



## Patent Troll Legislation Takes Another Step Forward: But Will It – or Should It – Matter?

*By Jason M. Schwent*

On December 5, the U.S. House of Representatives approved House Judiciary Chairman Bob Goodlatte's Innovation Act. This follow-up to the America Invents Act is the first of several Congressional bills targeting so-called "patent trolls."

Though touted as a needed force of change, the bill, as approved by the House of Representatives, lacks any real change of note. Thus, while almost everyone (Democrats, Republicans, the White House, major businesses, etc.) agrees that patent assertion entity litigation is a problem, not all agree that legislation is the best way to fix the problem, or that this bill in particular will do the job.

So what does the Goodlatte Innovation Act entail, and, more fundamentally, is a legislative approach the best way to go about solving the problem?

### **The Goodlatte Innovation Act**

The Goodlatte bill is a shotgun approach aimed at a number of the tactics and weapons commonly used by patent assertion entities. These tactics are addressed by four categories of proposals in the Innovation Act: (1) changes to patent litigation; (2) improvements in patent ownership transparency; (3) protections for customers in lawsuits involving manufacturer technology; and (4) new rules needed from the Judicial Conference. Another section of the Act proposes new small business education programs and studies of the effect of patent trolls and their tactics. And finally, the Innovation Act makes several improvements and corrections to the Leahy-Smith America Invents Act. Conceptually, each of these actions are noble efforts. But, in delivery, the Goodlatte bill falls somewhat short. Specifically, the Goodlatte Innovation Act requires as follows:

- Patent Litigation Changes: The bill requires parties alleging patent infringement to meet higher pleadings standards by disclosing the patents and claims allegedly infringed and to specify how they are being infringed. The bill also requires fees and expenses to be paid to the prevailing party if the claims brought were not reasonably justified under the law. The bill also allows a prevailing defendant to join an interested party to cover the fee-shifting award if the plaintiff is a patent assertion entity incapable of paying the fees and expenses. And the bill

allows courts, where warranted, to limit discovery until after the claims have been construed.

- Patent Transparency: The bill requires patent plaintiffs, when filing their suit, to provide basic information on the patent (including the patent assignee, the parent entity of any assignee, any entity with a right to sublicense or enforce the patent, and any entity with a financial interest in the patent) and to update that information throughout the litigation.
- Customer Suits: The bill allows a manufacturer to intervene in a suit against its customers and stays the customer suit, so long as the customer agrees to be bound by any issue it has in common with the manufacturer decided by the court.
- Judicial Conference Changes: The bill requires the Judicial Conference to promulgate several new rules and procedures. These rules and procedures include: rules ensuring the exchange of initial disclosures and early case management conferences to identify case-dispositive issues, eliminating Form 18 (the current short-form patent complaint) in lieu of a new form disclosing more information, and rules ensuring that U.S. law, and not foreign law, will apply in bankruptcy cases involving patents. This last measure is aimed at preventing a bankruptcy trustee from terminating licenses to patents and other IP of the debtor.
  - Small Business Education/Patent Studies: The bill would provide for a small business education and outreach program to educate businesses on patent litigation and requires the PTO to develop a website to include patent transparency information. The bill would also require several studies, including studies on: market oversight regarding patent transparencies; patents owned by the U.S. government; patent quality and access to information; developing a patent small claims court; the prevalence of bad faith demand letters; and business method patent quality.
  - AIA Corrections: The bill eliminates 35 U.S.C. § 145 (allowing patent applicants to appeal board decisions to the Federal Circuit) — leaving this to the continuation process. The bill requires claim construction to be a part of post-grant and inter partes review proceedings. The bill would also codify the double-patenting doctrine and apply it to first-to-file patents. And the bill would clarify the limits on patent term adjustments.

The biggest issue with these changes, particularly those directed to patent litigation, is that they accomplish little. Currently, district court judges have the discretion to implement each and every one of the changes proposed by the Innovation Act. The Supreme Court's *Twombly/Iqbal* cases already heightened pleadings standards and required patent plaintiffs to disclose more information in their complaints. Judges currently have the ability to award fees and expenses in litigation where warranted — and certainly where claims are brought in bad faith. And judges have the freedom to set their case schedules to prevent discovery until after claim construction has occurred. Manufacturers can already file declaratory judgment actions on patents involving their customers and courts have already granted stays under such circumstances.

Even if this bill was meant to require these changes, instead of allowing judges to implement them at their discretion, it fails on this front. The heightened pleading standard would still need to be interpreted in light of *Twombly/Iqbal*. Fees are not automatically awarded to prevailing parties — that is a discretionary award. And, courts are not required to limit discovery until after claim construction; that decision too is discretionary.

### **Is Legislation the Right Tool?**

Part of the difficulty with the Goodlatte Innovation Act, or any legislative act, in addressing this situation, is the blunt instrument used to craft the relief. It can be very difficult to legislatively define who the perpetrators of the “patent troll” problem are. Even the names applied to these entities have reflected this difficulty over time.<sup>1</sup> Congress, in drafting rules to apply in every conceivable case, cannot adequately address the patent troll problem without first defining who is causing the problem (and thus who should be targeted with the solution). A despised patent assertion entity suing the marketplace for licensing fees is nearly indistinguishable from a small inventor who lacks the capital to commercialize her technology and is faced with ruthless

competitors who have stolen her technology for their own gain. Legislation drafted to tackle the former will invariably ensnare the latter. So, to account for this, legislative solutions are often softened to allow for discretionary exceptions — exceptions that patent assertion entities then exploit to continue their operations as before.

This is why many have suggested that it is not the legislature, but rather the judiciary, who needs to be tackling this problem. While the legislative approach results in a blunt axe-like weapon to target patent assertion entities and small inventors alike, the judiciary can use a scalpel-like approach to determine, on a case-by-case basis, whether special protocol and procedures are warranted. The judiciary already possesses many of the tools to tackle the problem (as noted above). From adhering to Supreme Court pleadings standards, to creative scheduling and discovery limits, to the award of sanctions where appropriate and even the granting of well taken motions to dismiss, the judiciary is more than equipped to address each of the issues supposedly addressed by the Goodlatte Innovation Act. Further, the unintended consequences of the Act are not yet clear. One area of concern, raised by a number of members of the House, was what effect this law would have on small inventors, for instance. Thus, while this may be one of the few areas in the law where the major players in Washington, D.C., agree, that does not mean action should be taken for the sake of taking action.

While any attention paid to the problem of parasitic patent troll litigation is beneficial, it remains unclear whether Congress can fashion a better solution to the problem than can be meted out by the judiciary on a case-by-case basis. Ultimately, time will tell.

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<sup>1</sup>After the pejorative “patent troll” fell out of favor, the term “non-practicing entity” was used to describe the problem entities. But universities and small inventors found this term too broad, as it encompassed their beneficial and encouraged activities. So the term evolved to “patent assertion entities” or even “patent monetization entities” to further define the problem to encompass only those entities seeking to monetize their IP through litigation, as opposed to those seeking to do so through “legitimate” business interests. But what distinguishes a legitimate patent enforcer from an illegitimate one? Herein lies the problem.

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## About The Author

Jason Schwent’s practice is centered on the litigation of intellectual property matters, licensing technology and advising clients on intellectual property protections. He has experience in litigating complex patent, trademark, and copyright matters in both administrative proceedings (like interferences, reexaminations, oppositions, and cancellations) as well as in state and federal courts. He also is experienced in drafting and reviewing open source and proprietary software licenses, counseling clients regarding media licensing and technology transfer, and advising clients about maximizing the protection for their intellectual property assets.

Jason also has substantial experience representing and advising established and emerging technology companies, multi-state and multi-national manufacturing companies, as well as large Fortune 500 corporations.



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