Patent Medicine

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The 2004 book, *Innovation and Its Discontents*, has received too much attention to ignore. There, and more recently in the Wall Street Journal and elsewhere, Professors Jaffee and Lerner maintain that the patent system is broken, endangering innovation and progress. To their credit, they acknowledge that the alarm has been sounded for centuries. But such ground was well covered in Fritz Machlup's agnostic study, *An Economic Review of the Patent System,* published by the U.S. Senate in 1958. Also, to their credit, they criticize, at 158, Nobel Laureates for exceeding the scope of their expertise. Yet, their often-rambling book suffers from the same fault.

Ironically, an introductory section beginning at 18 is entitled "patent medicine." As noted by Wikipedia, for example, "One memorable group of patent medicines — liniments that allegedly contained snake oil, supposedly a universal panacea — made snake oil salesman a lasting synonym for a charlatan." The authors aren't charlatans, but it is difficult for anyone who knows much about patents to take *Discontents* seriously.

Jaffee and Lerner put a fresh face on prophesies of doom by linking them to two recent process changes in the patent system — a shift from tax to user-fee funding for the PTO and the creation of the U.S. Court of Appeals for the Federal Circuit. Although they argue that patent policy is too important to leave to patent lawyers, both problems and proposed solutions seem more related to process than policy.

The authors could be taken more seriously if they didn't persist in flagging a few patents as evidence that, according to their subtitle, "our patent system is broken, endangering innovation and progress." Three mentioned in their book and elsewhere are for sideways swinging, exercising cats with laser pointers, and wristwatches for dogs. They might not resort to such examples, however, if they appreciated that the

first is unenforceable, the second could not be enforced except possibly under § 271(b), and the third if enforced would seem unlikely to endanger much of anything.

By citing such patents, Jaffee and Lerner are hardly alone in subjecting the PTO to ridicule, but I fail to see how altered funding of the PTO could have increased the frequency of such patents. Nor do I see how their proposals would reduce it. Although they advocate, for example, earlier publication and expanded opposition, who other than the humorless would oppose? And how much time or money might such humorless individuals be willing to spend?

The relationship between the shift in PTO funding, on the one hand, and the issuance of patents for silly or trivial inventions, on the other, is remote. Indeed, I can think of nothing more likely to deter applications to protect inventions of little or no economic value than the substantial fee increases that followed the shift.

It is unlikely that those who got the swinging and cat-exercising patents harbored delusions about their economic value. Jaffee and Lerner, with most other patent system critics, however, seem not to appreciate why applicants often find such assessments difficult. As I've argued repeatedly, applicants unaware of the market value of inventions have far less incentive to scour the literature for potentially fatal art than infringers who subsequently become aware of the stakes. Anyone who understands that should not be surprised that patents are sometimes invalidated. Nor should they protest overmuch that infringers intending to do so must meet a heightened burden of proof. Moreover, they should not be sanguine about the prospects for early opposition.

Turning to Jaffee and Lerner's claim that the Federal Circuit was a bad idea, I'm even more skeptical. Prior to 1982, only two courts had appellate jurisdiction to review PTO decisions directly — the D.C. Circuit and the CCPA. The 1966 report of an expert commission established by President Johnson faulted the latter as too quick to favor applicants. Fearing erosion of a strong presumption of validity, the Johnson

Commission recommended that the CCPA be more deferential. It also recommended that the Office be allowed to appeal from the CCPA to the D.C. Circuit. Because that circuit was unlikely to see infringement appeals, I regard the post-1982 situation as an improvement over what was proposed.

If the Federal Circuit, reviewing directly, adopts rules unduly favoring applicants, the consequences must be faced in collateral review. The substantial price paid for that possibility, apparently unappreciated at the time — and perhaps even now, was the dearth of precedents bearing on the many issues that arise only in the latter context.

Beyond that, some things for which Jaffee and Lerner fault the Federal Circuit, e.g., the strength of the validity presumption, preceded its creation. Others, e.g., the role of juries in patent litigation, are best addressed by Congress or by Supreme Court justices who have made a hash of fact-law distinctions in patent law.

If Jaffee and Lerner, with many others, fear that the fox has been set to watch the hen house, they need to re-evaluate their assumptions about the Federal Circuit and the patent bar. Even if the court were inclined to be the handmaiden of that bar, how would it deal with the many internal conflicts manifested by the diversity of amici in the eBay case? How would it deal with the fact that, for many attorneys, patents are both sword and shield?

On balance I am anything but contented with *Innovation and its Discontents.* Those who share my belief that two relative newcomers have little grasp of key problems, much less meaningful solutions, should not stand silent.