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**Portfolio Media, Inc.** | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

# Patent Reform Is About Wealth, Who Should Have It

*11/1/2007* --- Attempts to alter the processes associated with creating, licensing and killing patents have waxed and waned. For the past 20 or so years, they have been spectacular failures. Not this time. Whether you want it or you were one of the many who watched and snickered in 2006, this time it will happen and the reason is the growing sensitivity to a form of redistributing wealth.

The idea of wealth redistribution in the U.S. is not new. We do it with both assets and income. The rise and fall of industries and technologies has reallocated enormous capital. GM is on a toboggan run while Toyota ships home record profits. In less than 30 years we went from IBM to Digital Equipment to Dell (the IBM we have today is not your father's IBM).

We use personal income and estate taxes to shift financial interests and assets from one group to another. Our legislative and judicial bodies create or bless new and novel ways of doing this every year.

In the mid-80s there was a change in power building between electronics companies in the US and Japan. Though not driven by a technological paradigm shift, it was an Andy Grove-esque inflection point for the semiconductor industry.

The slide of our chip builders was far more rapid than what we had seen earlier with aluminum and autos. However, this time there was something to help rebalance what was happening.

That something was intellectual property. Texas Instruments showed us all how to leverage the value locked in assets that for the most part were languishing in file cabinets. TI mitigated some of the shift in fortunes by asserting its rights against the beneficiaries of this flow of wealth.

Few would have predicted it at the time but a patent gold rush was on and new industries of service providers and asset managers were born.

The strategy for counter-balancing the Asian capture of wealth and prosperity was not based on an ability to execute a product plan or inherent cost advantages. No legislative hand was benefiting one demographic at the expense of another. This time, large amounts of capital began moving from one legal entity to another based strictly on the time-tested rule of property – intellectual property.

In its starkest incarnation – where companies purchase patent assets for the purpose of generating a return without developing the underlying technology

 

or producing products for market – wealth transfers from those who do to those who have.

We see this as royalties, settlements, court judgments and even benign sales of patents. A direct consequence of this, however, is that long term the costs (all the above plus litigation) to industry will be recovered through pricing so the redistribution is being subsidized by Mike the electrician and Judy the teacher. This effect could not go unnoticed and, in the long run, it helped kick-start the efforts of our governing bodies to look at what was happening.

Changes might be made to procedures and laws that could improve the fairness or efficacy of patents. However, in a populist society as the U.S. has become, Mike and Judy are not cheering $500 million court judgments unless perhaps “big (fill in the blank)” is paying Sam garage-inventor.

Companies feeling most besieged (principally in the high-tech arena) see an opening and are lighting fuses. Few politicians, sensing an opportunity, are going to pass up the sound-bites this issue offers; even if, as many believe, the consequences of action may not be fully understood. The bills before Congress may be many things but “protectors of our country’s competitiveness” and “enablers of innovation” have to be somewhere close to the bottom of the list.

Despite a presumed bias to reduce the level of judicial activism in the Roberts (Supreme) Court, clearly this is one area where the Court believes changes are needed (see eBay, MedImmune, Microsoft, KSR) and the CAFC will have to mend its ways and tread more carefully. Recent decisions by the CAFC seem to indicate it not only heard the message but it understands the nuances as well (Sandisk, Seagate).

The USPTO has its own plans and has assured itself a seat at the table. The people, Congress, the courts and the PTO – all the stars are aligning.

But, is this issue a poster child for the baby and the bathwater? In trying to solve presumed issues of wealth or any other problems in our system of generating franchises for inventiveness, let us hope we do not tear up constitutional rights for the incentives to create.

Without these privileges we could not be having these arguments. If we lose these rights, the same governmental bodies will just have to push the pendulum back the other direction, but after some damage is done.

The courts are doing something. Congress wants to be seen as protecting Mike and Judy (not so sure about Sam). The best we can hope for is there is enough certainty in what we are left with that wrongs are quickly identified and fixed.

The last thing we want is to find ourselves a 21st century incarnation of the semiconductor industry travails in the 80s. They had weapons. Our intellectual property must be just as strong or two decades from now Mike

 

and Judy are likely to be worse off than they are today.

--By Charles R. Neuenschwander, International Patent Licensing Co.

*Charles R. Neuenschwander is a principal and founding partner of International Patent Licensing Company in Dallas, Texas. IPLC specializes in representing clients in offensive and defensive assertive licensing programs in the high-tech industry.*

 