Innovation, Patent Litigation and Legislation – Again

By Marla Butler

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After passing the America Invents Act and the new, PTO patent-challenge proceedings it creates, Capitol Hill continues to try and control perceived patent litigation abuses. The latest effort, the Protecting Talent and Entrepreneurship Act of 2015 (PATENT Act), is a bipartisan bill that specifically focuses on non-practicing entities (NPEs). According to a 2013 report issued by the White House, litigation brought by NPEs has "increased dramatically in recent years."

Protecting business and innovation in the current atmosphere of increased litigation and heightened scrutiny has become more expensive for everyone. Whether this most recent effort passes or not, the focus on NPEs creates challenges for technology owners, innovators, and large companies both within and outside the technology sector.

NPE 101

At its most basic, the term NPEs describes patent owners that don't directly commercialize their patent-protected invention. For example, universities and research labs that develop technologies and license their patents for use are NPEs. So are individual inventors who lack the resources to pursue the development of their inventions and choose to sell or license their patents to others. Similarly, investors who obtain patent portfolios to monetize relevant, related technologies also meet the definition of an NPE.

But also included within the term NPE are patent owners who pursue frivolous litigation, often to get fast, cost-of-defense settlements, against thousands of small businesses that often do nothing more than use off-the-shelf products – for example, a document scanner – or offer Wi-Fi to customers, only to be served with a patent infringement notice. These kinds of abusive litigation practices have engendered use of the term patent troll, as well as many of the legislative efforts aimed at controlling patent litigation.

Nonetheless, use of the term patent troll to describe any NPE that seeks to recover damages for legitimate patent infringement is an unfortunate mischaracterization. Moreover, NPEs are not the only cause of increased patent litigation. A 2013 non-partisan Government Accountability Office (GAO) report serves as a good reminder of this. The report shows that companies that make products brought about the vast majority of U.S. patent-related litigation, while NPEs account for only about 20 percent.

The PATENT Act: Key Provisions

The PATENT Act would create changes to current patent litigation practices that are, according to the bill's sponsors, intended to curb the most common abuses associated with so-called patent trolls, without impinging on the ability of good-faith actors to enforce their patent rights. As stated by U.S. Senator Chuck Schumer, one of the bill's original cosponsors, "This bipartisan bill shifts the legal burden onto those who would abuse the patent system in order to make a quick buck at the expense of businesses that are playing by the rules." U.S. Senator Amy Klobuchar also cosponsored the bill. Fundamental to the legitimacy of any legislation that ultimately passes, however, will be whether such legislation truly targets abuse, as opposed to legitimate enforcement of patent rights.

Key provisions of the bill include heightened pleading standards for all civil actions in which a party alleges an infringement and identification of parties with a financial interest in the outcome of the case. Under the bill, customers included in infringement litigation against a manufacturer can receive a protective stay as long as they agree not to separately litigate issues adjudicated in the manufacturer's suit. Courts would also be required to stay discovery while early motions in the case are resolved, protecting litigants from expensive discovery.

Additionally, the bill attempts to control pre-suit demand letter abuses. It would limit how those letters get used to prove willful infringement and empowers the FTC to impose civil penalties against parties sending widespread demand letters in bad faith. Perhaps most significantly, the legislation allows for an award of attorney's fees against the prevailing party if their position in the litigation was "not objectively reasonable."

Impact on Technology Owners and Businesses

Regardless of what happens with the PATENT Act, ongoing patent litigation changes will continue to create challenges across the technology sector. Leading businesses in the sector will certainly welcome any relief they can get from what they perceive as nuisance litigation. Still, these businesses must address how to protect their own innovation while navigating and maximizing advantage in the current patent litigation multi-battlefront environment. As for smaller patent owners, whether they practice their invention or not, these patent owners may face additional vulnerability to infringement as litigation costs keep rising and the Patent Trial and Appeals Board keeps invalidating patents.

To keep options open, players across the technology sector need to stay attuned to the shifting patent litigation landscape while being mindful of other innovation protections, like trade secrets, that can safeguard their competitive advantage.