



There Is a Role for Congress in Patent Litigation Reform

By Ted Frank

Despite some in the media calling patent reform dead,¹ on January 24, 2008, the Senate placed S. 1145, the Patent Reform Act of 2007, on the general calendar. The next few weeks will be critical to the legislation, which the House passed in September.² Although much of the discussion has focused on the different perspectives and concerns that the high tech and the biotech/pharma industries have about the legislation, the fact remains that the patent litigation system is broken. Congress should make every effort to fix it by writing into this legislation reasonable formulas for damage awards and venue rules that discourage forum-shopping.

Impetus for new patent legislation came in response to the growing problem of “patent trolls”—holders of weak patents, often purchased in the open market and used solely for the purpose of litigation against successful companies. The problem predates the neologism: the notorious Jerome Lemelson made himself a billionaire through “submarine patents.” Lemelson would file a vague patent, which would remain secret “underwater” while he navigated decades-long delays in the patent office. Then, as new technology became available, Lemelson would amend claims in the pending patent, have the patent issued, and “surface” to claim that his long-ago filed patent “teaches” the newly invented technology. By threatening suit against hundreds of companies and offering to settle for a fraction of the cost of litigation, Lemelson and his attorney Gerald Hosier obtained over \$1.5 billion in royalties³ before a defendant was willing to stand up and spend the money on the legal expenses to invalidate the patents—well after Lemelson had died.⁴

While subsequent congressional action closed the specific loophole Lemelson used, others noticed the litigation business model. According to the *Wall Street Journal*, “lured by the potential returns,

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hedge funds and other institutional investors now are bankrolling businesses that buy up patent portfolios” and litigate them through contingent-fee attorneys.⁵ Affiliates of Erich Spangenberg’s Plutus IP have sued 476 different defendants in 42 lawsuits. The vast majority of those lawsuits allege infringements of patents that Plutus IP purchased for \$1,000.⁶ The use of invalid patents in litigation is more than theoretical. Philip Jackson sued his attorneys, Chicago plaintiffs firm Niro, Scavone, Haller & Niro, for malpractice after his \$12.1 million jury verdict against Glenayre Electronics Inc. was reduced to under \$3 million; Niro challenged the malpractice suit by claiming that the patent Jackson had successfully enforced was invalid.⁷ In 2006, approximately 6,000 defendants were sued in 2,800 patent cases; in 2007, the six thousand mark was reached in early October, implying a 30 percent increase in patent litigation in a single year. Such litigation stifles substantial technological innovation. Patent trolls claim to block entire fields, and one cannot hope to innovate in these areas without the financial capital to handle the threat of patent litigation. IBM has 370 corporate patent attorneys,⁸ not just to avoid the pitfalls of infringement, but to create a patent portfolio that can provide counterclaims (or cross-licensing opportunities) if a commercial entity were to sue

them for infringement. Since the late 1990s, patent litigation costs have outstripped patent profits.⁹

Why Punt When It's Not Fourth Down?

My AEI colleagues Claude Barfield and John E. Calfee have written an excellent book about intellectual property law and its relationship to biotechnology.¹⁰ But I disagree with their argument that the “danger of unintended negative consequences” and the “self-correcting mechanisms” in the status quo necessarily militate against “sweeping legislative changes.”¹¹ The problem of submarine patents was only fixed when Congress intervened with a sweeping change in 1995. And the problem of patent trolls is growing, notwithstanding the Supreme Court’s tightening of the injunction standard.

Barfield and Calfee express legitimate concern that the legislative process can be hijacked by special interests.¹² Indeed, passage of the legislation has been delayed by squabbling between the lobbies of groups who expect to be licensors and those who expect to be licensees. And legislation can shift the balance of power between the two groups, so there is risk of special-interest favoritism—though one concerned about that risk should not neglect the special interest of attorneys in a regime that generates billions of dollars in legal fees. Milberg Weiss spinoff Lerach Coughlin is diversifying from its practice of holding up deep-pocket corporations in securities litigation¹³ and is forming a practice that will focus on patent litigation,¹⁴ no doubt planning on employing the same strategy of using the hassle and expense of litigation and the risk of gigantic damages to force profitable settlements. Current debate on patent reform is largely nonpartisan, but this is in large part because the organized plaintiffs’ bar does not currently have a vested interest in the status quo of patent litigation. Should they obtain such a vested interest, future legislative efforts will have a partisan tinge that will make constructive changes more difficult.¹⁵ The time for reform, if ever, is now.

Barfield and Calfee argue that it is better to resolve many of the problems in the status quo through “developing case law.”¹⁶ As a political matter, I think they err in

assuming that the judicial branch and the U.S. Patent and Trademark Office (PTO) are in a superior position to solve the problems of the patent system, with little role for Congress. The submarine patent problem was itself an unintended consequence of the PTO changing its refiling procedures in the 1940s.¹⁷ Sometimes the federal common law of patents, as interpreted by the Federal Circuit, accumulates encrusted barnacles that take a working law and

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move it in the wrong direction. In such situations, the Supreme Court can certainly choose to clear up problems accumulated through years of accreted precedent. It did so in *KSR International Co. v. Teleflex Inc.*,¹⁸ when it loosened the Federal Circuit’s too-narrow “obviousness” test. But the courts can just as easily make a mistake. And the years of waiting for the Supreme Court to act can also impose costs.

In the most infamous example, BlackBerry manufacturer Research In Motion Ltd. (RIM) agreed in March 2006 to pay \$612.5 million to the patent-holding company NTP Inc. to settle an infringement ruling over questionable patents to prevent an injunction that would have shut down its business¹⁹—even as the PTO had decided to reject all five patents involved in the dispute.²⁰

Just two months later, the Supreme Court decided *eBay v. MercExchange*,²¹ limiting the availability of injunctions, which would likely have permitted RIM to continue litigating the case to a successful resolution. But RIM does not get their \$612.5 million back. Nor is it clear that

the *eBay* rule—creating discretion for a court to choose to refuse to grant an injunction on the grounds that the plaintiff is “only” a licensor of the intellectual property—is the optimal rule for stopping patent trolls. Is the lesson from the BlackBerry case one about the dangers of injunctions at the back end of litigation or one about the dangers of PTO mistakes at the front end in issuing patents when the applications should have been rejected? Though it occasionally acts to the contrary, the Supreme Court is not a legislature, and it can only decide the case before it. What existing statutes and precedents require may not be what public policy requires.

In *eBay*, the Court’s rule does not distinguish between the holder of a legitimate patent that has not

yet succeeded in commercializing a patent and one misusing the legal system to enforce a questionable patent; it simply shifts the legal balance from patent-holders to patent-infringers. False positives like the BlackBerry case will be reduced at the cost of increased false negatives in other cases. But no one has answered the empirical question of whether the optimal balance has been struck. If the answer is no, the Supreme Court will have no judicial reason to correct itself.

Punting to the courts could have deleterious effects. The Federal Circuit and the Supreme Court will be hard-pressed to seek more sensible apportionment rules for damages when Congress, given the opportunity, refused to do so.²² Congressional inaction might as easily lead to mistaken results as congressional action. A particular legislative reform may be wise or unwise, but there is no reason to create a presumption for the latter conclusion just because there is a lack of consensus. With that in mind, let us evaluate two areas ripe for reform: venue selection and damages calculation.

We Are Marshall

In 1990, the Federal Circuit held that the definition of “reside” created in 1988 amendments to 28 U.S.C. § 1391, the venue statute for general civil cases, also affected the meaning of the word “reside” in the earlier 28 U.S.C. § 1400(b).²³ While before corporations could only be sued where they had a regular place of business, now corporations could be sued for patent infringement in any district the plaintiff chose, so long as the defendant was subject to personal jurisdiction. Plaintiffs now had their choice of forum.

In 1990, the Eastern District of Texas had exactly one patent suit filed. In 2006, the number had risen to 264 filed against 996 defendants. The first ten months of 2007 surpassed that number: 312 cases filed against 1,253 defendants. And 60 percent of these cases were filed in the federal court in Marshall, Texas (population 25,000)—about a tenth of the entire nationwide patent docket in the improbable center of American patent litigation.

While it is an exaggeration to say that a defendant can never get summary judgment in Marshall,²⁴ the exaggeration is only slight. Suits can be expected to go to trial, and a trial can be expected to cost \$2.5 million on top of the millions of dollars in legal fees for pretrial proceedings.²⁵ The “rocket docket” gives defendants little opportunity to engage in discovery that might invalidate weak patents. Moreover, the expedited procedural schedule increases the

expense of complying with discovery, lest disproportionate sanctions be issued for technical failures to comply.²⁶

As one patent attorney argues,

Juries in East Texas, unlike those in Houston, Dallas or Austin, are much less likely to have a member with any technical training or education, which exacerbates the problem from the defense perspective, but makes East Texas federal courts an attractive venue for would-be plaintiffs, who know that the jury will, instead, gravitate toward softer or superficial issues that are difficult to predict.²⁷

Defense attorneys complain of the court’s idiosyncratic jury instructions that make invalidating patents unlikely. “[P]atent plaintiffs whose cases go to trial in Marshall win 88 percent of the time, according to research firm Legalmetric, compared with 68 percent nationwide.”²⁸ With all these factors, individual defendants often find it economical to settle, especially if faced with an offer less than the cost of trying a case.²⁹

Venue reform is an area in which only Congress can solve the problem. There is little chance the Supreme Court will hear an appeal on the Federal Circuit’s interpretation of the venue rules, and the Federal Circuit has shown no inclination to revisit its earlier decision.

The Hail Mary Pass

The *in terrorem* effect of patent trolls would be limited if they did not pose the plausible threat of outsized damages beyond economic reason. The existing statute provides that the floor for damages is a “reasonable royalty” but gives no definition of the term.³⁰ Rather, courts have determined that jurors are supposed to evaluate a fifteen-factor test to determine the outcome of a hypothetical royalty negotiation. One problem with this is that such a hypothetical negotiation acts as a ratchet on future actual negotiations—to the extent a court overcompensates, the background threat of such damages inflates future negotiations over the patent and rationalizes outsized estimates from testifying experts.³¹

Without firm rules for determining damages, damages awards become swearing contests between for-hire experts. For example, Plutus IP affiliate Orion IP won a \$34 million verdict in the Eastern District of Texas against Hyundai over their website’s alleged use of a minor patent that assists a salesperson in selecting appropriate parts needed by customers.³² Alcatel won a

\$1.5 billion verdict against Microsoft because the royalty for its minor MP3-compression technology was calculated against the value of every computer sold with a Microsoft operating system.³³ While the judge vacated the award post-trial,³⁴ the expert never should have been permitted to put the larger number before the jury. Such damages awards deter defendants with legitimate defenses from defending themselves.

Many have complained that this tilts the field too far against patent holders;³⁵ the provision appears to be the biggest sticking point in causing biotechnology companies to oppose the existing legislation.³⁶ The concerns seem overstated. Patent-holders who have commercialized or have the potential to commercialize their invention—like most pharmaceutical companies—will have access to lost-profits damages and will not be affected by any change to the reasonable-royalty standard.³⁷

In any event, Section 4 (formerly Section 5) of the Patent Reform Act has been substantially rewritten following earlier criticism. The proposed 35 U.S.C. § 284 would now read:

(b) Determination of Damages; Evidence Considered; Procedure—The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances. The admissibility of such testimony shall be governed by the rules of evidence governing expert testimony. When the damages are not found by a jury, the court shall assess them.

(c) Standard for Calculating Reasonable Royalty—

1) IN GENERAL.—The court shall determine, based on the facts of the case and after adducing any further evidence the court deems necessary, which of the following methods shall be used by the court or the jury in calculating a reasonable royalty pursuant to subsection (a). The court shall also identify the factors that are relevant to the determination of a reasonable royalty, and the court or jury, as the case may be, shall consider only those factors in making such determination.

(A) ENTIRE MARKET VALUE.—Upon a showing to the satisfaction of the court that the claimed invention's specific contribution over the prior art is the predominant basis for market demand for an infringing product or process, damages may be

based upon the entire market value of that infringing product or process.

(B) ESTABLISHED ROYALTY BASED ON MARKETPLACE LICENSING.—Upon a showing to the satisfaction of the court that the claimed invention has been the subject of any nonexclusive license for the use made of the invention by the infringer, to a number of persons sufficient to indicate a general marketplace recognition of the reasonableness of the licensing terms, if the license was secured prior to the filing of the case before the court, and the court determines that the infringer's use is of substantially the same scope, volume, and benefit of the rights granted under such license, damages may be determined on the basis of the terms of such license. Upon a showing to the satisfaction of the court that the claimed invention has sufficiently similar noninfringing substitutes in the relevant market, which have themselves been the subject of such nonexclusive licenses, and the court determines that the infringer's use is of substantially the same scope, volume, and benefit of the rights granted under such licenses, damages may be determined on the basis of the terms of such licenses.

(C) VALUATION CALCULATION.—Upon a determination by the court that the showings required under subparagraphs (A) and (B) have not been made, the court shall conduct an analysis to ensure that a reasonable royalty is applied only to the portion of the economic value of the infringing product or process properly attributable to the claimed invention's specific contribution over the prior art. In the case of a combination invention whose elements are present individually in the prior art, the contribution over the prior art may include the value of the additional function resulting from the combination, as well as the enhanced value, if any, of some or all of the prior art elements as part of the combination, if the patentee demonstrates that value.

(2) ADDITIONAL FACTORS.—Where the court determines it to be appropriate in determining a reasonable royalty under paragraph (1), the court may also consider, or direct the jury to consider, any other relevant factors under applicable law.

(d) Inapplicability to Other Damages Analysis—The methods for calculating a reasonable royalty described in subsection (c) shall have no application to the calculation of an award of damages that does not necessitate the determination of a reasonable royalty as a basis for monetary relief sought by the claimant.

Federal Circuit chief judge Paul Michel worries about the litigation that will take place over the term “specific contribution,”³⁸ but there is no reason that that litigation would be any more drawn out than existing litigation over the fifteen-factor test. Reasonable royalty disputes and battles of the experts already account for substantial expenses in discovery and trial; Michel does not persuasively argue that a different standard would add costs at the margin, especially when such a standard would deter much litigation over *de minimis* patents.

Robert Armitage, the general counsel of Eli Lilly, has expressed concern that the bill’s language will not be able to distinguish between the MP3 patents in the Alcatel-Microsoft case and a “modest bit of code . . . that turns out in the marketplace to be essential for operating systems and there are no unpatented alternatives for it.”³⁹

Certainly, if a patent is “blocking”—that is, if circumventing it “(1) is not commercially practicable, or (2) will not produce a commercially viable product”⁴⁰—it makes both economic and legal sense for patent-holders to be permitted to recover a reasonable royalty based on the total value of the infringing product. Section 284(c)(1)(A)’s “predominant basis for market demand for an infringing product or process” test should ideally be read in conjunction with Section 284(c)(1)(C)’s “economic value of the infringing product or process properly attributable to the claimed invention’s specific contribution” to include a blocking patent. If there is any dispute about that, it would be a simple enough amendment to tweak the bill to account for the principle of the blocking patent. The Patent Reform Act merely makes explicit the common sense idea that the inventor of a trivial improvement in windshield wipers does not get to recover a reasonable royalty based on the market value of the automobile.⁴¹ Notwithstanding

vague White House objections,⁴² legitimate patent holders have nothing to fear from the newly amended Section 4 reforming the reasonable-royalty standard.

Encouraging Good Claims

The worry of some patent-holders is that creating additional protections for defendants will encourage infringement. The availability of treble damages for willful infringement⁴³ should be sufficient disincentive,

but there is a simple reform that can provide additional protection for patent-holders without rewarding patent trolls: a “loser-pays” rule.

Current law only permits an award of attorneys’ fees to a plaintiff in “exceptional cases”⁴⁴ and to a defendant only upon a showing of bad-faith litigation.⁴⁵ A mandatory loser-pays rule has many benefits: it would give increased incentive for legitimate patent-holders to vindicate their rights while at the same time destroying the extortionate business model of the patent troll. A defendant confident in the invalidity of an asserted patent would no longer be forced to

settle for less than the cost of defense; contingent-fee representation might even come about. There would be additional long-term benefits, as loser-pays rules in patent litigation would demonstrate the advantages of such a rule in other litigation.

Conclusion

Barfield and Calfee’s *Biotechnology and the Patent System* is correct about the importance of the patent system to American innovation. But patent litigation is broken, and Congress is every bit as qualified as—and often more qualified than—the courts to fix it. Patent reforms are possible that discourage patent trolls while protecting the rights of both legitimate patent-holders and defendants and satisfying the “do no harm”⁴⁶ principle of Barfield and Calfee.

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Notes

1. E.g., Rita Weeks, *Recent Developments in Patent Reform Legislation*, MONDAQ BUSINESS BRIEFING, July 12, 2007; Patently-O, Congressional Patent Reform is Dead; Long Live Administrative Reform, Aug. 30, 2007, <http://www.patentlyo.com/patent/2007/08/congressional-p.html> (last visited Feb. 13, 2008).
2. H.R. 1908, 110th Cong. (2007).
3. Nicholas Varchaver, *The Patent King*, FORTUNE, May 14, 2001, at 202.
4. Symbol Technologies v. Lemelson Medical, Education & Research Foundation, 301 F. Supp. 2d 1147, No. 01-701 (D. Nev. 2004), *aff'd*, Symbol Technologies v. Lemelson Medical, Education & Research Foundation, 422 F.3d 1378, No. 04-1451 (Fed. Cir. 2005); Brenda Sandburg, *Judge Torpedoes Dead Inventor's Patent Claims*, THE RECORDER, Jan. 27, 2004.
5. William M. Bukeley, *Aggressive Patent Litigants Pose Growing Threat to Big Business*, WALL ST. J., Sep. 14, 2005, at A1; see also Nathan Vardi, *Patent Pirates*, FORBES, May 7, 2007.
6. John Letzing, *Speculator of mundane patents casts a long shadow*, MARKETWATCH, Sep. 7, 2007, <http://www.marketwatch.com/News/Story/congress-mulls-patent-reform-holding/story.aspx>. The Polaris patents are quite weak; Patent No. 6,411,947, issued in 1997, claims to teach responding automatically to emails, though that functionality has been available in some software since at least the 1990 release of Procmail. See discussion at Slashdot blog, Google and Others Sued for Automating Email, Aug. 28, 2007, <http://yro.slashdot.org/yro/07/08/28/2252231.shtml>.
7. John Bringardner, *A Bounty of \$5,000 to Name Troll Tracker*, IP LAW & BUSINESS, Dec. 4, 2007. "The case settled in late September [2007] for an undisclosed amount." Niro has been accused of using patent litigation to sue critics on the Internet, bringing a patent infringement suit against Greg Aharonian, the author of the Internet Patent News Service, for criticizing a jpeg decompression patent. *Id.*
8. Michael Fitzgerald, *A Patent Is Worth Having, Right? Well, Maybe Not*, N.Y. TIMES, Jul. 15, 2007.
9. *Id.* (citing JAMES BESSON AND MICHEL J. MEURER, DO PATENTS WORK (forthcoming 2008)).
10. JOHN E. CALFEE AND CLAUDE BARFIELD, BIOTECHNOLOGY AND THE PATENT SYSTEM: BALANCING INNOVATION AND PROPERTY RIGHTS(2007).
11. *Id.* at 65.
12. Claude Barfield and John E. Calfee, *Patents Pending*, THE AMERICAN, Jan./Feb. 2008, at 70.
13. E.g., Theodore Frank, *Enron: Extortion, Interrupted*, N. Y. SUN, Jan. 23, 2008, at 9; *Investor Protection: A Review of Plaintiffs' Attorney Abuses in Securities Litigation and Legislative Remedies: Hearing Before the H. Subcommittee on Capital Markets, Insurance,* and *Government Sponsored Enterprises of the Committee on Financial Services*, 109th Cong. 2 (2006) (statement of Ted Frank, Resident Fellow and Director, AEI Liability Project).
14. Bruce V. Bigelow, *S.D. Law Firm Forms Group to Undertake Patent Cases*, San Diego Union-Tribune, Jan. 31, 2008 at C1.
15. That is not to suggest that only entities with ties to Democrats are diversifying into the field of patent-litigation-for-profit. Edward "Rusty" Rose III, a former business partner of President Bush, is most famous in the legal world for bringing a stock-drop lawsuit at the same time he held a large short position against the defendant. *In re Terayon Communication Systems Inc*, No. C 00-01967 MHP, 2004 WL 413277 (N.D. Cal. Feb. 23, 2004). Recently, through his shell company NextCard LLC, Rose sued several credit card companies in the Eastern District of Texas. Zusha Ellison, *Discovering a Patent Troll*, THE RECORDER, Nov. 30, 2007.
16. BIOTECHNOLOGY AND THE PATENT SYSTEM 77-79.
17. Tomima Edmark, *Surprise Attack - Submarine Patents*, ENTREPRENEUR, Nov. 1998.
18. 550 U.S. ___, 127 S. Ct. 1727 (2007).
19. Press Release, Research in Motion, Research in Motion and NTP Sign Definitive Settlement Agreement to End Litigation (March 3, 2006) (available at http://www.rim.com/news/press/2006/pr-03_03_2006-01.shtml); Yuki Noguchi, *BlackBerry Patent Dispute is Settled*, WASH. POST, March 4, 2006, at A1; see also Lawrence S. Ebner, *The Blackberry Case – An Alternate Ending*, 7 ENGAGE 111, Oct. 18, 2006.
20. Ian Austin, *U.S. Patent Office Likely to Back BlackBerry Maker*, N.Y. TIMES, Dec. 20, 2005, at C1.
21. 547 U.S. 388.
22. E.g., Stoneridge Investment Partners, LLC v. ScientificAtlanta, Inc., No. 06-43, 552 U.S. ___, __ (2008), slip op. at 6-7 (refusing to create new cause of action in part because of Congressional inaction on same subject).
23. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990).
24. Maurice Mitchell Innovations, L.P. v. Intel Corp., No. 2:04-CV-450 (E.D. Tex Nov. 22, 2006) (invalidating patent), *aff'd*, No. 2007-1108 (Fed. Cir. Sep. 24, 2007).
25. M. Craig Tyler, *Patent Pirates Search for Texas Treasure*, TEXAS LAWYER, Sep. 20, 2004.
26. Sam Williams, *A Haven for Patent Pirates*, TECHNOLOGY REVIEW, Feb. 3, 2006.
27. Tyler, *supra* note 25.
28. Williams, *supra* note 26.
29. A complaint in the Eastern District has "has a nuisance value of a few hundred thousand dollars the minute it is filed and served." *Id.* Even in the Maurice Mitchell case, Intel could not obtain attorneys' fees, and even its relatively modest bill of costs

was rejected. *Maurice Mitchell Innovations, L.P. v. Intel Corp.*, 491 F.Supp.2d 684 (E.D.Tex. 2007).

30. See discussion at VIET D. DINH AND WILLIAM PAXTON, PATENT REFORM: PROTECTING PROPERTY RIGHTS AND THE MARKETPLACE OF IDEAS 17 (Dec. 3, 2007), <http://www.bancroftassociates.net/patentreform.pdf>.

31. *Id.* at 18.

32. *Orion IP LLC v. Hyundai Motor America*, case no. 6:05-CV-322-LED (E.D. Tex. 2007).

33. Saul Hansell, *MP3 Patents in Upheaval After Verdict*, N. Y. TIMES, Feb. 23, 2007, at C1; Dinh and Paxton, *supra* note 30, at 19; Jury Verdict, *Lucent Tech. Inc. and Multimedia Patent Trust v. Gateway Inc. and Microsoft Corp.*, No. 02-CV-2060-B-CAB (S.D. Cal. Feb. 22, 2007).

34. Ben Charny, *Microsoft Damage Award Voided*, WALL ST. J., Aug. 7, 2007.

35. E.g., William C. Rooklidge, "Reform" of Patent Damages: S. 1145 and H.R. 1908, http://www.patentsmatter.com/press/pdfs/Patent_Damages_Reform_Rooklidge.pdf; Letter from Hon. Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit, to Hon. Patrick Leahy and Hon. Arlen Specter, United States Senate 1 (June 13, 2007); Letter from Nathaniel F. Wienecke, Assistant Secretary for Legislative and Intergovernmental Affairs, to Hon. Patrick J. Leahy (Feb. 4, 2008).

36. Jon Van, *Proposals for Patent Reform Raise Fears*, CHI. TRIB., Sept. 7, 2007.

37. Mr. Rooklidge, *supra* note 35, had worried that the new § 284 would be applied to limit lost-profits damages. But it is already the case that lost profits are limited or even unavailable

where it is possible to circumvent the patent and sell a viable non-infringing substitute. E.g., *Grain-Processing Corp. v. American Maize-Products Co.*, 979 F. Supp. 1233, 1237 (N.D. Ind. 1997) (refusing lost profits where patent's advancement over prior art was "irrelevant to consumers") (Easterbrook, J.). In any event, the addition to the bill of a § 284(d) expressly disclaiming the applicability of the reasonable-royalty standard to a lost-profits analysis should solve the problem.

38. Letter from Hon. Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit, to Hon. Patrick Leahy and Hon. Arlen Specter, United States Senate 1 (June 13, 2007).

39. How to Improve IP Hygiene in the US, available at <http://new.managingip.com/Article.aspx?ArticleID=1450355> (last visited Feb. 11, 2008).

40. Ian Simmons, Patrick Lynch & Theodore H. Frank, "I Know It When I See It": *Defining and Demonstrating "Blocking Patents"*, ANTITRUST, Summer 2002, at 48, 49.

41. Mark A. Lemley, AMC Testimony on Patent Reform: Patent Reform Legislation—Public Comments on Substitute HR 2795 and the Role of the Antitrust Modernization Commission 11 (October 24, 2005), available at www.amc.gov/commission_hearings/pdf/Statement_Lemley.pdf (last visited Feb. 13, 2008).

42. Wienecke, *supra* note 35.

43. 35 U.S.C. § 284 (2006) ("[T]he court may increase the damages up to three times the amount found or assessed.").

44. 35 U.S.C. § 285.

45. F.R.C.P. 11.

46. Barfield and Calfee, *supra* note 10 at 65.