



IP: Maybe we should let the dust settle or the swirling vortex of patent reform

Patience, they say, is a virtue. It may be in everyone's best interest to take a deep breath, and let this all play out for a while.

BY CYRUS MORTON

The patent realm includes many scientists, at least by training. Most of us have at least some recollection of a fundamental concept of scientific research: the controlled experiment. In such an experiment, the goal is to test just one variable by comparing the results of a control group to an experimental group where the only difference is that single variable. In a successful controlled experiment, it can be shown whether that particular change yielded the desired result or not. Oh how different is the turbulent evolution of the U.S. patent system. The question Corporate America, and really all stake-holders in the patent system, needs to ask is: Are we really already sure that more seismic changes are necessary and will be beneficial? And even if the answer is yes, how can we know yet what those changes should be?

The outcry for patent reform has been ringing for at least a decade. During that time we have seen sweeping changes to the patent system. The courts, for instance, have lowered the bar for finding patents invalid as obvious or for claiming unpatentable subject matter, curtailed damages and made them much harder to prove, made findings of willful infringement a rarity, drastically limited the availability of injunctions, and more. Not to be outdone, Congress, after many years of debate, finally passed the America Invents Act in 2011, significantly altering numerous aspects of patent prosecution and litigation. Among other things, the Act created a near first to file system, expanded prior art globally, prevented most alleged infringers from being sued together, and created patent office litigation to address validity and overall patent quality concerns.

The ink had barely dried on the AIA when more proposed legislation flooded Congress. The new experiment has barely even been set in motion — there are only three final decisions in the new patent office litigation for instance, all invalidating the patent — but the following bills have been introduced:

- The Patent Integrity Act would award attorney's fees to the prevailing party.

- The Patent Abuse Reduction Act would shift fees, along with raising pleading requirements and limiting discovery.
- The SHIELD Act would shift fees, but only in favor of defendants, and only if the plaintiff is not the inventor, has not exploited the patent (tried to make a product), and is not a university.
- The End Anonymous Patents Act would essentially require disclosure in the patent office of all real parties in interest before damages could accrue.
- The Patent Quality Improvement Act would make "covered business method" review in the patent office permanent and expand it to virtually all software patents.
- The Innovation Act, or Goodlatte Bill. This bill passed the House in December 2013. The bill raises pleading requirements, shifts fees to the prevailing party, limits discovery, requires real-party-in-interest disclosures, adds many disclosure requirements to demand letters, and changes claim construction in the patent office.

Obviously, many of these bills are directed toward the perceived ills of litigation brought by non-practicing entities (NPEs). Debating the pros and cons of each proposal is beyond the scope of this article. But it may be helpful to keep a few things in mind before rushing to support more changes. First, as an August 2013 GAO report found, about 80 percent of patent cases are filed by companies that make products. Do those companies, especially start-ups or smaller companies, really want fee-shifting in patent cases? Second, in district courts the patent pilot program has only been in effect for 2.5 years, and local patent rules continue to spread. Do we really want or need Congress to require additional procedures which may or may not be suitable or cost effective for every case? Finally, with all the changes that have already occurred, many of which have clearly decreased the value of U.S. patents generally, are we sure we know what the

problem is? That same August 2013 GAO study came to following conclusion:

Public discussion surrounding patent infringement litigation often focuses on the increasing role of NPEs. However our analysis indicates that regardless of the type of litigant, lawsuits involving software-related patents accounted for about 89 percent of the increase in defendants between 2007 and 2011, and most of the suits brought by PME's [patent monetization entities] involved software-related patents. This suggests that the focus on the identity of the litigant — rather than the type of patent — may be misplaced. PTO's recent efforts to work with the software industry to more uniformly define software terminology and make it easier to identify relevant patents and patent owners may strengthen the U.S. patent system.

Debating the merits of software patents is also beyond the scope of the article. But stake-holders might ask themselves whether this type of patent protection will be important in the future with global competition. The GAO suggested ways to improve software patents, not abolish them. The broader point is that any good scientist would insist that we simply must give our new experiment some time to run. The courts, Congress and the patent office have added, eliminated or adjusted countless variables. The new patent office litigation alone, and its effect on patent quality and litigation cost, cannot be analyzed yet. Patience, they say, is a virtue. It may be in everyone's best interest to take a deep breath, and let this all play out for a while.

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