House Panel Calls For Action On Patent Trolls

By **Ryan Davis** Share us on:

Law360, New York (March 14, 2013, 5:31 PM ET) -- Members of a House Judiciary Committee panel said Thursday that legislation is needed to rein in lawsuits by so-called patent trolls and debated proposals for addressing the issue that included creating a "loser pays" system for some patent cases and putting limits on discovery.

Several members of the Subcommittee on Courts, Intellectual Property and the Internet expressed support for the recently introduced Saving High-Tech Innovators from Egregious Legal Disputes Act, or Shield Act, which would require patent assertion entities defined as trolls to cover the litigation costs of defendants if they lose, as well as other possible legislation suggested by in-house counsel from companies including Cisco Systems Inc. and Adobe Systems Inc.

Rep. Howard Coble, R-N.C., chairman of the subcommittee, said that "all options should be on the table for consideration" for dealing with patent troll litigation.

"Frivolous patent litigation continues to stifle innovation and job creation, and trolls or patent assertion entities are at the root of many problems," he said.

Cisco general counsel Mark Chandler told the panel that his company spends $50 million a year on legal fees defending against "shakedown efforts" from patent assertion entities.

"Like lab rats running through a maze to get food at the end, PAEs just go after the incentives in their ecosystem," he said. "It's up to Congress to change the incentives."

The Shield Act would accomplish that goal by shifting the cost of unsuccessful litigation

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onto the patent assertion entities that file them, because "entities whose business is licensing and litigating patents should be held to a higher standard when they lose," Chandler said.

Several other pieces of possible legislation were floated by speakers at the hearing. John Boswell, chief legal officer of SAS Institute Inc., suggested revamping discovery rules so that any party making broad requests for documents that go beyond routine issues like the technical specifications of the allegedly infringing product should have to pay the discovery costs themselves.

Patent trolls are "business terrorists" that try to leverage settlements by driving up the cost of litigation for the defendant and putting restrictions on discovery would defang that threat, Boswell said.

"We believe that this approach is narrowly tailed, without restricting the ability of parties to get evidence that would be enlightening," he said. "What it does do is remove the ability to use discovery as an abusive weapon."

Another suggestion raised at the hearing was bar patent trolls from pursuing litigation in both district court and the U.S. International Trade Commission. Plaintiffs often use the threat of an ITC exclusion order to leverage a higher settlement, so defendants in those situation should be allowed to stay the ITC case until the district court case is over, they said.

Members of the committee said they were particularly concerned that patent trolls have begun suing end-users of patented technology, such as coffee shops that offer Wi-Fi to customers, in the hope of extracting quick settlements from small businesses that don't have the resources to fight a patent suit in court.

"Something is terribly wrong here. The patent system was never intended to be a playground for trial lawyers and frivolous claims," said Rep. Bob Goodlatte, R-Va., chairman of the Judiciary Committee.

Some members of committee expressed wariness about passing litigation dealing with patent trolls, citing the difficulty of clearly defining what a troll is.

"While I believe there is abuse in patent litigation, we should be cautious about taking action that disincentives poorly-defined entities from filing patent litigation," said Rep. Melvin Watt, D-N.C. Such legislation could improperly restrict patent rights and devalue patents by removing the incentive to respect patents, he said.

Rep. John Conyers, D-Mich., said he found the Shield Act's provision that the plaintiff pay the full cost of litigation "disturbing" and noted that courts already have the ability to award fees for meritless claims.

Dana Rao, associate general counsel of Adobe Systems, responded to that point, saying that the current fee-shifting rules have the very high standard of proving that the plaintiff knew the suit was baseless.

"That is not likely to happen, and the patent assertion entities know it," he said. "If we can appropriately tailor this standard to address the abuses in the system, we could rebalance the asymmetry and curb opportunistic suits."

C. Graham Gerst, an attorney at Global IP Law Group LLC, told the panel that any

legislation should be aimed at abusive litigation tactics, rather than singling out patent assertion entities as a group.

While such companies are "politically unpopular," the serve an important role in the patent system, by helping companies generate revenue from their patent portfolios that can be fed back into research, he said.

--Editing by Katherine Rautenberg.