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United States: "Patent Troll" Reform Bills Moving Through Congress

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Patent litigation has become an enormous industry impacting companies of all sizes, from independent coffee shops to multinational technology firms. In 2012 alone, there were 5,189 patent suits filed, which was a 29% increase from the previous year. Over half of all patent suits are brought by corporations created solely for the purpose of enforcing patent rights, formally called "non-practicing entities" (NPEs) or "patent assertion entities" (PAEs) -- colloquially referred to as "patent trolls." Over 70% of patents now being asserted are acquired patents, that is, the patents are not being asserted by the inventor(s) or original owner, compared to 10 years ago, when only 30% of asserted patents were acquired.

Notwithstanding the relatively recent enactment of major patent reform (i.e., the "America Invents Act"), key Congressional leaders remain focused on the continued rise in, and perceived abusive nature of, patent litigation; patent trolls are perceived to be the culprit. As a result, several patent reform bills focused on patent trolls are under active consideration in the House and Senate, and, in the current political climate characterized by discord and obstruction, patent reform has drawn strong bipartisan support and cooperation.

On December 5, 2013, major patent reform legislation, House Judiciary Committee Chairman Goodlatte's (R-VA) "Innovation Act" (H.R. 3309)(described below), overwhelmingly passed the House by a vote of 325-91. Meanwhile, Senate Judiciary Committee Chairman Leahy (D-VT) and Senator Lee (R-UT) recently introduced bipartisan patent reform legislation, S. 1720 (described below), and, on Dec. 17, 2013, held a hearing on it in anticipation of further committee consideration of the bill, likely in early 2014. In addition, bills (described below) introduced by Senators Hatch (R-UT), Cornyn (R-TX), and Schumer (D-NY) are among those most likely to be considered as potential amendments during further committee consideration of S. 1720.

In addition, in early 2014, both the House Energy & Commerce Committee and the Senate Commerce Committee likely will consider legislation specifically focused on the Federal Trade Commission's (FTC) authority over unfair and deceptive trade practices relating to patent settlement demand letters, something which S. 1720, in part, also addresses.

The following are summaries of the bills referenced above:

Innovation Act (H.R. 3309) (Rep. Goodlatte, R-VA)

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H.R. 3309 attempts to reduce the granting of overbroad patents by repealing a provision of the U.S. Code enabling applicants to circumvent the USPTO by filing an action in federal district court instead of having to appeal a rejection to the Federal Circuit. It also redefines and narrows the estoppel impact of post-grant review and prevents double-patenting by amending the prior art requirements. The bill would reduce the impact of vaguely-written demand letters, heighten pleading standards, and impose new procedural and disclosure requirements on would-be patent asserters. It would allow prevailing parties to more readily recover litigation fees and discovery costs. Finally, the bill permits accused infringers to add parties having an ownership or financial interest in the patent to the litigation and expedite overall case disposition by streamlining case management and discovery procedures.

Patent Transparency and Improvements Act of 2013 (S. 1720) (Sen. Leahy, D-VT)

Senate Judiciary Committee Chairman Leahy's bill makes similar strides to curb overbroad patents and prevent double patenting. The bill would take a stronger stance on demand letters by labeling them unfair and deceptive trade practices under the Federal Trade Commission Act § 5(a)(1) and authorize the FTC to bring enforcement actions against issuers of false threats. S. 1720 would also require financial interest disclosures at the onset of litigation and create a customer stay provision.

Patent Litigation Integrity Act of 2013 (S. 1612) (Sen. Hatch, R-UT)

Sen. Hatch's bill is designed to make patent enforcement a high-risk gamble for the asserting entity. It would introduce a mandatory, two-way shifting of attorneys' fees to the losing party absent any special circumstances and would further require the patent asserter to post a bond sufficient to ensure the payment of such at the commencement of the action.

Patent Abuse Reduction Act (S. 1013) (Sen. Cornyn, R-TX)

Sen. Cornyn's bill largely mirrors the "Innovation Act" (H.R. 3309) (see above). It provides for heightened pleading standards, increased initial disclosures, shifting of discovery costs and fees, permissive joinder or parties, and the curtailing of runaway discovery.

Patent Quality Improvement Act (S. 866) (Sen. Schumer, D-NY)

Expands the existing post-grant review procedures established under the transitional program for covered business method patents to allow challenges to, inter alia, all software patents.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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The Time Has Finally Come For Post-Grant Review Of Patents
Fenwick & West LLP
The America Invents Act came into law back in September 2011, but it was not until last March that its provisions were completely phased in.

No Patent For You
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After years of issuing rulings limiting what can be patented, the Supreme Court turned its attention squarely toward patent eligibility in the life sciences and technology fields.

Considerations If Conceding Infringement Or Designing Around
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A decision issued by the Federal Circuit earlier this year raises a few things to have in mind when considering whether to concede infringement and when planning to design around a patent.

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In June you began discussing future litigation against other companies during weekly company lunch meetings.

Dumb Starbucks And Parody In Trademark Cases
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On Friday, February 7th, 2014, a store called "Dumb Starbucks" opened up in Los Feliz, California. Dumb Starbucks looked nearly identical to a typical Starbucks location and served coffee, frappuccinos, and lattes in cups bearing the Starbuck's logo and the phrase "Dumb Starbucks."

A Presidents Day Copyright Story: George Washington And The "First" Fair Use Case
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George Washington is responsible for a lot of "firsts." For example, he was the first President, the first Commander-in-Chief of the Continental Army and the first guy to have the George Washington bridge named after him.

"Facebook Said I Could" Defense Fails To Justify Digital Millennium "Trademark" Notice
Foley Hoag LLP
CrossFit, Inc., the fitness training company, licenses its trademarked name and goodwill to over eight thousand affiliates worldwide at $3,000 per year per affiliate.