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Patent Owners Hurry to Sue as Obama Plans to Sign Overhaul Bill

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By Susan Decker

Patent owners are rushing to sue companies such as Apple Inc. and Google Inc. before more restrictive standards take effect when President Barack Obama signs the biggest overhaul to patent law in six decades.

Federal courts in at least seven states have been handling a surge in infringement lawsuits against multiple defendants since Sept. 7, the day before the Senate voted to change how patents are reviewed. At least 41 such cases had been filed in the week ended yesterday, including 10 in the past two days, up from an average of three a day, according to lawyers tracking the cases.

A provision in the America Invents Act that Obama is scheduled to sign Sept. 16 aims to curb non-practicing entity cases. NPEs have no operations other than trying to extract quick settlements by acquiring patents and using them to sue a large number of companies with nothing in common -- typically anywhere from 15 to 100 at a time. Those cases would now have to be filed as a single complaint against each individual company.

"They're going to have to rethink their strategy," **Craig Smith**, a lawyer in Cambridge, Massachusetts, for Lando & Anastasi LLP who tracked the new filings, said of the NPEs. "Do they really want to file 15 lawsuits? That increases the cost."

Another section of the legislation may bring hundreds of existing patent cases to a halt.

False Marking Cases

About 450 "false marking" cases are likely to be thrown out because of a provision that limits who can demand punitive compensation from companies that post expired patent numbers on their products, according to Justin Gray, a lawyer at Foley & Lardner LLP in San Diego who monitors such cases on his blog.

An appeals court in December 2009 ruled that companies are subject to a penalty of as much as \$500 for every item marked with an

expired patent. Any person may sue -- under the theory that the public is harmed by the misleading information -- and split 50-50 with the government any money collected in the case.

Almost 1,000 such lawsuits followed, according to Gray.

About half have been settled and others dismissed. Gray said "maybe a handful" of the 450 remaining cases are the type that would be allowed to proceed under the new law, which states that only the U.S. government or competitors to the companies can make false-marking claims.

The Justice Department has received \$7.36 million as its share of settlements this year through Aug. 31, up from \$3.4 million in all of last year, according to its website.

Abbott, Pfizer Sued

One of the new multidefendant cases filed on Sept. 10 accuses more than two dozen companies including Abbott Laboratories and Pfizer Inc. of posting expired patents on their products. Gray and Smith said that case probably won't survive unless there's a successful challenge to the law.

"Marking cases will be going away entirely," said Brad Wright, a lawyer with Banner & Witcoff Ltd. in Washington.

The NPE and false-marking provisions are just two sections of a 150-page bill that revamps the patent application process, gives the U.S. Patent and Trademark Office more authority over its budget, creates a program to challenge newly issued patents and establishes satellite patent agency offices. The bill also limits tax-avoidance strategies and gives banks including Bank of America Corp. and Citigroup Inc. power to seek to cancel finance-related business method patents.

While the NPE provision merited no more than one line in the bill and wasn't the topic of any congressional hearings, it may bring the most immediate change to the patent system.

'Nuisance Value'

The U.S. Court of Appeals for the Federal Circuit in Washington, which handles all patent appeals, has criticized cases in which intellectual property owners seek a "nuisance value settlement." The court in July upheld a judge's decision to impose sanctions on lawyers

who helped an NPE file lawsuits that had characteristics of extortion against multiple companies.

The legislation addresses this concern with a requirement that defendants must have something in common if they are to be sued collectively.

"It's a lot more onerous for the trolls to deal with 30 lawsuits than one lawsuit," Wright said, using a pejorative for NPEs. "That's why they're rushing to sue right now."

Most of the patent owners affected are closely held entities including TQP Development LLC, which this week sued companies including Caterpillar Inc., General Electric Co. and PepsiCo Inc. over a patent on a modem that sends encrypted data over telephone lines. Plano, Texas-based Droplets Inc. sued EBay Inc., Target Corp. and Sears Holdings Corp. in another case over technology for remote delivery of applications.

'Judicially Economic'

Apple and Google have each been named in at least five of the lawsuits from the past week.

"As is becoming clear, the increase in patent litigation in the technology industry is a growing drag on innovation,"

said Jim Prosser, a spokesman for Mountain View, California- based Google.

Officials with Cupertino, California-based Apple didn't respond to a request for comment.

One federal judge said last month it was easier to resolve cases against multiple defendants when there are common legal issues, even if the products are different. The judge was able to dismiss 99 defendants out of 112 by ruling on one issue regarding the interpretation of key terms of the patent.

"By all defendants remaining in one case in one district, the court was able to resolve the controversy in the most judicially economic manner sparing many other courts from repetitive work, and at the same time saving the parties very significant sums of money in attorneys fees," U.S. District Judge Leonard Davis wrote in his Aug. 12 opinion.

A Droplets lawyer, Ted Stevenson, called the idea of forcing patent owners to file multiple suits over a single patent "a complete waste of judicial resources."

"Why clog up the courts unnecessarily?" Stevenson said.

"Let the judge use his discretion to determine what's best."