



Patent Litigation Reform Legislation Continues to Move Towards Passage

The Window to Address Substantive Concerns is Closing Quickly

Scott E. Taylor and Joseph S. Rubin

Congress has made it a bipartisan priority to stop “patent trolls,” and bipartisan legislation is moving towards passage. The House has already passed a bill, and the Senate Judiciary Committee is poised to markup legislation in a few weeks.

This legislation makes several fundamental alterations to patent litigation, including changes to discovery and pleading standards, and to the ability of companies to challenge or defend the validity of a patent.

Arnall Golden Gregory, LLP (“AGG”) has been following this legislation closely, and Joseph Rubin, Counsel in AGG’s Washington, D.C. office, spoke on this important issue last month at the IP Counsel Exchange in Silicon Valley.

AGG urges companies that have significant patent portfolios, and particularly those that frequently find themselves in patent litigation, to pay close attention to the changes in this legislation.

In December, the Senate Judiciary Committee held a hearing on Patent Litigation Reform, and Chairman Patrick Leahy (D-VT) announced that he would initiate a very inclusive process for members, staff and stakeholders to share thoughts and ideas about his legislation to stop patent trolls. A few weeks ago, Senator Leahy indicated that he planned to markup legislation early in April, and it appears as though he is going to adhere to that timeline – last week, he placed Patent Litigation Reform on the Markup Calendar, and announced that he was holding the bill over to allow bipartisan negotiations to continue. Although it was not announced publicly, he hopes to have a consensus, bipartisan product ready for Markup on either April 3rd or 10th.

Importantly, no Senators on the Judiciary Committee raised any concerns about the need to move the legislation or about the process.

The Senators involved in the process include a strong cross section of conservatives, moderates and liberals, such as: Chairman Leahy and Ranking Member Chuck Grassley (R-IA); liberal Democratic Policy Chair Chuck Schumer (D-NY) and conservative Republican Whip John Cornyn (R-TX); along with Senators Klobachar (D-MN), Blumenthal (D-CT), Hatch (R-UT) and Lee (R-UT).

Process:

This group of Senators and staff is working together to put together a bipartisan bill that will address the patent troll problem and likely pass the Senate. The members and staff are actively trading language and working in good faith with each other across the aisle.

Substance:

This legislation addresses several substantive issues that were “left on the floor” when Congress passed the America Invents Act (“AIA”), including:

- Fee-shifting provisions;
- Discovery reform;

- PTAB reform;
- Real party-in-interest disclosure;
- Demand letter reform;
- Pleading requirements; and
- Covered Business Method Patents

Discussions regarding these provisions are ongoing, starting with fee shifting – one of the toughest policy issues to resolve – and the negotiators are close to consensus on that issue.

Once that issue is resolved, they plan to move to discovery and pleading standards, followed by the customer stay, and the other issues.

Prospects:

While there is some opposition to patent litigation reform legislation, there is strong bipartisan support on the Judiciary Committee and among Senate leadership, and the expectation is that the bill will pass out of Committee easily – the only question is how many Senators will oppose it, if any. The fewer that oppose, the stronger the bill's chances on the Floor.

For those that have a stake in this legislation, NOW is the time to engage. Committee staff are still open to discussions with stakeholders and AGG, but that window is rapidly closing; once the Judiciary Committee marks up the bill, there will still be an opportunity to address any remaining issues, but those opportunities will be fewer and further between.

AGG will continue to closely monitor the progress of this legislation.

To learn more about this legislation and these proposed changes, and how to get engaged in the legislative process before it is too late, please contact Joseph Rubin at joe.rubin@agg.com or at 202 557-4180.

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