Beyond the SHIELD Act: Taking A Sword To Patent Trolls

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Introducing a bill in August of an election year IS GENERALLY an exercise in futility. So is complaining about "patent trolling"— the obnoxious practice of buying patents from other firms, then using those patents to file questionable infringement suits against third parties.

But the introduction of the bipartisan H.R. 6245 may buck the trend – and it shows that the growing problem of legalized patent extortion has finally caught congress' attention.

The SHIELD Act, short for "Saving High-Tech Innovators from Egregious Legal Disputes" would raise the cost of tech patent trolling by allowing judges to make computing patent plaintiffs pay winning defendants' legal costs if they had no "reasonable likelihood of succeeding."

There are a lot of entrenched interests comfortable with the current patent system, and passing this bill, introduced Aug. 1 by Rep. Peter DeFazio (D-OR) and co-sponsored by Rep. Jason Chaffetz (R-UT), will be an uphill battle. But it addresses an enormous problem that, until now, has gotten little notice in Congress outside of the America Invents Act.

In a survey published June 28, two Boston University professors estimated that patent infringement lawsuits from "non-practicing entities"– firms that don't build anything with their patents and instead employ them to collect licensing fees and infringement awards – sucked $29 billion in direct losses out of the U.S. economy in 2011.

The SHIELD Act does have a limited scope. It only covers computer hardware and software patents – although by legally defining that last category, it could make it easier for other laws to limit a type of patent that many developers feel shouldn't exist. And judges can already force the losing party to pay the winner's legal fees – except that few exercise that option.

Colleen Chien, a law professor at Santa Clara University, underscored that last issue, writing that history shows "courts are reluctant to find the plaintiff purposely brought a bad case." She added that the bill wouldn't penalize patent holders who threaten dubious

infringement lawsuits in the hope that targeted companies find it cheaper to pay for a license than kick off a prolonged court battle.

But for now, this short bill – under 500 words – is essentially a critical bug fix release that Congress could in theory ship quickly. What might follow the SHIELD Act? I asked a few critics of the patent system for their thoughts.

Tim Lee, an adjunct scholar at the Cato Institute and an astute observer of tech policy at sites such as Ars Technica and *Forbes*, suggested making it harder to get injunctions that bar a product from the market.

Lee also endorsed abolishing the specialized court that represents the last stop for patent disputes short of the Supreme Court, the Court of Appeals for the Federal Circuit. "While the idea was to make patent law more uniform, what ended up happening was that we gave control over patent law to the patent lawyers."

Mike Masnick, founder of the Techdirt policy blog, endorsed making it easier for judges to dismiss "obviously bogus cases" upfront. As a model, he cited the "anti-SLAPP" laws in some states that allow judges to halt abusive "strategic lawsuits against public participation" filed by companies against critics.

Masnick also said that stricter patent ownership disclosure rules would prevent patent trolls from cloaking their activity through hundreds of shell companies.

Julie Samuels, a lawyer with the Electronic Frontier Foundation (EFF), pointed to such earlier EFF recommendations as requiring losing patent plaintiffs to pay the winners' legal fees (as opposed to making it an option), allowing defendants to cite their independent invention of a patented feature as a defense (Masnick endorsed that too), and shorter terms for software patents.

The EFF's most intriguing proposal, a viral "Defensive Patent License," would let other firms use a patented innovation for free only if they pledged not to sue other DPL users for patent infringement. Twitter took a step towards that idea with its "Innovator's Patent Agreement," a contract to employ patents generated from its employees' work only for defensive purposes that would also bind future owners of those patents.

Jim Burger, a lawyer for Dow Lohnes in Washington who works on patent policy and other intellectual-property issues, would like to see more patent trials split into two phases. First the court would determine if infringement had happened, then a defendant could appeal, and only then would it assess damages.

Burger also advocated having judges short-circuit a common tactic of suing companies that sell or use an allegedly infringing product, not the producer itself. Instead, judges would stay that lawsuit and allow that alleged infringer to defend itself directly–a more "judicially efficient" solution, he said.

But almost all of these patent critics made one other point: The best way to solve the patent problem is to have fewer, higher-quality patents. Going after one particularly obnoxious class of litigants would still leave companies like Google and Amazon writing large checks to build out defensive-patent portfolios as the stakes get ever higher–past a billion dollars, in the case of the Apple vs. Samsung verdict.

Wouldn't you rather see that money spent creating new innovations? The Constitution has a handy little phrase for that ideal: the progress of science and useful arts.

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