

**In Defense of the Current Patent System
With no Requirement of Commercialization for Patent Rights Retention**

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There is no question that the United States patent system has had a profound impact on the strength of the American economic and technological giant, which has been unrivaled in recent world history. The patent system, which was originally described in the constitution to “promote the progress of science and useful arts” has become a major support for the sustained economic growth of the United States. While the capitalist system that has been a distinction of the American economic policy has created a great deal of motivation for invention and entrepreneurship, there is some debate as to whether or not the patent system does enough within this framework to encourage entrepreneurship and the economic advantage that accompanies such business ventures. One of the suggestions that critics out forth is that a requirement of commercialization for patentability might be appropriate. Although it is true that the present system has some problems that present themselves in various ways, there is not enough evidence to support a major revision to the patent law that would create a requirement of commercialization of an invention in order to achieve patentability. And while there are compelling reasons to support the idea of an amendment to the patent system that would require commercialization to receive a patent, such an amendment is ultimately unnecessary and would have some negative side effects.

The lack of necessity for a new requirement

In considering this issue, it is important to take the origin of the patent system into account. The system is set up under Article I, Section 8 of the constitution. The clause reads

that congress shall have the power to “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” There is no explicit mention of an exhaustive list of requirements for an invention to be patented, but several requirements are implied, and it does not take a great stretch of the imagination to see that the writers of the constitution were certainly implying that this “progress of science and the useful arts” was not meant to sit on the shelf, but rather to be used and commercialized. As mentioned previously, this system has resulted in amazing economic growth in the United States, but there are still critics who think it could be improve by actually requiring an invention to be commercialized in order to keep it patented. Most of them cite the fact that only a small portion of the number of patents that are issued are for inventions that actually are commercialized and are put to use. In some sources, the number of patents that are commercialized has been said to be as low as 2 percent, and even the most optimistic statistics are not much better.ⁱ While this is a valid point, the problem may be more with the liberal issuing of patents. There is still ample encouragement of commercialization in the present system, and implementing a new requirement would in fact create more problems, and not necessarily solve any.

While it is true that many patents are issued for inventions that are not commercialized, the solution may lie in more discretion when issuing patents, and not with laying down more requirements and the bureaucracies that go along with them. In the most recent revision of the patent law, the definition of patentability for an invention is simply that it must be useful, new, and nonobvious.ⁱⁱ It seems intuitively that any invention that is truly useful, new, and non-

obvious would be very marketable, and a patent holder would be passing up an amazing opportunity if they did not act on the chance to commercialize something so innovative.

One might wonder how “useful” should be defined. There are certainly many degrees to the utility of an invention, and it is not hard to think of examples that demonstrate the vast range of utility that is present in the realm of patented inventions. For example, one would consider a patent for air-conditioned shoes much less useful than a patent for an integrated circuit that would be used in a large percentage of mobile phones or some other common device.ⁱⁱⁱ

In the past, an invention was considered useful if there was a market for it. In *Lowell v. Lewis*, the court said, “whether [the invention] be more or less useful is a circumstance very material to the interest of the patentee, but of no importance to the public. If it be not extensively useful, it will sink into contempt and disregard.”^{iv} This effectively equated utility with the likelihood that the invention could be commercialized, and so relatively frivolous patents were not likely to be issued.

However, in more modern times, patents are not always given for things that aren’t new and useful.^v The courts have defined the utility requirement a bit more broadly. In *Brenner v. Manson*, “useful” was defined to be “minimally operable towards some practical purpose.”^{vi} This more loose definition of utility includes many ideas that one would not consider useful in an everyday sense, and allows for many inventions to receive patents which many people would not likely find to be “useful, new, and non obvious.” And so one solution to the current problem that

would not include a new requirement would simply be to rule on patent applications with a stricter eye towards the utility requirement of the patent application.

Assuming that the patent office were to issue patents with a narrower view of the definition of usefulness, it is unlikely that any commercialization requirement would even be considered. A patent effectively grants a temporary monopoly and although there are many ways in which that monopoly is restricted, not the least of which are antitrust laws, it still puts that business in an enviable position within that market.^{vii} In short, since patents would be issued for inventions that are especially attractive for commercialization, it is unlikely that any idea receiving a patent would sit on the shelf unused. This would obviously also apply to new uses for a previous invention as well, since they are also patentable.^{viii} Any person or company that finds a new use for a previously patented invention would be unusually delinquent if they did not act on that idea, patent it, and commercialize it.

The current United States patent system already includes policies that are very friendly to inventors who see the patent as a means to start a business venture. There is a grace period of one year in which the invention can be “on sale,” which allows the inventor to test his idea and see if there is enough interest in it that it is worthwhile to pursue a patent. This type of policy is very different from other countries, where there is no grace period. In fact, the patent systems of many other countries operate on a “first to file” system, which makes it impossible to test an invention in the public market without filing first, since someone will certainly file for any useful unpatented invention as soon as it is made public. These systems often require for patentability that the invention has not been made public. Great Britain is an example of one system with this

policy, and the German system even denies patents to inventions that have been made public in any country, not just in Germany.^{ix} Policies of this type obviously prohibit the inventor from undertaking any kind of experimental marketing before deciding on the value of applying for a patent. In this way, the American system is very friendly to the commercialization of any invention.

The effects of implementing the requirement

And so it can be seen that a revision of the patent system that would require an invention to be commercialized in order for the inventor to retain the rights granted by the patent is an unnecessary one. Along with its lack of necessity, the effects of the implementation of such a revision should also be considered. And so it is useful to picture what would happen if such a requirement were made. For clarification, it should be stated that this requirement would simply make it possible for the patent office to revoke the rights of exclusivity that were awarded with the patent if the invention is not commercialized. It would, of course, not apply to inventions that were considered important for national security or that would be detrimental to the public good.

There would also be some practical considerations when formulating this requirement. It would need to be determined what is meant by “commercialized.” A better term would be to simply equate it with the legal definition of “public use or on sale,” which is used when determining if an inventor has waited longer than the yearlong grace period from the first commercial availability of the invention to file the patent application.^x

Even with this specific definition of commercial availability, it is not likely that it will be strong enough to achieve the desired effect. If one of the objectives of this new system is to create more economic growth and maximize the availability of the invention, simply having the inventor meet some simple commercialization requirement will not do this as well as possible. If the inventor starts a company around the invention, and it is very small, or only operates in a certain region, then it will not have the economic impact or widespread effects that it would with a larger company.

Another more obvious problem with this system is that of enforcement. It may be true that there is a great waste of manpower involved in issuing patents for inventions that will never be used, but to enforce that commercialization would require far more effort. Even if only a small percentage of the patents were to be issued under this requirement, with the current patent length of twenty years, it would be a formidable task to process the resulting legal action. These claims by competitors in attempts to remove the patents would have to be processed in the same way that patent infringement lawsuits would be.

There are also many situations in which the inventor may have a useful patent, but it is not commercially viable yet. This is true of many chemical compounds for pharmaceuticals and other biotechnology inventions. For many innovations in this area, the grace period of one year is not nearly enough time to determine the demand or the usefulness of their products.^{xi} In such situations, it would not be possible for the company to receive a patent because although it is likely to be useful later in the development of a treatment or product, it would make no sense to market it at that time by itself.

Such a system would even be likely to hurt the small inventor in certain circumstances. The current system is a “first to invent,” not a “first to file” system. However, it is likely that a big company, or any entity that is in a position to file for a patent first would also be in the best position financially to market the product and make it commercially available. In the hands of the small inventor, it would take much longer for a useful invention to reach the public. While it is true that licensing would be an option that may not be in the best interest of the inventor either. In other words, if the objective of the new requirement is to use the patent system to create the greatest possible economic and social benefit from the invention, the “first to invent” system may not be the best to use.

And so it can be seen that not only is the idea of adding a commercialization requirement to the patent system is not likely to offer a lasting and thorough solution to the perceived problem. The United States patent system is already very friendly towards and even motivates actions that use innovation to benefit society both economically and technologically. This makes adding a requirement somewhat unnecessary, especially if the patent office was more strict with regard to the utility requirement of patentability. Regardless, it is likely that implementing such a requirement could have negative effects, and so the current system should be maintained without revoking the patent rights for inventions that are not commercialized.

ⁱ <http://www.library.umaine.edu/patents/value.htm>

ⁱⁱ 35 U.S.C.A, section 101, 102, 103

ⁱⁱⁱ United States Patent # 5,375,430

^{iv} quoted. in Schechter, Roger, and Thomas, John. Intellectual Property: The Law of Copyrights, Patents, and Trademarks. St. Paul: Thomson West, 2003. p. 316

^v Schechter, p. 292

^{vi} Quoted in Schechter, p. 282

^{vii} Bowman, Ward. Patent and Antitrust Law. Chicago: University of Chicago, 1973. p. ix

^{viii} 35 U.S.C.A, section 100

^{ix} Rines, Robert H. Create or Perish: The Case for Inventions and Patents. p. 33

^x 35 U.S.C.A, section 102

^{xi} Schechter, p. 315