WHY ANTI-TROLL PATENT LEGISLATION THREATENS TO DE-VALUE ALL PATENTS

Problems and Solutions

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STATED CONCERNS ABOUT TROLLS UNDERLYING S. 1013, S. 1612, S. 1720 AND H.R. 3309

- Litigation abuse
- Weak patents
- Protecting small businesses
- “Taxing” innovation

KEY PROVISIONS OF THE BILLS

- Fee-shifting provisions which place the burden on the losing party to justify its positions and conduct in the suit (e.g. S. 1013, S. 1612, H.R. 3309).
- Limitations on discovery before claim construction is decided (e.g. S. 1013, H.R. 3309).
- Pleading requirements that would require the identification of infringed claims in initial pleadings. These pleadings would be difficult to amend (e.g. S. 1013, H.R. 3309).
- Discretion for the Court to require a plaintiff to post a bond if the plaintiff is a potentially abusive NPE. (e.g. S. 1612).

LEGISLATIVE STRATEGY

- Senator Schumer, who strongly supports anti-troll legislation, recently described NPE's as "leaches" and "hookworms", and urged constituents not to get into the detail of pending legislation.
- Members of Congress constantly refer to "weak patents" as if they were a plague.
- The pending legislation assumes that the evil is so great that all patent owners suing for infringement should be punished. The first three proposals are equally applicable to manufacturing companies who practice their own patents and are suing competitors to protect their market. The fourth proposal is an invitation to try the plaintiff and not the case.

THE HARM TO ALL PATENTEES

- The chilling effect of fee-shifting on patent litigation. No matter how good your case, there is always risk in litigation. Now plaintiffs will have to worry about the risk that they will pay attorneys fees even if their complaint is well grounded. This will be particularly discouraging to small entities. The result will be more free-riding on patents.
- The requirements for pleading and restrictions on discovery assume that plaintiffs know everything they need to prove their case when it is filed. But given the complexity of modern technology, and the fact that much information is not in the public domain, it is frequently the case that the number of asserted claims and the strength of the infringement case increases as discovery proceeds. These provisions substantively restrict the strength and scope of a plaintiff's infringement case.

THE ASSUMPTION THAT DISCOVERY BURDENS FALL ONLY ON DEFENDANTS IS DEBATABLE.

- The reason that discovery is so expensive is largely the result of e-discovery. The stringent rules for preservation apply to both sides.
- Large defendants will typically have more documents as compared to small plaintiffs. But sophisticated plaintiff's counsel who are preparing for trial do not want millions of documents from defendants. Once the documents are produced, plaintiff's counsel needs to index, manage and review them. A document "dump" by defendants is particularly problematic. Plaintiff's counsel ideally focuses only on documents necessary to prove infringement and damages.

TAKING A STEP BACK

- The United States is a litigious society by design. Our legal system promotes the ability of individuals as well as corporations to "have their day in Court." But our Courts also have great discretion in their ability to control litigation to prevent abuse.
- In our system, winning parties bear their own attorneys fees. The provision for attorneys fees found in 35 U.S.C. §285 is a rare departure from that rule, and is to be applied only in "exceptional" cases. Most attorney's fees awards have been granted to plaintiffs.
- The label of "abusive litigation" has been used to denounce litigation in areas such as civil rights, employment discrimination, product liability and class actions. However, with some exceptions, these cases proceed in Federal Court like all other cases. The pending legislation is unprecedented.

TAKING A STEP BACK

- Patents are a property right recognized in the Constitution and in the United States Code.
- The essence of the patent right is the right to exclude.
- There is no restriction on the sale of patents.
- The United States has an examination system.
- There is a statutory presumption of validity.
- If the patents being litigated were worthless, then more cases would routinely be dismissed on summary judgment.
- The proposed legislation does nothing to improve the examination of patents.

ARE THE PROPOSED RESTRICTIONS ON LITIGATION REALLY NECESSARY?

- There is a great debate about the definition of who is a troll .
- As a result, there is no clear way to identify the volume of troll litigation.
- Estimates of the percentage of patent cases brought by trolls vary widely.
- One article refers to studies showing that trolls filed 69 percent of patent cases in 2012. *Anti-Troll Legislation Reform,* Shentov and Canfield, NYIPLA Bulletin, Dec. 2013-Jan. 2014. But *Debunking Patent Trolls*, www.savetheinventor.com, contends that “operating companies brought the overwhelming majority of cases in 2007-2011,” citing a U.S. Government Accountability Study.
- The definition of “abuse’ is in the eye of the beholder.

EVEN IF LEGISLATION WERE NEEDED, IT SHOULD BE TAILORED TO THE SPECIFIC PROBLEM

- Even if there was concrete evidence that troll litigation was widespread and harmful to the economy, the pending legislation is not the answer because it encompasses litigation brought by all patentees.
- Over-breadth necessarily follows from the fact that it is impossible to write litigation rules that apply only to one type of patent owner.
- The pending legislation seriously diminishes the value of all patents. The restrictions on litigation will apply to operating companies suing competitors.
- If Congress proposed to defund the patent office or end the presumption of validity, there would be an uproar. While this legislation is less dramatic, its impact will also discourage innovation. Why expend R&D resources of products that can't be protected?

PRIOR TAILORED LEGISLATION DIRECTED TO LITIGATION HAS NOT STOPPED THE TROLLS

- The requirement that each unrelated defendant must be sued individually has only multiplied the number of cases.
- The cases then get consolidated at least for discovery.

RECALIBRATE THE DISCUSSION- FOCUS ON THE PROCEEDS OF LITIGATION

- The resale market for patents is economically important. Every company pursues patents that it ultimately do not practice. Instead of abandoning the patents, it makes far more sense to sell them.
- There are many reasons why companies buy patents. Patents are bought to facilitate the manufacture of new products. Some patents are bought for defensive purposes. The root of the troll problem, if there is one, is patents bought for investment.
- Companies that buy patents for investment have to sue in order to make money, because many times litigation is needed to bring infringers to the negotiating table.

RECALIBRATE THE DISCUSSION- FOCUS ON THE PROCEEDS OF LITIGATION

- Litigation generates revenue from settlements and judgments. It also encourages accused infringers to take licenses without litigation.
- The more profit made by investors in patents, the more attractive this investment becomes. This is why hedge funds now support patent litigation.
- If we want to discourage the trolls, we need to make their activities less profitable.
- Placing significant taxes on revenues from patent investing would discourage this activity.

TAX POLICY MOTIVATES ECONOMIC BEHAVIOR

- The Tax Code represents social and economic policy.
- If litigation is a burden on the economy, then the best way to proceed is to discourage the underlying conduct, which is investment in patents.
- Right now, the revenues of patent investing companies, as well as the revenues they share with their investors, are taxed at a rate as low as a capital gains rate.
- Increasing the tax rates on these revenues will discourage further investment in patents.

PROS AND CONS OF THE TAX APPROACH

- A tax based approach focuses on the very conduct complained of by Congress without affecting the rights of all patent holders.
- A tax based approach is more likely to reduce troll litigation as compared to regulating litigation itself.
- Congress would need to carefully consider the impact of this legislation on the market for sales of patents.
- Many companies, large and small sell their patents to patent investing companies.
- Congress will need to balance the need for regulating the trolls with the negative impact this legislation will have on the market for patent sales.

THANK YOU

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