Patent reform bill has friends, foes in Del. (The News Journal)

Many businesses want abuse fixed, but some say changes would hurt them

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When the framers of the Constitution created a limited monopoly on inventions "to promote the progress of science and useful arts," they probably didn't envision the comb-over hairdo or crustless peanut butter and jelly sandwich.

But those are among the "inventions" that have been granted U.S. patent protection.

Dubious patent quality is just one of the issues that have led to calls for reform of the U.S. patent system. The issue may fly under the public's radar, but it has the business community's attention. A patent reform bill in Congress -- currently stalled in a Senate committee -- has driven a wedge between some of Delaware's biggest corporate citizens.

On one side are DuPont and AstraZeneca, among others -- companies that rely on strong patent protections and adequate enforcement against those infringing their patents.

On the other side are major financial services firms including Bank of America and J.P. Morgan Chase, which have joined in a coalition with high-tech companies. Both sectors are bedeviled by lawsuits from what are derisively referred to as "patent trolls," companies that gather patents to file lawsuits and collect licensing fees rather than make products.

At the center of the dispute is a patent system that hasn't seen a major overhaul in more than 50 years, and is straining to keep up with innovation in the 21st century.

"Software

is a lot different than a chemical composition to cure acne, and that's a lot different than a can opener, but we treat them all the same under the Patent Act," said Pat Rogowski, chairwoman of the patent prosecution section at Wilmington law firm Connolly Bove Lodge & Hutz LLP.

It may seem like an insider issue, but patent policy affects the public, said Dan Ravicher, executive director of the nonprofit Public Patent Foundation. He said policy makers need to consider the effect poor patent quality and other issues have on product prices, innovation and civil liberties.

"The patent system is one that benefits a very small group of people, and it has a corresponding harm on a very large group of people," said Ravicher, a patent attorney who started the foundation in 2003.

From DuPont's perspective, the U.S. patent system is the "gold standard in the world," said Uma Chowdhry, DuPont's chief science and technology officer.

DuPont holds more than 6,000 active U.S. patents, and they're coming at a greater rate -- since 2000, DuPont's U.S. patent filings have more than doubled, and patents granted have increased more than 50 percent, according to company financial filings.

"DuPont is a science company, and innovation is clearly the lifeblood of our businesses," Chowdhry said.

What makes the U.S. patent system best in the world is its enforcement mechanism, said Mike Walker, DuPont's chief intellectual property counsel.

Walker said DuPont generally sues to enforce its patents more often than it is accused of infringement. The company relies on the damages assessed by the federal court system as a deterrent on companies infringing its patents.

The question of damages has become a fault line in the issue of patent reform. DuPont and AstraZeneca are both members of The Coalition for 21st Century Patent Reform, a group of 40 chemical, pharmaceutical, biotechnology and manufacturing companies. Those companies -- all large patent holders -- are against a provision in the Senate bill that would potentially reduce the damages for patent infringement.

On the other side of the divide sits the Coalition for Patent Fairness, a group composed largely of high-tech and financial services companies. These firms are looking to curb weak patent claims and onerous lawsuits from companies that use patents as a way to extract money through litigation. BlackBerry users may be most familiar with a dispute that resulted in Research in Motion, the maker of the popular wireless device, paying a $612.5 million settlement to patent holding company NTP in 2006.

For financial services companies, the issue came into play with a 1998 federal appeals court ruling that opened the door to patents on business methods, including different types of e-commerce, banking, investment or insurance techniques.

The ruling was an invitation for individuals and small companies to take aim at the financial giants with patent suits. A recent study by Harvard Business School professor Josh Lerner found that patents for financial products and services are challenged in court at a rate 27 times greater than that of all patents.

"It's the largest emerging litigation threat my industry faces," said Andrew Barbour, vice president of government affairs for the Financial Services Roundtable, an industry lobby group.

The bill being considered by the Senate Judiciary Committee includes a provision that would grant banks immunity against lawsuits from Texas company DataTreasury, which holds a patent on a method of digitally scanning, sending and archiving checks. Several financial institutions have licensed DataTreasury's technology; a patent-infringement lawsuit is pending against Bank of America, among others.

Keith Agisim, Bank of America's lead intellectual property counsel, said the

bank, along with other financial firms, has filed an increasing number of patents in recent years. But unlike other industries, most financial institutions get patents primarily for defensive purposes, to guard against an escalating number of patent-infringement lawsuits.

"The plaintiffs in these suits are virtually always patent trolls, in that they're not offering a competing product," Agisim said.

Other major provisions of the Senate bill include extending the period of time following a patent award that a third party can challenge the patent; reforming the standard of "inequitable conduct," a common defense used by those accused of patent infringement; and changing patent awards from a "first-to-invent" to a "first-to-file" standard, bringing the U.S. in line with the rest of world in terms of patent policy.

One group of Delaware stakeholders -- local patent attorneys -- is closely watching potential changes to venue laws for patent lawsuits. Certain federal courts, like the U.S. District Court for the Eastern District of Texas, receive an undue share of patent lawsuits because of their perceived friendliness to plaintiffs, leading some to push for reforms that would restrict where patent lawsuits could be filed.

The U.S. District Court for the District of Delaware handles a high ratio of patent cases, largely because of the state's role as legal home to so many corporations. John Shaw, who is chairman of the intellectual property litigation section at Young Conaway Stargatt & Taylor LLP of Wilmington, said the Delaware system has developed a reputation for handling cases quickly and fairly, and policy makers should be cautious about changing venue laws.

"Changing those because some businesses don't like to be sued in Texas ... doesn't make a lot of sense," Shaw said.

The Patent Reform Act of 2007 passed the House in September. Rep. Mike Castle, R-Del., voted no, citing concerns about weaker penalties for patent infringement and the potential for discouraging innovation.

The heavily lobbied measure moved on to the Senate Judiciary Committee,

where negotiations stalled earlier this month over damages and other issues. The bill's supporters are hopeful it may still move forward, but that seems unlikely -- for this year, at least.

Among those lobbying Congress on the issue was AstraZeneca. Chip Davis, the drugmaker's vice president of corporate external relations, said intellectual property is "the absolute bedrock" of the pharmaceutical industry.

Successful branded drugs nearly always face some type of patent challenge from generic drug makers, Davis said. The pharmaceutical industry needs strong patent protection given the high cost of drug discovery and development, he said.

"It's absolutely critical to weigh in because of the impact it has on our business," Davis said.