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Client Alert

Intellectual Property Practice Group

November 26, 2013

Information Technology & Industry Council and King & Spalding Co-Host Thought Leadership Event on Patent Litigation Reform and the Future of U.S. Innovation

On November 14, 2013, the Information Technology Industry Council (ITIC) and King & Spalding co-hosted a thought leadership event focused on abusive patent litigation and its effect on U.S. innovation. The Capitol Hill event followed on the recent release of bipartisan legislation, the Innovation Act of 2013 (**H.R. 3309**), introduced by House Judiciary Committee Chairman Bob Goodlatte (R-VA) to address the increasing problem of abusive patent litigation.

The principal features of the Goodlatte bill are (a) a heightened pleading requirement for filing patent infringement claims; (b) an assumption that attorneys' fees will be awarded to the prevailing party; (c) limited discovery until after a claim construction ruling; (d) disclosure of the financial ownership of the patent; and (e) a stay for customer suits pending resolution of the case against the manufacturer, among other features. H.R. 3309 passed out of the House Judiciary Committee on November 20 by a vote of 33-5. In addition, Senate Judiciary Committee Chairman Patrick Leahy (D-VT) introduced a similar bill on November 18 entitled the Patent Transparency and Improvements Act of 2013 (**S. 1720**).

Several key policymakers spoke at the event, including House Judiciary Committee Chairman Bob Goodlatte; Congresswoman Zoe Lofgren (D-CA), Intellectual Property Subcommittee Chairman Howard Coble (R-NC); and Sen. John Cornyn (R-TX), a senior member of the Senate Judiciary Committee. Thought leaders from the technology industry participated in the event, as did former Maryland Governor and U.S. Congressman Bob Ehrlich, now Senior Counsel at King & Spalding, and Bill Abrams, Stanford University Professor and Partner in King & Spalding's Intellectual Property Practice, who served as moderator.

The policymaker and industry speakers all discussed the manner in which intellectual property works as a critical driver of technological innovation and economic competitiveness and the need for additional patent litigation reform. Chairman Goodlatte stated that the America Invents Act modernized the patent system, paving the way for quality patents to be issued from the PTO, but abusive litigation continues to be a drag on our economy and on innovation.

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In Goodlatte's view, the patents system was never meant to be a playground for patent assertion entities ("PAEs"). As a result, his legislation targets abusive patent behavior, not entities, and importantly does not diminish patent rights. Chairman Goodlatte also made clear his belief that Congress does have the authority to legislate in this area.

Senator Cornyn emphasized that the patent litigation system has not kept pace with technology and requires reform. As an example, Senator Cornyn cited the fact that under the district court's notice pleading requirements, PAEs do not need to explain how their patents have been infringed until late in the litigation, which drives up discovery costs. In his view, a growing bipartisan consensus exists to fix the system, and the Goodlatte bill incorporates the key features of the needed reform. Senator Cornyn also noted that he has introduced his own bill back in May, the Patent Abuse Reduction Act (**S. 1013**). His bill seeks to bring transparency to patent litigation pleadings and fairness to the discovery process. In particular, Senator Cornyn's bill contains a fee-shifting provision that would require the losing party to pay the prevailing party's fees and costs.

Representative Lofgren stated that patent reform is an issue of great interest in her district, which includes Silicon Valley. Abusive patent litigation has an adverse impact on innovation and the impact on start-up companies is worse than on large companies, although she noted that every big company in Silicon Valley began as a start-up. Representative Lofgren also described Goodlatte's bill as "sound," although potentially controversial. Representative Lofgren cited the fee shifting provisions as an example, while also noting that the bill does not address sequestration. In her view, the U.S. Patent and Trademark Office ("PTO") should be able to use the fees they collect to better fund PTO activities.

The industry panel largely voiced support for patent litigation reform. Members of the industry panel recited their experiences as the targets of voluminous patent litigation by PAEs, the costs of defending against such litigation, the disruption of their businesses as a consequence of such litigation, and the fact that the money spent on patent litigation could better be spend on research and development, which could lead to new innovation. The industry panel members stated that most PAE plaintiffs are patent aggregation companies, not individuals or inventors. They stated their belief that provisions in the Goodlatte bill requiring the disclosure of the real party in interest would prevent some of these suits.

The industry panel members also stated that such litigation typically is accompanied by tremendous pressure to settle. Settlement demands frequently are for nuisance value early in the case, which can be substantial in a patent case. To drive up nuisance value, PAE plaintiffs frequently seek excessive documents and other discovery unrelated to the issues in the case. One panel member cited a statistic that less than one document in 10,000 produced documents is actually listed on the exhibit list in a typical patent litigation case. Other PAEs demand settlement at a multiple of the cost of the patent to the asserting entity, which bears no relationship to the merits of the case. Moreover, many of these patents are on old technology.

The fee shifting provision in the Goodlatte bill and other bills also received vocal support. But the panelists were quick to point out that any legislation containing a fee shifting provision would have to define clearly the term "prevailing party" and focus on proportionality. Another provision that received broad support was the requirement of heightened pleading standards. The panelists believed that notice pleading in patent cases is a historical relic that currently allows PAEs to go on fishing expeditions in discovery before committing to an infringement theory or even accusing a specific category of products.

Members of the industry panel also expressed their belief that the Courts are ill equipped to address patent litigation abuse, as recommended by Chief Judge Radar of the U.S. Court of Appeals for the Federal Circuit, because they are too slow to act and cannot create uniform standards to stop the abuse. The panelists pointed to different judicial interpretations of the fee shifting standard in 35 U.S.C. § 285 as an example. Absent uniform reform standards, patent trolls will exploit the differences and shop for the best possible forum.

In sum, the thought leadership event boosted Congressional, industry and public awareness of current efforts at patent reform in Congress and provided a significant opportunity for affected industry players to voice their concerns.

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