The intangible investor

Written by
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Patentomics

Proposals to establish a small claims court for patent disputes in the US and to use patents to create jobs hold promise. But the devil is in the details

Disputes over innovation are inevitable. How they get resolved is not. While well over 95% of American patent suits settle, the cost in time, money and disruption is problematic for both alleged infringer and infringed.

Robert P Greenspoon, a partner at Chicago IP law firm Flachsbart & Greenspoon, LLC, is offering a solution. In "Is the United States Finally Ready for a Patent Small Claims Court", an article he wrote for the *Minnesota Journal of Law, Science & Technology*, he argues that this resolution alternative, similar to binding arbitration, would benefit plaintiff and defendant alike.

"A Patent Small Claims Court would fill [a] gap in our system," says Greenspoon. "… If there were a good, cheap, and fast way to bring a small claim to resolution, the patentee's dilemma would be vastly reduced… A small claims court for patent disputes would help individuals, small businesses, large businesses, and the court system itself. In contrast to the present patent litigation environment, where individuals or small businesses often cannot economically enforce their intellectual property rights even when they are willfully infringed upon, such a court system would provide a new opportunity. Unblocking access to the courts for a deserving subset of patentees will have the salutary effect of encouraging innovation. Helping innovation, in turn, helps consumers."

False proxy value

The author concludes that large entities would also benefit from a small claims forum because they are most affected by "a certain type of plaintiff who uses the costs of litigation (rather than the merits of the claim) as a false proxy of settlement value".

Greenspoon's analysis is timely. However, his proposal raises unanswered questions. For example, what about patent quality? Inventors may be encouraged to unleash a stream of marginal or even fallacious claims against risk-averse companies because they know that they are likely to be settled quickly. Once patentees are aware that XYZ Tech is paying up to prevent disputes from getting to district court, patent filing could become an end for cash strapped companies, not the means to create innovation. Defendants that may wish to view these awards as a relatively inexpensive field of use licence certainly could benefit. However, there is no clear indication on what the limits of "small" claims should be: US$1 million? US$100,000? How would validity be established? Or would the alternative court even bother to? Who would be qualified to hear small disputes?

The idea of a small patent claims court is not entirely new. In 1990, a Patents County Court was established in the United Kingdom as an alternative to the High Court for patent litigation. It would be interesting to know how it has fared.

Another proposal, this one to facilitate jobs by encouraging innovation, was offered recently in a *New York Times* editorial, "Inventing Our Way Out of Joblessness". The authors are former Chief Judge for the Court of Appeals for the Federal Circuit Paul Michel, a 2010 IP Hall of Fame inductee, and Henry Northhaft, CEO of Tessara (NASDAQ: TSRA), a successful patent licensing company. Joining them on the op-ed was un-credited collaborator David Kline, co-author of *Rembrandts in the Attic* with Kevin Rivette and *Burning the Ships* with Marshall Phelps.

The trio suggest that attributing more patents to small and medium-sized businesses would spur innovation, which in turn would stimulate the economy by creating jobs — a kind of patentomics.

"Our guess is that restoring the patent office to full functionality would create, over the next three years, at least 675,000 and as many as 2.25 million jobs. Assuming a mid-range figure of 1.5 million, the price would be roughly $660 per job — and that would be 525 times more cost effective than the 2.5 million jobs created by the government's $787 billion stimulus plan."

Increased funding to relieve USPTO backlogs and enhance the quality of issued patents makes great sense. But where the authors' logic eludes me is in their proposal to pay inventors to file patents by providing a cash incentive to cover about half of the cost: "To encourage still more entrepreneurship, Congress should also offer small businesses a tax credit of up to $19,000 for every patent they receive, enabling them to recoup half of the average $38,000 in patent office and lawyers' fees spent to obtain a patent. Cost, after all, is the No. 1 deterrent to patent-seeking, the patent survey found.

"For the average 30,000 patents issued to small businesses each year, a $19,000 innovation tax credit would mean a loss of about $570 million in tax revenue in a year. But if it led to the issuance of even one additional patent per small business, it would create 90,000 to 300,000 jobs."

Change or progress?

More patents are an unreliable indicator of increased innovation. Offering cash incentives to secure them is no guarantee of success.. Unless there is a way to monitor the quality of issued patents that result, these rewards may in fact encourage some entrepreneurs to file applications haphazardly or on inventions which do not fully meet the tests of patentability. Also, when would the cash be paid? Upon filing? Upon publication? Upon issuance? Even with a less backlogged PTO, it may be five or more years before the incentives reach those who need them most.

Independent and small business innovation has historically played a key role in US growth. The government needs to be more innovative about how it manages innovation, including disputes. Kudos to Messrs Greenspoon, Michel, Northhaft (and Kline) for suggesting how the patent system can be improved. But, as with patent claims, the devil is in the details. Potential defendants and their stakeholders will need convincing that change means progress.

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