

Free Enterprise

“Patents and Free Enterprise”

by Dr. Luke Pittaway

Biography: Luke Pittaway is the William A. Freeman Distinguished Chair in Free Enterprise in Georgia Southern University’s College of Business Administration. He teaches entrepreneurship classes in the Department of Management, Marketing, & Logistics. Dr. Pittaway’s research focuses on entrepreneurship education, behavior, and learning and has been published extensively. He may be reached by email at lukepittaway@georgiasouthern.edu.



According to Jonathan Ortman, the president of the Public Forum Institute on May 11, there is beginning to be momentum in Congress for patent reform. He reports that the House Judiciary Committee is examining a patent bill introduced by Judiciary Chairman John Conyers (D-MI) and Lamar Smith (R-TX). In an earlier column I also argued that strong intellectual property rules are supportive of entrepreneurial activity. So, is patent law supportive of entrepreneurship and what needs to change?

Before digging into this issue it is worthwhile reflecting on what a patent is. It is usually perceived to be a right which is granted by a governing authority (e.g., a state) to somebody who has invented a new process, machine, article of manufacture or composition of material or a useful improvement to an existing one. The word comes from Latin and means ‘to lay open’ or make available for public inspection. The concept of a patent has been traced back to ancient Greece but its modern form originated in Venice in 1474 where a new device once put into practice had to be communicated to the government. The English in 1623 focused more closely on the patent as ‘projects of new invention’ and in the early 1700’s developed the requirement that a written description should be submitted. The first US Congress adopted a Patent Act in 1790¹. The concept of the patent then is to protect the investment made by an inventor and his or her supporters so that a return can be made on their efforts, while also allowing the information to be publically available and there is a certain length of time that the patent provides this protection for (20 years in the US).

Whether patents help entrepreneurship or not is often a debated point. It is certainly the case that patents provide an incentive for people to create and make public inventions. Whether entrepreneurs should seek patents rather than stick to secrecy is also argued about. For example, an entrepreneur is best advised to check whether there is market for a product before patenting as it can be expensive to undertake. It is sensible to undertake research of existing patents, to assess the size of the market and to work out costs associated with manufacture before considering a patent. There is no point incurring an expense if there is no market, the market is too small or if the cost to make the device is too high for the market to accept. Even

if a patent is secured entrepreneurs can be at disadvantage from existing often large firm's who use their resources and litigation to pursue infringement cases and block entrepreneurship through their greater resource base even when limited evidence of real infringement occurs. Larger firms also use patent regulation, to protect markets where the patent has dubious merits and extend older patents to protect their existing market position (evergreening).

So the patent system may have some problems in the US (and elsewhere), a system that has been designed to promote entrepreneurship may in fact be creating barriers to it. As well as, spurious litigation, evergreening and doubtful applications the system itself has become overburdened, which has pushed up wait times and driven further litigation of legal presumption of validity from non-deserving applications. So what needs to be fixed?

The Public Policy Forum has some interesting ideas about thisⁱⁱ. They recommend two basic principles: firstly, patents should only be provided for non-obvious inventions and, secondly, the procedures for contesting patents should entail minimal cost. These two principles would lead to some changes: a two tier system where in the first stage applications do not have a presumption of validity; a continuation of discounts for smaller firms; a more cost effective post-grant review process to identify non-deserving patents and the expansion of online peer review of patents to speed up procedures.

It is clear from these issues that the current patent system is perhaps not doing its original job well, that it actually creates barriers to entrepreneurship and is perhaps now being manipulated to protect established firms rather than protect new inventors. Undoubtedly though, if you are an aspiring entrepreneur with a patentable opportunity, the outcome of the proposed patent bill and its progress through Congress will be worth keeping an eye on.

ⁱ Information adapted from Wikipedia <http://en.wikipedia.org/wiki/Patent>

ⁱⁱ See <http://entrepreneurship.org/Resources/Detail/Default.aspx?id=15580> for more information