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Brush up on patent law

The rules are changing. **Interviewed by Curt Harler**

Many businesses hold patents, which protect the core of the company's existence. Whether it is two or dozens of such patents, they represent the company's ability to distinguish itself to the market. However, the landscape around protection of those patents is changing.

Smart Business asked Michael Wilson of the Dallas law firm of Munck Carter, P.C. to help us through the thicket.

What is going on with our rights to enforce our patents?

First, the U.S. Supreme Court has been more active over the past couple of years in considering and deciding cases affecting patent rights. Overall, I think the impact of the recent decisions is that the courts are making it more difficult to enforce patent rights. It also has become easier to challenge the validity of a patent as part of a lawsuit.

Earlier this year, the U.S. House of Representatives passed a patent reform bill, H.R. 1908. The U.S. Senate was considering a similar bill. The bills could negatively impact the rights of patent owners. For example, both bills include changes affecting such things as venue (where a patent owner can file a lawsuit) and calculation of damages (the amount of money that a patent holder can recover from those found to have infringed a patent).

Supporters of the bills promise to press for passage during the next session of Congress, so many people expect change as soon as 2009. However, the November election could cause shake-ups in the committees that control these issues. That could delay the bill or cause changes to the more important proposals.

How would these changes impact venue?

Where a patent owner files a patent infringement suit can have a significant impact on how the case turns out and costs associated with the case. The proposed venue changes would require most patent suits to be filed where the defendant is based or has a major presence. Right now, a patent holder has more options, including filing in the patent owner's home dis-



Michael C. Wilson
Shareholder
Munck Carter, P.C.

trict or in any venue in which the defendant is selling infringing products. This allows plaintiffs to bring claims in federal districts that they believe are better suited to hearing their claims.

For example, recently more plaintiffs have elected to file patent suits in the Eastern District of Texas, both because of their perception of the juries here and because the district has adopted specific 'patent rules' designed to streamline and speed the litigation process.

How would these changes affect one's ability to recover damages?

Supporters of patent reform believe damage awards are too high. The proposed changes include rules to control how courts and juries measure damages where there is infringement. What has not received as much press, though, is that the courts often reduce or eliminate these damage awards, even without any changes. For example, reform proponents like to point to the \$1.5 billion jury verdict Alcatel-Lucent obtained against Microsoft in 2007, but the trial judge vacated the award.

MICHAEL C. WILSON is a shareholder at Munck Carter, P.C. and a member of the firm's litigation section. Wilson has 17 years of experience in all aspects of litigation, including trials, arbitration, mediation and appeals. Reach him at mwilson@munckcarter.com.

In addition, there is a legitimate concern that patent reform may have a corresponding negative impact on the value of these patents, which is not good news to the companies that own them.

Don't some big companies oppose these changes?

Many companies and groups oppose changes, including some of the large pharmaceutical companies. These companies have spent a great deal of time and money in research and development and in obtaining patents. The last thing they want are changes in the law that weaken their rights.

In addition, many businesspeople and economists believe that the current patent system has been incredibly successful in sparking innovation in this country, so they are reluctant to make wholesale changes to a system that seems to have worked for a long time.

Support comes from big businesses that are commonly named as defendants in patent infringement suits, including large technology companies. But that is not to say that the bills do not have broader support. Definitely, public attention from cases such as the Microsoft and BlackBerry cases has created a perception that the patent laws need changing.

What do these changes mean to a smaller business?

These days, many small businesses have spent a great deal of capital and human resources creating new and innovative technologies. In many cases, a company's patents and other intellectual property are among its most valuable assets. The proposed new laws could reduce the value of those patents. So any business that owns patents needs to take stock of its intellectual property rights and strongly consider whether to be more aggressive in licensing or otherwise enforcing its rights before any patent reform takes place. <<