

Patents

Opposition to Patent Litigation Bill Focuses on PTO Funding, CBM Expansion

Bloomberg BNA

Summary: Stakeholders opposed to H.R. 3309, the bill mostly addressing patent litigation abuses, hit the failure to address full funding of the PTO and the expansion of the covered business method program as key concerns.

By Tony Dutra

Nov. 15 — Stakeholders expressed concerns in a Nov. 15 press conference call about almost every provision of the patent litigation overhaul bill, the Innovation Act (H.R. 3309), currently under consideration in the House largely marketed as anti-patent troll.

The six participants agreed that the most pressing need is to eliminate any problems associated with patent quality and deficiencies of the patent system that lead to abusive litigation behavior, but they argued that full funding of the Patent and Trademark Office is the most important way to solve that problem. Rep. Robert W. Goodlatte's (R-Va.) bill, though, does not address PTO funding, while H.R. 3349, the Innovation Protection Act sponsored by Rep. John M. Conyers (D-Mich.) does .

To at least two stakeholders, Congress should drop Goodlatte's bill entirely and focus exclusively on H.R. 3349. To others, H.R. 3309 had some potential, but only if a number of other provisions—specifically the proposed expansion of the “covered business method” (CBM) option to challenge issued patents—were dropped as well.

Opposition From Multiple Sources

Goodlatte introduced the bill Oct. 23 and held a hearing on Oct. 29 that featured general support on all but one issue.

Participants in the press call were:

- Robert Budens, president of the Patent Office Professional Association;
- Q. Todd Dickinson, executive director of the American Intellectual Property Law Association.
- Rob Lindefeld, chair of the American Bar Association's Section of Intellectual Property Law;
- Brian Pomper, executive director of the Innovation Alliance;
- Robert N. Schmidt, member of the IEEE-USA IP Committee and founder & CEO of Cleveland Medical Devices Inc.; and
- John Vaughn, executive vice president of the Association of American Universities;

Budens and Dickinson—a former PTO director—were adamant about adding a PTO funding provision to H.R. 3309 before it could ever get their support. Conyer's approach is to get rid of the AIA-established PTO “reserve fund” established under the America

Invents Act—which did not save the agency from the repercussions of sequestration as stakeholders expected—and instead create a “revolving fund” in the Treasury Department that could be used by the PTO “without fiscal year limitation.”

List of Objections to What Is in Bill

Lindefeld said that the ABA's concern goes to the heart of H.R. 3309, with its provisions to modify pleading requirements and force specific rules of case management, particularly on issues such as discovery. “Courts, not Congress, are the entities that should prescribe rules,” he said.

The bill would require implementation of new case management rules by the Judicial Conference, and Lindefeld referenced a letter that body sent to Goodlatte and Conyers on Nov. 6 in objection, saying that Section 6 of the bill in particular “runs counter to” the Rules Enabling Act process requiring Congress's deference to the courts to establish their own rules.

Schmidt's objections were comprehensive as well, as he identified five different sections of the bill that tipped the balance in favor of alleged infringers and placed an increasing “cloud on the title” of a patent. For example, though most stakeholders have said they favored the heightened pleading standards in Section 3(a) of the bill, Schmidt said the IEEE was against that provision because there is no corresponding provision requiring heightened specificity in the alleged infringer's response to the complaint.

Vaughn was concerned with the combination of two provisions, one of which allows joinder of the patentee—often a university or its technology transfer department—even though an exclusive licensor is asserting the patent, and the other on “loser pays,” which requires shifting fees to the loser of a patent infringement litigation with few exceptions. This structure would force a university into court, subject to paying the defendant's fees if the licensor defaults, even if it would not have brought the infringement case itself.

CBM Big Issue

Pomper agreed that the fee-shifting and joinder provisions were troublesome, but he clearly was against the general tenor of the bill.

The one issue that was most controversial in the H.R. 3309 hearing Oct. 29 was the expansion of the CBM “transitional program.” Section 9(e) of the bill would expand the kinds of patents that can be challenged and make the program permanent—it currently is set to expire in 2020.

In the press call, Dickinson noted the “widespread opposition” to this change to the AIA-enabled program. AIPLA believes it was “a compromise in the AIA, addressed to a specific type of patent for a specific reason,” he said, meaning the supposed deficient examination of business method patents in the late 1990s.

Bloomberg BNA asked whether any of the stakeholders could support H.R. 3309 if its only two changes were to add a provision for PTO full funding and delete the CBM-expansion provision. Only Dickinson responded positively, and at that, only half way.

“That would be a significant move in the right direction,” he said.

But Pomper appeared to speak for the other participants in saying those two changes would be far from sufficient to change the Innovation Alliance's position. “There are still a lot of problems,” he said.