The price of troll busting

Irena Royzman addresses the impact of patent troll legislation on innovation in the pharmaceutical sector

In September 2011, President Obama signed into law the America Invents Act, the most sweeping overhaul of the US patent system in nearly 60 years. The act created *inter partes* review (IPR) proceedings to weed out invalid patents before the US Patent and Trademark Office (PTO) at lower cost and greater speed than in federal court. IPRs were largely created to help innovators in the high-tech sector fend off so-called patent trolls – companies that buy up often dubious patents to sue others, rather than make anything of their own. But these new proceedings are a double-edged sword. They are undermining confidence in US patents and taking a toll on a healthcare industry that depends on a strong and certain patent system to develop needed medical therapies.

The White House explained that the new PTO proceedings were intended to give a boost to American companies burdened with "unnecessary litigation, and let them focus instead on innovation and job creation". The high-tech sector has been besieged with frivolous but costly patent suits. The cost of a patent case is on average $5.5m where more than $25m is at stake and $2.6m when less is at stake. Suits filed by patent trolls cost $29bn in 2011 alone. This means less money for innovation, less job creation and higher prices for high-tech products for consumers.

IPRs have provided a boost to the high-tech sector: they cost less than litigation in federal court, are resolved within a year of being started and have resulted in courts frequently staying costly patent cases while an IPR proceeds. These new proceedings have been so successful in quickly invalidating patents and are instituted by the PTO's Patent Trial and Appeal Board (PTAB) so frequently, that the PTO is now the one of the most active forums for patent validity litigation in the US.

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But with patents in the computer and electrical fields being invalidated every week, the former Chief Judge of the Court of Appeal for patent cases has described the judges on the PTAB as a "death squad". And the Chief Judge of the board agreed, "If we weren't, in part, doing some death squadding we wouldn't be doing what the statute calls on us to do," he said, adding, "[t]he purpose of the proceedings is to identify some limited number of patents and claims that are unpatentable and make sure the claims are removed."

The board's death-squadding comes at a price. It undermines confidence in US patents and innovation. In February 2015 alone, the board invalidated 93% of all claims that reached a final decision. Even without such sobering numbers, Supreme Court Justices recently questioned the validity of US patents, commenting at oral argument in a patent case that "you could flip a coin as to whether a patent is valid or invalid and be pretty close".

Given that the numbers in favour of a patent being found invalid are much better than 50/50 if an IPR is instituted and many IPRs are settled just based on the filing of a request for IPR, hedge funds have jumped into the game. In the first few months of 2015, hedge-fund manager Kyle Bass, who previously bet on and profited from the US housing market collapse, filed more than a dozen IPR requests targeting the healthcare industry. Bass employs what he refers to as a short activist strategy. He uses IPRs to challenge patents protecting valuable medical therapies and stands to gain if the mere filing of the IPR results in a drop in the stock price of the target biopharmaceutical company. The Biotechnology Industry Organization has decried Bass' use of IPRs, calling on Congress and the PTO to protect innovation and "prevent abuse of the patent system in this manner".

There is no question that relief to innovators in the high-tech sector has come at a high price for innovators in the healthcare industry. Through implementing procedures advantageous for troll busting, the PTO created

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a system for patent challenges that many groups in the healthcare industry have characterised as unfair. In a letter to Congressional leaders seeking "comprehensive legislation to ensure the system is balanced", more than 90 medical organisations representing millions of patients across the country expressed concern that the PTO "implemented the [legislation] in such a way that it is now easier to invalidate patents than in district court". These organisations fear that IPRs will cause the value of patents to diminish and that investment in new treatments may suffer. Similarly, the Pharmaceutical Research and Manufacturers of America is clamouring for "fairness and due process to patent holders". Contrary to the intent of the America Invents Act, IPRs as currently implemented may deter innovation where it is most needed - in the healthcare and pharmaceutical industry.

While it may not be possible to satisfy both high-tech and pharmaceutical innovators given their disparate interests, it is clear that some compromise is needed and IPRs must be recalibrated to protect innovation and American competitiveness in the healthcare and pharmaceutical industry.

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