

Dismantling America's Patent System

by W. Arthur Fisher

Designed to protect the intellectual properties of American inventors, U.S. patent laws are in grave danger of being dismantled. Four bills [House Resolutions (H.R.) 1732, 1733, 2235, and 1659] presently before Congress, if enacted into law, could literally destroy America's patent system as we know it. The bills are crafted to indulge the avarice of multinational corporations and foreign interests.

160 years of patents offered

Since the 1970's vast amounts of U.S. technology and industry has relocated to foreign countries, severely handicapping America's commerce and economy. Now, efforts are underway to make the data on U.S. patent applications available to multinational corporations and foreign governments, in particular Red China, a nation under fire for human rights violations and for the counterfeiting of American made products.

According to *FDA Week* of April 5, 1996 (a report of the Food and Drug Administration), key officials in the U.S. Patent and

Trademark Office (PTO) told *FDA Week* that Patent Commissioner Bruce Lehman has agreed to provide the communist Chinese Patent Office the "entire" U.S. patent database on magnetic tape . . . for free. *FDA Week* claims that a key PTO official said, "We have offered to provide [the Chinese] the entire collection of U.S. patent documentation, covering over 160 years of patents, in digital form." The Chinese Patent Office will specifically receive all patent documents since 1920 in digital facsimile form.

The official claimed the information includes five-and-a-half trillion characters of data and technical drawings, with chemical formulations and the like — very important in doing a patent search.

The American PTO wants to make it easier for the Chinese Patent Office to search all previously patented material and thus give the Chinese "no excuse" to infringe on U.S. patents. A PTO source said the purpose of PTO Commissioner Lehman's agreement is to "make all U.S. patent information available, with text search or index retrievable fea-

tures to allow [the Chinese] a more effective search."

First-page database

However, the Chinese Patent Office will get the "*first-page database*" -- which is not yet available in the U.S -- with back and front files that provide condensed versions of the patent, bibliographical data and drawings. The *back file* covers all previously issued patents, whereas, the *front file* includes all new data issued each week, allowing the back file to be updated, *at no cost* to China. China and Japan are negotiating separately for access to Japanese patent data, which the U.S. cannot provide to the Chinese.

PTO sources say that Lehman told the Chinese that he would like to provide them data on still *unapproved* patents 18-months after they are filed. Lehman was also instrumental in the Commerce Department's approval of an agreement with Japan to publish patent applications 18-months after filing. Never before have patent applications been published *before* a patent was issued.

H.R. 1733

These accords hinge on the passage of H.R. 1733, which was sent to Capitol Hill by the PTO for Congressional approval.

H.R. 1733, the “*Patent Application Publication Act of 1995*”, will prematurely disclose an American invention to foreign countries so they can begin production of the invention *before* its inventor has any protection. Both H.R. 1733 and H.R. 3460 calls for the publication of *all* applications 18 months *after* the patent application is received in the Patent Office. This will negate the original intent of our founding fathers to grant an applicant a patent in exchange for full disclosure. The U.S. Code defines patents as “private property.” A patent application is the property of the inventor and is supposed to be held in secret *until* a patent is issued. A published disclosure at 18 months affords no patent protection.

This premature disclosure is extremely foolhardy since U.S. patent laws require a patent application be so detailed that someone skilled in the art can practice (or work) the invention. In combination with similar bills, H.R. 1733 creates a whole new category of prior art (including information on patent applications never issued) which then can be

used in filing arguments in opposition to a patent.

In a letter I received from Steven Michael Shore, president of the Alliance for American Innovation, Mr. Shore warns that if H.R. 1733 is passed, it will:

1) “Deprive inventors and entrepreneurs of compensation for their research and development of their invention.

2) “Disclose American technology in detail much more quickly to foreign interests and allow foreign governments and multinationals to seize America’s most important new job-creating technologies.

3) “Seriously harm new cutting-edge technologies because breakthrough patents take longer to issue and therefore are harmed by early publication.

4) “Encourage patent flooding . . . a tactic often used outside the U.S., where competitors file many patent applications with only minor changes which results in surrounding and strangling a breakthrough technology by delaying or preventing the original patent from issuing.

5) “Ultimately it will discourage American entrepreneurs from filing patent applications for their most important inventions.

6) “Permit patent term extensions only if the Patent Commissioner finds the patent applicant was subject to an “unusual ad-

ministrative delay”. Extensions are only awarded if the PTO admits they were at fault. The legislation does not solve the problem of awarding all inventors the same guaranteed patent term. It is not a simple legislative solution.”

According to Shore, providing the Chinese (and other nations) with all U.S. patents poses a *national security and economic threat* to the United States, and will give China a quick way of updating its technology. Although 20 or more years behind in missile technology, with automated patent search techniques, China can quickly leap forward to compete with the U.S., as well as become a military threat.

The exchange letters of 1995 between China and the U.S. for the Intellectual Property Enforcement Agreement (IPR) have not significantly protected American business from being ripped off by Chinese counterfeiters. The May 1, 1996 edition of *USA Today* reported that the U.S. accused China of rampant piracy and failure to implement IPR copyright protections, and threatened China with trade sanctions.

Based on a tip from Microsoft, Chinese authorities launched a raid on a bootleg factory that had produced 5,700 “illegal Russian language CD-ROM’s of Windows 95, Word and Windows NT programs.” Microsoft was told they were to be “shipped to Hanoi by train, then airfreighted to Russia for sale.” It is estimated that 90-million bootleg CDs, CD-ROM’s, video CDs and laser discs worth more than \$2 billion annually are manufactured in Chinese factories.

Why should America give a patent advantage to a nation that has 45 bootleg plants counter-

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feiting pirated products originally created in the U.S.? Does it make sense to give our patents to China when it is running a \$32 billion trade deficit with the U.S.? If H.R. 1733 passes, it will enable China (or any country or multinational corporation in the world) to grab American technology and use it before it's protected by the issuance of a patent.

The Patent Office is a "core federal function", however, with **H.R. 1659** it will be "corporatized" or privatized much like the Post Office, and headed by a CEO without substantive review of his actions. The Patent Office is not in competition with private companies. It's sole purpose is to "grant" not "sell" patents. It performs a quasi-judicial function in making a legal determination of whether an application contains subject matter that is new, non-obvious and fully disclosing. The U.S. Patent Office is the best technical teaching library in the world, and should not be corporatized. If it is, foreign countries and multinationals will gain control of America's patent system.

H.R. 1732, known as the "Patent Reexamination Reform Act of 1995", is a hunting license for giant and foreign companies to bring their full legal resources against any individual inventor to contest any issued patent and circumvent the Federal court sys-

tem. After an examination is completed, further requests for additional examinations can be filed by attorneys for the requesting company, thus tying up the patent process for years. An inventor's patent cannot be realistically enforced while a reexamination is in progress.

H.R. 2235, will wipe out American inventors and lead to a first-to-file system, which means first to the patent office — *not first to invent* contrary to the Constitutional rights and protection for inventors.

Recently, the subject matter of these four bills [House Resolutions (H.R.) 1732, 1733, 2235, and 1659] was combined together into one bill — **H.R. 3460**— entitled "To Establish the Patent and Trademark Office as a Government Corporation and For Other Purposes." The plan is to get H.R. 3460 on the floor of the House without public scrutiny, and then push it through so fast that no Congressman will have sufficient time to study it in depth.

The recent book, *Patent Wars: The Battle To Own The World's Technology*, by Fred Warshofsky, best describes the reason for the legislative struggle in Congress about intellectual property. It states,

"In the war for global economic dominance, the fiercest battles today are over intellectual

property. Where nations once fought for control of trade routes and raw materials, they now fight for exclusive rights to ideas, innovations, and inventions."

In this so-called global economy, the multinationals and foreign interests are attacking the patent system and independent inventors because it's the cheapest and quickest way of obtaining up-to-date technology. Intellectual property today accounts for well over 50 % of all American exports and 99 % of our manufacturing base. The U.S. remains a major player in the world community because we have the largest body of intellectual property in the world.

It is imperative that everyone reading this article contact their congressman, and demand that an inquiry be made into Bruce Lehman's authority to set foreign policy through the U.S. Patent Office, and that Congressional hearings be held on H.R. 1733, H.R. 3460 and any similar bills which seek to undermine the rights and protections of American inventors. Encourage your congressman to vote against any similar bills. This problem is too serious to ignore. Not only is America's patent system is at stake, so is the future of her economic and military security.

For additional information or updates, contact: Steven Michael Shore, President, Alliance For American Innovation, 1100 Connecticut Avenue, NW, Suite 1200, Washington, D.C. 20036-4101. Phone: 202-785-3072 Fax: 202-467-5591, 1-800-308-6933. W. Arthur Fisher is a legal researcher and free-lance magazine writer from Tulsa, Oklahoma.

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