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Patent Litigation Report Falls Short On NPE Activity

Law360, New York (August 26, 2013, 2:08 PM ET) -- For almost a decade now, technology companies and intellectual property commentators have expressed concern over the increase in patent litigation by nonpracticing entities ("NPEs") — patent owners that did not invent the patented technology and do not practice the patented technology themselves by manufacturing a product. More commonly known as "patent trolls," NPEs have recently become the focus of numerous bills introduced in Congress. These bills uniformly seek to make patent litigation by NPEs more difficult. Although each bill proposes a different solution, they all proceed from a common point of view, namely that NPE litigation imposes increased costs, without any corresponding benefit, on the process of developing new technology and manufacturing technology-based products in the United States.

Opponents of such legislation, however, argue that these bills proceed from a mistaken view of NPE litigation. NPEs and their allies contend that there is no evidence that such patent lawsuits impose an undue burden on the United States economy. A new report by the United States Government Accountability Office is likely to be seized upon by NPEs to support their argument against new legislation.

On Aug. 22, 2013, the GAO issued a much-anticipated report, entitled "Intellectual Property: Assessing Factors That Affect Patent Infringement Litigation Could help Improve Patent Quality."[1] The GAO report had been mandated by the America Invents Act as part of an effort by Congress to better understand the economic consequences of NPE litigation. Specifically, Section 34(b) of the AIA mandated that the GAO study address:

1. The annual volume of NPE litigation for the past 20 years;
2. The volume of NPE litigation found to be without merit;
3. The impact of NPE litigation on the time required to resolve patent claims;
4. The estimated costs associated with NPE litigation upon patent owners, licensors, licensees, inventors and users of competing inventions;
5. The economic impact of NPE litigation on the economy of the United States; and
6. The benefit, if any, supplied by NPE litigation.[2]

Unfortunately, the GAO report largely failed to fulfill this congressional mandate. In the view of the GAO, reliable data was not available to answer most of the questions posed by Congress. Accordingly, the GAO developed its own "report objectives." In other words, rather than address the topics set out by Congress, GAO prepared a report that addressed four somewhat different, albeit related issues. The GAO report set as its objective to determine:

"(1) what is known about the volume and characteristics of recent patent litigation activity; (2) the views of stakeholders knowledgeable in patent litigation on what is known about the key factors that have contributed to recent patent litigation; (3) what developments in the judicial system may affect patent litigation; and (4) what actions, if any, has PTO recently taken that may affect patent litigation in the future."[3]

Although the GAO report does not respond to the specific topics mandated by Congress for investigation, it does provide a number of significant statistical findings with respect to the volume and characteristics of recent patent activity that are certain to fuel further debate over NPE litigation. Relying upon data provided by the United States Patent and Trademark Office and by Lex Machina, a private firm that collects data on patent litigation, the GAO Report analyzed patent issuance activity since 1991, as well as patent litigation for the period 2007 through 2011. Among the GAO report's findings are:

- Patents granted for software-related technologies, including business methods implemented by a software program, ("software patents") have increased dramatically over the past 20 years and now make up more than half of all patents issued each year;

- After a decade of only slight fluctuations in volume, patent infringement lawsuits increased by 31 percent in 2011, with software patents accounting for 89 percent of this increase;

- Between 2007 and 2011, 64 percent of all defendants sued for patent infringement were sued over software patents;

- NPE litigation increased by 41 percent over the period 2007 to 2011; and

- 93 percent of the defendants in NPE litigation were sued over software patents.

The GAO report identifies three key factors as likely contributing to the recent increase in patent infringement lawsuits reflected in these statistics. These three factors are: (1) unclear and overly broad patents; (2) the potential for disproportionately large damage awards; and (3) the increasing recognition that patents are a valuable asset.[4]

In particular, the GAO report expressly criticizes the allowance by the USPTO of software patents with overly broad claims and unclear claim terms as contributing to the recent increase in patent litigation. The GAO report notes that such software patents often fail to give notice to entities seeking to develop new products as to exactly what is patented and, therefore, should be avoided. Moreover, NPEs are more likely to bring patent infringement lawsuits based on such low-quality patents because the uncertainty as to how the claim terms will be construed creates too great a litigation risk for the defendant inducing them to settle rather than litigate.

The GAO report also takes to task the legal rules for calculating damages in patent lawsuits. Pointing to a recent report by the United States Federal Trade Commission, the GAO report notes that the law of patent damages is not entirely grounded in sound economic analysis which often results in overcompensation of the patent owner that brings infringement litigation vis-à-vis market compensation.[5] Such overcompensation can overincentivize NPEs resulting in increased patent litigation. Although some recent legal decisions, such as the elimination of the so-called "25 Percent Rule" by the Federal Circuit[6] reflect progress in this regard, the GAO report concludes that "there is still a need for improvement in the way damages are calculated."[7]
Finally, the GAO report found that the recent increase in patent litigation may simply be a function of the realization by patent owners broadly — not just NPEs — that patents are a valuable asset that can produce new revenue sources in a challenging economy. In the past, entities used patents to protect

inventions, rather than to generate revenue. This view of patents, however, has changed, contributing to the recent increase in patent litigation.

The GAO report concludes by making only a single recommendation. The GAO report recommends that the USPTO "consider examining trends in patent infringement litigation, including the types of patents and issues in dispute, and to consider linking this information to internal data on patent examination to improve the quality of issued patents and the patent examination process."[8] Against the background of the GAO report as a whole, this bureaucratic jargon has to be understood as a recommendation that the USPTO must do a better job examining software patents. Indeed, the GAO report notes that the USPTO has already undertaken initiatives to improve the quality of software patents.

The unmistakable message of the GAO report is that new legislation constraining the activities of NPEs is unnecessary. In the view of the GAO report, the problem is software patents, not NPEs. As the GAO report states: "[T]he focus on the identity of the litigant — rather than the type of patent — may be misplaced."[9] Of course, this ignores the fact that software patents do not bring lawsuits, patent owners bring lawsuits. Thus, it would be unusual in any serious debate on the recent increase in patent litigation to focus exclusively upon the type of patents at issue without any attention being paid to the nature of the litigants.

The GAO report's implicit conclusion that new legislation constraining NPEs is unnecessary seems to be driven in large part by its belief that the USPTO and the federal courts are already pursuing changes that are likely to reduce perceived abuses. While it is true that several new initiatives are being undertaken by the federal courts, including a pilot program to enhance expertise in patent litigation among district court judges and development of a model order to reduce costs of electronic delivery, it is unlikely that either initiative will have any meaningful impact upon the decision by patent owners, whether NPEs or operating entities, to bring a patent lawsuit.

Such efforts may ameliorate some of the problems engendered by the recent rise in patent litigation, but do not actually address the trend toward more and more patent litigation. Similarly, improved examination by the USPTO of new applications for software patents may well improve the quality of such patents and reduce patent litigation in years to come. Such improvements, however, do not address the large number of already issued software patents of questionable validity and overly broad or unclear claim terms. Litigation over such low-quality patents will continue for several decades until they have expired or been found invalid in litigation. In short, the GAO report's faith in such initiatives is misplaced.

The GAO report is unlikely to put an end to the debate in Congress as to whether new legislation is needed to constrain NPE litigation. The statistics developed by the GAO report strongly suggest that there has been an unprecedented increase in patent litigation and that low-quality software patents play a part in this increase. It also appears, however, that the increase is associated with NPE litigation. Although the GAO report chose to focus upon software patents, it is unclear as to why Congress should not address both the role of low-quality software patents and NPEs in this problem. Thus, it seems that the GAO report may provide ammunition to both opponents and advocates of NPEs.

—By Terence P. Ross, Crowell & Moring LLP

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[1] U.S. Government Accountability Office, Report 13-465 (Washington, D.C. August 2013).

[2] Pub. L. No. 112-29 § 34(b) (2011).

[3] GAO Report at 4.

[4] Id. at 28.

[5] U.S. Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (Washington, D.C. March 2011).

[6] Uniloc USA, Inc. v Microsoft Corp., 632 F.3d 1292 (Fed. Cir. 2011).

[7] GAO Report at 34.

[8] Id. at 46.

[9] Id. at 45.