# IP Alert: Patent Litigation Reform - The Innovation Act

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On December 5, 2013, the United States House of Representatives passed the "Innovation Act" (H.R. 3309). This bill, now headed to the Senate, is intended to curb some of the perceived abuses in patent litigation. As background to the Innovation Act, the House considered that:

"Patent litigation is very expensive; the average suit in which $1 million to $25 million is at stake costs $1.6 million through discovery and $2.8 million through trial." Most unique defendants in these cases are companies with $10 million or less in revenue—and "startups are particularly vulnerable." Some "have noted that . . . 'Although startups are a crucial source of new jobs, [patent-troll] demands have impacted their ability to hire and meet other milestones, caused them to change their products, and shut down lines of business.'" Because patent litigation is so complex and costly, businesses often choose to pay licensing fees to patent trolls—even if the claims are baseless—rather than going to court."

See Legislative Digest for H.R. 3309 (internal citations omitted). The legislation has five primary reforms as well as a few other modifications that are relevant to specific situations.

First, patent plaintiffs would be required to plead their infringement claims with particularity. This proposed amendment should, in theory, require plaintiffs to specify which products allegedly infringe the patent and how. Currently, the Federal Circuit (which hears all patent appeals) has held that plaintiffs can initiate a patent lawsuit with a very basic complaint that simply identifies the patent and the alleged infringer. This proposed amendment would, no doubt, aide the alleged infringer in evaluating the merits of the plaintiff's complaint. However, some of the busiest patent venues already have local rules that require early claim charts and those rules have not slowed the litigation there.

Second, the Innovation Act would allow the court to award reasonable costs and attorneys' fees to the prevailing party in a patent litigation unless the court found that the nonprevailing party was "reasonably justified" in taking its position. This proposed amendment is a significant shift from the current law, where fees are awarded only in "exceptional cases." Although the proposal is a significant change, its effect may be lessened in the case of some non-practicing entities (NPEs), otherwise known as "patent trolls." NPEs are sometimes entities that are created for lawsuits. Such entities may not have the resources to pay an award of attorneys' fees.

Third, and perhaps most significantly, the Innovation Act proposes that discovery would be limited until the court has construed the asserted patent claims. As the House noted, discovery expenses are significant in patent cases. Parties typically are able to evaluate the case much better, and perhaps move for summary judgment, once the court has construed the patent. By limiting discovery until this critical stage, parties should be able to litigate the merits of the case with much less expense. By delaying discovery, weak cases will likely not cost as much to defend. Defendants may, therefore, choose to defend themselves rather than pay a license fee to avoid litigation.

Fourth, the Innovation Act would require that the patent plaintiff identify all entities with an interest in the patent, including those entities that have a financial interest in the patent litigation. Some NPEs are created for a specific round of patent enforcement efforts. The proceeds, if any, from these efforts are often funneled up to various investors. The proposed amendments would add transparency to this process.

Fifth, currently, patent lawsuits can be initiated against any entity that makes, uses, sells, or offers to sell a claimed invention. While the law does not allow a double recovery, a patent plaintiff could sue the manufacturer of a product or the end user of a product. For example, a holder of a Wi-Fi patent could sue the large manufacturer or every coffee shop and restaurant that is offering Wi-Fi. One strategy NPEs have used is to sue the end users, who presumably have fewer resources to meaningfully defend themselves. The Innovation Act would allow willing manufacturers to step into these lawsuits or otherwise take the lead in defending against the patent infringement cases.

Whether these reforms will be enacted or effective remains uncertain. Indeed, the Innovation Act fails to address what some commentators feel is the real problem — the existence and continued issuance of bad patents. Nevertheless, the Innovation Act is now awaiting consideration in the Senate. The Senate is already considering, among others, a somewhat similar patent reform bill titled "the Patent Transparency and Improvements Act" authored by Senators Leahy, Lee and Whitehouse. Thus, it appears that Congress will likely pass some patent reform measures in the near future. Given President Obama's speech in February 2013 strongly advocating patent litigation reform, some version of these bills may well become law in 2014.

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