
# The Phyllis Schlafly Report

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# Protect Our Constitutional Patent Rights!

One of our most important constitutional rights is the right of inventors to have, for limited times, "the exclusive right to their . . . discoveries."

This uniquely American provision in Article I, Section 8 of the U.S. Constitution marked a profound turning point in world history. Most of the world's inventions are American, and they have proved to be an essential factor in American economic growth and prosperity.

The inventor's private property right in the fruit of his own labor is the "engine" that has stimulated the wonderful inventions that have caused our tremendous economic expansion and rise in our standard of living. The principal feature that makes the U.S. patent system uniquely different from all other countries in the world is that our United States Constitution recognizes the *exclusive* property right of the *individual inventor* in his own creation.

This allows the inventor to keep his ideas secret until the government issues a patent recognizing his invention and stating the extent of his rights. The inventor's exclusive right is limited to about 17 years, after which his invention goes into the public domain.

Our basic constitutional patent right is now under attack from the lobbyists for Japanese and multinational corporations. It would be wiped out by two companion bills now pending in Congress: H.R. 400, the 21st Century Patent System Improvement Act, sponsored by Rep. Howard Coble (R-NC), and S. 507, the Omnibus Patent Act of 1997, sponsored by Senator Orrin Hatch (R-UT). These two bills have the same objectives and essentially the same defects, so can be referred to collectively as the Patent bills.

The Patent bills do not present a controversy between Republicans and Democrats, or between conservatives and liberals. This is an epic battle that pits multinational corporations, plus the Clinton Administration and those involved in shady Asian trade deals made by the late Secretary of Commerce Ron Brown, against the "little" guys who have built America — the independent inventors who are responsible for the marvelous scientific discoveries that have made the American standard of living the envy of the world. Passage of the Patent bills would bugle taps for the American dream because it would undermine our job base, prevent new companies from forming, and limit our future growth.

Supporters of the Patent bills have become highly intemperate. Patent Commissioner Bruce Lehman, a Clinton appointee, said that those who oppose H.R. 400 are "in the Timothy McVeigh category" and on "the lunatic fringe." (*San Jose Mercury News*, April 17, 1997)

Lehman displayed his personal bias in favor of big corporations and his disdain for independent inventors when he said he is outraged by "these people who file patent applications and never, ever, ever go to market with an invention, based on their application." Contrary to Lehman's outburst, there's no reason why inventors should have to manufacture or market their own inventions. Many inventors, such as Nikola Tesla (who invented the electric motor) and Robert Goddard (who invented rockets), did not go into manufacturing. It is actually remarkable that so many inventors also became entrepreneurs and built big companies.

H.R. 400 passed the House on April 23 but, as the result of a tremendous outpouring of grassroots opposition, an amendment sponsored by Rep. Marcy Kaptur (D-OH) removed some of the most objectionable provisions. The Kaptur Amendment will be described below, but first let's explain the present law and what the Patent bills, H.R. 400 and S. 507, are designed to change.

## *U.S. Patent Law Protects Inventors*

Under the current American patent system, the U.S. Patent Office holds inventors' patent applications in total secrecy until the patent is issued, thus safeguarding the exclusive right of the inventor. If a patent is not granted, the U.S. Patent Office continues to keep the application secret, thereby allowing the inventor to continue his work without someone stealing his ideas while they are developing.

Many great American enterprises, including General Electric, AT&T, Kodak, International Harvester, Goodyear, Polaroid, John Deere, Westinghouse, Dow, IBM, and Xerox grew to be great companies because the patents issued to their founders gave them exclusive ownership for enough time to start their businesses.

Under present law, once a patent is issued, the invention itself and its claims cannot be challenged in the Patent Office without a showing of prior art, *i.e.*, prior descriptive material about the invention in a reputable journal of which the Patent Office was unaware when it issued the patent.

Publication of the application before the patent is issued would be a scandalous giveaway to foreign and big-corporation competitors. They could use their enormous resources against the individual inventor to challenge and invalidate a patent application before it is granted, or to steal the idea, make slight modifications, and beat the individual into production. Big corporations don't want innovation they can't control or that would upset their existing markets.

## *The Attack on U.S. Patent Law*

H.R. 400 is titled the Patent Improvement Act, but it should be called the Patent Giveaway bill, the Steal American Technology bill, or the Ron Brown Sellout Legacy. Here are some of the most damaging provisions of this 93-page bill, all of which are also contained in the companion Senate bill, S. 507.

H.R. 400 and S. 507 would order the publication of all inventors' patent applications 18 months after the application is filed, whether or not the inventor has yet been (or will ever be) granted a patent. This would impose a sucker's contract on the inventor: he would be forced to give up his precious possession now without knowing when or whether he would ever get a patent or how broad it would be.

H.R. 400 and S. 507 would greatly expand the procedure for reexamining existing patents, widening the issues subject to reexamination. This would allow anyone, foreign or domestic, to attack all aspects of all existing patents with the purpose of invalidating or stealing them. The corporate challenger and its lawyers would be authorized to intervene in an administrative process conducted by the U.S. Patent Office rather than the courts. This dramatic change from present procedure would make it much easier for corporations to challenge a patent immediately and to invalidate it later.

Foreign and multinational corporations and their lawyers would prefer these changes, but the independent inventor would be hamstrung by a whole new set of obstacles to getting and keeping a patent. This change would also impede enforcement of the inventor's patent rights because the courts usually suspend patent enforcement litigation while a reexamination is in progress.

H.R. 400 and S. 507 would transform the U.S. Patent Office into a separate government corporation, whose board of directors (according to both bills) shall include persons "with substantial background and achievement in corporate finance and management." You can bet that these corporate types would ride roughshod over the rights of individual inventors.

The new corporation would have the power to borrow and incur debt; Patent Commissioner Lehman has said that he would like to borrow $2 billion for priorities such as a "new headquarters." Corporatization would inevitably put all future policies and regulations about patents under control of the giant multinational corporations. It would bias the entire process against independent inventors and all small businesses and entities.

A corporatized patent office would become a prime target for Asian and corporate bribes for the issuing of patents. Of course, the Patent bills don't use the nasty word bribes; they just say that the newly privatized Patent Office "may accept monetary gifts or donations of services, or of real, personal, or mixed property, in order to carry out the functions of the Office."

## *The Coble-Kaptur Debate*

On April 23, the House rejected some of the worst provisions of the Coble Patent bill, H.R.400, by adopting 220 to 193 an amendment presented by Rep. Marcy Kaptur (D-OH). The Kaptur Amendment would exempt individual inventors, small businesses and universities from H.R. 400's provision that would require publication of an inventor's patent application (which fully describes the invention) 18 months after the application is filed, instead of being kept secret until the patent is issued. The Kaptur amendment also deleted the Coble provision to greatly expand the ability of foreign and multinational corporations to challenge all existing patents.

This was a victory for grassroots Americans who had phoned and faxed their Congressmen, since there was practically no advance media coverage of the impending vote. However, the Kaptur Amendment doesn't make H.R. 400 acceptable; H.R. 400 is bad in every section.

This victory, however, is tenuous and temporary because well-heeled lobbyists for multinational and foreign corporations, the Clinton Administration, and some influential Republicans in Congress are determined to pass the Patent bill in its original form. Their game plan to circumvent the House decision is to quickly pass Orrin Hatch's companion bill in the Senate, S. 507, and then exclude all opponents of H.R. 400 and S. 507, as well as all supporters of the Kaptur Amendment, from the House-Senate conference committee.

During the House floor debate, Coble's main argument was that it "levels the playing field between our inventors and foreign corporations." His mantra was "harmonization" of our patent law with the rest of the world. That's a false description of his bill.

"Harmonization" might make sense *if* it meant that American patents would be recognized worldwide, or *if* we harmonized on the basis of the U.S. patent system, which has produced most of the world's inventions. It makes no sense to harmonize down on the level of the countries that have produced only a tiny fraction of the world's inventions and whose patent systems are biased in favor of infringers. The recent harmonization of copyright laws gives American authors copyright protection throughout the world. Coble's bill doesn't do anything like that; instead, it just diminishes the rights

of U.S. inventors, who still have to apply in foreign countries in order to protect their patents overseas.

Independent American inventors seldom file overseas because it's far too expensive and far too difficult to enforce a patent. In Japan, filing would expose them to patent piracy of their technology through "patent flooding," *i.e.*, inundating the Japanese Patent Office with hundreds of unworthy patent applications using minuscule modifications of the American invention, followed by bullying tactics to get cross-licensing agreements. H.R. 400 does nothing to protect U.S. inventors from these typical Japanese patent abuses, plus inordinate delays and a judicial system rigged against independent innovation. (For an excellent case history of how the Japanese cheat U.S. inventors, see "Patent Protection or Piracy," by Donald M. Spero, *Harvard Business Review*, Sept.-Oct. 1990.)

Rep. Howard Coble's "Dear Colleague" letter, written on Judiciary Committee letterhead, falsely asserted that "small inventors benefit under H.R.400" because, "by requiring publication 18-months from filing, H.R.400 would afford venture capitalists an early opportunity to review the application." On the contrary, H.R. 400 "would afford" the small inventor absolutely nothing because, as the sole owner of his own invention, he already has every right to publish it, and to show his idea to venture capitalists, at any time.

Supporters of H.R. 400 spent a lot of time during the House debate crying about the alleged problem of "submarine patents," *i.e.*, when inventors apply and then deliberately delay the process. This is a bogus issue. H.R. 400 supporters were not able to cite a single example of a submarine patent since the Patent Application Locator Management (PALM) system was installed 20 years ago, enabling the Commissioner to deal with abnormal delays. Furthermore, the General Accounting Office reported only 627 patents over a period of 23 years that could reasonably be called a "submarine." Of these, the majority were owned by the U.S. Government or were delayed by security considerations. The GAO could not determine the reasons for the other delays.

If there were about 300 "submarines" out of a total of 2.3 million patent applications, that's only a tiny fraction of 1 percent of patent applications. That's hardly a reason to change our entire system and cut off the rights of all independent inventors.

All provisions of the Coble and Hatch bills sound as though they were written by lobbyists for the multinational corporations, such as the stacking of the board of directors of the newly reorganized patent office with corporation officers, and allowing the new patent office to accept monetary gifts.

There is no reason to change our superior patent system when 90 percent of the world's inventions are American. No reason, that is, unless the purpose of the Coble and Hatch bills is to appease the Japanese and favor the multinational corporations over independent inventors. Rep. Roscoe Bartlett (R-MD), a Member of Congress who is a real inventor holding 20 patents, said it best: "Don't vote to give away our secrets to every copycat around the world."

## *The Asian-Ron Brown Connection*

The U.S. Patent and Trademark Office probably functions better than any other agency of the Federal Government. It has not been touched by scandal or corruption, and it even operates in the black. So why is Congress trying to pass a 93-page overhaul of the agency and make fundamental changes in our well-established patent procedures? "If it ain't broke, why fix it?"

The answer is the Asian-Ron Brown connection. Foreigners, especially the Japanese, want to change our system so they can steal or copy our patents more easily. Also, the multinationals are more interested in pursuing foreign markets than in standing up for the interests of American citizens.

In September 1993, the Japan Patent Association issued a written statement saying that Japan wants our patent system "changed" because it finds U.S. patent legislation and practices "unsatisfactory." Specifically, the Japanese objected to our system whereby patent applications are not disclosed to the public until the patent is issued. The Japanese said that our "reexamination system" should be changed "promptly," and they don't like our system of jury trials.

What impudence! Our American patent system certainly doesn't have to conform to what the Japanese think is "satisfactory," especially when it is almost impossible for an American inventor to get protection in the Japanese patent system.

The U.S. procedure of keeping the details of an invention secret until the patent is issued is a fundamental protection for the inventor so that wealthy corporations, foreign or domestic, cannot steal his invention before he has a chance to raise his own capital to produce it. The Japanese and the multinational corporations don't like this. They want access to American inventions *before* the patents are issued so they can steal them. So, the Japanese have been demanding that applications be made public 18 months after an application is filed, regardless of whether or not a patent is issued.

They argue that this is the way other countries do it and the United States should conform. But so what! Other countries have hardly any inventions. Inventions rarely happen in socialist or managed economies.

On August 16, 1994, a U.S. Commerce Department news release from the office of the late Secretary of Commerce Ron Brown announced that he had signed "Letters of Agreement" in his office with Japanese Ambassador Takakazu Kuriyama promising the Japanese what they demanded. The news release stated that the Brown agreement "requires the U.S. Patent and Trademark Office to publish pending patent applications 18 months after filing . . . and expand reexamination proceedings to allow greater participation by third parties."

Ambassador Kuriyama was ecstatic. He immediately wrote Ron Brown "confirm[ing]" his understanding that the United States will do what the Japanese have been demanding, and that "we look forward to

## The Japanese/Ron Brown Paper Trail

*Japan Patent Association statement, September 1993:*

". . . unsatisfactory in the U.S. legislation and practices. . . and which they would like to see changed."

". . . public disclosure of applications . . ."

"An improvement is promptly needed on reexamination system."

*U.S. Department of Commerce News Release, August 16, 1994:*

From Office of Secretary Ron Brown:

"The agreement also requires the U.S. Patent and Trademark Office to publish pending patent applications 18 months after filing, beginning with applications filed after January 1, 1996, and expand reexamination proceedings to allow greater participation by third parties."

*Letter from Japanese Ambassador Takakazu Kuriyama to Secretary Ron Brown, August 16, 1994:*

"I am pleased to inform you that the Government of Japan confirms that, on the basis of these discussions, the Japanese Patent Office and the United States Patent and Trademark Office are to take the actions described: . . .

1. . . . the USPTO is to introduce legislation to make applications publicly available 18 months after the filing date of the earliest filed application. . . .
2. (a) . . . the USPTO is to introduce legislation to revise current reexamination procedures.

   (b) The new reexamination procedures are to expand the grounds for requesting reexamination . . .

   (c) The new reexamination procedures are also to expand the opportunity for third parties to participate in any examiner interviews and to submit written comments on the patent owner's response to any action in the patent under reexamination."

working with you on a regular basis . . . in the field of intellectual property." Kuriyama then specifically restated Brown's agreement "to make applications publicly available 18 months after the filing date" (*i.e.*, before the patent is issued), "expand[ing] the grounds for requesting reexamination," and allowing "third parties to participate" in reexaminations.

The purpose of the Patent bills is to write the Japanese demands and Ron Brown's agreement into U.S. law. They are a sellout to the Japanese demands. In two days of debate on H.R. 400 in the House on April 17 and 23, no one denied or refuted the paper trail that proves the Asian-Ron Brown connection. Ron Brown was at the center of the Clinton Administration's strategy of selling out American interests to the Asians in return for political cash to assure Clinton's reelection. Those who vote for the Patent bills will be tarred with the same Asian money scandal that is closing in on the Clinton Administration.

## *Inventions Caused Our Prosperity*

When our Founding Fathers wrote the United States Constitution, they included a provision that was original and unique: "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." This right of inventors even preceded our famous rights listed in the Bill of Rights. This uniquely American right is completely democratic; it offers the same opportunity, the same protection, and the same hope of reward to every individual. Foreign patent law was developed to protect vested interests. American patent law was designed to protect individual inventors.

President George Washington signed the first Patent Act on April 10, 1790, which codified the distinctively American rule that inventions should be encouraged by guaranteeing to every inventor the exclusive right to his invention for a fixed term of years, after which the public is free to use it — and the public always benefits far more than the inventor. Thomas Jefferson, who was himself an inventor, was the first administrator of the American Patent System. He personally examined all the applications presented. Before he died, Jefferson was able to say, "The issue of patents for new discoveries has given a spring to invention beyond my conception."

We've seen the spectacular results. America has only five percent of the world's population, but we have created more new wealth than all other nations in the world combined and become the greatest industrial power the world has ever seen.

A study of the inventors honored in the National Inventors Hall of Fame in Akron, Ohio reveals that 91% of the world's greatest inventors worked in America and only 9% in other countries. This is not because Americans are genetically smarter, but because our superior patent system provides incentives to inventors to create new ideas in their garages or kitchens or bicycle shops, secure in the knowledge that they own a property right in their inventions. Our patent system promotes ingenuity, innovation, and entrepreneurship. It is the fountainhead of American progress — and, indeed, of the world's progress.

In honor of the Bicentennial of the United States Constitution in 1987, Phyllis Schlafly wrote and produced a multi-media program called "American Inventors." The U.S. Bicentennial Commission stated that this program has "exceptional merit with national significance, and substantial educational and historical value." It has been preserved as a 40-minute video and is available from Eagle Forum, Alton, Illinois 62002 for $21.95.

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