

# LITIGATORS CORNER: I Am Intel. I Am Big. I Am Right



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The general counsel of Intel, a giant in an industry that was founded on the creativity of a few individuals, bemoans what has become of our patent system in recent years. In an article entitled *Patent Nonsense*, appearing in *The Wall Street Journal* on July 12, Bruce Sewell reiterates every possible canard about patents, and about the patent system.

He claims the patent system of the United States “favors speculators over innovators.” Mr. Sewell, who has a bachelor’s degree in psychology, doesn’t know what he is talking about. In fact, the largest users of the patent system here aren’t individuals or speculators. The largest users are corporations — both foreign and domestic — and universities. According to a quick search on the PTO website, Intel itself has just over fourteen thousand patents, in the United States alone. The most recent Intel patent issued on August 7, just one day before this column was written. If, as Mr. Sewell says, the patent system is “impeding innovation and economic growth,” his employer hasn’t seemed to notice.

The U.S. patent system is overwhelmingly dominated by Intel and other giant corporations — not by individuals.

According to *Patenting by Organizations 2003*, published by the Patent Office in August, 2004, U.S. corporations obtained over seventy-five thousand patents in 2003; individuals got fewer than fourteen thousand patents. Foreign corporations obtained seventy-three thousand patents. So, in 2003, U.S. and foreign corporations combined got one hundred and forty-eight thousand patents in one year, while U.S. individuals got less than a tenth of that. So, who’s really dominating and using the patent system the most? Mr. Sewell’s employer, and companies like it. What Mr. Sewell wants isn’t a reformed patent system; he wants a patent system that benefits his employer, Intel, even more that the current system already does.

Mr. Sewell touts the benefits of the Patent Reform Act of 2007. But the benefits he touts are an illusion. He fails to note that the Chief Judge of the Federal Circuit has opposed portions of the bill. In letters to Congressmen Conyers and Smith, Judge Michel criticized the sections of the Act dealing with apportionment of damages and appeals of claim construction rulings as “unworkable.” In a letter to Senators Leahy and Hatch, Judge Michel argued that the Federal Circuit simply could not handle the workload that the proposed legislation would create. He commented that the current typical delay in patent trials in district courts — two to three years — could double, if the Act is passed. The Federal Circuit would experience the same problem the PTO has experienced for years: responsibilities without the resources to carry them out. There’s a sound recipe for legislation.

Nor has Mr. Sewell seen fit to mention that a group of companies and universities — including Abbott, Qualcomm, Boston Scientific, Monsanto, the University of Utah, the Wisconsin Alumni Research Foundation and the University of New Hampshire — wrote to leaders in Congress, criticizing aspects of the Patent Reform Act, and reiterating the need to end diversion of patent fees. This group stated that provisions of the Act “will not strengthen our patent system but instead will fundamentally undermine patent certainty, discour-

age investment in innovative technologies, and reduce publication and collaborative activities among academic scientists.”

Mr. Sewell says that the reexamination process hasn’t worked well. But he then assumes that patent opposition proceedings will work well, even though the same agency that he says has fumbled reexaminations would be handling the new post-grant opposition proceedings. Now, there’s good thinking.

Nor does this Act even resolve the problem that cripples patent owners whose method claims would be infringed, but for the fact that one step occurs outside the United States. *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005) held that a method claim was not infringed because one step occurred in Canada, even though the user of the system and the recipient of the transmitted message were both in the United States. This is an obvious and badly-needed subject of legislation; yet no one in Congress seems to be addressing the issue, perhaps because they are listening to representatives of large corporations who are grinding their own axes. As I said in a presentation before the American Bar Association’s Intellectual Property Law Conference in the summer of 2006, property owners and tax authorities in Canada, I suspect, are gratified by the pleasing prospect of increased rentals and tax revenues from an influx of server farms aimed at circumventing American patents. It will be like an Oklahoma land rush, except that the wagons will be hauling computers, monitors and racks instead of cast-iron pot-belly stoves.

Nor has Congress resolved the PTO’s funding problem. Congress can pass all the patent reform acts it wants, but if the PTO doesn’t have the funds to carry out its duties, then nothing is going to happen. Nothing, that is, except more delays. Without money, the patent system is becoming a joke, but not in the way envisioned by Mr. Sewell. H.R. 2336 would amend Section 42(a) of Title 35, so that the PTO could use all of the fees paid by users. But that bill appears to be stuck in a committee, while the Patent Reform Act gets much more attention than it deserves and moves toward passage.

Mr. Sewell complains about patent holding companies. Evidently he has not seen how some infringement defendants do their best to crush individual plaintiffs by threatening to bankrupt them if they do not give up their claims and go away. I have been a

witness to these mean tactics. Using a holding company to license or enforce a patent is a matter of survival for many inventors who lack the funds to manufacture their inventions. Nor has he paid attention to the scurrilous tactics of his own company, which established an off-shore shell corporation to buy a patent, and concealed that activity from a federal bankruptcy judge. *The Wall Street Journal* reported it on April 16, 1999, in an article by Dean Takahashi, who wrote:

The giant semiconductor maker secretly used a shell company in the Cayman Islands to argue on its behalf in the federal bankruptcy case of International Meta Systems Inc., a tiny El Segundo, Calif., computer-chip-design company. As part of the Chapter 11 proceedings, now under way in Austin, the Cayman company challenged IMS's sale last year of a patent to a Northbrook, Ill., law firm called TechSearch LLC. The law firm is using the patent as the basis of a separate patent-infringement suit against Intel, now pending in federal court in San Francisco. Initially, Intel didn't disclose its involvement in International Meta's bankruptcy case. But after it admitted its ownership of the Cayman company in court, Judge Frank R. Monroe, who is overseeing the proceedings, concluded that Intel and the Cayman company had portrayed themselves as trying to help the bankrupt debtor when they were in fact really out to undermine the patent case. "They are using this estate in an attempt to bring leverage upon TechSearch and the litigation in California," the judge said, describing the maneuver as "totally inappropriate."

Evidently Mr. Sewell's memory is short.

Mr. Sewell decries litigation. He notes that a recent patent decision resulted in a verdict topping \$1.5 billion in damages. Did he notice, or even care, that this case involved two more giants duking it out: Alcatel-Lucent and Microsoft? Nor does Mr. Sewell pay any attention to the fact that judges often reduce jury verdicts, as in the famous case of the lady who spilled hot McDonald's coffee on herself. The district court subsequently vacated the award to Alcatel-Lucent.

Mr. Sewell cites no source for his claim that patent suits have tripled. According to

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statistics maintained by the Administrative Office of the U.S. Courts, patent case filings have not grown at anywhere near the rate Mr. Sewell claims. Online data (available from 1997 forward) show about 2,100 patent cases filed in 1997, rising to 3,075 in 2004, but then dropping to 2,830 in 2006. So where does Mr. Sewell get the notion that patent lawsuits have tripled? He does not say.

Mr. Sewell claims: "In addition, a finding of 'willfulness' — which may trigger treble damages — can result from a defendant merely being aware of a patent which the defendant in good faith believed was invalid." Wrong again. Intel is the same company whose chief patent counsel, David Simon, complained that he spent too much time responding to letters from inventors, citing as an example a letter from an inventor who accused Intel of infringing a patent on a device for making hacksaw blades. Anyone who has read *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004) (*en banc*) knows that the Federal Circuit has made it harder, not easier, to prove that infringement is willful. But, if one is overwhelmed by letters about hacksaw blades,

perhaps one doesn't have time to read decisions of the Federal Circuit, or letters from its Chief Judge to congressmen and senators. *Knorr* also made clear that a good faith belief that a patent was invalid would favor a defendant who actually acted in accordance with that belief. Mr. Sewell's comment, like so much of his article, doesn't give due regard to reality.

*The Wall Street Journal* is an impressive publication, and one that I admire. But it should be more than a megaphone for a propagandist for a large corporation, whose "facts" don't accord with the real world. I wish the *Journal* would more often include the point of view of individual inventors, rather than just large corporations. After all, it is solo inventors, not large corporations, whose ingenuity and creativity have been responsible for so many important inventions in our country's history. Xerox exists, with tens of thousands of jobs, because of Chester Carlson's brilliance and persistence. Aviation — thousands of companies and millions of jobs — exists because of two bicycle builders in Dayton. Does the *Journal* care about them, or about the jobs and industries their lonely genius created? 