FOUR PRINCIPLES FOR EFFECTIVE PATENT REFORM

Abusive patent litigation creates a heavy burden for companies across the US economy — slowing innovation, undermining competitiveness and stunting economic growth.

Curbing these litigation abuses by bad actors while preserving incentives to innovate will require balanced reforms that build on the progress made in the America Invents Act (AIA). In crafting legislation, lawmakers should adhere to four key principles:

1. Litigation abuses are the problem, not patents.

2. The solution is to deter bad actors by reducing the skewed incentives in the legal system that make opportunistic litigation an attractive business model.

3. The law should provide the same incentives for all inventors; discriminating against certain types of technology innovation would undermine US competitiveness.

4. Improving patent quality is critical, and USPTO cannot do its vital part without adequate resources.

Background

The 2011 America Invents Act marked the first significant modernization of US patent law in more than 50 years. With a focus on improving patent quality and deterring abusive patent litigation, the AIA did several things:

- Established a more transparent first-inventor-to-file system;
- Authorized the public to participate in the patent examination process;
- Produced several new administrative procedures that allow members of the public, including those being sued for infringement, to quickly and inexpensively challenge a patent's validity before the USPTO;
- Effectively eliminated false-marking suits; and
- Established that plaintiffs could no longer indiscriminately join unrelated parties in a single lawsuit.

Since enactment of the AIA, so-called "patent trolls" have received widespread attention. They abuse the patent system by initiating litigation that is often meritless, merely to exact windfall settlements from defendants. Their tactics have evolved over time, targeting an increasingly broad range of customers and users with allegations of infringement. This is a troubling development with implications that cut across the whole US economy.

Bad actors pose a significant threat to companies that drive progress in fields as varied as biotechnology, communications, consumer products, energy, financial services, information technology, manufacturing, medical devices, pharmaceuticals and software. Companies in these fields invest heavily in research and development and take justifiable pride in their patents. They recognize the value of the intellectual property system and the need to respect the intellectual property of others. Because IP is essential to their businesses, they deplore abuses of the system.

PATENT REFORM PRINCIPLES

A number of reform proposals are now under consideration in Congress. Lawmakers should support the ones aimed at curtailing abusive practices through fair and comprehensive measures that would apply to all litigants. But proposals that target certain types of patents or alter the patent system itself risk undermining incentives to innovate. It would be a mistake to put all patent owners at risk to address a limited set of admittedly bad behaviors.

To craft effective patent reform legislation, BSA urges lawmakers to adhere to the following four principles:

1. **Litigation abuses are the problem, not patents.** Companies that invest in innovation and create jobs are deeply concerned by the arguments of those who would seek to limit or weaken patent protections in an effort to respond to litigation misconduct by a relatively small group of bad actors. The patent system rightly rewards those who advance technology and promote its dissemination by granting inventors exclusive rights for a period of years. Seeking a patent, owning a patent, and licensing patent rights are not abuses. These are beneficial activities that advance technology, grow our economy and benefit consumers. Any new reforms should encourage rather than deter such activity.

2. **The solution is to deter bad actors by reducing the skewed incentives in the legal system that make opportunistic litigation an attractive business model.** The companies targeted by litigation abusers face substantial costs and risks, including legal fees, discovery and potential liability for infringement. Bad actors bringing these suits often face few costs beyond researching their targets and filing suit. To deter abuse, reform measures should focus on addressing asymmetries in costs and risks by empowering courts to limit discovery and shift costs and fees in appropriate circumstances.

3. **The law should provide the same incentives for all inventors; discriminating against certain types of technology innovation would undermine US competitiveness.** For more than 200 years, America's patent system has succeeded in promoting "the progress of science and the useful arts" because it provides the same incentives for all types of inventions. Diverging from that approach now would threaten US competitiveness in technologies where America leads the world. For example, proposed expansion of the "covered business method patents" (CBM) program established by the AIA to include data processing or computer-enabled inventions more broadly would create special and discriminatory treatment for cutting-edge inventions in areas from IT to bio-technology to manufacturing. This could undermine valid patents by providing infringers an administrative means to delay legitimate lawsuits against them. And it could provide a roadmap for trading partners to establish exceptions or practices that disadvantage US innovators and protect special interests in their own countries. Proposals to institute such discriminatory practices risk chilling innovation and eliminating jobs that flow from it and therefore should be rejected.

4. **Improving patent quality is critical, and USPTO cannot do its vital part without adequate resources.** The need to assure sufficient levels of stable funding for the USPTO remains a fundamental problem facing our patent system. The AIA created important new rules and procedures for improving the quality and reliability of patents. To achieve these essential improvements, industry supported granting USPTO the authority to assess fees necessary to cover the costs of its operations — knowing that would mean raising them. Denying USPTO access to fees paid by users is shortsighted and unnecessary. Congress therefore should exempt USPTO from budget sequestration.