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The United States broken patent system is getting worse

By Russ Slifer, Opinion Contributor — 08/14/19 06:15 PM EDT 64

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Inventors like Thomas Edison and Nikola Tesla obtained patents to protect their many inventions, which in turn grew the U.S. economy. Today their inventions would easily be dismissed by courts as not even eligible for patenting. The lightbulb and alternating current generators would be characterized as either abstract, a law of nature or a building block of technology. Modern critics would minimize the magnitude of their inventions by saying that these great inventors simply had a good idea and told the world to apply it.

For more than 200 years the United States had been a world leader in innovation. The result of American ingenuity and our open patent system. Rooted in the Constitution, the patent system was a visionary idea and allowed everyone to contribute to the advancement of our country. Honoring the goals of the Founding

Fathers, Congress drafted the first patent statutes to be broadly inclusive and chose not to define categories of inventions that would be excluded from patent protection. The result was a system that provided protection for anything under the sun invented by man. If the invention was new and non-obvious, it could be protected.

At about the same time that President Lincoln recognized that the U.S. patent system added fuel to the fire of invention, the Supreme Court decided it was best positioned to decide the limits of the patent laws drafted by Congress. The first judicial decisions to begin the long slow erosion of the U.S. patent system seemed less than controversial. The Court reasoned that Congress could not have intended the protection of laws of nature or mathematical equations. Who could argue with that?

Ignoring that Congress has exclusive authority to draft federal laws, the Supreme Court continued the glacial erosion of patent rights over the last 150 years by adding and expanding its own judicial exceptions. What the Court could not anticipate was the innovative advancements that were yet to come. That is one reason the legislative branch of our government writes the law. A restrictive patent system may fail to protect, or incentivize, personalized medicine, artificial intelligence or inventions the next generations will create.

Each judicial exception reduced the scope of patent protection, but none of these exceptions has been more damaging to the U.S. than the creation of an abstract idea exception to patent laws. This patent exception expanded at a rapid pace in the last several years despite the fact that there is no clear definition of what constitutes an abstract invention. Frustrated inventors believe it is anything a court wants it to be.

Before the courts completely eroded patent law, the United States Patent and Trademark Office (USPTO) attempted to strike a reasonable balance. It correctly instructed inventors that mathematical concepts, methods of organizing human activity, and mental processes could not be patented unless they were applied to a practical application. Ignoring the USPTO's expertise, however, the Court of Appeals for the Federal Circuit recently decided that a charging station to charge electric cars was abstract. No invention could be more of a practical application

than a physical charging station for cars. Edison and Tesla must be turning over in their graves.

The Trump administration, through the USPTO, cannot by itself rein in the courts to protect the U.S. economy. Congress must act. Special interest groups prefer weaker patents, but there is strong support for bipartisan legislation proposed by Sens. Thom Tillis.