AS POSTED ON IPTODAY.COM

Special Feature -- Non-Practicing Entities Race to File Lawsuits Before Patent Reform Ends An Era of Multi-Defendant Patent Litigation

Monday, September 12, 2011

By Craig R. Smith

In the past few days there has been a dramatic increase in the filing of lawsuits alleging that many different companies infringe a patent. More than 32 new multi-defendant lawsuits have been filed since September 6, when it became clear that patent reform would pass Congress. Non-practicing entities are racing to courthouses to file patent litigations before a change to the patent law puts an end to the practice of filing large, multi-defendant patent lawsuits.

On September 8, the Senate passed the Leahy-Smith America Invents Act – a significant change to the patent system – and President Obama is expected to sign the Act into law in the next few days. One of the major changes made by the America Invents Act is to limit multi-defendant patent litigation, a typical strategy employed by companies whose business model is based on suing and licensing a large number of defendants.

NPEs frequently sue many companies for patent infringement in one lawsuit. The defendants often have no relationship with one another except that they have all been accused of infringing the same patent by the NPE. These massive patent litigations are complex, expensive and time-consuming. Defendants are forced to work together to negotiate schedules, discovery, claim construction and strategy, even when the defendants have different products, defenses, and potential liability.

The America Invents Act will put an end to the practice of naming many defendants in a single litigation where there is no connection among the defendants. According to the Act, the mere fact that all the defendants are accused of infringing the same patent is not sufficient to join them together in the same lawsuit. To join defendants in the same litigation, the plaintiff must allege that the defendants are jointly or severally liable, or that the same products or services are at issue for the group of defendants.

This change means that NPEs must file a separate lawsuit for each unrelated defendant accused of infringement. As result, NPEs may have to deal with different schedules, judges and jurisdictions, thus increasing the expense of pursuing infringement claims against multiple entities. In the interest of judicial economy, courts within the same jurisdiction may consolidate individual lawsuits for purposes of pretrial proceedings and trial.

As indicated by the recent increase in multi-defendant patent litigations, NPEs and other patent plaintiffs appear to be concerned about the new patent reform. Within the past few days, over 32 new multi-defendant patent litigations were filed – 16 of them involved 10 or more defendants. Google, Apple, Microsoft and Dell were among the defendants named in the suits. The plaintiffs included GTZM Technology Ventures, TuitionFund, E-Contact Technologies, Hopewell Culture & Design, Lochner Technologies, E-Micro Corp. and ICH Intellectual Capital Holdings.

Although the America Invents Act applies only to new patent litigations, it may influence the handling of new litigations filed prior to enactment of the law. A few courts already have begun to question the propriety of suing a large number of unrelated defendants in the same patent litigation. In particular, district courts in the Ninth Circuit have severed defendants from multi-defendant patent litigation. A recent ruling in the Western District of Washington held that a large multi-defendant patent case should be severed into individual cases, where the "Plaintiff [had] not alleged that the Defendants have engaged in the same transaction or occurrence or series of transactions or occurrences." *Interval Licensing LLC v. Apple Inc. et al.*, 2-11-cv-00708 (WAWD April 29, 2011, Order). Other courts may follow this trend even for litigations filed prior to enactment of patent reform.

With the clock ticking, more multi-defendant litigation likely will be filed in the next few days until the America Invents Act becomes law. Although the Act marks the end of an era of massive, multi-defendant patent litigation, it will be interesting to see how NPEs adjust to the change and how courts handle a large number of individual suits based on infringement of the same patent.

Craig R. Smith, a partner at Lando & Anastasi, LLP, helps high-tech companies protect and defend their inventions in complex intellectual property litigation.