



Insight

Target Patent Law Reforms in the 114th U.S. Congress

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In the 113th Congress, the U.S. House of Representatives passed the “Innovation Act” (H.R. 3309) in December of 2013 by a bi-partisan vote of 325 to 91; however, this legislation languished and died in the U.S. Senate. On February 5, 2015, Congressman Goodlatte, House Judiciary Committee Chairman, joined by a bi-partisan group of House committee and sub-committee chairs who have a common interest, introduced H.R. 9, the “Innovation Act” in the House, which is “identical” to the legislation passed by the House in 2013. The Innovation Act is an attempt to address some of the more egregious behaviors of patent assertion entities (PAEs) and build on patent reforms passed in the “America Invents Act of 2011.”

The Innovation Act (H.R. 9) includes the following major provisions:

- Plaintiffs are required to disclose who the owner of a patent is before litigation.
- Plaintiffs, in their court proceedings, are required to actually explain why they are suing a company.
- Courts are required to make decisions about whether a patent is valid or invalid early in the litigation process.
- When parties bring lawsuits or claims that have no reasonable basis in law and fact, the Innovation Act requires judges to award attorneys’ fees to the victims of the “frivolous” lawsuit - referred to as a “loser pays” system. Moreover, the bill allows judges to waive the award of attorneys’ fees to both plaintiffs and defendants in special circumstances.
- The Judicial Conference is required to make rules to reduce the costs of discovery in patent litigation.
- The Innovation Act creates a voluntary process for small businesses to postpone

expensive patent lawsuits while their larger sellers complete similar patent lawsuits against the same plaintiffs.

- The Patent and Trademark Office is charged with providing educational resources for those facing abusive patent litigation claims.

According to the Federal Trade Commission, a PAE (also pejoratively referred to as a “patent troll”) is defined as “a business model that focuses on purchasing and asserting patents against manufacturers already using the technology, rather than developing and transferring technology” to licensees, thus simply transferring a legal right not to be sued for the transfer of money. Patent law scholars also call a PAE a “non-practicing entity” (NPE), in contrast to a “practicing” entity, or a firm that uses patents to design or manufacture products or processes. An NPE that is not a PAE can include university research laboratories, licensing agents, development firms, and both technology entrepreneurs and major technology companies selling or licensing their patents. In contrast, a PAE focuses on aggressive civil litigation, threatening to sue thousands of companies through elaborate “letter campaigns”, without any credible evidence of infringement; creating “shell companies” that make it difficult for defendants to identify who is suing them; asserting that their patents cover inventions not imagined at the time of the patent grant; and enforcing “weak” patents in litigation, assuming some companies will financially settle litigation instead of risking a trial.

PATENT REFORM OVERKILL?

While there is strong support in Congress for H.R.9, and President Obama has indicated that he would support legislation addressing patent law reform, there are stakeholder interests expressing serious reservations over this comprehensive patent law reform legislation. In a January 21, 2015 “open letter” sent to Chairmen Goodlatte and Grassley, of the House and Senate Committees on the Judiciary, and Ranking Members John Conyers and Patrick Leahy, a coalition representing “the majority of the nation’s patent holders and inventors”, ranging from universities (Association of American Universities) and nonprofit foundations (Texas Life Science Foundation), to start-ups and small businesses (National Small Business Association), to manufacturing, technology, and life science companies (Monsanto, Qualcomm, and Merck & Co., Inc.) and industry and professional associations (PhRMA and IEEE-USA), announced that:

We are willing to work with you and other stakeholders to develop targeted and measured reforms that address harmful patent enforcement practices. However, we will continue to strongly oppose legislation that would weaken the overall patent

system and thereby diminish innovation and job creation in the United States (emphasis added).