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Kathleen Hudik
American University Washington College of Law

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by Kathleen Hudik

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Dear Judge Posner,

I think you're great. Really. I've sung your praises far and wide, and was so excited you got your capable hands on the Apple patent case last month. Thank you also for taking the time to slyly comment on the underlying problems of the patent system instead of commenting publicly on the case (wink). May I humbly suggest one edit to improve the effectiveness of your work? Move your "I am not enough of an expert in patent law" disclaimer, located in your last paragraph, to the beginning of the piece. Although I am likewise no expert, reader expectations might thus be better managed in advance.

Ever your admirer,

Kathleen Hudik

In a July 12th article published in The Atlantic, titled "Why There Are Too Many Patents In America," Judge Richard Posner parlayed his recent participation in the *Apple v. Motorola* patent case into an opportunity to recommend general patent system reform. His June decision on *Apple* dismissed the case with prejudice, in a fit of frustration with the parties and apparently, with the American patent system as a whole. In his article, Posner claimed that the patent system's one-size-fits-all sort of protection is inappropriate for diverse industries with unique costs, motivations, and markets. He uses American pharmaceuticals as the exemplary industry fit for the sort of patent protection offered in this country currently. Citing the high upfront costs to develop a new drug even before it may be released to the public to reap profits as well as how cheaply a competitor may then reproduce a knock-off of the drug, Posner considers the 20-year exclusive patent and licensing system well-suited to this industry. He refers, however, to a hypothetical industry in which product improvements are created by well-salaried researchers and developers even when the improvements are minor and cost very little. In this hypothetical industry, merely being the first to develop the improvement confers benefits to inventors as consumers will develop brand support and the inventor will have a jumpstart on making improvements or cost-effective adjustments to the product before its competitors. In this hypothetical industry, where products become obsolete as quickly as they are invented, Posner states that the winner-take-all exclusivity of the patent system results in "excessive resources being devoted to inventive activity." He says this, and all signs indicate that he means it. It doesn't take much technical understanding to realize Posner's talking about technology.

The judge doesn't simply leave us with this gripe about unnecessary protection. He rounds out his frustration with the patent system in America with several suggestions on how to fix the problem of an ill-fitting system in a diverse marketplace:

- Reduce the patent term of 20 years in industries that are unlike pharmaceuticals.
- Institute compulsory licensing.
- Eliminate court trials of patent disputes by expanding the adjudication available at the United States Patent and Trademark Office (USPTO) followed by limited appellate review.
- Eliminate patent trolling by requiring proof of use.
- Provide judges trying patent cases with special training on technical issues and patent law.

These suggestions can, and hopefully will be, parsed at length in the comments section by those who have given these topics extensive

thought. I'd especially welcome a robust discussion on how to eliminate patent trolls by instituting proof-of-use similar to the trademark system or what types of specific training for federal judges trying patent cases would be most helpful. I would, however, like to briefly point out to the reader and the learned Judge a few particularly basic weaknesses and pitfalls of his suggestions.

To begin with, I'd like to draw attention to the fact that the USPTO is in the process of reformulating its adjudications in light of the changes within 2011's Leahy-Smith America Invents Act (AIA). The Board of Patent Appeals and Interferences will become the Patent Trial and Appeal Board (PTAB) as of September 16, 2012, with new procedures and deadlines to promote more efficient use of its adjudicatory abilities.

Furthermore, the AIA has given the USPTO fee-setting abilities, which will give the office a greater chance of having an efficient workforce and adjudication process. While court trials will still be available to parties, a more efficient and low-cost system will be more attractive to parties and will therefore likely decrease patent caseload in the court system. Removing the cases from the court system entirely would place a huge encumbrance (even with its fee setting authority) on an administrative agency with limited ability to award damages or sanctions. The USPTO's emphasis on decreasing pendency and increasing efficiency is a more palatable and tenable solution to an overburdened court system.

As for Posner's suggestion on tailoring the patent system to accommodate specific industries' characteristic, this tack would be incredibly difficult and overall, self-defeating. Some basic questions come up: Who will support decreasing patent rights to only certain industries? As Judge Posner very well knows, inventors are granted exclusive rights to protection through the United States Constitution. Disassembling the system, however abused, because those innovators and their markets operate differently would be a difficult position to take politically or judicially. Also, and perhaps most importantly to this point, how will America be able to promote equality of patent protection worldwide to protect its industries when its own system discriminates based on the content of its industries? The United States, through its membership to the TRIPS agreement, is advocating nondiscrimination of patent subject matter worldwide in an effort to protect its markets. Discriminating amongst our own industries might solve an immediate domestic problem but would put American innovation at risk internationally if other countries attempt to draw their own lines around the most profitable or troublesome industries. Reducing patent protections for any industry in America sets a dangerous precedent for our interests abroad – the proverbial "shooting oneself in the foot."

While Judge Posner is justified in his frustration over the abuse of the standing patent system, his suggestions on how to quash unintended negative consequences of the system create even bigger, even more dangerous negative consequences of their own. If fixing need be done, which indeed it may, those fixes should consider American industry both specifically and generally, and should likely be left to the experts.