

LITIGATORS CORNER: We Don't Want Nobody Nobody Sent



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Those of us who live in Chicago, and read the commentary by, for example, John Kass of the *Chicago Tribune*, know what “We don’t want nobody nobody sent” means. In Chicago and Cook County, you are not eligible for a government job unless you have a political sponsor. If you want to be a fireman, a garbageman, a police officer or a judge, you must have a sponsor who is politically connected. It starts with a ward committeeman, and probably goes up from there, depending on the level of the job.

The phrase is the title of a book about the Daley years, written in 1979 by Milton Rakove. According to Wikipedia, the phrase originates from, of all people, Abner Mikva. When seeking his first job in politics, he stopped by a ward headquarters to volunteer to work for Adlai Stevenson and Paul Douglas. The ward committeeman, Tim O’Sullivan, asked Mikva who sent him and, with his cigar in his mouth, added, “We don’t want nobody that nobody sent.” Actually, I have a hard time believing that the committeeman used “that.” Mikva probably added it.

The rest of us are what John Kass calls “chumbolones.” It is as derisive as it sounds. Kass says it means what politicians think of us taxpayers — that is, not much. The Urban Dictionary credits Kass, and says it means a “person who is notably stupid or severely lacking in judgment,” or a “resident of Chicago who accepts endless tax increases and pervasive corruption; a chump.”

That’s what the Coalition for Patent Fairness must think of us. After all, the Coalition will soon have just the person it wants running the Patent Office. President Obama’s nominee for director of the Patent Office is the former vice president and general counsel for intellectual property law at IBM, the most prolific patent owner and licensor in the history of, well, gosh, the whole world and all time. I will take it as a given that the nominee is a talented, honest person. But his company is at the heart of the problem that the Coalition always blames on small inventors represented by lawyers looking for windfalls. According to the Corporate Scorecard in the July, 2009 issue of *Intellectual Property Today*, IBM runs away with the gold medal for most patents, like a supersonic Lance Armstrong. IBM got 4,186 patents in 2008, and had revenue of \$101 billion, according to Yahoo. Hitachi, Ltd, with revenue of \$105 billion, got only 1,313 patents, less than a third of IBM’s. Pfizer, with revenue of \$48 billion, less than half of IBM’s, got only 81 patents. IBM got fifty-two times as many patents as Pfizer. Maybe someone should ask if a few thousand fewer applications from IBM would contribute to alleviating the burden on the Patent Office.

The nominee testified before Congress in March. He said that it was important to “preserve America’s [Newspeak: IBM’s] innovation leadership and competitiveness in the world, and to encourage investment to produce economic growth and create jobs.”¹ Okay, I guess. But then he said he supports S. 515, the Patent Reform

Act of 2009. He told Congress that “the problem of poor quality patents persists.”² I am reminded of George Orwell’s *1984*, where the government’s Ministry of Truth invented Newspeak to control thought. (And by the way, according to the nominee, IBM gets one billion dollars per year in licensing income.)³

But he didn’t mention that IBM hasn’t avoided the problem the Coalition complains about: poor quality patents. (That’s really Coalition Newspeak for “patents that scare us because we might infringe them.” I wonder if the Coalition has a Ministry of Truth, too.) One of IBM’s patents is on a reservation system for a toilet. See U.S. Patent No. 6,329,919, “System and Method for Providing Reservations for Restroom Use.” Claim 1 (of sixty-four claims) is not exactly narrow. It reads:

1. A method of providing reservations for restroom use, comprising:
receiving a reservation request from a user; and
notifying the user when the restroom is available for his or her use.

There’s a dependent claim for “passenger trains or boats” and for “airplanes.” The last time I looked, IBM didn’t manufacture or sell commodes, trains or ships. Figure 3B is hilarious; you get priority to the loo if you are a first-class passenger, a frequent flyer, or paid more for your ticket. The rest of you, whether aged, infant or infirm, just have to hold it in.

The PTO initiated a director-ordered reexamination on February 12, 2002. Somebody at IBM must have said “Uh-oh” or “How the hell did this get through?,” because it filed a disclaimer of all sixty-four claims on February 27, 2002. Good move. But, why was the application filed in the first place? If it is human to err, then why does the Coalition blame all the problems with the PTO on the individual inventor or small company?

The Coalition for Patent Fairness (or, as I have referred to it in previous columns, the Coalition for Fairness to Foxes in the Hen House) supports the appointment. I will bet it does. The Coalition says the nominee has the “background and experience needed to lead the U.S. Patent Office at a time when it faces significant operational

challenges in an ever-evolving competitive global marketplace.” He is everything the Coalition could want.

In his testimony, the nominee said that Patent Office problems were a recent phenomenon. Apparently he is not aware of the article, “The Starved Patent Office,” in the December 17, 1921 edition of *The New York Times*, which said the Patent Office was swamped, urged better pay for examiners, and concluded with: “How long will it take to hammer into the head of Congress that larger salaries must be paid to the Patent Office examiners?”

The nominee backs the Patent Reform Act, including post-grant review, and “reforming” (Newspeak: reducing) reasonable royalties. The funding woes of the Patent Office are apparent to everyone, but the nominee had nothing to say about this problem in his testimony. No director — other than God — could run a PTO without the money. The problem continues to exist. See Orin Hatch and Paul Otellini’s “Opinion: Fully Funding the Patent Office is a Key to Economic Recovery,”⁴ in the *Mercury News*. As Lawrence Ebert says in his blog, get the job done right in the first place.⁵ If you want to build a better car, do the job right on the assembly line, not after the car is built. That is the lesson that Toyota and Professor W. Edwards Deming taught everyone. The notion of repairing patents after the fact, in a Patent Office that hasn’t the tools to do the job right in the first place, would be laughable if it weren’t so sad.

The nominee’s whole pitch is slanted toward large companies. Here’s his testimony, with my comments in brackets:

The nature of innovation has changed. Today we benefit from inventions made possible through highly collaborative [Newspeak: big companies’ research and engineering organizations] and interconnected technologies. Many of the products that consumers demand are complex and include contributions from multiple innovators [Newspeak: the employees of big companies] that incorporate hundreds if not thousands of patented inventions. At the same time, many new innovations require investments of unprecedented size [Newspeak: Only big companies can

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So how come Intel started with three courageous guys, and Hewlett-Packard with two? How is it that the web was invented by one person? Have we all turned into the Borg, some sort of weird mental collective? Maybe IBM is really the Borg. With these remarks, the nominee tells us where his heart is, and the Coalition must be jumping for joy.

He complains about the rise in patent litigation, but cites no source. I looked at data for the district courts, specifically, Table C-2A, “Cases Commenced, by Nature of Suit, 2004 Through 2008.”⁶ It says that, in the year ending September 30, 2004, 3,075 patent suits were filed. For 2005, it was 2,720, a dip. For 2006, it was 2,830, a slight rise. For 2007, it was 2,896, a slight rise again. For 2008, it was 2,909. There were fewer suits filed in 2008 than in 2004. If that’s a tsunami, it’s a teeny-weeny one that wouldn’t drown a tadpole. Maybe the nominee is relying on other data. If so, he should have cited it. Anyone testifying before Congress should at least cite a

source for his assertion that patent litigation has exploded.

I don’t know about you, but I am not a chumbolone for IBM or for the Coalition. You shouldn’t be, either. I am interested in a patent system that does the job right the first time, and I am for respecting the patent rights of every inventor and patent owner, not just the ones I hear jabbering Newspeak.

ENDNOTES

1. See the testimony of the nominee before the Senate’s Judiciary Committee on March 10, 2009.
2. See the same testimony.
3. See the same testimony.
4. See http://www.mercurynews.com/opinion/ci_12538915
5. See <http://ipbiz.blogspot.com/2009/06/hatchotelini-fully-funding-patent.html>
6. See <http://www.uscourts.gov/judbus2008/appendices/C02ASep08.pdf>