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We Must Reinvent Patent System, Says Attorney In New Book

By **Matt Masich**
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DENVER—While Americans have long prided themselves as being the most innovative people in the world, the nation's inventive output has slowed dramatically since its 19th-century heyday.

That's the central idea in the new book "Why Has America Stopped Inventing?" by Darin Gibby, a patent attorney with Kilpatrick Townsend's Denver office.

"America is losing its competitive edge," Gibby said. "We clearly have more talent and more resources than any other country in the world, but we need to do something to foster innovation."

The idea for the book sprang from a casual conversation he had a few years ago with fellow patent attorneys. They were asking each other what "groundbreaking" inventions they had seen lately. Gibby was at a loss. He found it difficult to remember the last time he came across something that truly broke new ground.

"I wondered if it was always this way," he said. "Was it always this hard to get a patent?"

Gibby concedes that the world's cities are filled with American technology, from iPods to Nike shoes, but he says that's lulled us into thinking our inventiveness continues to grow. In the span of a few generations, we developed the steam engine, automobile and airplane, but we've now been relying on the same fossil-fuel-powered mode of transportation for 100 years.

He looked at the patent statistics and discovered that the number of U.S. patents granted per capita is less than half what it was in the 1800s.

"When I ran the numbers, I knew there was a story there," Gibby said.

He ordered 100 books on America's great inventors and in the course of reading them sought to answer two questions: What made them successful? And why can't we do the same thing today?

Rule by patent attorney

The mid-19th Century saw a flourishing of patents. The general public followed patent cases with great interest, Gibby said. When Samuel Colt, inventor of the revolver, took to trial his first patent-infringement lawsuit, The New York Times would publish the daily trial transcripts in their entirety.

Abraham Lincoln's cabinet included no fewer than three patent attorneys: Secretary of State William Seward, Secretary of War Edwin Stanton and Secretary of the Treasury Salmon Chase. Though Lincoln was not a patent attorney, he did hold a patent for a system of lifting boats over shoals.

The two figures in early patent law that Gibby found most compelling were Thomas Jefferson and Henry Ellsworth.

Darin Gibby, patent attorney with Kilpatrick Townsend's Denver office, wrote "Why Has America Stopped Inventing?" | FILE PHOTO

"Thomas Jefferson was so important," he said. He was head of the patent office after the Revolutionary War but before his presidency. "He was so adamant that the country was going to succeed based on innovation that he insisted on reading every patent application."

But the strain of evaluating each patent became too much, and after three years he threw in the towel. The country went to a registration system, in which patents were issued without examining them to make sure identical patents hadn't already been filed.

The system was flawed, with many patents issued to different people for the same invention. Ellsworth took over at the patent office in the 1830s and persuaded Congress to go back to Jefferson's original examination system, with a few enhancements. Ellsworth championed important inventors Colt and Samuel Morse, inventor of the telegraph, to show the value of invention and protecting intellectual property.

Both Colt and Morse were old friends of Ellsworth, which no doubt helped them get their patents approved. But even people of extremely modest means could come up with world-changing ideas and gain rapid approval for their patents. Charles Goodyear spent a dozen stints in debtors' prison in the course of inventing vulcanized rubber; his wife would visit him there to drop off rubber samples to work on.

Since those times, patent law has grown vastly more complex and cumbersome.

"The ironic thing is that over time they would see problems in patent law and want to make it more fair," Gibby said. "The new statutes made it more fair, but in so doing they added levels of complexity" that make it extremely time-consuming and expensive to obtain a patent.

Patent barriers grow

If an inventor today were to sacrifice 10 years to develop an idea, it would probably take another five to seven years and $30,000 to get a patent, and perhaps $2 million to $3 million in infringement litigation to protect one's intellectual property.

"If you're an inventor trying to file your own patent application, the chance of you getting a patent through, that could be enforced, is zero," Gibby said.

The system these days is weighted in favor of large corporations, though he writes of examples of smaller clients of his that bucked the trend.

Gibby advocates simplification of patent law, including adopting a first-to-file system without the loopholes present in the recent America Invents Act, to foster a new era of invention.

Gibby also thinks it would be a good idea to revive the use of patent models. Until the 1880s, no patent would be issued unless the inventor submitted a model of the invention to prove it was real. Once models were no longer required, there arose a proliferation of "paper patents" that were used by "patent trolls" who didn't intend to create a product, but to sue or sell licenses to those who did.

One of the first patent trolls was George Selden, who filed a patent for a motor-powered horseless carriage but never manufactured one. When automobile companies emerged years later, Selden filed a host of infringement lawsuits. Most companies paid to end the suits, with only Henry Ford choosing to fight, at great expense, before prevailing.

Gibby rejects the idea that most inventions have already been invented: "I think the sky's the limit."

And while acknowledging that contemporary technological infrastructure required to invent is quite expensive and complicated, it's not substantially more so than in the past. Consider the sophisticated metallurgy required to develop the engine, he said.

Gibby spent two years researching and writing the book, which was released online last week and will hit bookstores nationwide on Dec. 1. He would get up at 5 a.m. every morning to put the book together and spent long airplane flights writing. He's traveling in coming weeks to New York City to do interviews with National Public Radio and other media. •

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