CBM Expansion Would Hurt Innovative Small Businesses

Background

Congress is now considering legislation to curb abusive litigation by so-called “patent trolls.”

A number of reform proposals have garnered wide support — especially those designed to reduce skewed incentives in the legal system that make opportunistic litigation an attractive business model. But one proposal — expanding the Transitional Program on Covered Business Method Patents at the US Patent and Trademark Office — takes a different approach. It has proven to be controversial enough that it would be a serious impediment to reaching consensus on any patent reform legislation.

Among the concerns with CBM expansion:

- It would create uncertainty and risk that discourage investment in any number of fields where we should be trying to spur continued innovation.
- It could inadvertently undermine many valid patents by giving infringers a new procedural loophole to delay enforcement.
- It would eviscerate the delicate balance that was struck with other new post-grant review programs in the AIA to ensure that patents would not be devalued by limiting serial challenges during life of a patent.

In addition to those concerns, the program could be especially damaging to innovative small businesses, as the following case studies illustrate:

Case Study: AvMarkets, Inc. (www.AvMarkets.com)

Thanks to patented technologies, AvMarkets, Inc., a small company based in Coraopolis, Pennsylvania, is able to provide a variety of services to aviation and aerospace companies through its online software platform. AvMarkets helps its customers sell aviation-related assets, find FAA certified repair stations and find industry-specific inventory through major search engines.

Founder Paul J. Pollastro exercised his patent rights against a large publicly traded company for infringing upon his patent. In response, they filed a CBM petition, which has now dragged AvMarkets, a small business, into a complicated and lengthy regulatory review process. Before he can even make his case in district court, Paul will have to wait at least 12 months for the CBM review to be completed and it could be another 12 months waiting for appeal. That is, at a minimum, two years that Paul will be unable to stop this large competitor — or any other — from using his technology. Furthermore, once back in district court his competitor could continue to invoke other sections of the Patent Act that could technically keep this case tied up in court for well over 5 more years. That additional cost of time and money, on top of mounting uncertainty, could ultimately ruin his company. This is not patent reform.

Paul is not a patent troll who is simply holding a patent to extract settlement money from productive companies. He is a small business owner and entrepreneur who takes his business very seriously. He has sacrificed years, along with significant monetary investment, into his enterprise. The only way he is able to prevent a larger competitor from using his idea is by asserting his patent rights. Unfortunately, in this case, a well-funded, publicly traded company is taking advantage of the patent system by using CBM as nothing more than a roadblock and stall tactic.

Case Study: Versata Software

In 1995, Tom Carter invented a solution to complex pricing problems facing large corporations — a solution he patented and turned into a commercial product that began earning millions in new revenue for the company he co-founded. Historically, software pricing systems were slow and inflexible, but one of Tom's innovations resulted in pricing searches that executed 10-1000 times faster than existing software and were easier to maintain. For the first time, global companies could manage their pricing in real-time from a single database. This patented technology helped drive Versata into a global enterprise software company with customers across the globe, revolutionizing industries from automotive to high tech along the way.

A major — and much larger — competitor of Versata, studied and ultimately mimicked Versata's patented method in its own pricing software which led to a rapid decline in Versata's pricing business. The company's internal documents even touted that their software contained Versata's pricing capabilities. Versata sued for infringement of its patent and the jury sided with them on two separate occasions, awarding Versata $345 million. Versata's competitor lost its appeals to both the Federal Circuit and then the Supreme Court. In an effort to get another bite at the apple, Versata's competitor brought the patent into the CBM program, using defenses that it waived during the federal court litigation.

As a startup, Versata risked millions of dollars in developing this technology and relied on the US patent system to protect their innovations. Even after losing in federal court (all the way to the Supreme Court), Versata's competitor has delayed paying Versata for damages it caused by dragging Versata's patent into the CBM process. The CBM program is being used against Versata to prolong litigation, maximize expense, and game the system—all in an effort to avoid paying the judgment that has been legally entered against it. This competitor used Versata's own technology to drive it to the fringes of the market, and now it is using the CBM process to heap further cost and delay — after seven years of litigation — on Versata's attempt to be compensated for the wrong done to it.

Case Study: Ameranth

Ameranth Inc., a veteran-owned business based in San Diego, has won five major best product technology awards and has been selected for three National Science Foundation (NSF) grants. Their pioneering and patented data synchronization inventions have been widely adopted and deployed to enable modern hospitality IT systems to be completely synchronized across functions such as online/mobile ordering, reservations, ticketing, and payment processing. This is a game-changing innovation for all parts of the hospitality industry, from restaurants, hotels, to sports stadiums and casinos. Given the explosion in the use of mobile devices and cloud computing, the need for synchronization has never been greater — and Ameranth's competitors have taken notice. In fact, many companies that used to legally buy the software from Ameranth began to copy the technology and then cut out Ameranth altogether.

It is difficult for a small company like Ameranth to get the credit it deserves for a breakthrough idea in the court of public opinion when companies with much greater public profiles implement a very similar type of system. But the purpose of our patent system is to give them a fighting chance to protect their idea, one which lies at the very core of their business. Even as Ameranth defends its innovations and multiple patents, the companies they are taking to court have responded by requesting a CBM review of Ameranth's patents — delaying and denying Ameranth the right to make their case in district court.

In the quickly-evolving world of software and information technology, timely protection of intellectual property is critical for survival. Ameranth's technological innovations have received widespread acclaim but they are not getting the opportunity to properly defend their valuable ideas. Instead, they are now mired in a process that binds their hands while their innovation is copied and precious time is lost.