INCENTIVES AND INVENTIONS

Keep patent bill tabled

By Charles Burson & F. Scott Kieff

The central problem with all of these proposed changes is that they would inject far too much uncertainty and arbitrariness into the patent system, making it the plaything of political whim. Especially now, when the economy’s infirmities loom large, we must focus on the central lesson taught by leading thinkers on both sides of the proverbial political aisle: Predictable property rights are essential for economic growth, innovation and jobs. Bringing new things to market is a very risky and expensive process requiring huge investments by inventors, venture capitalists, manufacturers, managers, laborers and others. Unpredictable enforcement of patents tells all of those players in that process to cut back on investing their financial and personal capital.

The proposals on validity procedures should be rejected because if any patent can be invalidated at the discretion of an expert without required citation to a factual record, or held up in endless validity proceedings, then every patent becomes a bad bet for all investors.

The proposals on remedies invite an impossible inquiry into the “true merit” of an invention designed to get the amount of inducement for inventive activity “just right.” This completely overlooks the especially forward-looking and diffuse incentives patents provide to help all the many complementary users of a technology make coordinated investment in its commercialization. A predictably enforced patent acts like a beacon by drawing to itself all those interested in the technology and then motivates each of these parties to reach agreements with one another over its deployment.

The most recent proposed change is the peak of arbitrariness and political whim: The banking industry now wants a special exemption targeting the patents owned by a company called DataTreasury. These patents cover a technology used by most of the industry to electronically process check images. Instead of a fair royalty, the banks want to slip into the patent bill their own confiscatory rider.

Strong patents help create industry and jobs. For numerous reasons such as lower labor costs, it is already usually cheaper for companies to manufacture overseas. Without domestic enforcement of property rights in inventions, sales back to the United States do little to foster domestic industry. Absent domestic patent enforcement, we ship money and jobs overseas and buy back technologies invented here. Strong patents also have been a linchpin of U.S. policy in trade negotiations, helping get IP rights enforced internationally. When word gets out that patents are not being taken seriously in the United States, our voracious international competitors will pounce. Several countries have long been pushing compulsory licenses for drug patents and easy piracy for copyrights in the software and entertainment industries. Weakening IP rights in the United States would only help those who argue for weakening IP worldwide, which would harm the many components of the U.S. economy that rely heavily on international IP enforcement.

Adopt only targeted solutions

None of this belies those legitimate complaints about the problems of frivolous litigation tactics used by or against patentees, which can be well addressed with tools long used in various aspects of the U.S. litigation system (and much of the British one): fee-shifting and other damages rules that make a party asserting a frivolous defense pay enough to deter such bad acts.

Instead of pandering to narrow interests of particular industries, protecting IP while decreasing frivolous suits is an approach that is true to the consensus intellectual values that are core to economic growth, innovation and jobs.

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