

Byline

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Patent Reform Likely to Succeed in Next Congress

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While it is no secret that patent trolling is a significant problem in the United States, many wonder why efforts at reform have stalled in recent years, especially with associated costs continuing to rise.

In 2011 alone, nonpracticing entities, referred to as "NPEs" or "patent trolls," cost an estimated \$29 billion in legal and licensing fees in the United States. A recent study by PricewaterhouseCoopers found that patent trolls now account for 67 percent of all patent infringement lawsuits filed, a 28 percent increase from five years ago.

Beginning in June 2013, President Barack Obama issued five executive actions directing the U.S. Patent and Trademark Office to increase transparency in the patent system. In February 2014, he followed these orders with three additional executive actions directed at increasing the quality of patents, including "crowdsourcing" prior art. At the same time, Rep. Bob Goodlatte, R-Va., introduced his Innovation Act (HR 3309) to lessen the impact of frivolous lawsuits brought by patent trolls.

With a few amendments, the bill easily passed the House with cross-party backing in December 2013. Several other bills were pending in the Senate, including the Patent Abuse Reduction Act of 2013 (S.1013), the Patent Integrity Act of 2013 (S.1612), and the Patent Transparency and Improvements Act of 2013 (S.1720). With broad, bipartisan support in both chambers, reform appeared almost certain.

For myriad reasons, however, the legislation stalled shortly after being introduced in the Senate. In May 2014, Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., removed patent reform from the committee's agenda, alleging that the Innovation Act would have severe unintended consequences on legitimate patent holders. As a result, laws curbing the activities of patent trolls, along with any chance at patent reform, quickly died.

The incoming Republican majority in the Senate, buoyed by what still appears to be strong bipartisan support, has an opportunity to show the country that Congress can work together to correct one of the longest-standing threats to American innovation. Implementation of specific provisions of the Innovation Act should significantly change the ways in which patent trolls conduct their business.

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Unlike the America Invents Act, passed in 2011, which made most of its changes to the way that patents are granted, patent reform in 2015 will likely focus on the way in which patents are enforced, and, in particular, discouraging patent trolls.

For example, the Innovation Act included enhanced pleading requirements as well as fee-shifting to the prevailing party—unless the court finds that the position and conduct of the nonprevailing party or parties were reasonably justified in law and fact, or that special circumstances (such as severe economic hardship to a named inventor) make an award unjust.

Additionally, a new bill will likely include specificity in patent infringement complaints, such as requiring a clear and concise statement of where each claim element may be found in the accused instrumentality, and will also require transparency in patent ownership.

Discovery will initially be limited to information necessary for the court to determine the meaning of terms in the patent claim, including any interpretation of those terms used to support the claim of infringement. Whether reform will include an expansion to the Covered Business Method review remains to be seen.

Although patent reform in 2015 will affect all patent owners, the real target will continue to be the patent troll. With strong, bipartisan support, as well as support from the president, expect patent reform to be low-hanging fruit for the 114th Congress.