The Internet Association

Meaningful Patent Reform Must Stop the Abuse of Discovery in Patent Litigation

The average cost of a single patent case litigated through trial is over $5 million. Even for small and medium-sized companies, the cost reaches $1.75 million. The majority of this cost is attributable to discovery. Patent trolls ratchet up discovery costs by demanding the production of millions of pages of documents even when they have absolutely no intention of using those documents at trial. Indeed, less than one out of every 10,000 pages disclosed in discovery actually result in a trial exhibit. Patent trolls know that they can use discovery to increase both the pressure to settle and the settlement amount regardless of the merits of their case. And because patent trolls have no operating business of their own, and therefore no comparable scope of production, they face no corresponding burden in litigation. Thus, discovery in patent cases is used as a ratchet to hike up one side's litigation costs and extract a settlement. When defendants feel compelled to pay up and settle cases simply to avoid the exorbitant costs of full discovery, even worthless patents become immensely profitable. This is the essence of the patent troll business model and legislation that does not address it is a half-measure.

The Internet Association supports a common-sense solution to this problem by limiting initial discovery to claim construction, subject to certain exceptions. The logic of this proposal is self-evident: to decide that a patent claim is infringed, you must first determine what the claim means. Judicial construction of claim in a patent is required in almost every patent case. Because claim construction represents a decisive point in most patent cases, early claim construction facilitates quicker and less expensive resolution of patent disputes. Requiring a defendant to produce information about its product lines, proprietary technologies, customers, business practices, and finances before the parties understand what the patent covers makes no sense. In many cases, claim construction will make clear that the asserted patent claim does not cover the accused technology. Further, such production is legally irrelevant to the construction of the claims, which is dictated by only the language within the patent itself and, sometimes, by the state of the art at time the patent was filed. Allowing discovery without claim construction is burdensome, disruptive, and perpetuates patent troll litigation as a low-risk, high-reward enterprise unrelated to the protection and promotion of innovation.

Some opponents of meaningful patent reform have noted that the district courts that most frequently hear patent cases do not have local rules requiring early claim construction. Indeed, the Eastern District of Texas and Delaware do not have such rules, which is no small part of why they are the venues of choice for patent trolls. The fact that plaintiffs file 45% of all patent cases in 2 out of 94 U.S. judicial districts is not a testament to those districts' fairness or efficiency in managing patent cases. It is a testament to the ease with which plaintiffs exploit inefficient local procedures to skew the odds in their favor.

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Nor is it correct to say that early claim construction would leave operating companies harmed by a competitor's infringement of their patents without recourse. In cases where delaying full discovery could cause real harm to a plaintiff, courts may allow additional discovery under the House-passed legislation. Some object to that exception because it requires filing a motion for preliminary injunction, noting that such motions are rarely granted (a debatable contention in competitor litigation that nonetheless illustrates that much of today's patent litigation is driven by non-practicing entities that are rarely entitled to any sort of injunction). However, the exception does not require that a preliminary injunction motion is granted, only that it is filed, a minor inconvenience compared to the burden and expense of full discovery in a patent case.

It is entirely appropriate for Congress to identify and correct specific abuses of judicial process, and it has done so in past legislation. The initial limitation of discovery to claim construction preserves the discretion of courts to permit additional discovery when the interests of justice so require. What the limitation does not do is allow patent trolls to continue using discovery as a form of arbitrage to extract settlements far in excess of the worth of the questionable patents they assert.

Early resolution of claim construction is a sensible, targeted reform to patent litigation that will curb the most abusive practices of patent trolls. The Internet Association is willing to work on any required adjustments to avoid unintended consequences. However, legislation that neglects the issue entirely, or simply makes "recommendations," will leave patent trolls' business model intact, their victims unprotected, and the essential problem of the misuse of our patent system unresolved.