

Intersection of American Law and Technology: The Innovation Act's Fight Against Patent Trolls

Mohamed Elfarra

INTRODUCTION

Few issues have attracted more legal attention and spurred more public debate in recent years than the controversy over patent rights. The crossroads of American law and innovation finds its origin in the U.S. Constitution. Article 1, section 8 states that “Congress shall have the power to . . . promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” [1] The founding fathers recognized the social value of innovation, and the critical role government will inevitably play in protecting and encouraging technological advances.

Out of the foundations of the Constitution grew an elaborate system of patent laws, evolving over time to meet the needs of modern society. Nevertheless, in recent years, the frequency of extraneous patent lawsuits has become increasingly concerning. The economic and social burdens of frivolous litigation have led “academics, policymakers, and even judges to suggest that patent law[s] may have overleaped its proper bounds, or at least become too likely to frustrate, rather than to fulfill, its constitutional purpose of ‘promot[ing] the progress of science and useful arts’. [2] The primary causes of this problem are the overly litigious entities pejoratively known as patent trolls, who are collectively responsible for the majority of today’s patent infringement cases. [3] Although solutions to this complex problem are evasive, the need for reform is readily apparent. One of the most important and highly debated pieces of legislature surrounding the issue of

patent trolls is the Innovation Act. This article introduces the Innovation Act, discusses proposed arguments for and against it, and opine on its merit.

II. The Innovation Act

Rep. Bob Goodlatte reintroduced the Innovation Act in February 2015 as a potential solution to the patent troll problem. Although the bill is still pending, the potential impact it will have on the patent industry has drawn enormous attention from businesses, universities and the legal community. Non-practicing-entities, or “patent trolls” do not make any products, but file dubious patent lawsuits against commercially lucrative companies. [4] Several provisions within the act are meant to discourage disingenuous non-practicing-entities from filing exploitative patent infringement lawsuits in the future.

The first provision heightens the standard of specificity in a complaint and requires a detailed description of the technology accused of patent infringement. [5] [6] A second major provision attempts to increase the prevalence of fee shifting by eluding the American rule that each party pays its own litigation costs, in favor of a loser pays system. Currently, a court may award reasonable attorney fees to the prevailing party in “exceptional cases”. [7] The Supreme Court decision in *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, increased a court’s flexibility in awarding attorney fees by lowering the standard of an “exceptional case”. [8] The presumptive fee shifting provision of the Innovation Act takes this a step further, by *requiring* a court to award attorney’s fees unless the conduct of the losing party is deemed reasonably justified, or if doing so would create an unjust outcome. [9] Such a payment scheme will likely deter frivolous suits by increasing the risk for plaintiffs because they will be forced to incur litigation costs of the winning party as well as their own. [10] Within this provision is a section titled “Joinder of Interested Parties”,

which gives courts the discretion to join any third parties “interested” in the patent to the litigation and hold them liable for any damages that cannot be paid by the losing party. [11]

A stark dividing line has been drawn between supporters and opponents of the proposed reform set forth through the Innovation Act. Supporters of the bill include the gamut of technology companies, from Silicon Valley start-ups to industry giants like Apple and Google. The bill also has strong bipartisan support in Congress. However, patent lawyers, law firms, biotechnology and pharmaceutical companies, as well as many research driven Universities oppose the bill.

III. Arguments in Favor of The Innovation Act

Simply put, the cost of litigation is high and patent trolls are keen on using this reality to their advantage. In fact, 90% of technology patent cases are filed by patent trolls [12] and roughly 80% of the defendants in these suits are small or medium sized companies. [13] Patent trolls lamentably take advantage of the fact that these small to midsize businesses often lack the resources to litigate, and are likely to make the economically efficient decision to settle outside of court. Interestingly enough, a letter written by members of the Consumer Electronics Agency regarding the Innovation Act states that “when companies do fight back in court, trolls lose more than 90% of the time.” [14] It is estimated that frivolous lawsuits brought forth by patent trolls cost Americans approximately 80 billion dollars per year [15], and perhaps, “impedes the spread and development of technology at large.” [16] These statistics shine light on the inadequacy of patent law in the United States, as it allows for disingenuous claimants to file suit in bad faith, and to emerge financially prosperous despite the frivolity of their claims.

The Innovation Act Will Spur Venture Capitalist Investment In New Technologies

Proponents of the Innovation Act contend that strengthening inventor's patent rights will result in increased venture capitalist investment in new technology. It has been vehemently argued that the inability of small companies to protect their legitimate patents decreases the value of their technology, and results in venture capitalists who are much less likely to risk investing. [17] Indeed the National Venture Capital Association (NVCA) agrees that "investment is based on the existence of patents to protect an emerging company's innovative idea and deter competitors from stealing...if this investment is not protected...further investment in patent-reliant technology will decline." [18]

The deterrence of frivolous lawsuits as a result of the Innovation Act may indeed incentivize venture capitalist investment in start-up companies, and the NVCA says as much. However, they also express concern that the Innovation Act will raise costs of litigation for *all* companies, in effect "making it harder for startups to enforce their patent rights against entrenched competitors." [19] In other words, the same legislature that protects an inventor's patent rights by deterring frivolous accusations of infringement will also impede his/her ability to file a good-faith suit against a true infringer because of the heightened risks of losing in court. In effect, the Innovation Act may not be the answer to the problem.

IV. Arguments Against Innovation Act

The Innovation Act Makes Patent Defense Too Risky and Will Therefore Decrease Research Funding Incentives

Universities across the United States echo the concerned sentiment of the National Venture Capitalist Association, but hold more zealously in opposition of the Innovation Act as a solution to the patent troll problem. In a letter addressed to leaders of the House

and Senate Judiciary Committees, 145 Universities outlined their concerns with the Innovation Act, arguing it “would make the legitimate defense of patent rights excessively risky and would thus weaken the university technology transfer process, which is an essential part of our country’s innovation and entrepreneurial ecosystem.” [20]

One signatory of the letter, the University of Wisconsin-Madison, recently triumphed over Apple Inc. in a patent infringement case involving the company’s 2013-2014 iPhone and iPad releases, in which Apple Inc. could face up to \$862.4 million in damages. [21] Universities worry that the increased risk of litigation resulting from the Innovation Act will hinder their ability to confidently file good-faith claims such as these. The universities further contend that the increased risk of filing suit as a result of the fee shifting provision will “reduc[e] the number of research discoveries that advance to the market place.” [22] This argument should be given considerable weight due to the positive societal impact of university research, including groundbreaking technologies such as the CAT scan, MRI and the Internet. [23]

The Act’s Burdens on the Courts Outweigh Its Benefits

A second argument against the Innovation Act stresses the unfair and undue burden on the plaintiff and the judge. The contention is that the Innovation Act requires a level of specificity in pleading far beyond what is legally mandated. This added burden could make it more difficult to file a good-faith claim because the plaintiff may not have access to enough information from publicly available information to meet the heightened standard of specificity. [24] Information that can only be gleaned through the process of discovery may in fact be necessary to file a legitimate claim. This is clearly a problem.

CONCLUSION

What is clear from all of this is that patent law reform is inevitable. Suffocating the patent troll's exploitative power is critical for scientific discovery and innovation to flourish. The Innovation Act's attempt to accomplish this goal is commendable, although its methods may be concerning. The provisions touted by the Innovation Act to curb patent trolls are the same provisions that may weaken the same entities it is meant to protect. However, like anything else, a balance must be struck and the Innovation Act will likely be that balance for the immediate future, at least until the next round of patent reform attempts to catch up to the burgeoning innovative industry of the 21st century.

SOURCES

- [1]. U.S. Const. art. I § 8, cl. 8.
- [2]. John M. Golden, “Patent Trolls” And Patent Remedies, 85 Texas L.J. 2011, 2112 (2007).
- [3]. Robert H. Resis, *History of the Patent Troll and Lessons Learned*, 17 Intellectual Property Litigation (2006).
- [4]. Eric Rogers and Young Jeon, *Inhibiting Patent Trolling: A New Approach For Applying Rule 11*, 12 Nw. J. Tech. & Intell. Prop. 291 (2014).
- [5] Innovation Act, H.R. 3309, 113th Cong. (2013).
- [6]. Jared A. Smith, *Trolling For An NPE Solution*, 7 Hastings Sci. & Tech. L.J. 215, 236 (2015).
- [7]. Glenn Forbis, *The Ups and Downs of the Innovation Act of 2015*, IP Watchdog (May 27, 2015), www.ipwatchdog.com/2015/05/27/the-ups-and-downs-of-the-innovation-act-of-2015/id=58075/.
- [8]. *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014).
- [9]. Glenn Forbis, *The Ups and Downs of the Innovation Act of 2015*, IP Watchdog (May 27, 2015), www.ipwatchdog.com/2015/05/27/the-ups-and-downs-of-the-innovation-act-of-2015/id=58075/.
- [10]. Neal S. Vickery, *Don’t Forget About The Little Guys: Trolls, Startups, And Fee Shifting*, 13 Colo. Tech. L.J. 171, 186 (2015).
- [11]. Innovation Act, H.R. 3309, 113th Cong. (2013).
- [12]. Joe Mullin, *Patent Troll Lawsuits Head Toward All Time High*, arstechnica, (July 10, 2015), <http://arstechnica.com/tech-policy/2015/07/patent-troll-lawsuits-head-towards-all-time-high/>.
- [13]. Kelley Servick, U.S. Universities and Electronics Companies Spar Over ‘Patent Troll’ Bill, Science Magazine, (April 10, 2015), <http://news.sciencemag.org/education/2015/04/u-s-universities-and-electronics-companies-spar-over-patent-troll-bill>.
- [14]. Id.

- [15]. Steven Titch, *Why Patent Reforms Are Needed: Intellectual Property Abuses Threaten Innovation and Cost Consumers Billions*, (February 2015), www.heartland.org/sites/default/files/02-05-15_titch_patent_reform_0.pdf.
- [16]. Eric Rogers and Young Jeon, *Inhibiting Patent Trolling: A New Approach For Applying Rule 11*, 12 Nw. J. Tech. & Intell. Prop. 291, 300 (2014).
- [17]. Peter J. Toren, *The anti-innovation Patent Act of 2015*, The Hill, (June 22, 2015), www.thehill.com/blogs/congress-blog/technology/245544-the-anti-innovation-patent-act-of-2015.
- [18]. National Venture Capital Association, <http://nvca.org/issues/patent-reform/>.
- [19]. Id.
- [20]. Kelley Servick, *U.S. Universities and Electronics Companies Spar Over 'Patent Troll' Bill*, Science Magazine, (April 10, 2015), <http://news.sciencemag.org/education/2015/04/u-s-universities-and-electronics-companies-spar-over-patent-troll-bill>.
- [21]. Karen Herzog, *Jury Rules Patent Infringed on UW-Madison Patent*, Journal Sentinel, Oct. 13, 2015, <http://www.jsonline.com/business/warf-wins-in-patent-suit-against-apple-b99596325z1-332581992.html>.
- [22]. Kelley Servick, *U.S. Universities and Electronics Companies Spar Over 'Patent Troll' Bill*, Science Magazine, (April 10, 2015), <http://news.sciencemag.org/education/2015/04/u-s-universities-and-electronics-companies-spar-over-patent-troll-bill>.
- [23]. Id.
- [24]. Arjun Rangarajan, *Pleading Patents: Predicting The Outcome Of Statutorily Heightening Pleading Standards*, 13 Duke L. & Tech. Rev. 195, 213 (2015).