

How Google and Big Tech Killed the U.S. Patent System

By Michael W. Shore

This is the story about patents, but more importantly, it's a story about how the United States has become a banana republic. The term "banana republic" was coined by American author [O. Henry](#) in 1904 in reference to [Honduras](#) which came under extraordinary influence by multinational American fruit corporations. Banana republics are societies characterized by their starkly [stratified social classes](#) and a ruling-class [plutocracy](#) comprised of the business, political and military elites. The Elites rule over a servile government that abets and supports, for [kickbacks](#) and bribes, the exploitation of the rest of society. Instead of Dole and United Fruit controlling Honduras, we now have Apple, Microsoft, Google and other tech giants controlling Congress and the Executive Branch through unlimited lobbying and political donations. As demonstrated below, the only difference between Honduras in 1904 and the United States today is that the bananas are smartphones and the software they contain.

What Are Patents?

A patent is a disclosure of new and novel technical information to the world. In essence, patents inform the world of something new *and* useful. For a patent to issue, the information disclosed must be sufficient to enable a person familiar with the technological field to make the invention without undue additional experimentation. The purpose of the patent system is to encourage the disclosure of new, innovative technology so the base of knowledge upon which other inventors work advances. Technology advances faster and the world benefits from those advances when new technology is disclosed and built upon instead of hidden from other innovators in the field who, if they knew about the new technology, could further advance it.

In exchange for the technical disclosures in patents to competitors and potential competitors, the patentee has to be protected from free-riders and thieves who contributed nothing to the disclosed technical advancement, but would copy it for their own profit. So for disclosing her invention for others to advance going forward, the original inventor/patentee is granted a patent. The patent is an exclusive right to make money off her invention for a limited period of time. A patent is essentially a right to exclude others from using your invention without compensating you. A license from the patent owner to a

company that wants to use the patented technology is a compensated, or bargained waiver of that right to exclude.

A strong patent system means an inventor can rely upon the strength of his patent to actually receive the benefit of the public disclosure of his invention. This reliance on a strong patent system is called the “presumption of validity”. In order to attract investments, justify research and development efforts and develop new markets for new products, a patentee must be confident that its duly-issued (and paid for) United States patent will be enforced by the issuing government and therefore respected by competitors, both existing and potential. In other words, if the patent system is viewed as weak as to enforcement of patent rights, inventors receive nothing for disclosing their inventions. The free-riders, copiers and thieves can simply take the free information without compensation to the inventor. If inventors see the patent system as weak, they will not disclose their inventions, but hide them as trade secrets. This stifles innovation because new inventions that if disclosed could be improved upon are available. Most inventions today are improvements on prior, disclosed inventions, so a weak patent system that discourages patenting slows the advances of technology and the benefits those advances would have brought are delayed or not realized at all. Patents matter.

The beneficiaries of a weak patent system are large multinationals who already dominate their markets with financial power and market share like Google, Facebook, Apple and Amazon. The Elites do not need patents. As they gain dominance in their markets, innovation is not as important as market share, profits and maintaining their dominance. The “peasants” (read: small companies and inventors who must innovate to compete) need strong patents to compete with, and perhaps one day join, the Elites. Patents enable the American Dream.

What Google Wants, Google Gets.

Google is in essence a software company built upon a set of algorithms to enable the efficient search of internet content. Google did not invent the internet (nor did Al Gore). The internet was invented by the United States government and research institutions supported by your tax dollars. Google just found a really profitable way to profit from the internet’s invention by others.

As a business, Google is very susceptible to competition. If a group of programmers in their garage could come up with a new set of algorithms that searched more accurately, faster or even in a way that uses less energy, Google could be replaced, or at least have its market dominance threatened. But such a threat only exists if the new market participant is protected by patents. Without patent protection, Google can simply copy the new methods or use its

hundreds of billions in offshore cash to buy the new market entrant for less than its full value. Google understood its precarious position as to new and emerging technologies, so it did what any banana republic Elite would do--it set out to destroy what it perceived as the real threat: the United States patent system.

Google was one of the three largest bundlers of campaign contributions to President Obama.¹ The year after the America Invents Act (“AIA”) was passed, Google employees and their spouses’ direct contributions to Congressmen were almost \$1 million, spread evenly between Republicans and Democrats.² Google spent \$18 million on lobbyists the year the AIA was passed.³ Google’s support of “think tanks” was even greater, and was done in cooperation with other Silicon Valley tech giants.

What did Google get for its money? A new, weaker patent system that allows challenges to patents outside of court, without a jury, without any presumption of validity, and using a low standard of proof. In essence, Google and its Elite friends killed any presumption of validity, the presumption that makes patents valuable by protecting the expectations of patent owners that their rights would be enforceable in neutral, impartial courts against infringers.

¹ See <https://www.opensecrets.org/pres12/contrib.php?id=N00009638>.

² See <https://www.opensecrets.org/pacs/pacgot.php?cycle=2012&cmte=C00428623>.

³ See <https://www.opensecrets.org/lobby/top.php?showYear=2012&indexType=s>.

The patent owners who paid for the research and development of their inventions, paid attorneys to prosecute the patents according to the rules at the time, paid filing fees to the PTO, paid issuance fees to the PTO, paid maintenance fees to the PTO, then created markets for their patented products with investments in factories, distribution systems, and marketing. This was all based on the presumption that these investments would be protected from copiers, free-riders and thieves by a strong, Constitutionally-based U.S. patent enforcement system. But the new AIA procedures, paid for by the Elites, destroyed centuries of U.S. law and precedent so that patents are now **not** presumed valid and can be adjudicated before biased administrative tribunals.

Google wanted a weak patent system because it already dominated the search and internet advertising market in 2012, the year the AIA went into effect, with a 67% market share.⁴ Today with a weaker patent system firmly in place and no fear of any innovating competition protected by patents, Google's market share has increased to almost 82%.⁵

Killing the U.S. Patent System Required the Hiring of Executioners, in This Case, Administrative Patent Judges (APJs)

⁴ See <https://searchenginewatch.com/sew/news/2232359/google-takes-67-search-engine-market-share>.

⁵ See <https://www.netmarketshare.com/search-engine-market-share.aspx?qprid=4&qpcustomd=0>.

Now that Google and other Elites had destroyed the presumption of validity and removed impartial judges from the decision-making process via the AIA, they needed a set of executioners. To finish the job of killing the U.S patent system, the administrative judges appointed to hear the cases had to be insulated from meaningful legal review and understand that their job was to kill patents. Enter head banana, Michele Lee, the political appointee who headed the PTO's implementation of the AIA under bundler recipient President Obama.

Lee is a former Google patent attorney who was in charge of patent *strategy* for Google.⁶ After passage of the AIA and \$36 million in lobbying by Google the prior two years, Ms. Lee was magically promoted to Director of the PTO.⁷ The fox was not only put in charge of the henhouse, it was a fox paid for by the wolves.

The executioners Ms. Lee chose were a new AIA creation, Administrative Patent Judges, or APJs. They are not judges in the sense that term is understood by Americans. They are not independent:

1. APJs work for the PTO Director, a political appointee.

⁶ See <http://www.allgov.com/news/appointments-and-resignations/director-of-the-us-patent-and-trademark-office-who-is-michelle-k-lee-141122?news=854893>.

⁷ See <https://www.opensecrets.org/lobby/top.php?showYear=2014&indexType=s>.

2. The PTO Director can hire and fire APJs who make decisions they do not like. There is no tenured independence for APJs.
3. The PTO Director decides what to pay APJs and can change their pay for any reason.
4. If an APJ panel asserts its independence and reaches a decision the PTO Director does not like, the Director may convene an expanded panel to redecide a case until the PTO Director and his/her political boss is satisfied with a panel's decision.⁸
5. The PTO Director may assign the APJs for each panel, so the decision on who hears the case is a political decision.
6. APJs are not bound by the Code of Conduct for United States Judges or any other ethics code.
7. APJs can decide cases involving former clients.
8. APJs are allowed to decide cases then go to work for the same companies that sought to invalidate those patents.
9. APJs are exempt from job performance reviews.

⁸ *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Matal*, No. 2016-2321, 2017 WL 3597455, at *6 (Fed. Cir. Aug. 22, 2017) (“While we recognize the importance of achieving uniformity in PTO decisions, we question whether the practice of expanding panels where the PTO is dissatisfied with a panel's earlier decision is the appropriate mechanism of achieving the desired uniformity.”).

Judges that are chosen by politicians who decide cases brought by political donors to the politicians are not really judges at all. They are banana workers who pick the bananas the donors want picked.

And even if the APJs were independent, which they are not, the procedures designed by Michele Lee governing the APJs' conduct were set up to kill patents. Neither the AIA nor the PTO rules limit the number of times a patent can be subjected to *inter partes* review. Let that sink in. The Elites can keep attacking a patent they do not like until they find a panel that will kill it. No matter how many times a patent owner wins at the PTAB, its patents are never safe.

Since the creation of IPRs, patents have been routinely reviewed on multiple occasions, some having *more than 125* separate petitions filed. Because a decision of one PTAB panel does not bind another one, surviving one review provides no armor against subsequent challenges. Thus, a PTO Director (or for that matter a President of the United States) intent on invalidating a *particular* patent for a major donor or supporter can continue ordering more and more *inter partes* reviews until the desired outcome is achieved. Pass the bananas.

The Effect of PTAB Invalidating Patents Via IPRs

On September 26, 2016, the U.S. Commerce Department released a comprehensive report, "[Intellectual Property and the U.S. Economy: 2016 Update](#)," which found that IP-intensive industries support at least 45 million

U.S. jobs and contribute more than \$6 trillion dollars to, or 38.2 percent of, U.S. gross domestic product. The report, a joint product of the Commerce Department's United States Patent and Trademark Office and Economics and Statistics Administration serves as an update to the [Intellectual Property and the U.S. Economy: Industries in Focus](#) report released March 2012.⁹ A crisis is developing in this sector of the U.S. economy, however, as new AIA procedures allowing attacks on the validity of U.S. patents have made these valuable assets far less valuable and therefore incapable of supporting the same level of investment in new industries and technologies. Jobs are being lost, millions of high paying, high tech jobs. Some economists are estimating the decline in the value of U.S. patents to be in the *trillions* of dollars.¹⁰ That is a *lot* of bananas.

Why the drop in value? Remember, patents are only valuable if they can be enforced, so any “reform” efforts that make enforcing a patent more expensive and less certain as to outcome harms the patent owner and undermines the ability of the U.S. economy to protect inventors’ rights. The proof is in the cost of bananas. The average price per patent over the three-year period 2012 to 2014 dropped 61% from \$422,286 per patent to \$164,232. In that timeframe,

⁹ See <https://www.uspto.gov/learning-and-resources/ip-motion/intellectual-property-and-us-economy>.

¹⁰ See <https://patentlyo.com/patent/2015/06/america-invents-trillion.html>.

the number of patents sold by inventors dropped from just under 7000 to 2800, showing a decrease in liquidity in the patent market. The overall sales dropped from \$3 billion to well under one-half billion in patent sales per year, or by 84%. The trend accelerated after 2014. If an inventor cannot sell his or her invention for a price that supports their time and effort, they will stop inventing. When they stop inventing, innovation stops.

Why did this precipitous drop in the value of United States patents occur?
IPRs.

Federal District Court with the traditional protections to patent owners invalidates 28.76% of patents as of 2015. The PTAB invalidates 76.61% in IPRs, and because there is no limit on the number of IPRs that can be filed against a patent, the infringers and free-riders can keep filing IPRs until they win. The effective kill rate is likely close to 90%, and in some industries even higher. If the IPRs were really intended to stop bad patents from being enforced at great cost, then the results in IPRs and district courts should be the same, or very similar. But the kill rate for patents in IPRs is almost three times higher. Unless you believe that the U.S. Patent Office is wrong on its efforts to issue patents 2 out of 3 times it acts, there is something else going on in IPRs. The IPR statistics prove that the system was not designed to get to the same results faster and cheaper,

but to get to a different result – the destruction of the United States patent system.

Since passage of the AIA, the United States has fallen from 1st to 10th in the ranking of the strength of its intellectual property system, now tied with Hungary and behind all other highly developed economies.¹¹ As the U.S. weakens its patent system, other countries are strengthening theirs. China in particular is beefing up its patent infringement remedies like injunctions and allowing ever higher damages awards.¹² So the center of the intellectual property universe will move to China. That can only be bad for U.S. inventors and companies. China designs its IP policies to protect Chinese entities.

The United States Congress has effectively redesigned our intellectual property policies to protect political contributors, many of which are multinational corporations that have no loyalty to the United States because a majority of their revenue is sourced (and kept beyond the reach of U.S. taxes) overseas. Anti-patent, market dominating multinational Elites like Google are loyal to profits and their ability to dominate markets.

A banana republic only continues to exist as long as it can supply the bananas. Today, the Elites need the U.S. less and less. They keep trillions of

¹¹ See <https://www.inventorsdigest.com/articles/u-s-falls-1st-10th-patent-system-strength/>.

¹² See <https://www.wsj.com/articles/SB123419814824764201>.

dollars overseas to avoid taxes, they build their products in Asia and their largest markets are quickly becoming Asian as well. We are selling our democracy to the highest bidder while those same bidders are planting all their new banana trees elsewhere. Go ask the people of Honduras what United Fruit and Dole are doing for them now.