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OPINION

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## Patent lawsuits: Senate legislation would seriously damage innovation sector

By Ben Pless and David J. Kappos

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The ATI Neurostimulation System is a sophisticated combination of electronics, programming and mechanical invention designed to stop the pain of a headache with the flick of a switch. It is American-designed and built by a small company in San Francisco, led by co-author Ben Pless, representing the very best of our country's innovative culture.

What is most wonderful is its strategy to target a precise solution to a precise problem. The system activates a tiny neurostimulator, inserted behind the cheekbone, using a handheld remote. Get a headache, turn on the remote. The device stimulates only the specific nerve bundle believed to be responsible for pain associated with many headaches — it takes a targeted approach. It quickly relieves pain without the side effects common with overbroad approaches, like pumping our bodies full of drugs.

Congress could learn something from targeted neurostimulation. As it advances legislation to reduce abusive patent demands, it risks causing damaging side effects to the U.S. patent system. The unintended consequences of pumping the U.S. innovation sector — which is responsible for 27.7 percent of U.S. jobs and 34.8 percent of U.S. GDP — full of untargeted legislation puts in jeopardy U.S. technology leadership.

The Senate is considering a central provision in the legislation that would be downright toxic to products like the

ATI neurostimulator. This provision is intended to stop patent holders from suing consumers and retailers, requiring patentees instead to take their beef directly to the infringing product's manufacturer.

The problem is that many modern products are built by assembling component parts from different sub-manufacturers — in some cases hundreds or thousands of parts like memory chips, connectors, processors, displays, cases, fasteners, etc. As drafted, the law is so broad that it would hand out “get out of jail free” cards within these networks of sub-manufacturers, including the infringing product's actual manufacturer, instead of just protecting consumers and retailers.

This untargeted approach invites clever patent infringers — including foreign manufacturers, assemblers and parts suppliers — to conspire with one another, arranging for the lowest value, least accessible, least answerable party to handle suits for patent infringement instead of the product's actual manufacturer having the liability. That would make it considerably more difficult for innovators like ATI to stop patent infringers, who under the proposal would be able to hide behind complicated assembly and manufacturing chains.

For products like the ATI neurostimulator, and thousands of other American innovations that integrate component parts from many suppliers, this would be devastating. It would mean mass devaluation of investments

in interdisciplinary products integrating diverse components. That will cause investment to move away from the ATIs of the world, with the certain result of fewer bright new breakthroughs that integrate multiple scientific disciplines.

Perhaps this gambit would be understandable if our laws contained no mechanism to correct situations where suits fail to focus on the most appropriate party. But that is not the case. In fact, every federal court already has the power to “stay” patent litigation against an inappropriate defendant in favor of a more appropriate one. And the data show that, with few exceptions, courts have succeeded in granting stays in the customer/manufacturer cases cited as the rationale for this provision.

There is a simple way to achieve the laudable objective of the stay provision at the center of the Senate's patent bill. Congress should limit the provision to small businesses and retailers who use and sell unaltered goods, period. That approach achieves the core purpose of moving infringement suits to where they belong, without opening a huge gap in our patent system. In an important sense it is a lot like a modern neurostimulator — targeted.

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