

How Congress plans to reel in Bass

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Congress has apparently taken note of the strategy of hedge fund manager Kyle Bass to take advantage of the IPR process, with two pending patent reform bills which include provisions that could curtail his activities, says John Abramic of Steptoe & Johnson.

Kyle Bass, a prominent hedge fund manager, has recently caused a stir among the pharmaceutical and biotechnology community. He and his entities are engaging in a strategy of using a fairly new process, the inter partes review (IPR), for challenging patents, allegedly to assist in a financial scheme for shorting the patent owner's stock.

There appears to be broad agreement in the patent community that Congress never intended to create a patent challenge process to give investors a tool to manipulate stock prices. Congress has also apparently taken notice, and at least two current patent reform bills contain amendments that could eliminate the exploitation of the patent challenge process.

The signing of the America Invents Act (AIA) on September 16, 2011 created the IPR for challenging the validity of patents before the US Patent and Trademark Office (USPTO). The IPR process allows any person to challenge a patent by filing a petition before a panel of administrative patent judges at the Patent Trial and Appeal Board (PTAB).

The IPR process has quickly come to be viewed as a cheaper and quicker alternative to the lengthy and expensive patent litigation proceedings found in the federal courts. On an ever increasing scale, companies facing patent infringement allegations seek to institute IPRs to invalidate the patents that are being asserted against them. As the statute is currently written, however, defendants in a patent infringement suit are not the only parties allowed to petition for an IPR, but rather any person may use the IPR process to challenge an existing patent.

Bass makes waves

Enter Bass, hedge fund manager and founder of Hayman Capital Management and his affiliated Coalition for Affordable Drugs.

Bass reportedly declared his intent in January 2015 to "challenge and invalidate patents through the IPR process". Specifically, Bass had his eyes set on challenging patents of brand pharma and biotech companies, noting that the effect of those efforts would "lower drug prices for Medicare and for everyone".

Shortly after this pronouncement on February 10, 2015, Bass's coalition filed a petition for an IPR against US patent number 8,663,685 for the drug Ampyra (dalfampridine) owned by Acorda Therapeutics. This was the first of more than 20 IPR petitions to date challenging patents owned by pharma companies.

While Bass has asserted that his activities will lead to lower drug prices, some have alleged that Bass's activities function to benefit his investment strategy. Needless to say, Bass's actions began to garner attention, not only from the companies directly affected by the IPR petitions, but from the public at large, and even Congress.

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In an April 14 statement to the House Judiciary Committee opposing amendments to the AIA, Bass reiterated the basis for his IPR petitions, stating that they “intend to challenge less than 1% of the existing branded drug universe” in order to “police the abusive patent tactics used by the worst-offending drug companies.” And further, that “we are filing merit-based IPRs at the USPTO with the full expectation of seeing the challenge through to a final decision by the PTAB”.

Pharma fights back

Some of the companies directly affected by Bass’s IPR petitions are attempting to fight by arguing the issue directly to the USPTO. Acorda, in a preliminary response to a Bass patent challenge, argued that the PTAB should reject the patent challenge because “allowing hedge funds to use the IPR process to manipulate financial markets is inconsistent with Congressional intent.” On Monday, August 24, the PTAB declined to institute Bass’s petition.

Celgene went further and secured permission from the PTAB to file a motion for sanctions against Bass. In its motion, Celgene argued that Bass’s filing of the IPR constitutes an abuse of process because Bass is not using the IPR process for its designed purpose, but rather “as a tool to affect the stock prices of public companies for financial gain, to the detriment of those companies and the investing public”.

At least some USPTO judges have recently appeared receptive to hearing arguments on whether the Bass strategy amounts to an abuse of the IPR process. Challenging the Bass strategy directly at the USPTO, however, may not ultimately be effective because there is nothing in the AIA statute that imposes a standing restriction preventing certain classes of individuals from filing an IPR, and the USPTO’s judges may believe that policing the Bass strategy is beyond their authority. Further, the primary job of the PTAB judges is to assess the validity of patents, not to engage in satellite issues that are not relevant to their role.

Congress steps in

Congress has apparently taken note of the Bass strategy, and two pending patent reform bills include provisions designed to curtail his activities.

The Support Technology and Research for Our Nation’s Growth Patents Act (STRONG Act), a patent reform bill introduced in the Senate by Senator Chris Coons on March 3, includes a provision that would preclude individuals from filing IPR petitions unless they are sued for patent infringement or charged with infringement of a patent. If enacted, this provision would in effect end the Bass strategy since there is no danger of pharma companies charging Bass with infringing a patent.

Given, however, that Congress crafted the IPR process to allow any individual to challenge a patent regardless of whether he or she had been accused of infringement, the provision in the STRONG Act would introduce a standing requirement in an IPR proceeding that Congress apparently never originally intended. This aspect of the STRONG Act may therefore face resistance since it would drastically restrict the class of individuals who can take advantage of the IPR process.

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On June 9 Representative Bob Goodlatte amended the House of Representatives' pending patent reform bill, the Innovation Act, to add a provision aimed at barring the Bass tactics. The amendment provides that the USPTO may not institute an IPR unless the patent challenger certifies (1) that petitioner and real parties in interest of the petitioner "do not own and will not acquire a financial instrument ... designed to hedge or offset any decrease in market value of an equity security of the patent owner or an affiliate"; and (2) that the petitioner and real parties in interest of the petitioner have not demanded payment from the patent owner or an affiliate in exchange for forgoing filing an IPR unless the petitioner or a real party in interest of the petitioner have been accused of infringement under the patent at issue.

The pending provision would in effect prevent the Bass strategy provided that all IPR filers provide proper and accurate certifications. The provision does not, however, address the consequences of filing false certifications, and legislators should expect that the provision may not deter others from attempting the Bass strategy. Congress could grant the PTAB judges the authority to award sanctions in the event that false certifications are provided. This, however, would potentially put the judges, who should be focusing on the validity of patents, in the position of dealing with discovery and litigation over the certifications.

Congress may therefore wish to consider additional provisions to further deter individuals from filing false certifications. Given that the motivation for individuals employing the Bass strategy is to make money by trading in the securities of an IPR target, it would seem sensible for Congress to find a way to eliminate or reduce the true incentive involved. For example, traders attempting to employ the Bass strategy would likely act differently if they were subject to sanctions imposed by the Securities and Exchange Commission, a private cause of action by the patent owner, or some other mechanism that would disgorge profits obtained through trading in the securities of a company targeted by an IPR.

With the patent reform bills pending in Congress, it is likely that the provisions dealing with the Bass issue will continue to be debated and possibly modified. It is also possible that Bass-related provisions will be added to other pending patent reform bills.

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