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Louis Basile, CEO of Wildflower Bread Company and Steve Chucri, president and CEO of the Arizona Restaurant Association

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# TROLL PATROL

Lawmakers hope patent reform will curb frivolous litigation that exploits innovation

By JACOB GREEN

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he executive and legislative branches have been notoriously polarized during President Barack Obama's tenure. One of the few initiatives they've been willing to work together on, however, is curbing so-called "patent trolls."

A patent troll is a person or firm who buys broadly written patents solely for the purpose of suing violators. The businesses that have been victims of patent trolls find the lawsuits particularly frustrating because not only does it cost them a fortune in legal bills, it also allows someone else to profit from their innovation.

"The part that's so frustrating from the perspective of those of us who are involved in legitimate patent litigation is that it's just largely viewed as an extortion scheme and you're taking money from legitimate businesses over very questionable patents and very questionable claims," said Donna Catalfio, an attorney at Gallagher & Kennedy who has experience defending businesses from patent trolls. "It takes money that a company could use for research and development, expanding their business or for hiring new employees."

The success of patent trolls is dependent on the high price of patent litigation, which provides an incentive for defendants to settle instead of paying even more in legal fees.

According to Catalfio, the trolls used to typically target large, brand-name manufacturers. There has been a recent shift, however, to target small businesses who use the service of manufacturers instead, she said.

"If they get the manufacturer, they could get one big payout, but it's only one time," she said. "But if they go after the hundreds and thousands of consumers, they may get smaller payments, but there's more money to be made because there's so many more."

Another reason small businesses are attractive targets for patent trolls is because they are more likely to settle than a large company that has sufficient legal protection, she said.

"If you're a small company, you might not have the money for patent litigation," Catalfio said. "Even if you do, it might deplete the business"



financial resources so drastically that it doesn't make sense to fight."

The broad nature of these vulnerable patents allows the firms to rake in profits as they draw in settlement fees from hundreds of "violators," functioning with very low operating costs as they do not produce anything themselves.

David Anderson, a board member of Entrepreneurs' Organization Arizona, has been a victim of patent trolling.

"They kind of hold you hostage," he said.

In 2013, Anderson was threatened with a lawsuit for violating a patent relating to multi-use computers his company used. The computers transferred data to be printed or scanned from printers to the machine. The threat was issued through a letter, he said, that claimed the lawyers' client owned the patent to the copiers and would press charges if a settlement couldn't be reached.

"It's like old mafia money where you have to pay thugs to back off," he said.

Anderson is among the lucky minority who challenged the patent troll and did not have to settle. Nevertheless, the frustration did not escape Anderson.

"It's incredibly frustrating because they don't even provide a service," he said. "It's not like I could have called them if the copiers broke and said, 'Hey, our copiers aren't working, can you come fix them?' But they still want money."

The issue has gained steam since the end of 2013, with Obama drawing focus on the issue in his State of the Union address.

"Let's pass a patent reform bill that allows our businesses to stay focused on innovation, not costly, needless litigation," he said in the address.

Obama has been particularly active on this cause, issuing five executive actions and seven legislative recommendations last year.

A piece of legislation has emerged from the increased attention on patent trolls. Despite some resistance, the legislation is gaining steam. The Innovation Act, which has already passed the House of Representatives, is waiting to be reviewed by the Senate Committee on the Judiciary.

"That's significant because that levels the playing field with patent trolls," Catalfio said.

Their cases are usually weak and frivolous and they have a lot more risk in actually suing on those because whereas now they have no operating expense, they would have significant potential liability."

The resistance to the bill is coming from small businesses and universities that believe the bill would harm legitimate patent litigation. The concern is that businesses with a legitimate patent would be scared to protect it if they have to fear reimbursing the defendants legal fees.

Catalfio believes that this resistance is unwarranted.

"I think that those concerns are being overplayed and I think the legislation will ultimately help curb patent abuse," she said.

While the Innovation Act waits in Congress, Catalfio said that she encourages small businesses to voice support for the reform to their trade associations and to Attorney General Tom Horne to push for "Arizona-specific legislation."

In the meantime, if you do get a letter, she suggest that you do not react immediately.

"It's probably not best to be first out of the gate," she said. "You're probably one of many and you want to stay off their radar screen as long as you can."

If the letters keep coming, though, she said to contact a lawyer to calculate your next move based on your circumstances.

"You want to force them into it and make them do the work," she said. **AB**

## THE INNOVATION ACT

The Innovation Act hopes to make procedural changes to the patent system to discourage the tactics preferred by patent trolls. The major provisions are these:

► **Require specificity in patent lawsuits.**

Right now, patent plaintiffs can file lawsuits that are vague about exactly how the defendant allegedly infringed the plaintiff's patent. The bill would require lawsuits to be more specific.

► **Make patent ownership more transparent.**

The Innovation Act requires patent plaintiffs to name anyone who has a financial interest in the patent being litigated.

► **Make losing plaintiffs pay.** The Innovation Act makes it easier for a victorious defendant to recover the costs of defending against an unsuccessful patent lawsuit.

► **Delay discovery to keep costs down.**

A big reason patent lawsuits are so expensive is that plaintiffs often force defendants to produce millions of pages of e-mails and other internal documents to help them build their case. The Innovation Act would delay this phase of the litigation process until after the courts have addressed legal questions about the meaning of patent claims.

► **Protect end users.** A common troll tactic is to sue end users (such as coffee shops offering their customers WiFi access) rather than technology vendors (such as the manufacturer of the WiFi equipment). The Innovation Act allows technology vendors to step into the shoes of their customers and fight lawsuits against trolls on their customers' behalf.



Donna Catalfio



David Anderson