

## Congressional Outlook 2016: Patents

*Law360, New York (February 21, 2016, 8:46 PM ET) --*

***Law360's Expert Analysis congressional outlook series*** highlights key areas to watch during this election year, featuring commentary from law firm public policy practice leaders, academics and former members of Congress.



Eric Steffe



Pauline Pelletier

Despite having strong momentum a year ago, efforts to enact patent litigation reform were frustrated by Congress' failure to pass a bill in 2015. While two bills remain scheduled for floor action in the 114th Congress, the election cycle, recent amendments to the Federal Rules of Civil Procedure, and the U.S. Supreme Court's interest in a key case involving post-grant proceedings may have the impact of deprioritizing patent reform, at least in the near term.

Why did patent reform fail in 2015? Many commentators cite an inability to strike the right balance between targeting litigation abuse by "patent trolls" and protecting the interests of "legitimate" patent holders considered crucial to American innovation.[1] During the failed negotiations in 2015, a split emerged between 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). This split caused House leadership to postpone a vote scheduled for July 2015 until after recess. Since that time, the topic of patent reform appears to have been eclipsed by the election cycle and recent activity by the courts.

This article provides a brief overview of the pending reform efforts and a discussion of recent events that may affect the legislative appetite for patent reform in the 114th Congress.

### **House's Innovation Act Targets Litigation Abuse by "Patent Trolls"**

On Feb. 5, 2015, House Judiciary Committee Chairman Bob Goodlatte, R-Va., introduced the Innovation

Act (H.R. 9), carrying forward the substance of a prior bill that failed in the Senate in 2013. At a high level, the Innovation Act aims to curb abusive patent litigation by among other things: imposing heightened pleadings requirements on plaintiffs; providing for loser-pays fee-shifting; creating limitations on discovery; requiring disclosure of real party-in-interest information; and creating stays for customer suits.

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., Gilt Groupe Inc.) and the Internet Association, who have voiced support for legislation to reform litigation practices exploited by so-called “patent trolls.”[2] These groups have sought to strengthen some of the key provisions of H.R. 9, but have faced opposition from the biopharma industry, as well as universities, and large patent licensors who are concerned about the anti-patent climate and the erosion of patent protection for innovators.[3] Specifically, in the context of post-grant proceedings before the U.S. Patent and Trademark Office (e.g., inter partes review and post-grant review), biopharma has advocated that H.R. 9 include an exemption for drug and biotechnology patents.[4] This proposal was in turn opposed by senior groups and Medicare organizations who argued that creating unique protections for biopharma patents could adversely affect drug pricing.[5] While the exemption has stalled, the Innovation Act does include a provision requiring the patent office to apply the same claim construction standard as district courts in post-grant proceedings.

H.R. 9 has been placed on the Union Calendar for floor action as Calendar No. 177.

### **Senate’s PATENT Act Roughly Parallels the House Bill 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. Like its House counterpart, H.R. 9, the PATENT Act was introduced to address abusive patent litigation practices leveraged by so-called “patent trolls.” Like H.R. 9, the PATENT Act includes heightened pleading standards, requirements for early infringement contention disclosure, stays of suits against customers, limits on discovery, and fee-shifting provisions. The PATENT Act also attempts to emphasize the Federal Trade Commission’s regulatory authority in the area of abusive demand letters. The PATENT Act also includes a provision requiring the patent office to apply the same claim construction standard as district courts in post-grant proceedings. The PATENT Act met the same opposition as H.R. 9 by the biopharma industry, universities, and patent licensors for failing to strike the right balance, including not doing enough to protect the rights of “legitimate” patent holders who must use the same system as “patent trolls.”

S. 1137 has been placed on the Union Calendar for floor action as Calendar No. 203.

### **STRONG Patents Act Reflects the Pro-Patent Legislative Agenda**

And the balance to be struck in these negotiations has a second center of gravity: the patent office. The America Invents Act introduced new trial-like proceedings for challenging the validity of issued patents as a lower cost alternative to district court litigation. Since becoming available in 2012, these new post-grant proceedings have often been criticized as being unfairly skewed against patent owners. On March 3, 2015, Sens. Chris Coons, D-Del., Dick Durbin, D-Ill., and Mazie Hirono, D-Hawaii, introduced an alternative patent reform proposal entitled the Support Technology and Research for Our Nations Growth Patents Act (STRONG Patents Act), S. 632, which 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. The STRONG Patents Act aims to counter H.R. 9 and S.1137 by advancing reforms to post-grant proceedings that will make the regime less unfavorable to patent owners.

Generally speaking, 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: requiring that the patent office apply the same claim construction standard as district courts (eliminating the “broadest reasonable interpretation” standard); requiring that the patent office permit claim amendments as a matter of right; creating a previously unrecognized presumption of validity before the patent office; and requiring that petitioners have standing to petition for inter partes review analogous to declaratory judgment standing. Since its introduction in March 2015, there has been virtually no action on S. 632, although it has been used as a counterpoint to H.R. 9 and S.1137 supported by those who are concerned about the anti-patent climate.

### **Is Patent Reform Likely to Be a Priority for Congress in 2016?**

There are a few possible reasons patent reform may not be a priority for Congress this year. First, a total of 469 seats in the U.S. Congress are up for election on Nov. 8, 2016, along with the presidency. And patent reform, as a topic of national conversation, is simply not well suited for stump speeches and televised debates. The America Invents Act passed under the auspices of a bipartisan “job creation” agenda — an agenda that seems to have evaporated for purposes of achieving patent litigation reform. For this reason, the failure to gain passage in 2015 (in contrast to the failure to gain passage in 2014, or any other year) has graver consequences for supporters of patent litigation reform, given this larger shift in national attention. All of which underscores the tactical victory achieved by opponents in getting the July 2015 vote postponed.

Second, the Federal Rules of Civil Procedure were amended, effective Dec. 1, 2015, to include changes that (1) alter the pleading requirements for patent cases and (2) emphasize “proportional” discovery. Vague bare-bones pleading and onerous discovery have been cited as the two most-feared weapons in the “patent troll” arsenal — both of which are arguably blunted by these amendments. With the elimination of Form 18, plaintiffs in patent cases will be required to provide sufficient specificity to survive dismissal, meaning more facts to support infringement claims, more detailed pre-suit investigation, and more detailed allegations. With the emphasis on proportionality, aggressive discovery with unbounded scope should have a lower chance of success, thus eliminating a key point of leverage for coercing settlement. Because heightened pleading and limited discovery are primary reforms offered in H.R. 9 and S. 1137, opponents of the bills will likely argue that the job is done and Congress should leave well enough alone.

Third, on Jan. 15, 2016, the Supreme Court granted certiorari in *Cuozzo Speed Technologies LLC v. Lee* on the question of whether the patent office can apply the “broadest reasonable interpretation” claim construction standard in post-grant proceedings. The high court also granted certiorari on the question of whether institution decisions in these proceedings are reviewable on appeal to the Federal Circuit. Both questions are loaded to address the patent office’s authority and vulnerability to judicial review, which (if answered as the petitioner is seeking) are likely to give patent owners a new lease on life in post-grant proceedings. Or at least a way to guarantee claim constructions at the patent office that are not theoretically broader, and thus more vulnerable to prior art, than before a district court. Because alignment of the claim construction standard between district courts and the patent office is one of the primary reforms offered in all three of the legislative proposals, the Supreme Court’s interest in addressing the issue is likely to undercut the need for Congress to intervene. The same argument has

been made for fee-shifting following the decision in *Octane Fitness LLC v. ICON Health & Fitness Inc.*

In conclusion, patent reform appears to be an issue of perennial interest to lawmakers, but one that requires substantial momentum in order to succeed. For example, prior to passage of the America Invents Act in 2011, the last major patent reform occurred in 1952. And while small changes to the patent code have been implemented over the years, large-scale systemic change has proven difficult to bring about. As mentioned, the Supreme Court's recent interest in patent law has also reduced the need for congressional intervention. For example, parties can now rely on case law making injunctive relief harder to obtain for non-practicing entities, obviousness easier to establish, patents more vulnerable to declaratory judgment challenges, subject matter eligibility more narrow, and fee awards more available for baseless claims. Thus, beyond the split between groups favoring patent litigation reform and those supporting strong patent rights, the question is also whether the courts are in a better position to calibrate the law than legislators.

—By Eric Steffe and Pauline Pelletier, Sterne Kessler Goldstein & Fox PLLC

*Eric Steffe is a director and Pauline Pelletier is an associate at Sterne Kessler in Washington, D.C.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] M. Trujillo, House pushes back vote on patent reform, *The Hill* (Jul. 15, 2015), <http://thehill.com/policy/technology/248055-house-delays-vote-on-patent-reform-bill>; R. Davis, Innovation Act Vote Delayed As Opposition Voices Get Louder, *Law360* (July 16, 2015), [http://www.law360.com/ip/articles/679966?nl\\_pk=398e8b40-d06a-4211-9c4c-2d371977a796](http://www.law360.com/ip/articles/679966?nl_pk=398e8b40-d06a-4211-9c4c-2d371977a796).

[2] Press Release, Business Leaders Call for Passage of Innovation Act, House Judiciary Committee (July 16, 2015), <http://judiciary.house.gov/index.cfm/2015/7/business-leaders-call-for-passage-of-innovation-act>; Letter to Speaker Boehner, Majority Leader McCarthy, Majority Whip Scalise, Minority Leader Pelosi, and Minority Whip Hoyer, Internet Association (July 16, 2015), [http://judiciary.house.gov/\\_cache/files/196fb897-efd8-4e63-904c-2da5d6d13b8b/ceo-letter-oninnovation-act.pdf](http://judiciary.house.gov/_cache/files/196fb897-efd8-4e63-904c-2da5d6d13b8b/ceo-letter-oninnovation-act.pdf); The Innovation Act, A Look at Who Supports Comprehensive Patent Litigation Reform, [http://judiciary.house.gov/\\_cache/files/2b9f4bfb-81bc-4fde-9350-67efe07cdf70/a-look-at-who-supports-comprehensive-patent-litigation-reform.final1-2-.pdf](http://judiciary.house.gov/_cache/files/2b9f4bfb-81bc-4fde-9350-67efe07cdf70/a-look-at-who-supports-comprehensive-patent-litigation-reform.final1-2-.pdf).

[3] M. Trujillo, McCarthy: 'More work' needed before patent reform gets vote, *The Hill* (Jul. 21, 2015), <http://thehill.com/policy/technology/248681-mccarthy-more-work-needed-before-patent-reform-gets-vote>; K. Gupta, The Innovation Act vs. The Innovation System, *IP Watchdog* (Mar. 15, 2015), <http://www.ipwatchdog.com/2015/03/15/the-innovation-act-vs-the-innovation-system/id=55742/>.

[4] R. Davis, Drugmakers Have Tough Task In Quest For AIA Exemption, *Law360* (Sept. 11, 2015), <http://www.law360.com/articles/700894/drugmakers-have-tough-task-in-quest-for-aia-exemption>.

[5] M. Bultman, Medicare Group Opposes Carveout For Drug Patents, *Law360* (Sept. 22, 2015), <http://www.law360.com/articles/705730/medicare-group-opposes-carveout-for-drug-patents>.