

# A Busy Kickoff for Patent Reform in the 114th Congress

March 17, 2015

After failing to get legislation across the finish line during the 113<sup>th</sup> Congress, advocates for reforming the current patent system have reinvigorated their efforts early in the 114<sup>th</sup> Congress. Those parties wary of reform have similarly been active in trying to steer the Congressional agenda. Legislation has already been introduced in both the House and the Senate that will help shape the contours of the debate. Senate and House Committees have begun reviewing this issue in earnest, with two more hearings on patent reform legislation taking place during the week of March 16<sup>th</sup>. With the change in Senate control for the 114<sup>th</sup> Congress and a weakened opposition from former Senate Majority Leader Harry Reid, there is a feeling amongst stakeholders that the momentum is gaining for some form of patent reform law to be enacted this Congress. The following sections provide an overview of the legislative activities in the 114<sup>th</sup> Congress thus far.

## Legislative Activities in the House

*Innovation Act 2.0* - House Judiciary Committee Chairman Bob Goodlatte (R-VA) signaled that patent litigation reform remains one of his top priorities by re-introducing the Innovation Act early in the new Congress. The new bill, H.R. 9, is almost identical to the original Innovation Act that passed out of the House in 2013 by a margin of 325-91. It has 20 bipartisan co-sponsors, including the Communications and Technology Subcommittee Ranking Member Anna Eshoo of the House Energy and Commerce Committee. The Innovation Act is a comprehensive patent litigation reform bill that would impose, among other things, heightened pleading requirements, discovery reforms, fee-shifting for losing parties and a customer stay provision. Proponents claim that the Innovation act

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would serve to curtail abusive patent litigation tactics by certain parties while opponents of the legislation claim it will make it more difficult for entrepreneurs to protect their innovations through litigation. The Judiciary Committee held a hearing on this issue last month and will hold another one in March. Given the broad support for the original Innovation Act, Chairman Goodlatte will likely move the legislation through the House in a substantially similar form in the near future.

*The Targeting Rogue and Opaque Letter (TROL) Act:* Last year, when it became clear that comprehensive patent reform was dead in the Senate, then-Chairman of the House Commerce Committee Subcommittee on Commerce, Manufacturing and Trade Lee Terry (R-NE) introduced the Targeting Rogue and Opaque Letters (TROL) Act. It is an attempt to pass patent litigation reform in a more targeted fashion by focusing only on demand letter abuses by so-called patent trolls. The TROL Act would have made the bad faith filing of misleading demand letters a violation of the prohibition against unfair and deceptive business practices under section 5 of the Federal Trade Commission (FTC) Act. Additionally, and somewhat controversially, the TROL Act would have preempted state laws on the same subject matter. While the TROL Act attracted support from pro-licensing interests and even some pro-reform stakeholders, many reform advocates were concerned that if passed, the bill would dissipate the energy and focus needed to pass the more sweeping reforms they believe necessary to fix a broken patent system. Rep. Michael Burgess (R-TX), who succeeded Rep. Terry as the subcommittee chairman, held a hearing last month on patent demand letters, indicating his interest in continuing to pursue a targeted legislative solution. If comprehensive reform measures fail to advance through Congress in a timely fashion, more targeted legislation such as the TROL Act focusing on demand letter reform might be the legislative vehicle

### **Legislative Activities in the Senate**

While the House has already begun committee activity, the Senate has been slower to take up reform due to other Judiciary Committee priorities. Sen John Cornyn (R-TX), who introduced S. 1013, the Patent Abuse Reduction Act, last Congress and is the leading Republican on the pro-reform side of the debate, has been in discussions with other members of the Judiciary Committee, including Democratic Sens. Patrick Leahy (D-VT) and Charles Schumer (D-NY), to forge a bipartisan consensus on a strong reform bill. Cornyn is said to be pushing for a Senate bill that is more closely aligned with the Innovation Act than the compromise language that Sen. Leahy tried to move out of the Committee last spring. Most controversially, in order to gain the support of additional Senate Democrats, the compromise language would have modified some of the Innovation Act's provisions regarding fee-shifting, which was also included in Cornyn's bill. Cornyn's staff has indicated that the new Senate bill will certainly contain a fee-shifting provision, reducing the number of potential Democratic supporters, who have serious concerns with fee-shifting due to its potential impact on access to justice for smaller entrepreneurs.

*The Support Technology & Research for Our Nation's Growth Patents Act of 2015 (the "STRONG ACT"):* On March 3, Sen. Chris Coons (D-DE) introduced the STRONG Act, which Coons says strikes the right balance between reducing abuse without adopting broad litigation and other reforms to the patent system that would cause collateral damage in the form of decreased protections for the rights of patent holders. While the STRONG Act, which was co-sponsored by Democratic Sens. Richard Durbin (D-IL) and Mazie Hirono (D-HI), has

virtually no chance of moving forward in the Senate, it is viewed as a tool for negotiating against reform supporters on a more comprehensive legislation. The STRONG Act would adopt several reforms of post-grant review procedures that would increase the burden on those challenging granted patents to prove their invalidity while adopting the same language contained in the TROL Act to empower the FTC to crack down on abusive patent-related demand letters.

### **Upcoming Activities may Provide Additional Insight**

The Senate is about to activate on patent reform this week by holding two hearings on the issue. The first hearing will be held on March 18 by the full Senate Judiciary Committee chaired by Sen. Charles Grassley (R-IA) and could be the occasion for Sen. Cornyn to introduce his new bill either immediately before or after the scheduled hearing. The hearing will feature witnesses from manufacturing, biotech and academic interests and details can be found [here](#). The next day, the Senate Committee on Small Business and Entrepreneurship will hold a hearing focusing on the impact of abusive tactics by patent trolls on small businesses and entrepreneurs centered, such as the use of demand letters. Details about this hearing can be found [here](#). As discussed, Senator Coons' STRONG Act addresses this issue by incorporating the TROL Act introduced in the House last year.

The debate going forward will largely resemble the lines that have already been drawn in this debate for a number of years: certain high-tech interests supporting the Innovation Act that would curb patent abuses versus universities and bio-tech industries seeking to preserve the interests of patent holders. Some of the issues that will continue to be raised in the legislative debate include:

- How can a legal framework be constructed to address the real need for patent litigation reform while limiting any collateral damage to legitimate patent holders wishing to pursue case against infringers?
- How does fee-shifting in patent litigation impact innovation and investment, especially in regards to smaller companies and investors' incentive to utilize the legal process?
- How can reforms be structured to guard against abuses of the post-grant procedures for challenging the validity of a patent?
- How will the U.S. debate on patent reform impact ongoing bilateral and multilateral trade negotiations such as the Transatlantic Trade and Investment Partnership (TTIP) and Trans-Pacific Partnership (TPP)?
- How has antitrust law been utilized to address licensing and assertion of patents?