In Practice: IP Reform Shifts to Consumer Protection

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A new breed of patent litigation reform is developing that has less to do with patent law and more to do with consumer protection. Prompted by the practice of patent trolls threatening businesses with expensive patent litigation to extract a licensing fee, recent legislative proposals have an underlying policy of protecting the Public from unfair trade practices.

Akin to labeling and truth in advertising laws that help consumers make informed choices, a number of recently introduced bills require patent trolls to provide more information to defendants than is currently required. For example, some bills require specific information describing the relevance of the asserted patent to the accused product, as well as disclosure of the "ultimate parent entity" that owns the patent. This information theoretically enables the defendant to make an informed decision regarding the threatened lawsuit, for example, whether to mount an active defense, or to license the patent asserted by the troll thereby settling the case.

Similarly, laws enabling class action suits are mirrored in aspects of proposed legislation that attempt to level the playing field between the targeted business and a well-informed and well-funded troll. Some legislation would compel the costs of electronic discovery to be borne by the discoverer, in theory reducing a troll's ability to use the threat of expensive e-discovery as a tool for pressuring the targeted business to pay a license fee rather than engage in litigation. Other legislation delays discovery until after the troll files a very specific complaint, again reducing the ability of expensive and time consuming discovery to be used as a threat. The policy objective of these proposals is to make it more difficult for trolls to bully their targets into buying a license to avoid costly and distracting litigation, thereby leveling an asymmetry in power between the troll and the targeted business.

Further evidence of this policy shift is also apparent in a unique state law passed by the Vermont legislature to address patent troll abuses in the Green Mountain State. Like many of the legislative proposals at the federal level, the Vermont law attempts to protect consumers by increasing the costs of the troll business model and requiring trolls to provide information to their targets. For example, the Vermont law establishes a standard for "bad faith assertions of patent infringement." Indications of a bad faith assertion include the troll sending a demand letter that lacks the patent number, the name of the patent owner, and factual allegations connecting the patent to the accused product. A patent owner asserting a patent in bad faith may be required to provide a bond up to $250,000. Around the time this bill was passed, the Vermont Attorney General also sued a patent troll under Vermont's consumer protection statute in state court.

Along similar lines, the FTC has initiated a study permitting the FTC to subpoena trolls, and their variously layered shell companies, in order to determine the parties and beneficiaries of patent trolling. As with the other efforts described above, this study was prompted by consumer protection concerns that trolls reduce competition and innovation, and possibly engage in trust-like behavior.

The new focus on protecting the Public interest from abuses of intellectual property law is not limited to patents, but can even be seen in other bodies of intellectual property law. The recent controversy regarding "unlocking" mobile phones is one such example. The Librarian of Congress, as authorized by the Digital Millennium Copyright Act (DMCA), determined that an owner of a mobile phone would break the law by decoupling the phone from software installed by the wireless service provider that sold the phone to the consumer, even though the user was no longer in a service agreement with the service provider. Both the White House and Congress are working to protect consumers from this problem for many of the same reasons mentioned above. That is,

coercing a consumer to remain with a wireless service provider under threat of legal action or compelling the consumer to buy a new phone associated with different new carrier, smacks of anti-competitive behavior and unfair trade practices.

These proposals are a sharp departure from reforms instituted by the America Invents Act (AIA), which are notable for de-emphasizing the role of inventors in the patent process. For example, the AIA provides a procedure by which a "juristic entity" (e.g., a corporation) may submit a patent application in which it has an ownership stake. While this is consistent with many foreign countries, previously the U.S. permitted only inventors to apply for patents. This change was implemented to reduce the costs and administrative burdens of the patent process for employers and other patent owners by permitting employers (among other patent owners) to directly participate in the application and prosecution of a patent application after an assignment by the inventor, rather than having to act through the inventors during the entire process.

Another example of an AIA reform that de-emphasized the role of individuals was the change from a "first-to-invent" system to a "first-inventor-to-file" system. This change received substantial press coverage for its effect of removing a perceived benefit to individual inventors – that of permitting an applicant to defeat prior art by demonstrating a date of invention up to a year before a corresponding patent application was filed. In theory, this allowed individual or smaller inventors to focus on business development before investing in a patent. With the AIA change however, there is a race to the patent office that clearly favors well-funded and well-organized applicants.

These AIA provisions, and others, are mostly for the convenience of business. Given that businesses, and not individual inventors, are the overwhelming majority of patent owners, these provisions do have legitimate policy goals. But nevertheless, the AIA reforms changed the U.S. patent system from one that formerly emphasized the role of individuals to one that favors well-organized and well-funded business. But in contrast to both the AIA changes and the former policies favoring individuals, the patent reform proposal now being discussed are directed to benefit the public at large.

The addition of consumer protection policy has the potential to dramatically reform intellectual property law. Even thought patent trolling has been an increasingly controversial industry, only recently, with the application of consumer protection theories, is meaningful reform in sight. These developments have the potential to improve competition and lower legal distractions and costs for businesses. Similarly, the proposed reforms to the DMCA will protect consumers from anti-competitive and unfair trade practices of wireless telecommunication companies, and encourage competition. At their core, this policy shift seeks to raise the costs of the patent troll business model, and reduce the unintentional negative impact on consumers and businesses of the exercise of intellectual property law.

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