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Congress must stand up for inventors against patent infringers

By Alan Heinrich

As a new Congress prepares to take the reins in January, lawmakers on Capitol Hill are racing against the clock to tackle the mountain of pending legislation that awaits their attention.

Not every bill deserves to make it to the president's desk, though. The innocuously named Litigation Transparency Act would make it harder for inventors to defend their patents in court. And since patents are the cornerstone of the high-tech economy, the bill would undermine our collective prosperity.

Deep-pocketed corporations — both domestic and foreign — increasingly help themselves to the discoveries and inventions of America's most innovative small businesses. If those small firms try to fight back, the big corporations often engage in a drawn-out legal battle, betting that they can use their vast resources to wear down the little guy.

Sadly, this strategy of "efficient infringement" often works. Filing, and then litigating, a patent infringement lawsuit can easily cost millions of dollars. For a small inventor or startup without big financial reserves, this creates an almost insurmountable barrier to enforcing intellectual property rights.

In recent years, some startups and other small innovators have turned to financial firms for help funding patent infringement suits. This financial backing enables startups to press a lawsuit through to its conclusion — and makes potential infringers think twice before trying to steamroll over others' intellectual property rights.

The Litigation Transparency Act wouldn't ban these funding arrangements outright. But, make no mistake, that will be the result. The Litigation Transparency Act would force small businesses to disclose their financing agreements and all investors in the financing, all in the name of targeting "serious abuses" in our courts and achieving "long-overdue transparency."

Mandatory disclosure of sensitive funding information could potentially expose a plaintiff's legal strategy. Mandatory disclosure of the funders and funders' investors would leave funders and their investors vulnerable to harassment campaigns and intimidation tactics to strongarm them into pulling back from the cases. And it would lengthen legal proceedings with meaningless arguments about compliance.

If we truly value innovation and justice, we should be looking for ways to strengthen the ability of small inventors to enforce their rights, not handing more advantages to efficient infringers.

The source of funding for a lawsuit is ultimately irrelevant to the merits of the case itself. Regardless of who is financing it, the core issue remains whether patent infringement has occurred.

These extra barriers would deal a blow to small businesses. In effect, the law would end litigation funding. This result benefits the bad actors and disadvantages already vulnerable inventors, enabling big corporations and nefarious foreign actors to walk all over American small businesses and entrepreneurs.

Any piece of legislation that hamstrings small businesses and entrepreneurs from protecting their own IP rights would deal a major blow to American innovation. That's because smaller firms with under 10 employees receive close to 60% more patents, per capita, than large corporations with 25,000+ employees.

Proponents of the bill argue that disclosure is necessary to expose unethical or illegal funding arrangements. But existing court procedures and ethics rules already address such concerns.

In Taction Tech., Inc. v. Apple Inc., a California court showed how existing rules can balance transparency and privacy. The judge limited what information about litigation funding had to be shared during the lawsuit. While some details could be disclosed, the court protected sensitive information, especially documents subject to confidentiality agreements. These were considered "protected work product" — essentially, private legal strategy that doesn't have to be revealed to the opposing side.

Similarly, in Trustees of Purdue Univ. v. STMicroelectronics N.V., a Texas court reviewed funding-related documents privately — without showing them to the other side — and decided they didn't need to be shared. The judge found these documents both irrelevant to the case and protected by legal privacy rules. Notably, the judge even described the litigation funder as more than just a money source, but as an entity providing important legal services.

Courts are already fully capable of balancing the need for transparency with the protection of privileged information and legitimate business interests. A one-size-fits-all approach to disclosure, as proposed in the bill, is not only unnecessary but assuredly lethal to the rights of small business owners, and potentially harmful to the judicial process.

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