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Alternative Patents Would Solve Many Inventor Woes

By **John Powers** (October 25, 2023, 4:55 PM EDT)

Elon Musk's biotechnology startup Neuralink Corp. recently received institutional review board approval to enroll U.S. participants for clinical trials. The technology involved has the potential for significant advancements for those with spinal cord and other injuries.

Two of Musk's other well-known companies — Space Exploration Technologies Corp., or SpaceX and Tesla Inc — are also pioneers in their respective fields. However, despite the discoveries being found by these companies, the billionaire entrepreneur has made no secret of his disdain for patents, saying that they are for the weak, and benefit attorneys and corporations rather than inventors.[1]



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Meanwhile, Musk holds 23 patents in his own name by one recent estimate. While that's comparably few, even Musk is not able to dispense entirely of patents.

Certainly, there are countless problems with today's patent system, such as money and time spent procuring and enforcing patents, as well as the extortive manner in which many patents are abused. To remedy these and other problems, one solution is to fundamentally reform the patent system by giving inventors the option of having carefully crafted alternative patents, each of which would be tailored to the value of an invention.

This reform to the patent system, referred to as patent durability, would allow inventors — those who know more about the magnitude of the problems being solved than anyone else, and whose opinions about those problems should be paramount — to bargain for their patent protection on a patent's filing date so that the patent's strength, e.g., its durability, would match the value of the secret it protects.

It would do this by entrusting inventive secrets with statistics and mathematics, as opposed to today's one-size-fits-all approach which leads to waste.

In proscribing patent durability, inventors would be given the option on the filing date to, for example, set a cap on future damages, set a cap on future patent assertions, set a limit on a number of claims being filed, proscribe a patent term, set standards that the patent would satisfy — e.g., relaxed standards under Title 35 of the U.S. Code, Sections 101 and 103 — or proscribe an increased amount that future defendants would have to pay to institute inter partes review.

All of this data would be fed into a calculator which would output, via an actuarial process as done in the insurance industry, a U.S. Patent and Trademark Office cost schedule. Attorney fees would also be affected — e.g., an application limited to one claim would require less time to draft, in

addition to requiring less time to examine.

In turn, inventors would be able to pick and choose which aspects of a patent they want and pay a proportionate amount in exchange. It follows that because each of these newly issued patents would be constructed with a credible eye on future examination as well as litigation, inefficient back-and-forth communications between inventors, examiners, infringers, and judges would be minimized.

In other words, patent offices and courts would not become clogged via these alternative patents, but would rather, if legislation were passed strategically, be made more efficient due to the increased trust between inventors and users of their technologies.

Accordingly, if actuaries, existing computing technologies, and potentially those companies like xAI, another Musk company, were utilized to give inventors the power to proscribe patent durability, one day these alternative patents would be issued, enforced and expired so dynamically that they would function like the internet to facilitate trade between inventors and users of technology, who are typically spaced very far distances from one another in an intellectual commerce sense.

These alternative patents might also cause tough patent critics to change their tune when it comes to patents, if they do in fact value the rights of individual inventors to declare ownership and prosper.

Specifically, if critics saw that patent durability could reduce USPTO and attorney fees and better guide future litigations for some, they might view alternative patents as being designed to enrich actual inventors instead of entrench the positions of large corporations.

They might view them as a way for inventors who often cannot afford the patent system and inventors of less valuable but still patentable inventions, to accumulate capital.

Now, for the more valuable inventions, a cautionary tale from Pliny the Elder is worth remembering. The ancient Roman author told of a glassmaker who invented a shatterproof glass bowl, which the glassmaker placed before Emperor Tiberius.

After the emperor tested the bowl, discovered its significant value, and learned that no one else knew the manufacturing technique, he had the glassmaker beheaded, fearing that such an invention would undermine the value of gold and silver.

For inventions like the bowl, rather than entrust the fruits of their discovery with one individual, or with a patent that might not be capable of keeping infringers in check, patent durability enables inventors to justly collect on what they have discovered.

For these inventions, inventors would be given the choice to bargain for more durable patent protection than is available in today's system. Doing so would make them prudent, not weak.

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[1] Specifically, in a September 2022 CNBC article, he was quoted as saying, "I don't care about patents...patents are for the weak...[they are] used like landmines in warfare." He also stated in a 2014 memo to Tesla employees that patents "entrench the positions of giant corporations and enrich those in the legal profession, rather than the actual inventors."

[2] <https://insights.greym.com/elon-musk-patents/>.

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