Bay State's economy has high stakes at play in patent reform

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Over the past several years, the proliferation of patent infringement lawsuits has generated an impassioned and polarizing debate on the use (or misuse) of patents. General awareness of "patent troll" lawsuits has led to extreme positions, clouding the debate about reasonable reform to strengthen the patent system. The vague term "patent troll"— also known as "patent assertion entity," "non-practicing entity" (NPE), and "patent monetization entity" — has been defined loosely as a person or entity who seeks to enforce patents, but does not make or sell the products or services disclosed in those patents. Although certainly meant to be derogatory, this wide-ranging characterization often encompasses universities and large technology companies with broad patent portfolios as well as entities established solely to engage in patent licensing and litigation.

Early patent reform efforts have been mixed. The Leahy-Smith America Invents Act, known primarily for its implementation of the first-to-file patent system, also contains measures aimed at curbing NPE litigation, including a new post-grant review proceeding of newly issued patents in the U.S. Patent and Trademark Office and provisions limiting the ability of litigants to join unrelated entities in a single lawsuit. However, it is unclear whether the AIA has had the intended effect, especially considering that the number of patent infringement lawsuits filed each year has continued to increase and NPEs are responsible for roughly half of them.

Last June, President Obama proposed five executive actions and seven legislative recommendations in the area of patent reform and Congress is now considering at least seven different pieces of legislation that seek to further control patent litigation and reduce NPE litigation. These bills, such as the Lawsuit Abuse Reduction Act of 2013 (H.R. 2655), the SHIELD Act of 2013 (H.R. 845), the End Anonymous Patent Act (H.R. 2024), and the Patent Abuse Reduction Act (S. 1013), offer heightened pleading standards, more limited discovery, protection of end users, and sanctions for abusive litigation. However, many cast doubts on the likelihood of passage.

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Vermont recently took the lead in passing legislation which gives the state's attorney general, Vermont businesses, and Vermont citizens the right to bring legal action against patent holders who assert bad faith claims of patent infringement. The validity of such legislation has not yet been tested and there is no question that it will be challenged as an improper preemption of federal patent law.

Last week, at the annual meeting of the Intellectual Property Owners Association, in Boston, keynote speaker Judge Kathleen O'Malley of the U.S. Federal Circuit warned that many of the proposed bills before Congress undermine the authority and independence of the judiciary. Passing such proposed legislative patent reform, said Judge O'Malley, would be similar to "swatting a fly with a grenade — there will be collateral damage." "I understand your frustration. I understand you need a better system," she said. "But to do that you need to look at the bigger picture — you need to take a broader view of how best to get there. Work with the courts, work with the patent office, but don't go to Congress. The implications of this go far beyond the IP world."

How and in what forum this divisive issue will be debated and resolved is far from clear. What is clear is that Massachusetts has a high stake in its outcome. As home to world-class universities and research centers, entrepreneurs and innovative companies, the Massachusetts economy depends upon a balanced and trusted patent system which gives companies the freedom to operate and enforce property rights, while simultaneously encouraging innovation.

Matthew Horvitz, a trial lawyer with Goulston & Storrs, contributed to this article.