

Connecticut Law Tribune

April 20, 2015

 ctlawtribune.com

An ALM Publication

INTELLECTUAL PROPERTY patent & trademark

Patent Litigation Reform on the Horizon?

CONGRESSIONAL DEBATE TO CENTER ON TROLLS AND STRENGTH OF LAWS

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For several years, there have been rumblings that Congress will be passing patent litigation reform. The proposed reforms have primarily been directed at addressing complaints about so-called “patent trolls” that misuse “bad patents” by bringing resulting vexatious and costly litigation that leave companies with a choice between paying to defend the lawsuit and paying a settlement to end the litigation.

Prior efforts at reform stalled. Most recently, at the end of 2013, the proposed Innovation Act passed by an overwhelming majority on a 325-91 vote in the U.S. House of Representatives. The Senate version of the bill, the Patent Transparency and Improvements Act, had progressed through the Judiciary Committee and was about to reach the Senate floor. But Sen. Patrick Leahy, D-Vermont, who had been a vocal critic of the current system and a proponent of reforms intended to curb perceived abuses, pulled the bill after Senate Majority Leader Harry Reid, D-Nevada, informed Leahy he would not let it come to the floor for a vote. Again, patent reform efforts stalled in Congress.

With the Republican majority in place after the November 2014 mid-term elections, patent reform is now back on the political agenda. The prospect of a patent litigation reform bill passing into law is closer than ever before.

With this political backdrop, there now are several bills being considered by Congress to change the patent laws in several ways. The public comments illustrate strongly held beliefs as to

whether strong patent laws help or hurt our economy.

In this regard, there have been significant lobbying efforts made by those in favor of stronger or weaker patent laws and the various proposed litigation reforms. On one side are those who believe that the reforms are necessary to address the patent troll problem. On the other side are those who believe that the proposed reforms are not narrowly tailored to address bad actors and will weaken patent laws for all patent holders (whether operating companies or licensing companies), disadvantage them in court, and make it harder for them to protect against infringers.

Some have advocated that, before additional reforms, more time is needed to judge the impact of the changes already made to patent law made in recent Supreme Court cases, as well as those enacted in the 2011 American Invents Act.

For example, critics of additional reform argue that recent Supreme Court decisions will ensure less abusive practices. These include last year's decisions in *Alice Corp. v. CLS Bank International*, which tightened standards on patent eligibility for computer implemented inventions, and in *Octane Fitness v. Iconn Health and Fitness*, which lowered the standards for those seeking awards of attorney fees in patent cases. Still further, potential patent infringement defendants also have new and highly ef-



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fective tools to challenge the validity of patents in AIA post-grant proceedings at the U.S. Patent and Trademark Office. In this landscape, it is argued that the proposed patent reforms swing the pendulum too far toward weakening the patent system. The critics have also pointed to unintended consequences of the 2011 AIA reforms that perhaps were the result of passing such reforms without full consideration of the consequence.

Advocates of reform note that the stated goals of the legislation put provisions in place that are likely to curb abusive litigation tactics and strategies, while at the same time preserving the ability of patent owners to protect their patents. But questions as to where to draw the line and the true consequences of the proposed reforms are being hotly debated by stakeholders across different industries.

The proposed patent reform legislation has taken the form of various proposed bills. We outline and discuss key provisions that are the hallmarks of reform efforts.

The proposed legislation includes provisions that range from streamlining discovery to fee shifting that would make it more common for the loser to pay counsel fees, to requiring plaintiffs to name the real party of interest, to making it easier for manufacturers to defend customers accused of patent infringement.

Fee Shifting: Loser Pays

SB 1612 includes a proposed fee-shifting provision that would create a presumption that courts award attorney fees and costs to the prevailing party, unless the nonprevailing party can show that its positions and conduct were sub-

stantially justified, or that special circumstances make the award unjust. Other contemplated provisions require plaintiff-patentees that profile as possible abusive nonpracticing entities to post a bond to cover the litigation expenses of alleged infringers. Of course, most relevant here is how to distinguish between abusive nonpracticing entities, often referred to as “patent trolls,” and other nonpracticing entities, inventors and universities.

Specificity in Pleadings

The general litigation pleadings in U.S. courts are based on a “notice pleading” standard. Complaints often contain bare-bones allegations. This practice has been confirmed in patent cases, under existing Federal Rule of Civil Procedure 84 and Form 18, and defendants often complain that it is difficult or impossible to ascertain the infringement alle-

patent case, leading to increased costs and longer patent litigations.

Discovery Limitations

Many of the patent reform provisions provide specific discovery limitations.

The purpose of the discovery limitations is to decrease the cost of patent litigation and curtail abusive discovery practices. The mechanism for streamlining discovery, in some proposals, follows the lead of local patent rules that define the categories of essential discovery documents, such as core technical documents about how the accused products work, and provides for early disclosure of these documents. Other provisions seek to limit discovery pertaining to claim construction issues until the court has construed the claims of the patent.

End-User Lawsuits

Other provisions provide for the ability to customers to seek stays of litigation against them pending the resolution of the issues in an action involving the manufacturer of the allegedly infringing product or component.

The stay provisions are intended to curb abuses where a patentee sues an end-user like Starbucks for using a Wi-Fi module, rather than the chip maker or module maker, and then seeks to extract settlements.

The rationale of the proposal is to focus the litigation and assertion on the manufacturer of the accused product or component that is best positioned to defend the case.

With each passing day, more voices are weighing in on the need for and scope of such reforms. This Congress seems intent on passing some form of patent reform legislation. While the specifics of what changes will be made and what new requirements will be put into place, it will affect both patent holders and potential accused infringers alike, and will have consequences—both intended and unintended—on the relative strength or weakness of the patent system.

It is important that Congress tread carefully and allow the issues to crystallize sufficiently so that reforms to the patent laws are made with an understanding of their broader consequences and longer-term impact on the American information economy. ■

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The fee-shifting provisions are particularly controversial.

Proponents of adopting rules in which the loser pays argue that this will place a strong disincentive in place that will prevent plaintiffs from bringing unmeritorious patent infringement litigation.

However, critics of the provision argue that fee shifting will chill legitimate patent infringement lawsuits brought by individual inventors, startups, universities and small businesses, thus unfairly advantaging large technology companies. Patent cases are notoriously complex, and many patent owners would not risk litigation if there were a presumption that they pay the other side's fees if they were to lose.

Critics also argue that the Supreme Court, in its recent *Octane Fitness* decision, has already lowered the standard for awarding fees and that this may be flexibly applied by courts to discourage bad actors. They also argue that fee shifting is contrary to the American system, where access to the courts is not tempered by the fear of paying the other side's defense costs unless bad faith is shown.

gation from patent infringement complaints. However, Supreme Court cases in the last decade, such as *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), do require some level of specificity, and the Judicial Conference is considering abrogating the use of the bare-bones Form 18 as a model of the appropriate level of specificity in patent cases.

This proposed reform would require patentee-plaintiffs to identify in the complaint for patent infringement: (1) all alleged acts of infringement; (2) how infringement occurs; (3) all allegedly infringing devices or processes; and (4) all parties with ownership and financial interests in the patents.

The rationale is that increased pleadings standards would discourage the bringing of lawsuits of questionable merit. Critics of the provision argue that it raises the bar too high, and that in many cases the information required is not publicly available and may only be obtained through discovery after the filing of the complaint. Still others argue that having a specific statutory provision on sufficiency of the pleadings will make motions to dismiss the pleadings a routine first step in nearly every