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Protecting the American Inventor

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The company did what American entrepreneurs have done for centuries. It invented something, patented it and built a business around it. Then, the company's intellectual property was stolen.

Its livelihood under fire, the company sued. But the entities that stole the intellectual property challenged, employing a relatively new legal tactic in the world of IP and kicking off a nasty and lengthy battle. This is an increasingly common situation for American inventors of all sizes, and there is a cruel irony to it: the new technique stems from 2011's America Invents Act (AIA), federal legislation designed, in part, to reduce the overall cost and duration of patent litigation.

Prior to the enactment of the AIA, inventors were confronted with costly and protracted district court litigation when attempting to protect their patent rights. The primary mechanism by which the AIA attempted to address this was the introduction of inter partes reviews (IPRs), which were intended to largely replace traditional patent validity proceedings in district court litigation. In practice, however, IPRs have dramatically increased the cost and overall duration of patent litigation. They have become a popular tool used by well-heeled defendants to overwhelm and outspend inventors who attempt to protect their intellectual property rights.

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A common tactic employed by defendants is to file multiple IPRs challenging the validity of the property rights granted to the inventor by the U.S. government. Often, these validity attacks are filed by multiple parties. As if this were not enough, many challengers file multiple IPRs against each asserted patent and coordinate their IPRs in a manner causing the overall litigation process to become as protracted and costly as possible. In our experience as one of the largest

litigation finance firms in the world, the cost of defending a single IPR can exceed $300,000 and take over a year to complete. These costs increase dramatically when multiple IPRs are filed.

Having funded over 170 patent cases to date, we have witnessed all too often the unintended consequences of the AIA. Defendants have filed multiple IPRs in nearly every patent case we have funded, whether for small to medium size companies, renowned research universities, or Fortune 500 corporations. Overall, our clients have defeated a large majority of those IPR challenges. In one particularly egregious case, the defendants filed 13 IPRs against a single patent, all of which were overcome by the inventor—but not before the inventor was forced to incur millions of dollars in additional attorneys' fees and endure years of delay. Without financial support to fund their cases, many inventors would be unable to protect their intellectual property rights without overwhelming financial hardship.

While critics of litigation finance often bark about the potential for frivolous litigation, the real threat to American inventors is the abuse of the AIA by well-financed defendants. Something needs to change.

Congress and the United States Patent and Trademark Office need to revisit the AIA in light of the rampant abuse of the IPR process, and additional resources must be brought to bear to enable American inventors to protect the valuable intellectual property rights granted to them by the United States government and afforded to them by our Constitution. Fortunately, there is reason for hope. As recently as March 12, Sen. Mazie Hirono, D-Hawaii, questioned USPTO Director Andrei Iancu about the use of serial IPRs by large tech giants to force small inventors to settle for "pennies on the dollar" when seeking to enforce their patent rights. In a specific call to action, Hirono stated that "[e]specially when you're looking at very powerful entities like Apple, Google, LG and others, there should be some kind of remedy to stop them."

We could not agree more. The time for action is now.

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