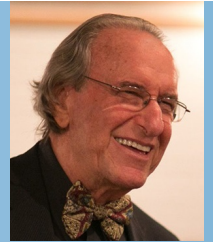


# 2014 POST-AIA PATENT REFORM IS DEAD

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A great deal of attention and discussion has been directed to the America Invents Act (AIA), which was passed into law by the US Congress in 2011. The AIA represents the largest overhaul of US patent law in longer than half a century. However, there are those who do not believe that the AIA went far enough in reining in what have been characterised as “patent trolls”, or non-practising entities (NPEs). These forces have been relentless in seeking the passage of yet more legislation that would blunt the impact that the NPEs have been having upon segments of the technology world. It was the hope of these forces that the year 2014 would see the passage of such legislation.

Many have felt the impact of extraordinary increases in patent infringement litigation costs, not only in financial terms but also in diverted energies required of management in such cases. It has been reported in this column that the median legal fees associated with litigating a non-complex patent infringement lawsuit, through trial but not through an appeal, has reached \$5 million. This figure does not include non-fee costs such as experts’ fees, multiple appeals, and the possibility that a reversal on appeal sometimes results in a brand new trial and possible subsequent appeals.

It now appears that new post-AIA legislation will not happen any time soon—certainly not before the November elections of 2014 or even later in the year. A bill that was working its way through Congress was abruptly removed from the agenda by the president *pro tempore* of the US Senate, Patrick Joseph Leahy, the only elected Democratic senator in Vermont’s history. As chairman of the Senate Judiciary Committee, Leahy has enormous power to kill proposed legislative bills in their tracks, by preventing an up or down vote. He did so with respect to the 2014 patent reform bill that appeared to have bipartisan support.

The House of Representatives overwhelmingly passed a similar patent-directed Innovation Act in December 2013, with a 325-91 vote that included a majority of both Republicans and Democrats. Leahy’s action in removing such legislation from the Senate’s agenda resulted in a major setback for the enactment of patent reform during 2014 despite efforts by Senators Chuck Schumer and John Cornyn to negotiate a bipartisan deal. Companies such as Google and Cisco Systems strongly support the bill, as do retailers which have been targeted by NPEs.

The media’s portrayal of patent reform legislation has been primarily focused on efforts to deal a fatal blow to NPEs. The targets of NPEs have included technology startups as well as mainstream businesses. It is anticipated that President Barack Obama will sign patent reform legislation once it reaches his desk.

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There are many who view Leahy’s action in a positive light. They include universities, pharmaceutical companies, and segments of the biotech industry. Such supporters of Leahy’s action worry about several unintended consequences that would affect legitimate owners of patents. Leahy himself cites such worries as reasons for him to have killed the bill. Others point out relatively harmless provisions of the Innovation Act that include, for example, the ability of a manufacturer to assume the position of its customers in defending patent infringement claims. This would cut down on what might include multiple lawsuits against a plurality of customers who may offer for sale or sell accused infringing products and/or services. What might otherwise be multiple and multi-district litigation would be consolidated in a single forum.

Another example of what is perceived as a sensible provision of the Innovation Act is described by Adi Kamdar, Daniel Nazer and Vera Ranieri in their May 21, 2014 Electronic Frontier Foundation article found online at <https://www.eff.org/deeplinks/2014/05/senator-leahy-kills-patent-reform-now>. This includes a requirement that a plaintiff in a patent infringement action “...provide details in its complaint about how a defendant supposedly infringed its patent.” These authors confirm that “a patent holder should know at the outset what their patent claims and how it believes a defendant infringes. A patent holder, if its claim is legitimate, would suffer no harm from this.”

There is a consensus among those who monitor patent reform that we should expect the passage of further reform legislation, perhaps during 2015. ■

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