Inventing a new system

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AMERICA HAS LONG PRIZED INVENTORS. The scrappy dreamer celebrated on the "American Inventor" reality TV show is also one of the few professionals — if that's not too grandiose a term — specifically protected in the Constitution. But lately the federal government has been struggling to fix a patent system that prizes inventors too much. The Supreme Court is considering two cases this term that could roll back the type of patents granted and allow less punitive remedies when one is violated. The U.S. Patent and Trademark Office is mulling a rule that could narrow the scope of patent applications. And a House subcommittee is working on a bill by Rep. Lamar Smith (R-Texas) to make it easier to block or remove bad patents.

The activity reflects a growing sense in Washington that the patent system has lost its moorings. That's due in part to rapidly changing technologies that prompt patent holders to make novel and unanticipated claims. But it also reflects the nature of patents and intellectual property generally. With a plot of land or a string of pearls, it's easy to tell where one person's property ends and another's begins. With something as abstract as intellectual property generally. With a plot of land or a string of pearls, it's easy to tell where one person's property ends and another's begins. With something as abstract as intellectual property, it's easy to tell where one person's property ends and another's begins. But tech products frequently involve dozens, if not hundreds, of patented parts and processes. The tech world is a thicket of patents, and companies frequently find themselves on the receiving end of lawsuits by other inventors.

High-tech companies are increasingly running into stop signs waved by patent holders who claim the rights to some element of the companies' products or services. One example is Research in Motion Ltd., maker of the popular BlackBerry wireless e-mail device, which was forced to pay more than $600 million in a patent infringement suit — despite the very real possibility that the patents on which the suit was based will prove to be invalid. The BlackBerry case is Exhibit A for patent reformers, who want to give companies a better chance to challenge patents before they go to court and to reduce the likelihood that federal judges will shut down services that have some infringing elements.

But the tech industry and its allies face powerful opponents on Capitol Hill, led by pharmaceutical and biotechnology companies. Like high-tech firms, drug makers rely on innovation and intellectual property to generate profits. But tech products frequently involve dozens, if not hundreds, of patented parts and processes. The tech world is a thicket of patents, and companies frequently find themselves on the receiving end of lawsuits by other inventors.

Patents in the pharmaceutical world are more straightforward, and big drug makers typically are plaintiffs, not defendants, in patent suits. They're resisting proposals to let the patent office second-guess patents years after they're granted and to reduce patent holders' leverage against infringers.

Given the lobbying might of the industries involved, Congress won't be able to make any major improvements to the patent system until the two sides are closer than they are today. It's clear that the process of granting patents has to be improved. Those whose businesses would be affected by a patent need to be able to help patent examiners judge an application. And companies that do nothing but collect royalties on their patents should not be able to threaten alleged infringers with near-certain shutdown.

The Supreme Court may rule on the latter issue when it decides a case involving EBay. A second case could improve the quality of the patent office's work by forbidding patents tied to observations of natural phenomena. But the system needs a major overhaul, not a handful of tweaks. And only Congress, which is granted sole power in...
the Constitution "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," can do that.

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