

# LITIGATORS CORNER: Who is the Law For?



BY JOSEPH N. HOSTENY,  
OF NIRO, SCAVONE,  
HALLER & NIRO

*Regular IP Today columnist Joseph N. Hosteny is an intellectual property litigation attorney*

*with the Chicago law firm of Niro, Scavone, Haller & Niro. A Registered Professional Engineer and former Assistant US Attorney, his articles have also appeared in Corporate Counsel Magazine, The Docket (American Corporate Counsel Association), American Medical News, Inventors' Digest, Litigation Magazine and Assembly Engineering Magazine. Listed in Who's Who, Mr. Hosteny was recently named to the Board of Editors of Patent Strategy & Management (a monthly publication of American Lawyer Media), for which he will also be writing periodic guest columns. In addition, an article quoting him appeared in the November, 1999 issue of Entrepreneur Magazine. Mr. Hosteny can be reached at (312) 236-0733, or by e-mail at [jhosteny@hosteny.com](mailto:jhosteny@hosteny.com), or by visiting his web site at <http://www.hosteny.com>.*

A recent email message started me wondering: why do so many conferences about patent reform present the views of lawyers, professors, and Patent Office officials, but NOT those of the people in the trenches — the inventors? I won't tell you where this particular seminar is being held, or who is sponsoring it because I don't want what I say to be considered a criticism of the people or institutions involved. The truth is, I don't even know most of them. My point is that the law is not made for lawyers, or judges, or politicians. It is made for "real people." When we lose sight of that, we risk becoming like the country-club doctor in *The Sopranos* who forgot that his patients are the only reason doctors exist — until Tony and one of his muscular pals gave him a rude awakening.

The conference described in the email message features many speakers, including two judges, one commentator, one person from the Patent Office, and thirty-eight

lawyers: twenty-three from law schools, four from big corporations, and eleven from substantial, well-known law firms. They will speak on topics such as reforms for pharmaceutical patents, how to make more information available to the Patent Office, specialized patent courts, the process of patent system reform, etc., etc.

Don't get me wrong. I don't mean to criticize the notion that legal professionals need to get together. Lawyers do need to meet and talk about these things. But let's face it: many of these subjects are about as exciting as watching a grocery truck unload, and no person in his right mind (other than an attorney) could possibly be interested. So some subjects do not merit the participation of inventors or businesspeople. Another seminar I saw offered concerns the relationship of patent law to antitrust law, probably a subject that doesn't merit participation by the unwashed laity.

So, when we plan seminars about "patent law reform," we need to remember who the users of our product are. Without this, it is so easy to lose sight of what patent law is really about. It has two goals. The first is expressly spelled out in the constitution, which says that the purpose of a patent is to protect "for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The other goal is implicit in the phrase "limited times." The role of patents is to benefit the public by encouraging the disclosure of new ideas and devices. Neither one involves us lawyers. It's true that these patent laws may be written by us, litigated by us, and reformed by us. But they are intended to benefit others. As I see the increasing complication of patent laws, and the recent amendments, I wonder if we are really making these laws serve their true purpose, or if we are instead erecting a complicated, obscure set of rules that no one — including lawyers and judges — can really follow. It's become like our semi-decennial reform of the Internal Revenue Code, sometimes referred to as the Tax Lawyers' and Accountants' Relief Act.

Having only lawyers discuss patent reform leaves us open to missing important aspects we need to know about and think about in the course of reform.

Mathematician Norbert Weiner said that "lawyers and judges in general, and those who deal with patent rights and other intellectual property in particular, should be better educated, not only in technical details but also as to the actual processes which constitute invention and discovery." The best way to learn about the processes which constitute invention and discovery is to listen to inventors and learn how they work.

There are two aspects of the patent reform process that we may not be paying enough attention to. Both may bear upon the efficacy of any patent law reform, and keeping them in mind is crucial to developing sound patent laws. First, anyone contemplating patent law reform must decide for whose benefit the law is being reformed, and whether some people will be disserved by the reform in question. Second, we must appreciate the difficulties experienced by the fledgling inventor. The obstacles to his or her success, and even after success, are daunting.

We must also appreciate that creation is an individual act. The individual inventor may be heroic, or demented, or sometimes both. Surely some inventors don't understand how difficult the path of invention is before they start. Chester Carlson, the inventor of xerography, began his work in 1934. It took him four years to make a xerographic copy, and ten more years before he got any support from Battelle. The first copy machine using his invention was sold in 1958, twenty-four years after he began his work. Similarly, one of our clients was an Iowa teacher who had a better idea for ink. She couldn't license her invention for years. Another of our clients was an immigrant physician who ran out of his last few dollars while traveling to his first job, so he had to walk the rest of the way. He spent about ten years developing a new type of catheter that finally became the standard. Yet another of our clients, Frank Calabrese, was deposed as he was dying.

History is full of such examples of inventors who overcame adversity. All of them were people involved in businesses or trades, and frequently had modest backgrounds. John Deere started as an apprentice blacksmith and developed the steel plow that made midwestern America an agricultural success. Eli Whitney, who was broke, invented the cotton gin. After being involved in many disputes over his invention, he concluded that "an invention can be so valuable as to be worthless to its

inventor.” He never patented anything again. Alexander Graham Bell was a teacher and author. His patent for the telephone led to years of litigation. Joseph Glidden, the inventor of the first successful barbed wire, was a farmer from DeKalb, Illinois. Elias Howe, an unemployed machinist in frail health, spent five years inventing the sewing machine. He was destitute for years, while others were using his invention. He didn’t begin receiving any royalties on his 1846 patent until 1854. The Wright brothers were bicycle manufacturers in a small shop in Dayton. It took them years to perfect their invention. Nikola Tesla came to the United States from Serbia in 1884 with four cents in his pocket. We hear the same story from inventors over and over: had they known it would be so hard, they would never have begun the process in the first place.

And for every one inventor that succeeds against great odds, there are a thousand failures.

There is another important thing to understand when we are planning seminars and conferences about patenting and patent reform: invention comes from individuals, not from organizations. Creativity is an individual characteristic. Organizations may foster or discourage creativity, but they

do not possess it. Only individuals do. According to a little light reading of my Encyclopedia Britannica, most people agree that creativity is usually found in those people who value intuition over more analytical thinking, and who have a strong interest in disorder and imbalance. That, of course, is not a description of your average organization man or woman, the human cog in the gray flannel suit. It is more likely a description of someone who works outside of the large organization. To a degree, creative people are (or can be) troublemakers. Instead of the orthodox solution to a problem, they come at it from a different direction. There is the story of the physics teacher who asked his class how to measure the height of a building, using a barometer. Presumably, the students were to measure the pressure at the bottom and top of the buildings, and use the difference to calculate the distance. But one student — possibly a future inventor — said he’d just tie the barometer to the end of a string and lower it from the top of the building. Another said he’d offer the barometer as a gift to a building engineer in exchange for telling him the height of the building.

The first purpose of our patent laws is not international harmonization, however nice that may be. If we want to reform our patent laws, we should ask ourselves




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whether the average inventor trying to make a living can tolerate yet another “reform.” We should ask whether the laws we have spent the last ten years making more complicated are reasonably comprehensible. But most important, we should be certain we preserve the incentive to invent. Finally, we should ask inventors and business people (big and small) what their answers to these questions are. Then we should listen. And we should stop overreacting to the anecdote, and we should solve the PTO’s financial problems. If we don’t, reforms won’t mean anything. Who is the law for? Inventors and the public who uses their inventions. 

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