

Has Patent Policy Kept Pace with Innovation?

Chair: Alan Marco, Former Chief Economist, U.S. Patent and Trademark Office; Associate Professor of Public Policy, Georgia Tech

Panelists:

- *Anne Glover, Chief Executive and Co-founder, Amadeus Capital Partners*
- *Mary Moore Hamrick, Chief Public Policy Officer, Grant Thornton*
- *Kyle Jensen, Associate Dean and Director of Entrepreneurship, Yale School of Management*
- *Jeff Kuhn, Assistant Professor of Strategy and Entrepreneurship, UNC Kenan-Flagler Business School*

Panel chair Alan Marco began the session by providing examples of recent changes to the U.S. patent system that have important potential ramifications for the entrepreneurial landscape. In particular, he mentioned the America Invents Act, signed by President Obama in 2011, which switched the patent system from “first to invent” to “first to file.” The law became effective in March of 2013. Marco continued to lay out a list of other issues for the panelists to discuss, including recent Supreme Court decisions that have brought into question the subject matter eligible for patenting, potentially weakening patent protection. Marco then proceeded to place these developments in the context of recent economic and technological changes which present additional challenges for innovation and entrepreneurship. Specific examples that he brought up included innovation in artificial intelligence, trade policies and the push for lower prescription drug prices.

Each panelist proceeded to discuss issues that they believe are important questions for the space. Anne Glover, a U.K.-based venture capitalist, asked how these changes will impact foreign investment in U.S. companies, in particular through export trade restrictions and technology ownership.

Panelist Mary Moore Hamrick pointed out that, despite the current dysfunction in Washington, D.C., one of the few issues still being addressed in a bipartisan manner is patent reform. Given the recent developments in global security, data privacy and cybersecurity, Hamrick brought up the need to modernize the legal language surrounding patenting and copyright policies in current trade deals like the USMCA.

Kyle Jensen picked up the discussion of Supreme Court cases and the issue of practical application for previously unpatentable things. The issue of gene patenting was offered as a specific example in which Supreme Court decisions changed what can be patented and invalidated thousands of gene patents. Following such rulings, judicial challenges jumped more than tenfold, which raises questions about the efficacy of patent laws. On the other hand, judicial rulings that clarify the boundaries of what can and cannot be patented are a necessary adjustment to patent laws that are at times too broad. Thus, it’s not obvious that Supreme Court decisions regarding patent disputes are harmful to entrepreneurs across the board.

Jeff Kuhn brought up the concept of intellectual property as a strategic asset. In his view, some of the Supreme Court decisions discussed by the panelists have smoothed out edges in the patent system because practically, it is large firms who build up patent bases. Additionally, Kuhn discussed how patent

policies affect different industries differently. For example, the software and technology space has not been as affected by the recent changes in patent policy as industries like biotechnology.

Generally, patent rights seem to have been weakened. Anti-joinder laws that allow firms to sue many patent violators at once have been removed. Moving to “first to file” has benefited large companies at the expense of the small, and while copyright laws have been strengthened over time, patent laws seem to have taken a different path. Throughout the discussion, other questions and reforms were raised and discussed. For example, how do entrepreneurs protect their ideas? Large companies are very good at strategically using the patent system. However, maintenance fees may have the potential to disincentivize the building of large patent portfolios. For panelists like Kuhn, the bigger problem is not the ability to file patents, but large strategic portfolios of patents. Other issues discussed included the role of patenting in slowing down the monopoly of large firms with access to large amounts of data. Can their innovation in how they use this data be patented?

Finally, a number of potential reforms were discussed. Should the U.S. return to “first to invent?” Can escalating fees for resubmission of rejected patent filings eliminate some of the strategic behavior by firms? Would it also burden smaller firms? Would a provisional patent system be beneficial to entrepreneurs? How do policymakers clarify the patentable subject matter laws to make the system work for small firms, without further encouraging strategic behavior by large firms?