialize them, and then, if caught, litigate the inventor into oblivion or capitulation. These risks act together to profoundly degrade the investment value of patent assets thereby inhibiting investment in new technologies.

The effects are real and are playing out right now. In the last two years, the gross value of patent sales is down 83%, the number of patents sold is down about 50%, and the average price per patent is down about 55%.[45] The secondary market is collapsing.

In yet another report which studied the period immediately following *Alice Corp v. CLS Bank,* there has been a 28% drop in patent lawsuits compared to the same period in 2013 (July 1 to October 31).[46] Other research reported as much as a 40% drop in patent lawsuits since 2013.[47] This drop hits hardest in two critical areas.

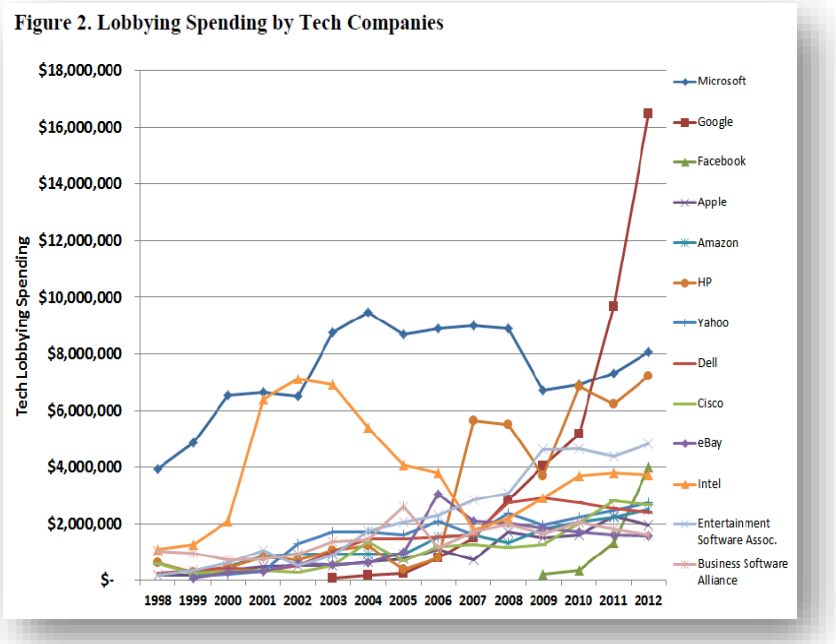
First, 88% of that decrease is attributed to non-practicing entities (NPE) or so-called "patent trolls",[48] which are defined as patent holders who do not commercialize an invention, but instead license the invention to others who commercialize it. While this definition encompasses individual inventors, patent-based businesses, research labs and universities, it also encompasses entities that acquire patents and enforce them. The later are the NPE's that make up the secondary market for patent assets and a critical part of the patent economy. Inventors can sell their patents directly to NPE's so they can continue inventing. Alternatively, inventors can collateralize patents for capital investment to build a company. If the company fails, the patent is often sold to NPE's on the secondary market so investors can get their investment returned. It is obvious that the secondary market is critical to funding the new companies that bring the next big technology to market, thus driving our economy and creating jobs. While this is the target of corporate patent reforms, damaging it not only harms inventors, but it also harms the economy overall.

Second, the number of software patent lawsuits filed was down 42% in the period from July 1 to October 31 of 2014 compared with the same period in 2013.[49] Therefore, the drop in lawsuits directly affects software patents more than any other technology. At the same time, software inventions are

[44] See https://www.yahoo.com/tech/the-u-s-government-has-a-secret-system-for-104249688314.html
[45] See http://www.ipwatchdog.com/2014/12/11/is-the-patent-market-poised-for-rebound-in-2015/id=52593/ A quote from Richard Baker, a senior IP licensing executive who is on the Board of LES, "the dollar value of patent sales are down 83% and the number of patents sold is down about 50%, and this is just in the last two years, but the most striking piece of data is that the average price per patent has gone down about 55%. So you a dramatic drop in value."
[46] See supra at 10
[47] https://lexmachina.com/2014/10/september-2014-new-patent-case-filings-40-september-2013/
[48] See supra at 10
[49] See supra at 10

used nearly everywhere, from your personal computer to your refrigerator, and from your car to your tennis shoes. In 2011, software related inventions accounted for over 50% of all patents issued.[50] Software is a primary area of innovation simply because it is an essential element relevant to nearly everything made today, regardless of whether that software innovation is the actual product or is manifested in an enhancement to a product. When a product does not use software directly, it is software that controls how the product is engineered, manufactured, distributed, financed, marketed, sold and serviced. The software industry created 3.65 million U.S. jobs and contributed $526B to our GDP in 2012, and it is growing at 50%.[51] Software is one of the greatest American industries and one where America leads the rest of the world.

Despite the importance of software to our economy, software patenting is the target of corporate "patent reform" lobbying. These reforms are aimed at preventing creative individuals and small software startups from beating the industry software giants to the punch. Large software corporations have a strong financial resources, large numbers of programmers, market dominance and a sticky customer base. Inventors have none of these advantages. Yet, while large technology corporations have successfully silenced inventors and tilted patent law in their favor with over a billion dollars of political spending in the last decade,[52] they are still not satisfied and seek further reform.



Software innovation will likely continue for decades, and may never end. However, if American software inventors cannot protect new ideas (as is the case today), whether the U.S. continues to lead

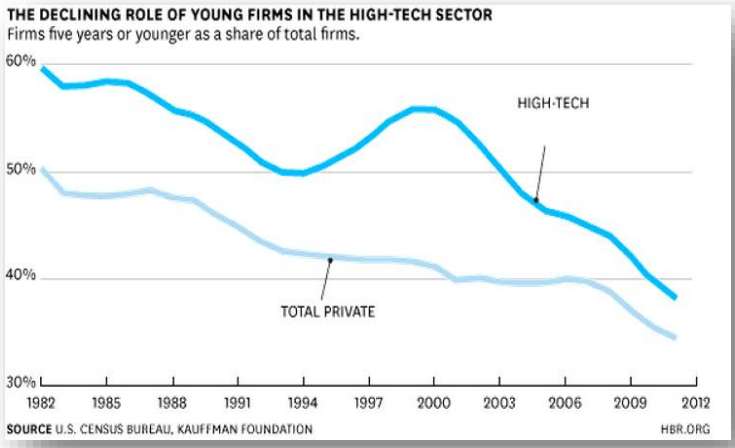
[50] See GAO Report titled INTELLECTUAL PROPERTY Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality http://www.gao.gov/assets/660/657103.pdf

[51] See The U.S. Software Industry As an Engine for Economic Growth and Employment, Robert J. Shapiro, September 2014

[52] WORKING PAPER No. 13-12 July 2013, A HISTORY OF CRONYISM AND CAPTURE IN THE INFORMATION TECHNOLOGY SECTOR, by Adam Thierer and Brent Skorup, Mercatus Center, George Mason University. http://mercatus.org/sites/default/files/Thierer_CronyismIT_v1.pdf , Figure 1

the world in software or is displaced by China is uncertain. In stark contrast to the U.S., China and the rest of the world have been strengthening the *Exclusive Right* and the *Presumption of Validity* for patents in their respective countries.[53] These positive changes are stimulating innovation in those countries and growing their economies.

The U.S., unfortunately, is going in the opposite direction. We are weakening patent protection. Today, we have more companies going out of business than starting up for the first time in our history.[54] It's not surprising that since the creation of the "patent troll" myth and the corporate push for patent reform began in the late 1990's,[55] the number of technology related startups in the U.S. is down nearly 40%.[56]



If we continue down this anti-patent road, the U.S. will no longer lead. China will.

It is important to understand that degrading patent protection for software effects all other types of patents equally. Today medical related patents are damaged in the same way and to the same extent. In fact, some medical research companies have stopped research of key medical related technologies, such as Ebola treatments, in part because patented inventions cannot be protected.[57]

Congress, the administration and the courts all see that the patent system as broken. They are right. It is broken. But not for the reasons they think. The facts have been hijacked by the loud impermeable voices of a few moneyed corporations who benefit from weak patent rights. Those negatively affected, the inventors and the American public, cannot get a word in edgewise. If we continue to enact broad changes under the misguided "patent troll" arguments, we can expect even greater damage to our economy and our standing in the world.

We must go the other way. We must stop weakening the U.S. patent system and we must return it to what it was just ten years ago. Congress must pass laws negating the effects of *eBay vs. MercExchange*

[53] See supra at 11
[54] See supra at 12
[55] http://en.wikipedia.org/wiki/Patent_troll
[56] With Fewer New Firms, the High-Tech Sector is Losing its Dynamism, by Ian Hathaway, February 12, 2014 http://blogs.hbr.org/2014/02/with-fewer-new-firms-the-high-tech-sector-is-losing-its-dynamism/
[57] See http://www.ipwatchdog.com/2014/12/26/can-diagnostics-companies-afford-to-provide-ebola-testing/id=52779/

so that a patent is again an *Exclusive Right*. The *Presumption of Validity* must also be restored by eliminating PGO's and other provisions of the AIA. The misguided "abstract idea" category of patentable subject matter must be eliminated altogether. Lastly, the PTO must be fully funded and better managed.

Without these changes that reset the patent system to what it was just a decade ago, we will become like all other countries – unexceptional. Someone else will lead future technology revolutions. Perhaps that country will be China and our generation will be known for the greatest blunder in history.

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