

Big Tech Has Eviscerated America's Patent System

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Google founder Larry Page's first patent -- U.S. Patent Number 6,285,999 -- describes the search algorithm that later became one of the most powerful tools in human history. Mr. Page and his colleagues turned that patent, which was licensed from Stanford, into a trillion dollar company -- and revolutionized the internet in the process.

But now, having reached the commanding heights of the economy, Google and other technology giants -- with some help from their allies in Washington -- are trying to weaken patent protections and thus prevent a new generation of startups from climbing the ladder.

In any industry, a new entrant faces off against established players that possess numerous advantages, including an established customer base, government connections, and lots of cash. Patent laws help even the playing field by allowing smaller companies the exclusive right to their innovations. In fact, Google and all of America's giant technology companies were once upstarts themselves, during an era that featured strong patent rights.

But the U.S. patent system has changed dramatically since then, and not coincidentally, just as "Big Tech" started to dominate the technology industry.

First, starting in 2014 with *Alice Corp v. CLS Bank International*, a series of Supreme Court decisions made it much harder to patent the kind of algorithmic innovations that made Google what it is today. In the years after the Alice decision, for example, denials of AI-related patents on grounds of ineligibility quadrupled. Indeed, under current law, Mr. Page's first patent would almost certainly be invalid.

Lower courts have extended the Supreme Court's precedent to new areas, ruling that even innovations in electric car chargers and garage door openers are actually unpatentable "abstract ideas." Bad law that once affected only tech startups, now impacts potentially any industry.

A bipartisan reform proposal in the Senate crafted by Thom Tillis, R-NC, the Patent Eligibility Restoration Act, would clear up the murkiness the Supreme Court created. But Big Tech interests are dead-set against it. The less that's patentable, the more Big Tech can lift the work of others without paying.

Second, around 2010, Big Tech lobbied Congress to pass the "America Invents Act," which lawmakers wrote with the intention of streamlining patent litigation. Most notably, the law set up an administrative body that could review the validity of already-issued patents, to confirm whether they were genuinely novel, useful, and nonobvious. One of the architects of that legislation, Rep. Darrell Issa, R-CA, just became the new chair of the House subcommittee on intellectual property.

Unfortunately, Big Tech almost immediately abused the law, by infringing on smaller rivals' patents and then repeatedly filing challenges against those patents. In fact, there are now companies

whose entire business is challenging patents on behalf of Big Tech. These professional patent challengers keep their clients anonymous, enabling them to mount repeated attacks on their rivals' patents.

In 2020, the Patent Office issued decisions to cut back on duplicative patent challenges, but last year, Big Tech's lobbying teams urged Congress to reverse the reform. Fortunately, the bill failed -- but Big Tech will almost certainly try to secure favorable treatment this year.

Third, even if a patent survives Big Tech's attacks, it has become virtually impossible to stop their infringement. Traditionally, courts would order an infringer to simply stop using the technology as a matter of course. The patent owner could decide whether to compete based on its idea or accept payment from infringers.

In recent years, however, courts have moved towards awarding a "reasonable royalty" but allowing infringement to continue. Now, after years of infringement and millions in litigation costs, the most a patent owner can usually collect is what the infringer should have paid before using the technology.

This system gives Big Tech no incentive to avoid infringement, or even pay appropriate compensation when they're sued. If they litigate they stand a reasonable chance of invalidating the patent, in which case they pay nothing. At worst they pay what they originally owed, but years later. In the meantime, they continue to profit and their smaller competitor may go out of business.

The result of all of these changes to our patent system is that it is almost impossible for startups to use patents to challenge the Big Tech incumbents as they might have in the past. With their other market advantages, Big Tech companies can crush new competition -- and make our economy less dynamic in the long run.

That's why Congress needs to empower small innovators by restoring the balanced patent system that built America's tech industry.