

Protecting America's True Innovators: Combating the Decline of Patents Granted to Small Entities

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Statistics indicate that in the past several years patents granted to small entities have declined significantly. In the wake of this decline, the U.S. Patent system has recently undergone significant changes. For example, the United States Patent Office recently introduced a five-year strategic plan. In addition, the Leahy-Smith America Invents Act ("AIA") was signed into law on September 16, 2011. Unfortunately, the implementation of new patent policies may have a negative impact on small entities. There is significant evidence that small entities developed several of the major innovations in the past forty years. However, the combination of the decline in patenting and less than favorable patent policy threatens the ability of small entities to continue to make similar contributions to the country.

For example, in a recent article, Abrams and Wagner use Canadian data to empirically predict that the shift from a "first-to-invent" to "first-to-file" system will result in a significant drop in the number of patents granted to small inventors. While Abrams and Wagner focus on the "first-to-file" system, this article analyzes the new policies that may affect small entities once an applicant's application is "in the system." This article shows that the prosecution process puts small entities at a disadvantage in comparison to large entities. Further, the new procedures implemented because of the AIA at best maintain the status quo regarding patent prosecution and most likely will further harm small entities. The analysis includes a study of patent applications filed under MPEP 708.02(XII), which was a provision that allowed small entities filing biotech applications to take advantage of swifter examination. There may be evidence to suggest that implementing a similar procedure may yield beneficial results for small entity applicants. In response, this article suggests several small procedural and/or legal modifications to the prosecution process. The goal of these modifications is to balance the USPTO's desire to optimize patent quality and timeliness with the goal of increasing the number of filed patent applications that are granted to small entities.