

## Industries Brace For Tough Battle Over Patent Law

### Drug Makers Oppose Overhaul Plan Backed By Tech, Finance Firms

By GREG HITT

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WASHINGTON -- U.S. patent law, already shaken up by a Supreme Court ruling this spring, is facing its biggest overhaul in 50 years, amid a legislative battle that pits drug companies against some major players in the financial and high-tech sectors.

The battle's next round is in the Senate, where a committee is set today to consider legislation backed by Democratic and Republican leaders that would make patents harder to get and easier to challenge. It would also reduce penalties for violating them.

The proposed legislation reflects years of criticism from judges and businesses that the nation's current system of protecting intellectual property is ill-suited to the modern economy, where new inventions crop up quickly and often involve the marriage of hundreds of potentially patentable technologies and ideas. Many large companies also complain that patent litigation is becoming increasingly common and judgments against patent infringers increasingly costly.

Mark Chandler, the general counsel for Silicon Valley giant Cisco Systems Inc., who is in Washington this week to rally support for the proposed legislation, says the current patent system has encouraged "lottery ticket" litigation and deterred innovation. Critics complain the system as it stands now abets inventors and companies who patent incremental advances in technology largely to gain the right to sue for damages if their patents are infringed, rather than to develop products based on those advances.

In March 2006, little-known patent-holding company NTP Inc. won a windfall settlement from [Research in Motion Ltd.](#), maker of the popular BlackBerry wireless email device. Faced with the possibility a court-ordered shutdown of its services in the U.S. without a license from NTP, RIM, of Waterloo, Ontario, agreed to pay \$612 million to NTP, whose patents had never been applied to an actual product. The case produced widespread calls for patent reform.

Cisco has been joined in its support of the overhaul legislation by high-tech leaders including Microsoft Corp. [Goldman Sachs Group Inc.](#) and other financial-services companies are also backing the changes. The widening use of patents on "business methods," such as ways to service mortgages or clear checks, has prompted the industry to focus on the patent issue, as has the industry's rapid embrace of the Internet and other high technology.

The financial-services industry is particularly vulnerable to "infringement suits and nuisance claims," says John Squires, Goldman's chief intellectual-property counsel. Mr. Squires, who is scheduled to testify today in the Senate, says the legislation is needed to "restore some balance and fairness to the litigation landscape."

But pharmaceutical companies like [Eli Lilly & Co.](#) and [Pfizer Inc.](#), along with manufacturers like [Caterpillar Inc.](#) and [Dow Chemical Co.](#), have been telling lawmakers the proposed measure goes too far.

They say the legislation wouldn't only weaken the value of patents, but would make challenges to them too easy to launch -- and win.

"It's almost everything an infringer could ever want," says Phil Johnson, the chief patent attorney for health-care products maker [Johnson & Johnson](#). He says the legislation being pushed by the leadership of the influential Senate and the House judiciary committees would make "very sweeping changes," and would be a "very substantial policy shift away from fostering innovation."

Drug makers have jealously guarded their technology against challenges by Congress and the courts, arguing that their patents make up the bulk of their real assets, and that any weakening of patent protections would discourage expensive research into next-generation cures.

Critics, however, have pushed long and hard for an overhaul of the system, which still follows the basic framework of the Patent Act of 1952, enacted well before the computer age sparked a whole new level -- and style -- of innovation. But the issues involved in the debate are complex, and Congress until recently had left it largely to the courts to sort them out.

In recent years, the Supreme Court has underscored the patent system's disrepair in a series of rulings rejecting the way lower courts have been interpreting existing law. The justices have declared, in effect, that the patent system, as it has developed through the courts, has deviated from the balance Congress set a half-century ago between promoting innovation and spreading the fruits of progress.

This spring, the high court, in two important rulings, took action that made it harder to get new patents and defend existing ones. In one of those decisions, the justices sided with critics who contend innovation has been stifled by lower-court rulings that gave patent holders more power than Congress intended. The legislation now on Capitol Hill marks an effort to transform what have been piecemeal court rulings into a comprehensive set of changes.

Democratic leaders came to power last fall vowing to make patent reform a priority, as part of a broader agenda to stimulate innovation in the economy. But the current initiatives have a strong bipartisan flavor, increasing their chances for passage. In the House, Rep. Howard Berman (D., Calif.) is working with Rep. Lamar Smith (R., Texas), while Sens. Patrick Leahy (D., Vt.) and Orrin Hatch (R., Utah) are teaming up on the Senate side of the Capitol.

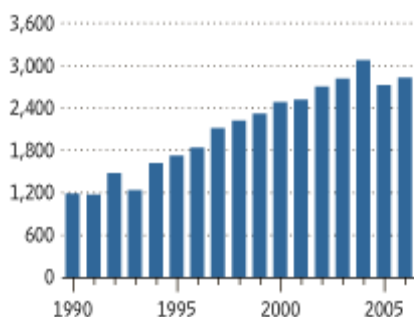
The bill has already cleared an important hurdle, winning approval in May from the House Judiciary Subcommittee on Intellectual Property. The measure is expected to go to the full House Judiciary Committee later this month, and could be ready for floor action in July. Today's hearing before the Senate Judiciary Committee is designed to set the stage for formal action in the chamber later this summer.

Lawmakers have introduced identical bills in the House and Senate, as part of a strategy to push legislation through before the 2008 presidential campaign draws much nearer. "We're on a fast track," says Mr. Berman, who is chairman of the House Judiciary Subcommittee on Intellectual Property.

## More Suits, More Pricey Damages

The number of patent cases heard by U.S. courts has climbed since the early 1990s. Before 1990, only once had a damage award exceeded \$100 million. Since then, there have been more than a dozen.

Patent cases heard by U.S. district courts:



Largest patent-infringement awards:

Year	Patent holder	Patent infringer	Award, in millions
1990	Polaroid	Eastman Kodak	<b>\$909.5</b>
2007	Lucent Technologies	Microsoft	<b>769.0</b>
2004	Eolas Technologies, et al.	Microsoft	<b>565.9</b>
1994	Alpex Computer	Nintendo	<b>253.6</b>
1996	Haworth	Steelcase	<b>211.5</b>
1997	Procter & Gamble	Paragon Trade Brands	<b>178.4</b>
1998	Exxon, et al.	Mobil Oil, et al.	<b>171.0</b>

Sources: Administrative Office of the U.S. Courts (cases heard); William O. Kerr and Christopher P. Loza, LECG (damages)

Under the legislation, patents would still be granted by the government for as long as 20 years. But the legislation would make some fundamental changes in how they are issued and defended. Among other things, the legislation would create a "first to file" system for granting patents, bringing U.S. rules in line with those used by the rest of developed world.

Under the current U.S. system, patents typically go to the first inventor. Under a "first to file" system, a patent would go to the first individual or entity that filed a claim with the government. That could put smaller companies and individual inventors at a disadvantage, but the shift could streamline the patent-approval process by eliminating debates about who first came up with an idea.

Another proposal would make it easier to challenge a patent already approved by the U.S. Patent and Trademark Office. Today, patents can be challenged in two ways: through a special administrative proceeding within the agency or through litigation. The legislation would create a third avenue -- a three-judge tribunal that would consider the validity of patents.

Supporters say the proposal would cut down on questionable patents and reduce the number of lawsuits. They say such a tribunal would be better suited to sorting out the complicated disputes that arise in the high-tech and financial sectors.

But the Coalition for 21st Century Patent Reform -- a broad group that includes drug makers as well as manufacturers like [3M Co.](#) and [United Technologies Corp.](#) -- contends the tribunal approach would subject a patent to open-ended challenges. That would be a big problem for pharmaceutical companies, which sometimes spend hundreds of millions of dollars to develop products based on a single patent.

"It cuts right to the business model of our industry," says Ken Johnson, a spokesman for the Pharmaceutical Research and Manufacturers of America, the trade group representing major brand-name drug makers.

Another hotly contested proposal is designed to rein in damage awards in patent-infringement cases. The legislation would limit the circumstances under which damages could be trebled. It would generally prescribe damage awards based on the narrow value of an infringed patent, which might only cover one component in a broader product.

For supporters of the legislation, a federal jury's decision last winter to order Microsoft to pay \$1.52 billion to Alcatel-Lucent SA underscored the need for controls on damages in patent litigation. The jury found that Microsoft had infringed patents related to the MP3 technology used for playing and recording digital audio, but critics said the final damage award far exceeded the value of the technology at issue in the case.

The debate is multilayered, and many of the industries involved aren't unified. Some technology companies, for example, oppose the legislation. Bruce G. Bernstein, the chief intellectual-property officer at InterDigital Communications Corp. in King of Prussia, Pa., complains the changes are being pushed by larger, more established technology companies, which are already working the issue aggressively on Capitol Hill. "They've got a big head start," adds Mr. Bernstein, who is scheduled to testify at today's hearing.

The Bush administration has taken a mixed position on the overhaul legislation. It has commended the "bicameral and bipartisan" legislative effort, while also expressing concerns about details of the bipartisan bill. Among other things, the administration has raised questions about the new procedures proposed for reviewing existing patents and the patent office's ability to handle the additional workload. But the administration's statement stressed that it "looks forward" to working with Congress as the measure moves forward.

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