

The Politics of Patent Law: Why Patent Reform Failed in 2015 and Prospects for 2016

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While patent reform appears to be an issue of perennial interest to lawmakers, the floors of Congress are littered with failed attempts to bring about large-scale, systemic change. To be sure, small and important changes to the patent code have been successfully enacted over the years. But prior to passage of the America Invents Act (AIA) in 2011, the last major patent reform occurred in 1952. This article provides an overview of pending congressional efforts to change the dynamics of patent litigation and recent events that may affect the legislative appetite for reform in 2016.

Ongoing negotiations have revealed a split between groups committed to reducing litigation abuse by so-called “patent trolls” and those concerned that poorly tailored legislation will erode the strength of patent rights for all innovators. Irreconcilable differences led to postponement of a vote in 2015. Since then, patent reform appears to have been eclipsed by the 2016 election cycle, recent amendments to the Federal Rules of Civil Procedure, the Supreme Court’s interest in a key case involving post-grant proceedings, and hopes for federal trade secret legislation. These topics are discussed in depth below, beginning with an overview of the bills that are pending before the House and Senate. While two bills aimed at curbing patent litigation abuse remain scheduled for floor action in the 114th Congress, the factors mentioned above may have the effect of deprioritizing patent litigation reform, at least in the near term.

H.R. 9: The House’s Innovation Act Targets Litigation Abuse by Patent Trolls

On February 5, 2015, House Judiciary Committee Chairman Bob Goodlatte (R-Va.) introduced the Innovation Act (H.R. 9), joined by Representative Peter DeFazio (D-Or.); Subcommittee on Courts, Intellectual Property, and the Internet Chairman Darrell Issa (R-Cal.); Subcommittee on Courts, Intellectual Property, and the Internet Ranking Member Jerrold Nadler (D-N.Y.); Science, Space, and Technology Committee Chairman Lamar Smith (R-Tex.); Representative Zoe Lofgren (D-Cal.); and Energy and Commerce Subcommittee on Communications and Technology Ranking Member Anna Eshoo (D-Cal.). The Innovation Act carried over the substance of prior legislation that passed in the House in 2013 before failing in the Senate, seeking to address abusive practices in patent litigation.¹ Generally speaking, the key advocates for the Innovation Act are search, social network, and online retail companies (e.g., Google Inc., Yahoo! Inc., LinkedIn Corp., Yelp Inc., Etsy Inc., Pinterest Inc., TripAdvisor Inc., Rackspace Inc., and Gilt Groupe Inc.) and the Internet Association, who have all voiced strong support for comprehensive legislation to reform litigation practices exploited by patent trolls.²

Specifically, the Innovation Act aims to curb abusive patent litigation by:

1. heightening the pleading standard for infringement claims by requiring identification of every asserted patent and claim and each accused instrumentality, a description of each infringement theory, and proof of authority to assert the patent;
2. creating strict limits on initial discovery, including stays of discovery in cases where a motion to dismiss or a preliminary motion has been filed;
3. requiring enhanced disclosure of real party-in-interest information, including disclosure to the U.S. Patent and Trademark Office (USPTO), the court, and all adverse parties of: any assignees, any entities with a right to sublicense or enforce, any entities with a financial interest in the patent, the ultimate parent entities, descriptions of the principal business of the plaintiff, a list of all other complaints filed that assert the patent, and any licensing requirements to which the patent is subject;
 1. providing a specific statutory basis for loser-pays fee-shifting that requires the court to award attorneys' fees to the prevailing party unless the plaintiff's position and conduct are "reasonably justified in law and fact" or special circumstances exist that make an award unjust;
 2. placing limits on venue in patent cases to where the defendant has its principal place of business or is incorporated, where the defendant has committed an act of infringement and has a regular and established physical facility, where an inventor named on the patent conducted research or development, or where a party has a regular and established physical facility and has managed significant research and development for the invention claimed in the patent, manufactured a tangible product embodying the invention, or implemented such a process;
 3. providing for stays of customer suits such that courts must suspend any litigation against a customer (defined as a retailer or end user) if the manufacturer is a party to any action involving the patent, the customer agrees to be bound, and the customer timely requests the stay; and
 4. expressing the "sense of Congress" that sending evasive demand letters is a fraudulent or deceptive trade practice.

A vote on H.R. 9 was postponed in 2015, and it has since been placed on the Union Calendar for floor action as Calendar No. 177.

S. 1137: The Senate's PATENT Act Roughly Parallels H.R. 9

On June 4, 2015, the Senate Judiciary Committee approved an amended version of S. 1137, the Protecting American Talent and Entrepreneurship Act (PATENT Act) by a vote of 16–4. The bill was originally introduced and cosponsored by Senators Patrick Leahy (D-Vt.), John Cornyn (R-Tex.), Charles Schumer (D-N.Y.), Mike Lee (R-Utah), Orrin Hatch (R-Utah), and Amy Klobuchar (D-Minn.). Like its House counterpart, H.R. 9, the PATENT Act seeks to address abusive patent litigation practices leveraged by patent trolls. Like H.R. 9, it includes heightened pleading requirements for infringement claimants, limits on discovery in the form of stays of discovery pending preliminary motions, enhanced disclosure requirements relating to real parties-in-interest, stays of customer suits, a similar but not identical fee-shifting provision, and a more detailed demand letter mandate that prohibits a plaintiff from relying on

evidence of presuit notification to establish willful infringement unless the communication contains sufficient information. The demand letter provision also prohibits extortionist demands and defines widespread demand letter abuse as a violation of the Federal Trade Commission Act. The demand letter provisions of the PATENT Act incorporate agendas raised in the Demand Letter Transparency Act³ and the Targeting Rogue and Opaque Letters (TROL) Act.⁴ S. 1137 has been placed on the Union Calendar for floor action as Calendar No. 203.

Despite its many similarities to H.R. 9, the Senate's PATENT Act lacks a venue provision. The concern about venue has been attributed to a 1990 opinion by the Federal Circuit, *VE Holding Corp. v. Johnson Gas Appliance Co.*, which applied the general federal venue statute, 28 U.S.C. § 1391(c), to patent infringement cases, thereby expanding the scope of venue available beyond § 1400(b) to "any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced."⁵ The practical upshot of *VE Holding* is that patent plaintiffs can sue anywhere the accused product is offered for sale. Dialogue on the topic of forum shopping has given judicial districts such as the Eastern District of Texas a reputation for being plaintiff-friendly, in turn making them popular among patent trolls. The venue provision of the House's Innovation Act would have the effect of overruling *VE Holding* by expressly exempting the special venue statute for patent actions from the general venue statute, among other limitations. The PATENT Act contains no such provision. And the issue has measurable significance, as shown by the broad amicus participation in *In re TC Heartland, LLC*—a mandamus action currently before the Federal Circuit that seeks to advance similar reforms via this judicial mechanism.⁶

Interestingly, on March 17, 2016, Senators Jeff Flake (R-Ariz.), Cory Gardner (R-Colo.), and Mike Lee (R-Utah) introduced S. 2733, a new bill called the Venue Equity and Non-Uniformity Elimination Act of 2016 (VENUE Act) that seeks to place restrictions on where patent suits can be brought. The bill has been promoted as making it more difficult for plaintiffs to establish jurisdiction in places where they do not have physical facilities and by discounting facilities that are "primarily for the purpose of creating venue." One day after these senators introduced the VENUE Act, the Federal Circuit issued its decision in *Acorda Therapeutics Inc. v. Mylan Pharmaceuticals Inc.*, holding that by filing a new drug application (ANDA), a generic opens itself up to personal jurisdiction in any state where the generic will market the approved drug—which in most cases means nationwide.⁷

S. 632: The STRONG Patents Act Advances the Pro-Patent Legislative Agenda

While the House's Innovation Act and the Senate's PATENT Act advance a series of patent *litigation* reforms, a third bill focuses on reforming "post-grant proceedings" created by the AIA for challenging the validity of patents before the USPTO's Patent Trial and Appeal Board (PTAB). There are three types of post-grant proceedings: inter partes review (IPR), covered business method (CBM) review, and post-grant review (PGR). While each is distinct in terms of the criteria and standards for eligibility, they all offer petitioners the same basic opportunity to challenge patents before a technically savvy tribunal operating under a statutory mandate to conclude proceedings within a year. When the AIA passed in 2011, these proceedings were advertised as an expedient, lower-cost alternative to district court litigation. And the USPTO has delivered on that promise for over three years. As a result, post-grant proceedings have proven popular among accused infringers. For the same reasons, they have been criticized as unfairly skewed against patent owners. Specifically, petitioners who challenge patents before the PTAB

enjoy a lower burden of proof, a presumably more favorable claim construction standard, and far less exposure to discovery than before a district court. Owing to this, many patent owners feel that Congress tilted the playing field too sharply against patent owners in the AIA and that a legislative correction of course is required to reset the balance.

On March 3, 2015, Senators Chris Coons (D-Del.), Dick Durbin (D-Ill.), and Mazie Hirono (D-Haw.) introduced an alternative patent reform proposal, S. 632, entitled the Support Technology and Research for Our Nation's Growth Patents Act (STRONG Patents Act). The legislation embodies a series of criticisms about the current post-grant regime and attempts to reset the balance to some degree. The proposed reforms include:

1. requiring that the USPTO apply the same claim construction standard as district courts (eliminating use of the "broadest reasonable interpretation" standard) and consider a court's claim construction if the patent owner was a party to the prior action;
2. requiring that the USPTO permit claim amendments as a matter of right, and specifying that the PTAB only has discretion to deny claim amendments if the patent owner previously amended in the proceeding;
3. creating a previously unrecognized presumption of validity before the USPTO such that the petitioner bears the burden to prove unpatentability by clear and convincing evidence, and that only amended claims are assessed under the lower preponderance of the evidence standard;
4. requiring that petitioners have "standing" to petition for IPR in a sense that is analogous to declaratory judgment standing, a feature that is already present in CBM review;
5. allowing for discovery of evidence to positively identify the petitioner's real party-in-interest;
6. allowing patent owners to submit supporting declaratory evidence prior to an institution decision, which is presently foreclosed by USPTO regulation;
7. prohibiting institution if the patent is already the subject of a reissue or reexamination proceeding; and
8. specifying that trials cannot be heard by administrative judges involved in the institution decision.

Presumably, to make these restrictions somewhat more palatable to the USPTO, the STRONG Patents Act also includes an end to USPTO "fee diversion." That is, it includes a provision that would allow the USPTO to spend all fee revenue that it collects without further appropriation by Congress. Specifically, S. 632 would establish a revolving fund within the U.S. Treasury called the "Innovation Promotion Fund." Fees collected by the USPTO would be deposited into the fund, and the amounts would be made available to the USPTO, without fiscal year limitation, to pay for all expenses, including any and all administrative and operating expenses. Other compromise provisions include a nod to the demand letter agenda by giving the Federal Trade Commission and state attorneys general authority to enforce the Federal Trade Commission Act against parties who demonstrate a pattern of bad faith demand letter writing behavior. The compromise provision with respect to patent litigation includes proposed elimination of the model complaint for patent infringement (also known as "Form 18").

In its current form, the STRONG Patents Act has been endorsed by the Biotechnology Industry Organization, the Innovation Alliance, the Association of American Universities, and the Association of Public and Land-grant Universities. Since its introduction in March 2015, there has been no official action on S. 632, although it has been used to counterbalance H.R. 9 and S. 1137. It is supported by those who are generally concerned about the anti-patent climate.

Why Did Patent Litigation Reform Fail in 2015 and What Are the Consequences?

Since being introduced in 2015, the Innovation Act, the PATENT Act, and the STRONG Patents Act have cross-pollinated somewhat. Not included in the overviews above are provisions that found their way from one bill into another in an apparent attempt to craft a consensus. Most notably, the STRONG Patents Act's provision requiring the USPTO to apply the same claim construction standard as district courts found its way into both the Innovation Act and the PATENT Act. The Innovation Act also added a provision prohibiting initiation of a post-grant proceeding by a hedge fund, or for purposes of extortion. The PATENT Act added a provision granting a presumption of validity in post-grant proceedings. Other notable alterations to the original versions of the Innovation Act include a special exception for civil actions under 35 U.S.C. § 271(e)(2), or so-called "ANDA suits." In the Innovation Act, the ANDA exception would exempt involved parties from the heightened pleading requirements, limitations on discovery, real party-in-interest disclosure obligations, and stays of customer suits. In the PATENT Act, the ANDA exception would apply to all of those except real party-in-interest disclosure. Despite these attempts to reach consensus, however, Congress hit an impasse in 2015 and postponed a vote on H.R. 9 until after recess—effectively tabling patent reform.

Despite having bipartisan support at the committee level and strong momentum over the summer, patent reform failed to launch in 2015. Many cite an inability to strike the right balance between targeting litigation abuse by patent trolls and protecting the interests of "legitimate" patent holders as the reason.⁸ This became pronounced when, during the failed negotiations in 2015, a sharp split emerged between various companies invested in the Internet economy (search giants and online retailers) and the biopharma industry (joined by universities, research institutions, patent licensors, and venture capitalists). While those who support comprehensive patent litigation reform persisted in strengthening the key provisions of H.R. 9 and S. 1137, they faced louder and louder opposition from groups represented by the Biotechnology Industry Organization, the Pharmaceutical Research and Manufacturers of America, and university groups such as the Association of American Universities and the Association of Public and Land-grant Universities, as well as large patent licensors. At one point, biopharma proposed an exemption from post-grant proceedings for drug and biotechnology patents.⁹ This proposal was in turn opposed by senior groups and Medicare organizations, who warned that creating unique protections for biopharma patents could adversely affect drug pricing.¹⁰ Facing strong headwinds, and unable to craft an acceptable compromise, even sponsors of the Innovation Act were forced to concede that key members were struggling with the bill.

In the end, opponents of patent litigation reform scored a tactical victory in July 2015 when a vote on the Innovation Act was postponed until after recess. And despite the Innovation Act and the PATENT Act remaining scheduled for floor action in the 114th Congress, there may be growing opposition on a different front: the impact on small businesses. On February 25, 2016, the Senate Committee on Small

Business and Entrepreneurship convened to address the effect of the proposed legislation, among other things, on small businesses and universities. The topics addressed ranged from the impact of the Supreme Court's decision in *Alice v. CLS Bank*¹¹ in harming small businesses to the general skewing of patent law to favor large corporations. Some witnesses during the hearing remarked that post-grant proceedings, in combination with Supreme Court decisions such as *Alice*, have significantly undermined patents owned by small businesses. They also noted that small businesses are hit much harder than large corporations by changes in the law, such as the changes that may be introduced by comprehensive patent litigation reform.

If the Senate grows skeptical of patent litigation reform, H.R. 9 may not survive even with strong support in the House. That was the same fate met by its predecessor, H.R. 3309, after it passed the House with a vote of 325–91 in the 113th Congress before failing in the Senate. In that sense, the fate of patent litigation reform may rest in the “saucer.” And based on the tenor of its latest hearing, the hurdles may be increasing rather than decreasing for litigation reform.

Will Patent Litigation Reform Be a Priority for Congress in 2016?

There are a few possible reasons that patent reform may not be a priority for Congress this year. Since losing momentum in 2015, patent reform appears to have been eclipsed by the election cycle, recent activity by the courts, and the potential for federal trade secret legislation.

First, 469 seats in the U.S. Congress are up for election on November 8, 2016, along with the presidency. The simple fact is that patent reform, as a topic of national conversation, is not well-suited for stump speeches and televised debates. The concepts are not easily communicated to the general population, whose votes are the ones up for grabs at the moment. And, in contrast to the AIA—which passed under the auspices of a forward-looking, bipartisan “job creation” agenda—patent litigation reform has adopted the rhetoric of punishing bad actors, the goal being to “combat the scourge of patent trolls on our economy without burdening the companies and universities who rely on the patent system every day to protect their inventions.”¹² That is a fairly difficult position to convey without first explaining what the patent system is, how it works, what a patent troll is, who they are harming, and how all that affects the economy. Thus, because of the general election cycle, the failure to gain passage in 2015 (in contrast to the failure to gain passage in almost any other year) may have graver consequences for supporters of patent litigation reform, given this inevitable shift in national attention. All of which underscores the tactical victory achieved by opponents of the bill in getting the July 2015 vote postponed.

Second, the Federal Rules of Civil Procedure were amended, effective December 1, 2015, to include changes that arguably moot the need for congressional intervention on the issue of heightened pleading and limited discovery. Namely, these amendments to the Federal Rules (1) heighten the pleading requirements for patent cases by eliminating Form 18, and (2) emphasize “proportional” discovery. As mentioned, bare-bones pleading and onerous discovery are among the complaints driving patent litigation reform—both of which are arguably addressed by these amendments. While the courts will be tasked with applying these rules, one could assume that elimination of Form 18 will require plaintiffs in patent cases to provide sufficient specificity to survive dismissal by specifying asserted patents and claims, providing more detailed allegations, alleging more facts to support infringement claims, and

conducting more detailed presuit investigations. A legislative provision containing heightened pleading requirements risks being duplicative of the amendment, if the amendment is interpreted this way. Similarly, the new emphasis on “proportionality” in discovery suggests that aggressive requests with unbounded scope will have a lower chance of success, eliminating the point of leverage used by patent trolls for coercing early settlement. Because limited discovery, like heightened pleading, is one of the primary reforms offered in H.R. 9 and S. 1137, opponents of these bills will likely argue that the amendments address both concerns and Congress should leave well enough alone.

Third, on January 15, 2016, the Supreme Court granted certiorari in *Cuozzo Speed Technologies, LLC v. Lee* on the question of whether the USPTO can apply the broadest reasonable interpretation claim construction standard in post-grant proceedings.¹³ The high Court certified the question of whether institution decisions in these proceedings are reviewable on appeal to the Federal Circuit. Both questions are geared to address the USPTO’s authority and its vulnerability to judicial review—questions which, if answered in favor of the petitioner *Cuozzo*, could give patent owners a new lease on life in post-grant proceedings. At a minimum, elimination of the broadest reasonable interpretation standard would help guarantee claim constructions at the USPTO that are not theoretically broader and more vulnerable to prior art than before a district court. Because alignment of the claim construction standard between district courts and the USPTO is one of the key reforms offered in all three of the legislative proposals, the Supreme Court’s interest may undercut the need for Congress to intervene. But that of course depends on how the case is resolved. Similarly, depending on the Federal Circuit’s appetite for addressing the issue in *In re TC Heartland*, venue concerns may also be dispatched by the courts in a single decision. And the same argument has already been made for fee-shifting following the Supreme Court’s decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*¹⁴

Relatedly, the Supreme Court’s interest in patent law may generally reduce the need for congressional intervention. Parties can now rely on case law making injunctive relief harder to obtain for nonpracticing entities, obviousness easier to establish when asserting invalidity, licensed patents more vulnerable to declaratory judgment challenges, subject matter eligibility more narrow, and fee awards more available for baseless claims. The Supreme Court has also taken up complex issues such as inducement, divided infringement, exhaustion, and the standard for willfulness. Thus, beyond the split that has emerged between groups favoring patent litigation reform and groups supporting strong patent rights, a related question is whether the courts are better situated to calibrate the law than Congress. In contrast, Congress may be ideally situated to address emerging intellectual property concerns created by globalization and the unavailability of patent protection for certain types of subject matter. For example, in April, the Senate passed by a vote of 87–0 the Defend Trade Secrets Act (DTSA), which would amend the Economic Espionage Act to allow trade secret plaintiffs to file civil claims for misappropriation in federal court.¹⁵ As this relates to patent law, more companies have started to rely on trade secret protection in view of the Supreme Court’s jurisprudence on subject matter eligibility. A federal cause of action may be one way to protect innovations that fall outside the scope of patent law, as well as a way to national defenses to espionage. Passage of the DTSA would also be a sign that large-scale, systemic change can be made, even if it is not in the context of *patent* reform.

In conclusion, the “politics” of patent law are complex and systemic changes are difficult to bring about. But legislative action is not always necessary. An entire generation of patent litigation has been influenced by this dialogue—one that is evolving as we speak.

Endnotes

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13. 136 S. Ct. 890 (2016) (No. 15-446).
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15. S. 1890, 114th Cong. (as passed by Senate, Apr. 4, 2016).