GUEST OPINION

Taxing Patents - the Worst Idea Ever?

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Charging a value-based fee on patents could be a major drag on innovation.

We're flooded these days by policy ideas with questionable value and uncertain impacts. Some connect to real issues but are flawed in their application. There's one in the pipeline, however, that's just plain dumb.

The Department of Commerce appears to be considering a major change to the U.S. patent system. Without getting too technical, the idea is to charge a fee for U.S. patents based on their value (currently they're only charged a modest fee to cover the cost of processing). Nothing has been announced yet, but usually where there's smoke there's fire.

Here's why this is a bad idea.

Patents are at the root of the United States' intellectual property system, which is the best in the world. That system, in turn, is the foundation for our innovation-led economy, as entrepreneurs and innovators turn their discoveries into products. Patents give those innovators time to benefit from their discoveries. The technology economy we have today is a direct product.

Patents, however, have an indeterminate value. They have potential value, but until proven in the market, it's hard to say how much.

Fixing the value of a patent at a point in time is therefore context-dependent and incredibly complex. Who will determine that value – an already understaffed and overstretched Patent and Trademark Office? The process would require a small army of economists and industry and legal experts. Disputes would come with the territory, creating a new field for litigation.

Another problem is that a single product can involve a stack of patents. This is particularly true in the semiconductor industry, where one chip might package over a thousand patents.

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Most startups have little or no revenue in their early stages and won't be profitable for years. Apart from their team, a patent may be their only asset. Will a patent tax looming over the heads of entrepreneurs encourage the kind of dedicated risk-taking that has made Silicon Valley a success? Venture capital could also be affected – what will investors make of the added uncertainty and risk to their portfolios? Then you have universities that hold large numbers of patents, which may or may not ever be licensed but could be taxed.

The list goes on. If patent-holding companies successfully develop commercial products, they already pay federal and state tax on their revenue, so this would constitute double taxation. If companies then choose not to patent their technologies, the alternative is to rely on trade secrets. Patents, however, require the disclosure of technologies and by keeping them secret we prevent their future accessibility and the competition that comes with it.

Globally, the powerful U.S. role as a secure home for intellectual property protection could be undermined. Companies and inventors from around the world patent their technologies in the U.S. because our system is the best – transparent and with strong legal roots. Will they continue to bring their IP here if it's taxed?

The bottom line is that patents shouldn't be a barrier to innovation – they should be an enabler. We should encourage entrepreneurs to take risks, not put obstacles in their way. By viewing patents as just another way to extract government revenue, this idea cuts against the grain of innovation and the entrepreneurial system that makes this country great. Innovation is a process and a vision, led by risk-takers, not a transaction. This is a terrible idea and the business community needs to say so.

Send op-ed questions or ideas to Editor-in-Chief Jeremy C. Owens at jowens@bizjournals.com.

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