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Have U.S. Patent Laws Become Unconstitutional?

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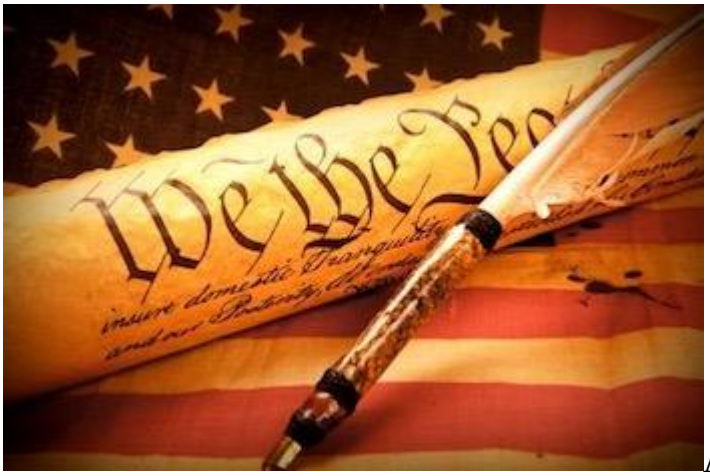

As we look at the contentious discussions about the impact of the America Invents Act, IPRs, and other legislative reform on the current patent landscape, it's important to take a step back and look at how our patent system is enshrined in our nation's Constitution, the purpose of the

patent system, and whether recent legislation impacts the bargained for exchange of the patent system.

The basis for our patent system is spelled out in Article I, Section 8, Clause 8 of the Constitution which grants Congress the power "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." In establishing the USPTO, Congress has used its authority under Article I, Section 8, Clause 8 of the Constitution. The patent system "promote[s] the progress of science and useful arts," by disseminating information about an invention and how to practice (or implement) it. This disclosure of information is a benefit to society because a) it teaches our society about the invention and b) it spawns creativity for related inventions. The example that most directly explains the benefits of disclosing an invention to society and why our government is willing to protect an inventors' rights to their invention is as follows: if I have the cure to cancer and keep it as a trade secret and get hit by a bus, the cure to cancer dies with me; however, if I patent my cure to cancer and get hit by a bus, society still benefits from my invention because the patent disclosed my invention and how to practice it. This dissemination of information promotes innovation for the betterment of society. The question now is whether Congress has setup the USPTO and our patent laws in a way that is congruent with its obligations under the Constitution for "securing" our discoveries and whether our laws still "promote" as required by the Constitution.

There is little record of how Article I, Section 8, Clause 8 was added to the Constitution. Since we do not know the founders' full intent on this matter, I believe it's relevant to examine the language used in context to the other provisions of Article I, Section 8. The first word to closely examine in Article I, Section 8, Clause 8 is the word "securing." Some will argue that our inventions are "secure" when you are awarded a patent. I, however, maintain that the patent merely defines the scope of an invention and that it does nothing to "secure" an invention. In practice, you cannot call the police to help you "secure" your patent rights in the same way you would for the theft of something else. Others argue that the patent laws allow for litigation to enforce your patent rights, but the exorbitant costs for patent infringement litigation are out of reach for all but the wealthiest of inventors. Does that make this an equal protection claim or has Congress inappropriately pawned off the responsibility of "securing" an inventors exclusive right to their discovery to the Judiciary Branch? I believe the latter.

My belief for this comes from the other powers delegated to Congress under Article I, Section 8. Specifically, the Constitutionally granted powers (and clauses) that support my opinion include Congress's power: "to declare war" (Cl. 11); "to raise and support Armies" (Cl. 12); "to provide and maintain a Navy" (Cl. 13); "to coin money" (Cl. 5);

and “to provide for the punishment of counterfeiting the Securities and current coin of the United States” (Cl. 6).

When the term “securing” is used in the same set of powers that grants Congress the power to declare war, build and maintain an army and navy, and prosecute counterfeiters of our currency, it implies that “securing” an inventors exclusive right to practice their invention should be backed by the full faith and credit of the U.S. government. With the recent adoption of the trade secret act, why else would an inventor be motivated to disclose their invention in support of the betterment of society. Strangely, our system is setup where we can record copyrights and trademarks with customs and border patrol, but we are unable to register our patents. This hardly seems to be proper for any number of reasons. The basis for copyrights and patents are mentioned in the Constitution, but copyrights and trademarks (not mentioned in the Constitution), not patents, can be registered with customs and border patrol. Yet, patents are supposed to provide the right to exclude from importation, so the inability to register with customs and border patrol absolutely frustrates the property rights system.

Another point to consider is that Cl. 6 specifies “securities” too. Any good intellectual property (“IP”) license agreement should be recorded under the UCC and this generates a security interest in the IP. Yet, while Cl. 6 gives Congress the power “to provide for the punishment of counterfeiting the Securities and current coin of the United States,” it seems that securing an inventor’s exclusive right to practice their discovery or protecting the security interest in the discovery is beyond Congress’s ability. Additionally, every other provision of Article I, Section 8 is enforced by the Legislative branch, not the Judicial Branch or individual citizens.

In a dysfunctional partisan political system, where our politicians discuss jobs being shifted overseas, perhaps they should better look at securing our innovations here to justify the investment in our economy rather than letting foreign corporations profit when they steal our innovations and sell them on our shores. As more reports come out that patent filings for individuals and small businesses are down and a general recognition that real innovation does not come from large organizations, but rather small ones, it is becoming clearer that changes in our laws have decreased the previous standards that were in place to “promote the progress of science and useful arts.” As such, it seems to this author that our current patent laws are unconstitutional, or at the very least are thoroughly and completely frustrating the constitutional purpose for which they were created since our laws are promoting less and not “securing” our discoveries. We need to strengthen our patent laws to have a system that promotes the progress of science and useful arts by efficiently and affordably securing for inventors the exclusive rights to their discoveries and innovations.