High tech, biotech clashing on patent bill

By Stephen Heuser, Globe Staff  |  July 19, 2007

Biotech and high technology, two key Massachusetts industries, are often seen as allies -- innovation-driven businesses that depend on a highly educated workforce. But this week they're on opposite sides of a fight playing out in Washington: How to overhaul the nation’s patent system.

Both industries depend on patented inventions, but high-tech firms have been pushing for changes to lower the risk of expensive patent infringement lawsuits. And much of what they want is reflected in a bill making its way through Congress.

Biotech companies, however, argue that such changes would make it harder to protect new discoveries, and they are scrambling to blunt provisions they see as potentially damaging.

The two sides have been pressing Senator Edward M. Kennedy, the Massachusetts Democrat whose Senate committee is scheduled to consider amendments to the bill today, and Representative William D. Delahunt, also a Democrat of Massachusetts, on the corresponding House committee. The looming patent-reform act represents the biggest set of proposed changes to patent law in a generation, and has galvanized executives and trade groups. Corporate lobbyists have been paying "line standers" to wait outside the Dirksen Senate Office Building overnight to win a spot at the subcommittee hearings where the laws are being shaped.

"There are very few issues I think where we disagree," said Joyce Plotkin, president of the Massachusetts Technology Leadership Council, a local high-tech lobbying group. "The interesting thing about the problems on this, for some reason, is there doesn't seem to be progress."

The proposed changes would create a rapid avenue within the US
Patent and Trademark Office to challenge patents and would also
limit the money at stake in patent-infringement claims -- a relief for
electronics giants whose products depend on hundreds or even
thousands of patents, each vulnerable to suits.

They would also limit the ability of patent lawyers to shop for
obscure, plaintiff-friendly courts in which to litigate.

Advocates for the changes say they represent a long-overdue update
to the US patent system.

"Both biotech and high tech have come on the scene relatively
recently, and patent law is in the process of adjusting," said Emery
Simon , a lawyer for the Business Software Alliance, a high-tech
trade group in Washington.

"Right now the patent law works pretty well for one set of inventors," he said, referring to biotechnology and drug firms. "It works less well
for our industry."

The discord highlights the increasing complexity and importance of
patent law. Created to ensure basic protections for inventors, the law
has become both an insurance policy for innovative businesses and
a weapon in ferocious corporate legal wars. In some industries, such
as medical devices, nearly every major company is tied up in a web
of patent-infringement suits with its competitors, all designed to block
or delay competing products. In high tech, large firms complain of so-called patent trolls, small companies with a portfolio of unused
patents that make infringement claims against successful products,
winning millions of dollars in settlements.

Proponents of the changes often cite the recent lawsuit against
Research in Motion Ltd., maker of the popular BlackBerry device.
The company was sued by a small firm with rights to a patent they
claimed the BlackBerry violated. The suit nearly brought BlackBerry
service to a standstill, and RIM ended up paying more than $600
million to settle the suit.

By limiting damages and creating a new path for patent challenges,
the proposed law would make it easier to overturn issued patents,
and would cut down on companies' risk of facing such massive
liability. The biotechnology industry, however, foresees damaging
consequences. Biotech firms, major drug companies, and universities
all stand to earn millions, sometimes billions of dollars on inventions
that can be as small as a single molecule. They attract financing
based largely on the potential value of their inventions, whose profits
may be many years in the future. If those inventions were more
vulnerable to patent challenge, with decreased penalties for
infringement, they would become far shakier foundations on which to
build a company.

"You can't get investors to put forth millions of dollars and wait 10
years for a product if you don't have good patent protection," said
Rebecca Peterson, spokeswoman for Cambridge biotechnology
company Alkermes Inc. "People are very motivated about this issue."

Alkermes chairman Richard Pops, a high-profile industry leader, is
scheduled to fly to Washington this morning to meet Kennedy, and
the firm earlier sent general counsel Kathy Bieberstein to Washington
to testify on the need to keep barriers to patent infringement high.
Joshua Boger, the chief executive of Cambridge's Vertex
Pharmaceuticals Inc. and chairman of the national biotechnology
trade group, is also now in Washington to press the industry's case.
The biotech industry appears to have prevailed, at least partly, in a significant early battle.

Yesterday the House judiciary committee completed its mark-up of the bill and eliminated the new avenue to challenge patents, according to an analysis by Hans Sauer, an intellectual-property lawyer for the Biotech Industry Organization in Washington. It also introduced options that would let judges limit potential damage payments.

The Senate Judiciary Committee is scheduled to discuss the bill this morning.

Kennedy is a key member of the committee, and like fellow member Senator Dianne Feinstein, Democrat of California, must balance two powerful constituencies, each of which employs thousands of people and is seen as a huge engine of job growth.

On the high-tech side, the Massachusetts lobbying effort has included executives from data-storage giant EMC Corp., the state's largest public company, as well as Cisco Systems Inc., the California network powerhouse with more than 1,600 Massachusetts employees.

EMC is currently ensnared in a patent lawsuit filed in Texarkana, Tex., whose reputation for plaintiff-friendly courts has made it a popular venue for patent-infringement suits.

The company's associate general counsel, Krish Gupta, calls the suit "just a shakedown."

"We are often recipients of letters from people who we like to label as 'trolls' -- they'll cite a bunch of patents and say, we think you need a license," he said. "A typical patent suit could cost anywhere from $2 [million] to $4 million to defend, and it's a huge drain."

Plotkin, president of the Massachusetts Technology Leadership Council, pressed the issue with the state's congressional delegation and has also raised it with Kennedy.

Kennedy, through a spokesman yesterday, said his priority was to improve innovation and lower litigation costs "in all our cherished industries."

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