

## Standing Up to the Anti-Patent Beanball January 1, 2014

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Baseball is a good analogy for politics, which is why political talk shows have names like “Hard Ball.”  A defining moment for any hitter is realizing that a 95 mile an hour fastball has just been deliberately thrown at your head.  Pitchers throw the “beanball” is to see if a batter has the courage to play the game knowing that the risk of serious injury is literally an inch away.  As former Dodger pitcher Sandy Koufax said: “Pitching is the art of instilling fear.”

A similar challenge is delivered to those who get in the way of well-funded lobbyist’s campaigns. An equivalent of the beanball is the attack article in the Washington Post, the paper of record for the political class.  So it should not be surprising that as soon as universities announced that they could not support the House patent reform bill in its current form that a beanball was immediately headed their way.

“The pitcher has to find out if the hitter is timid.  And if the hitter is timid, he has to remind the hitter that he’s timid” said Don Drysdale, a pitcher who built a career successfully intimidating batters. In baseball and politics the message behind the pitch is the same: “Kid, are you sure you want to take me on?”

[***Patent trolls have a surprising ally: universities***](http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/30/patent-trolls-have-a-surprising-ally-universities/) ran in the Washington Post on November 30, 2013. Two days later “Techdirt” threw the follow up: [***Patenting University Research Has Been A Dismal Failure, Enabling Patent Trolling. It’s Time to Stop***](http://www.techdirt.com/articles/20131122/01322825335/patenting-university-research-has-been-dismal-failure-enabling-patent-trolling-its-time-to-stop.shtml).

Their titles and parallel arguments suggest that both articles arise from shared talking points. Both immediately set up their victims by linking them with patent trolls.  Casting anyone as an “ally of patent trolls” after huge amounts of money have been invested vilifying the term in the public mind is meant to quickly knock opponents to their knees and drive them from the field.  Ostensibly the focus of their wrath is university patent licensing, but the real target is the patent system itself.

The Washington Post article begins by expressing astonishment that universities would join those resisting the House bill. “Many of the letters came from organizations you’d expect to be opposed to ***legislation weakening patent protection****..*. But one letter opposing the legislation comes from a surprising source: academia.” (emphasis added).

That’s an interesting characterization of the bill’s purpose— which its sponsors would surely disavow. The author then gets to the point: licensing and the enforcement of university patents harm the public interest.

Essentially the universities are concerned that the legislation would make it harder for patent holders to enforce their patents. And they’re right. The line between patent trolls and other patent holders isn’t always clear, so any reform designed to make patent trolling more difficult is also going to inconvenience many conventional patent holders—including universities.

But it’s far from obvious that this would be a bad thing. After all, while universities don’t engage in the most egregious troll tactics, universities’ efforts to generate licensing revenue have imposed significant costs on the public that aren’t so different from problems created by patent trolls.

Several examples are presented supposedly illustrating this point including the licensing of Myriad for its genetic test for susceptibility to breast cancer (addressed in [**this previous column**](http://www.ipwatchdog.com/2013/01/16/getting-beyond-witch-trials/id=33294/)) and the development of an early AIDS treatment.  In the latter case, without patent licensing the drug would never have been available to patients at all as it required an expensive, high risk partnership between the university and the company to overcome formidable developmental obstacles.  Ironically, the licensing agreement gave the university its only leverage to make the treatment affordable in South Africa where it was sorely needed.

The article continues: “While the rest of a university works to promote the public interest by creating and disseminating new knowledge, technology transfer offices do just the opposite: enriching the university by obtaining patents that limit the public’s access to the fruits of university research.”  This is followed by “…the cash generated by patent licensing efforts is not free. It represents a tax on innovation that raises prices, limits consumers’ choices and slows future innovation. For licensing demands to be credible they must be backed by the implicit threat of a patent lawsuit.”

Thus, universities licensing inventions so they can be commercialized and turned into products that can actually be used by U.S. taxpayers— often alleviating intense human suffering– is characterized as preying on the public. Enforcing university patents against infringement is termed “patent trolling.”

Why companies would commercialize a university invention requiring considerable amounts of their own time and money in development if competitors could infringe it with impunity is not explained.

Abraham Lincoln said the patent system, the printing press and the discovery of America are the three greatest breakthroughs in all of human history. But you certainly wouldn’t guess that the patent system has much value after reading the Washington Post article.

Tech Dirt repeats the same themes calling the impact of the Bayh-Dole Act (which allows universities to patent federally funded inventions) “a near total disaster.” It charges that universities license patent trolls; that patenting restricts research; and curiously that fewer academic discoveries are transferred to industry because of Bayh-Dole.

We’ve listed in previous columns the facts showing that Bayh-Dole — built on the foundation of a reliable U.S. patent system — has been a tremendous boon to public health, wealth and general welfare, and won’t repeat that now.  See, for example,

* [***Bayh-Dole: A Success Beyond Wildest Dreams***](http://www.ipwatchdog.com/2013/09/15/bayh-dole-a-success-beyond-wildest-dreams/id=45171/)
* [***Intellectual Dishonesty About Bayh-Dole***](http://www.ipwatchdog.com/2013/05/10/intellectual-dishonesty-about-bayh-dole-consequences/id=40200/).
* [***Being Green: Bayh-Dole Makes Every Day Earth Day***](http://www.ipwatchdog.com/2013/04/22/being-green-bayh-dole-makes-every-day-earth-day/id=39269/)
* [***Fuel Cells and Bayh-Dole: The Pursuit of a Hydrogen Economy***](http://www.ipwatchdog.com/2012/11/04/fuel-cells-and-bayh-dole-the-pursuit-of-a-hydrogen-energy/id=29636/)
* [***Senator Birch Bayh on 30th Anniversary of Bayh-Dole***](http://www.ipwatchdog.com/2010/12/05/statement-of-senator-birch-bayh-on-the-30th-anniversary-of-the-bayh-dole-act/id=13638/)
* [***The Good Steward — Turning Federal R&D into Economic Growth***](http://www.ipwatchdog.com/2012/08/02/the-good-steward-turning-federal-rd-into-economic-growth/id=27046/)
* [***Why Bipartisanship Matters***](http://www.ipwatchdog.com/2012/11/03/why-bipartisanship-matters/id=29610/)

Bayh-Dole replaced anti-patent policies similar to those now being advocated because they had utterly failed.  Unfortunately, this painful history is not known by the general public.

The challenge before us is to better communicate our case knowing that the next beanball may be headed our way.  Our opponents constantly present misleading, emotional arguments through the media.  If they succeed in undermining public support for the patent system it’s an ill omen for our future prosperity. Unlike baseball, determining which side wins this game for the hearts and minds of America has long term, real life consequences.

Perhaps we should take to heart how Frank Robinson, a Hall of Fame hitter, responded when facing beanballs.  “Pitchers did me a favor when they knocked me down. I wouldn’t let that pitcher get me out.  They say you can’t hit on your back, but I didn’t hit on my back. I got back up.”

It’s time to get back up.