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Senate Should Enact Meaningful Patent Troll Reform

Law360, New York (April 09, 2014, 1:03 PM ET) -- President Obama has put patent troll litigation reform on the national agenda. He issued executive orders to enact some reforms last June and renewed his call for legislation in this year's State of the Union address. The problem with patent troll litigation, the president explained, is that shell businesses nicknamed "patent trolls" game the system by purchasing dormant patents, waiting for others to independently develop comparable technology, and then accusing those other businesses of infringing on those patents.

In the president's words, they make their living by trying to "extort some money" from innovators, claiming they own technology that the innovator developed on its own. The House of Representatives responded by passing an omnibus anti-troll bill in December with broad bipartisan support. The Senate bill could be before the Senate Judiciary Committee as soon as this week.

A patent troll's litigation play is based on its ability to leverage its low costs of bringing a patent claim against the high costs of defending it. They often threaten claims against many innovators in an industry, offering settlements or "licensing fees" for less than it would cost a company to defend its right to make, sell or use its product. Patent cases are expensive to defend, as the average defendant will spend about $1.6 million in pretrial discovery alone.

Newegg Inc.'s general counsel Lee Cheng exposed the troll's modus operandi, saying that trolls are "so blunt" that they will tell you they are "pricing [their] settlement offer 'well below the pain level'" to make it more worthwhile to settle than defend. Some companies (not Newegg) may settle, but, this legal extortion undermines the greatness of the American civil justice system.

Sens. Patrick Leahy, D-Vt., and Chuck Schumer, D-N.Y., among others on both sides of the aisle, are working on an omnibus reform bill in the Senate. There is no doubt that a multifaceted approach is needed. The House bill, H.R. 3309, which passed 325 to 91 in a rare show of broad bipartisan support, reforms both the patent and legal systems in an effort to take away the troll's leverage. The legal reforms in the House bill include meaningful fee-shifting, basic pleading requirements and phased-in discovery. These are reforms where common ground should be reachable.

For example, phased-in discovery for patent litigation provides a simple way to facilitate the proper resolution of the case without diminishing the ability of patent holders to bring legitimate claims. It focuses the initial stage of patent litigation on making sure the party asserting infringement has a plausible claim. Thus, the first order of business is for the court to assess the construction of the plaintiff's claim by defining any vague terms in the plaintiff's patent. This process is referred to as a "claim construction hearing" or a "Markman hearing" after the 1996 case Markman v. Westerview Instruments Inc., in which the U.S. Supreme Court gave judges, not juries, the responsibility for resolving

all claim construction issues.

Making sure the court and parties have a clear understanding of the plaintiff's patent is critically important. First, patent infringement is a strict liability tort. This means that entity asserting the patent does not need to prove the infringer knew of the patent or willfully infringed on it — only that the infringer made, used, sold, imported or offered for sale a product that included technology covered by the patent. Strict liability makes sense, though, only when patents are well defined and provide proper notice to the innovators of what technology has been patented. Otherwise, innovators can be subject to liability without the ability to reasonably assess whether they can own or need to license the technology they developed for their products.

Second, the uncertainty over the scope, strength and validity of many patents is at an all-time high. This is due, in part, to the fact that patent applicants intentionally use vague and expansive terms to define what they have invented in an effort to claim the broadest property right possible. After all, if an inventor were to file an overly specific patent, using exacting terms to describe only the parameters of a prototype, for example, it could be too easy for others to misappropriate that inventor's ideas without infringing on the specific patented design.

Court rulings have approved the use of increasingly expansive terms in recent years, and the U.S. Patent and Trademark Office, which has seen patent applications double in the past 15 years, has been approving patents that are highly ambiguous.

The resulting patent uncertainty is the manna for troll litigation. When innovators and courts cannot readily determine whether a product infringes on a patent, the only way to resolve the troll's allegations is through litigation — expensive litigation. By focusing the first round of discovery on the construction of the plaintiff's claims, though, courts can provide needed clarity before a defendant has to spend a large part of that $1.6 million on defense-side discovery.

If the plaintiff, troll or otherwise, can establish the foundation for its allegations through the new pleading requirements and claim construction process, the parties can engage in discovery about the defendant's product. But, if the plaintiff cannot establish a plausible case, the court can dispatch it at a much lower price point for the defendant.

To make sure legitimate patent plaintiffs are not improperly disadvantaged by the new rules, the House bill offers several good faith exceptions. For example, the court can allow discovery to support a preliminary injunction or when denial of discovery would lead to manifest injustice. It also allows the parties to voluntarily waive these limits when appropriate in their litigation. Consequently, phased-in discovery reduces a patent plaintiff's leverage for objectively baseless claims, while preserving their rights for plausible claims. When coupled with fee-shifting, these reforms go a long way toward getting rid of bad patent claims.

At a February White House event on patent trolling, the president's Economic Council Director Gene Sperling said that the president is focused on solutions that directly solve the patent troll litigation problem, recognizing that what may work for patent litigation may not work for other types of civil litigation. The legal reforms in the House bill are highly targeted for resolving patent troll abuses and should garner bipartisan support. For those of us who believe in America's civil litigation system, removing the patent troll stain is important for assuring the ability of a court to facilitate fair, accurate legal outcomes for those who need it.

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