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USPTO Should Let Inventors Valuate Patents In Prosecution

By **John Powers** (April 20, 2026, 5:17 PM EDT)

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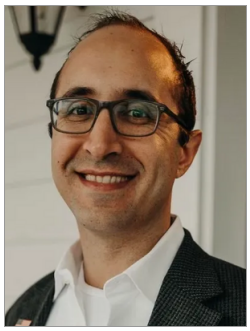

John Powers

In a Feb. 10 Senate Appropriations Committee hearing, U.S. Department of Commerce Secretary Howard Lutnick was asked how to value patents. The question was posed by Sen. Chris Coons, D-Del., and it was in response to Lutnick offering a plan in 2025 to tax patents based on value. Lutnick responded to Coons by asking, "How in the world could we do that? How in the world could anyone reasonably do that?"

Rep. Darrell Issa, R-Calif., also posed this question to U.S. Patent and Trademark Office Director John Squires in a March 25 U.S. House of Representatives Judiciary Subcommittee hearing. Squires responded to Issa by stating, "Certainly the patent office would not be in the business of providing market valuations for people on their patents."

Valuing patents is a tough proposition, but in this case, Lutnick and Squires were right to throw up their hands when pressed by Coons and Issa. They and other third parties are not the ones we care about when it comes to patent value. Instead, we have always only cared about one party when it comes to patent value — inventors.

In patent litigation, inventors are the most credible witnesses for value because inventions flow through them first, meaning their voice trumps all secondhand witnesses.

Thus, the question Coons and Issa should be asking our innovation leaders is not how do you value patents, but how do inventors value patents? Everything that counts in U.S. patent law hinges on the answer to that question.

Now here's the real problem that everyone is ignoring — the answer to this question only becomes part of the official patent record during litigation. No one asks inventors this question during patent prosecution, even though patent attorneys frequently hear their clients utter remarks like, "I know the second this invention gets out there it will be copied."

The USPTO should ask inventors this question both when they file their patent applications, and when their patents are getting ready to issue.

As inventors enter patent prosecution at the USPTO, they are better able to forecast the impact of their inventions than anyone. They also gain additional knowledge about the strength of their inventions during prosecution, such as after overcoming claim rejections and dealing with patent examiners of varying difficulty.

The total amount of knowledge inventors have about the impact of their inventions on the market when they enter patent prosecution and right before their patents issue is astounding. However, today's patent system forces them to sit on this knowledge, and then one day far in the future

face an opposing attorney during a deposition or trial.

The solution is incredibly plain — inventor knowledge must be made part of the official patent record closer to the birth of inventions. Failing to do this allows speculation to creep into future damages determinations, which is very bad for inventors.

By accounting for inventor knowledge early on, the securities around the flow of money would tighten, meaning more money would flow to inventors from infringers. This would help to combat rot in the patent system.

More technically, the call to the USPTO is to give inventors the option to vary durability elements of their patents when they procure their patents in exchange for variances in their USPTO fees — as proposed in my previous Law360 guest articles, "**Alternative Patents Would Solve Many Inventor Woes**" and "**DOGE Should Address Inefficiency In The Patent Marketplace**."

Using USPTO fees is a perfect opportunity for inventor knowledge to become part of the official patent record. It would inform future litigation, and also inform attorney fees associated with both patent prosecution and patent litigation.

Importantly, inventors would have every reason to ensure these fees are accurately paid. If an inventor tried to game the system by paying for higher durability elements, such as a requirement that future defendants pay higher inter partes review request and post-institution fees, it would not work out in their favor.

In litigation, the inventor would still have to prove infringement, meaning the big strong patent would not be able to recover what it is was designed for. On the other hand, if an inventor were to pay reduced USPTO fees for lower durability elements, such as a cap on future damages and assertion power, the infringement would be too great for the little patent.

Both situations highlight the incentive that inventors would have in accurately proscribing the durability of their patents. The process of paying based on inventor value is not the honor system, and it is not the USPTO monitoring future infringement. Instead, it is the inventor using what he or she already knows to move closer to the infringer in commerce.

At present, infringers enjoy the distance that inventors must travel to recover from them.

That distance includes inventors engaging and paying for a patent attorney, filing a patent application, waiting one to four years, hoping that a patent examiner allows coverage that reads on the products of infringers, paying the patent attorney to send cease and desist letters, filing a complaint, responding to answers, hiring experts, engaging in discovery, being successful at inter partes review or ex parte reexamination, and often also being successful in a full federal district court trial.

The costs and time for inventors are mind-boggling. These hurdles and costs are the direct consequence of inventors being muzzled in the patent process, and then being forced to answer questions from opposing attorneys many years after the fact.

Giving inventors the option to vary USPTO fees in exchange for variable patent durability will inform both present patent prosecution and future patent litigation, thereby reducing speculation and better allowing patents to be matched to the infringers who violate them.

In other words, the knowledge that inventors have early on will be used to shorten the distance they will ultimately have to travel when it comes to procuring and enforcing their patents.

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