

The Spoilsmen: How Congress Corrupted Patent Reform

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WASHINGTON -- After months of dead-end negotiations over raising the federal debt ceiling, President Barack Obama walked into the East Room of the White House on June 29 to demand action. The stalled talks not only threatened the integrity of the nation's debt, he said, they reflected a lack of purpose about solving economic problems and improving the plight of middle-class families.

"Many people are still looking for work or looking for a job that pays more," Obama said to a scrum of reporters. "There are more steps that we can take right now that would help businesses create jobs here in America."

The first item on Obama's list of immediate, job-creating congressional actions was the passage of patent reform legislation.

"Right now, Congress can send me a bill that would make it easier for entrepreneurs to patent a new product or idea, because we can't give innovators in other countries a big leg up when it comes to opening new businesses and creating new jobs," he said.

Obama was jumping into a drawn-out Capitol Hill battle, one that has never been particularly concerned with creating jobs or alleviating unemployment, despite what recent rhetoric might suggest. Lawmakers have spent nearly a decade jockeying over intellectual property rules in what has become a sprawling corporate feud -- one that currently involves nearly 800 registered lobbyists.

Today, the patent bill looks like a scorecard tallying points for powerful corporations: a win for pharmaceutical companies whose monopolies are driving up Medicare costs; a win for Wall Street's battle against check-processing patents; a loss for tech giants who had hoped to curb costly lawsuits.

Left out of the tally is the public, even as the economic landscape for American families grows darker. Historian Richard Hofstadter famously observed that Congress during the Gilded Age busied itself with dividing the nation's spoils among the rich and powerful. But as the current patent struggle suggests, the spoilsmen are back and Washington is once again an arbiter of who lands the lucre.

"Congress has lost any capacity to piece together these private interests into a public-welfare-promoting change to the patent system," says Christopher Sprigman, an intellectual property expert at the University of Virginia Law School. "It's really not about optimization anymore, it's about which faction is going to win out."

When legislators first introduced a patent bill in 2005, they designed it to lower the costs of lawsuits burdening Internet and software companies. Lured by the big, juicy settlements to be won by suing huge companies for intellectual property theft, an entire industry had emerged around patent chasing alone. These so-called "patent trolls" don't produce any goods. Instead, they secure unclaimed patents for ideas in use and try to cash out in court.

Trolls file hundreds of lawsuits a year over "low quality" patents -- lobbyist legal jargon for the questionable or downright bizarre patents routinely granted by the understaffed Patent and Trademark Office. In recent years, patents have been approved for products including a wheeled flower pot ([patent No. 7,908,942](#)), the crustless peanut butter and jelly sandwich (patent No. [6,004,596](#)), a decorative box that can be placed in a casket ([No. 7,908,942](#)) and an accounting scheme that helps people dodge taxes by moving stock options around ([No. 6,567,790](#)). Once approved by the patent office, it's difficult and costly to overturn the patent in courts, which grant significant deference to the office's decisions.

The legislative attempt to crush patent trolls ignited a byzantine war in the nation's capital between powerful interests -- tech giants, drug companies, even too-big-to-fail banks -- sweetening the pot for politicians sitting at the center of it all in Washington.

"The interesting thing about patent reform is that it didn't break along traditional ideological lines. It wasn't a left-right, Democrat-Republican thing. It was a corporate thing," says Karl Manheim, a law professor at Loyola Law School in Los Angeles. Manheim served as special counsel to the House Subcommittee on Courts, the Internet and Intellectual Property for much of the patent fight. "[Microsoft CEO] Steve Ballmer came once to a meeting that we held, and there were folks there from Sun Microsystems. We had discussions with Pharma, with the Biotechnology Industry Organization ... I can even recall meeting with the aftermarket autoparts industry."

As the patent struggle has dragged on in Washington, patent trolling has surged in popularity. And some of the most aggressive players aren't boutique, lawsuit-only operations -- they're the very tech giants who came to Congress for patent help in the first place.

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