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PERSPECTIVE

Patent reform increasingly risks deadlock

By Andrew C. Whitney, Jacob J.O. Minne and Ehsun Forghany

For the past decade, intellectual property legislation was a bright spot for a Congress otherwise mired in partisan gridlock. In 2011, Democrats and Republicans in Congress united to pass the Leahy-Smith America Invents Act (AIA). And just this past May, President Barack Obama signed into law the Defend Trade Secrets Act, which modernizes and strengthens trade secret law by adding new federal civil trade secret remedies and increasing the maximum criminal penalties for misappropriation.

But now, the bipartisan engine of intellectual property reform seems to have petered out. Why this loss of steam? While there is no single answer, two reasons are common: First, judicial changes to the law have obviated the need for many of the contemplated reforms; second, Patent Assertion Entities (PAEs) and other IP owners have been successful in countering patent reform advocates and maintained a legislative stalemate.

While patent reform has languished in Congress, it has moved at a relatively blistering pace in the courts. Since passage of the AIA, the Supreme Court has heard and decided 20 patent cases. These decisions have expanded the district court's power to grant attorney fees, *Highmark Inc. v. Allcare Health Management Systems Inc.*, 134 S. Ct. 1744 (2014), and award treble damages, *Halo Electronics, Inc. v. Pulse Electronics Inc.*, 136 S. Ct. 993 (2016), much as the Patent Act (S. 1137) and Strong Patents Act (S. 632) would have. Similarly, the Supreme Court, through its annual revisions to the Federal Rules of Civil Procedure, eliminated the form pleadings (Supreme Court of the United States, Order Regarding Amendments to the Federal Rules of Civil Procedure (Apr. 29, 2015)), in effect raising the patent pleading requirements from bare-bones complaints, to the heightened plausibility standard articulated

in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). A similar amendment to the pleading standard would have been effectuated by the Innovation Act.

But many of the goals of patent reformers are yet to be achieved. For instance, several of the proposed reforms address the asymmetrical discovery burdens and expenses that exist in patent disputes. Currently, plaintiffs can satisfy the pleading requirements and compel discovery without much cost, while defendants are forced to incur discovery costs by providing responsive information that plaintiffs could have obtained through their own pre-filing investigation. The Patent Act alters the cost and structure of discovery by requiring a court to stay discovery pending the resolution of motions to dismiss, transfer venue and sever accused infringers. And if the claims need to be construed by the court, the Innovation Act (H.R. 9) limits discovery to information necessary for the court to determine the meaning of the terms used in the patent claim. While amended Federal Rule Civil Procedure 26(b)(1) limits discovery "proportional[ly] to the needs of the case" — potentially easing the litigation burden on both sides — these legislative reforms would directly benefit defendants by changing the timing for discovery and ultimately affording greater leverage to settle cases against PAEs by avoiding lopsided discovery costs early in litigation.

One force stopping patent reform is an increasingly fractured community, and much of the debate has been increasingly driven by public pressure rather than academic and industry discourse. On July 22, 2011, "This American Life" ran an hour-long documentary titled "When Patents Attack," focusing on the disproportionate litigation costs and pressure PAEs bring against small businesses. On April 19, 2015, late night news host and comedian John Oliver ridiculed the state of the nation's venue laws and discussed the large number

Innovation Act (H.R. 9)

Rep. Goodlatte (R-Va.)

2.4.15: Introduced
2.25.16: Hearing in the Committee on Small Business and Entrepreneurship

Demand Letter Transparency Act (H.R. 1896)

Rep. Polis (D-Co.)

4.20.15: Introduced
5.15.15: Referred to the Subcommittee on Courts, Intellectual Property and Internet

Venue Act (S. 2733)

Sen. Flake (R-Ariz.)

3.17.16: Introduced
3.17.16: Referred to the Senate Judiciary Committee

STRONG PATENTS Act (S. 632)

Sen. Coons (D-Del.)

3.2.15: Introduced
2.25.16: Hearing in the Committee on Small Business and Entrepreneurship

TROL Act (H.R. 2045)

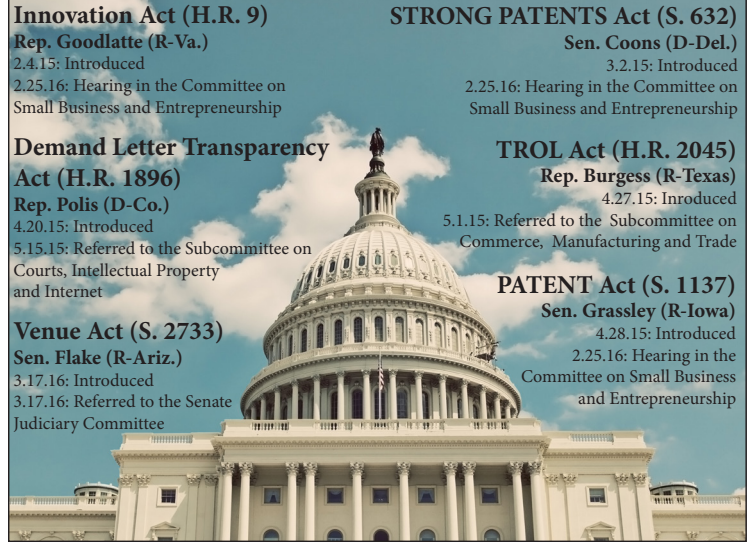
Rep. Burgess (R-Texas)

4.27.15: Introduced
5.1.15: Referred to the Subcommittee on Commerce, Manufacturing and Trade

PATENT Act (S. 1137)

Sen. Grassley (R-Iowa)

4.28.15: Introduced
2.25.16: Hearing in the Committee on Small Business and Entrepreneurship



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of cases filed in the Eastern District of Texas. In addition, advocacy groups like the Electronic Frontier Foundation and Public Knowledge have spearheaded a campaign dedicated to driving a mass movement to radically reform the patent system.

But PAEs and similarly aligned think tanks and organizations have not sat idly by. One of the competing pieces of legislation, the Strong Patents Act, sits philosophically opposed to the innovation and patent acts. It focuses on empowering patent holders by weakening post-issuance review. As one example, it would add a "presumption of validity" to inter partes review and similar proceedings. It would also block all review proceedings by persons without Article 3 standing, and prohibit anonymous petitions. Outside of the Patent Trial and Appeal Board, the Strong Patents Act would expand the doctrine of indirect infringement by legislatively overruling the Supreme Court's holding in *Limelight Networks Inc. v. Akamai Technologies Inc.*, 134 S. Ct. 2111 (2014), and allowing a finding of induced or contributory infringement even where a patented process is not practiced by a single entity.

With two increasingly vocal sides to the patent reform debate, this once

bipartisan issue increasingly risks deadlock. But not all hope for reform is lost. Skeptics should recall that even when debate is less rancorous, reform can move very slowly. The lauded AIA was largely modeled after the Patent Reform Act of 2009, which in turn was modeled after the Patent Reform Act of 2007 and so on back to the Federal Trade Commission recommendations from 2003. Even if not passed this term, today's bills could still be tomorrow's laws.

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