

Patent Litigation Update

Senate Introduces Bipartisan Patent Reform Bill Targeting “Troll” Litigation

By Brian Ferguson and Robert Vlasis

On April 29, 2015, the U.S. Senate introduced a bipartisan bill known as the “Protecting American Talent and Entrepreneurship Act of 2015,” or the “PATENT Act.” If enacted, the bill would amend Title 35 to add more transparency in patent litigations, curtail onerous discovery, and mitigate against baseless litigation.

In particular, Section 3 of the Act proposes to eliminate Form 18 in favor of more strict pleading requirements, including an identification of each allegedly infringing claim and a detailed identification on an element-by-element basis of how the accused products allegedly infringe. The bill furthermore directs courts to dismiss any counts that do not comport with the new requirements. Section 3 also adds early disclosure requirements for the patentee that, among other things, require it to disclose parent companies and any others with a financial interest in the asserted patent or the patentee. Finally, the patentee must disclose prior litigations of the asserted patent and any relevant RAND obligations.

The PATENT Act also protects downstream customers sued concurrently with upstream sellers or suppliers. For instance, Section 4 provides that certain downstream customers are entitled to a stay of litigation pending resolution of any concurrent litigation against upstream suppliers that involve the same patents and accused products. Downstream customers should be aware, however, that they may be precluded from re-litigating certain issues determined in the concurrent litigation.

Sections 5 and 6 of the PATENT Act introduce new discovery limitations. In particular, Section 5 includes a mandatory stay of discovery when defendants file a motion to dismiss, motion to transfer venue, or a motion to sever accused infringers, if filed before the first responsive pleading. To address concerns regarding the asymmetries in discovery burdens and costs, Section 6 directs the Judicial Conference of the United States to develop new rules clarifying the extent of “core” documentation and electronic communications that must be produced. The Act specifically excludes source code as “core” documentation, and requires that parties show good cause for why source code should be discoverable. To the extent that a party seeks discovery beyond the established limits, such party must bear the associated costs.

Section 7 provides a procedure for awarding costs to the prevailing party when the non-prevailing party’s position was objectively unreasonable. And

where the defendant believes that the plaintiff is a patent troll, the plaintiff must show its ability to satisfy an award of costs under this section, or alternatively, demonstrate that its primary business is not asserting and licensing patents.

The bill also introduces new requirements for any pre-suit demand letters, as well as consequences for abusive demand-letter practice. For example, Section 8 requires that pre-suit demand letters identify, among other things, each patent believed to be infringed, at least one asserted claim, each accused product, the basis for the plaintiff's infringement allegations, and an explanation for how any demand for compensation was determined. Where the demand letter does not contain this information, not only is the defendant entitled to an additional 30 days to respond to the complaint, but the plaintiff cannot rely upon the demand letter for any willful infringement claim. Moreover, Section 9 of the Act provides for civil penalties when a patentee engages in abusive practices with respect to demand letters sent in bad faith.

Section 10 of the Act precludes a patentee from obtaining enhanced damages or attorney fees during any period where the patentee has failed to record any assignments of the asserted patent.

Finally, the Act introduces protections to licensees where the patentee is involved in bankruptcy proceedings, establishes educational resources for small businesses defending against patent suits, and directs the Patent Office to conduct various studies to identify further improvements to the patent laws.

The majority of the new provisions would generally become effective upon on the date of enactment and apply to complaints filed after that date.

The bill is co-sponsored by Chuck Grassley (R-Iowa), Patrick Leahy (D-Vermont), John Cornyn (R-Texas), Chuck Schumer (D-New York), Mike Lee (R-Utah), Orrin Hatch (R-Utah), and Amy Klobuchar (D-Minnesota).

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