

June 23, 2017

Patent Legislation on the Hill: Senators Introduce the STRONGER Patents Act of 2017

Although the America Invents Act was enacted less than six years ago, the appetite for intellectual property legislation in D.C. has continued unabated over the last several years. In addition to the recent Defend Trade Secrets Act (passed by Congress in 2016), there is a laundry list of recent introduced (but unenacted) bills implicating IP rights: the PATENT Act, the STRONG Patents Act, the TROL Act, the Innovation Act, the Trade Protection Not Troll Protection Act, the SHIELD Act, and the Stop Online Piracy Act—to name just a few. Because IP issues do not tend to break along traditional party lines, many of these bills were co-sponsored by members of both parties, and some drew wide bipartisan support.

Now, the 115th Congress has jumped into the IP fray. This week, a group of senators placed a pro-patent owner stake in the ground with legislation likely intended to begin to frame the 115th Congress's discussion of intellectual property issues. Senator Chris Coons (D-Del.), along with Senators Tom Cotton (R-Ark.), Dick Durbin (D-Ill.), and Mazie Hirono (D-Haw.) introduced the [STRONGER Patents Act of 2017](#) in the Senate. As stated in a [press release by Senator Coons](#), this bill is intended to “protect and support inventors and innovators and ensure that our patent system protects this essential property right.” The bill is somewhat of a follow-on to last year's STRONG Patents Act, also written and introduced by Senator Coons, and contains many of that earlier bill's provisions. The STRONGER Patents Act also incorporates provisions from the TROL Act, introduced in 2015 by Representative Michael Burgess (R-Tex.).

In his press release, Senator Coons states that the Act is intended to make post-issuance proceedings before the Patent Trial and Appeal Board (PTAB) more fair and efficient, and “address recently emergent concerns about these proceedings and the continual weakening of patent rights by the courts.” The release also states the main goals of the Act to be restoring investor confidence in patents by achieving balance and efficiency at the USPTO, restoring incentives for licensing, helping universities and small business access the patent system, and ensuring that the USPTO can modernize its technology and improve its services through improved fee collection.

Much of the bill is devoted to *Inter Partes* Reviews (IPRs) and Post-Grant Reviews (PGRs)—proceedings which themselves are just a few years old, having been introduced in the America Invents Act (AIA). According to its sponsors, the STRONGER Patents Act aims to harmonize some of the differences between these proceedings and district court litigation, and would require proceedings at the PTAB to follow the same claim construction and burden of proof standards applied in district court. The bill also aims to cut down on the number of PTAB proceedings, both by limiting post-grant PTAB review of patent claims to a single instance per claim by and limiting petitioners to a single challenge per patent.

Certain provisions of the Act would also make it more difficult to challenge a patent in front of the PTAB. A stricter standing requirement (akin to so-called “declaratory judgment” standing in district court), in addition to an expansive new “real-party-in-interest” provision, would limit those who could seek to bring a PTAB patent challenge. Patent owners would also gain additional protections from PTAB proceedings, as interlocutory appeal will now be available for institution decisions, and cases in district court and the International Trade Commission (ITC) would receive priority over any parallel PTAB proceedings. With respect to IPRs and PGRs, the bill lastly provides an “expedited” examination procedure and clarifies that the panel of judges deciding whether to institute a petition must be different from those who issue a Final Written Decision in that IPR or PGR. Finally, the bill also includes a provision that would expand the scope of estoppel applicable to later district court or ITC proceedings.

Some of the other major changes brought by the bill relate to infringement, with additional provisions relating to injunctive relief, higher education, and small businesses. Perhaps most notably, the STRONGER Patents Act would re-establish the presumption of injunctive relief upon a finding that a patent is valid and infringed—overturning the Supreme Court’s landmark 2006 *eBay v. MercExchange* decision. The bill would relax the standards for proving inducement and other indirect infringement, and provides for infringement liability related to the outsourcing of manufacturing.

Lastly, the sponsors of the bill also explain that the STRONGER Patents Act aims to crack down on abusive, patent-related, demand letters by including provisions of the 2015 TROL Act, a former House bill. These provisions would empower the Federal Trade Commission and state attorneys general to bring suit against entities who engage in misleading and deceptive practices through the sending of patent infringement demand letters.

All told, the STRONGER Patents Act would—if enacted—substantially change the patent laws. For example, its provisions would modify or overturn the holdings of at least five IP-related Supreme Court cases from the last 11 years:

- *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006) – addressing whether there is a presumption of injunctive relief for patent infringement
- *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007) – addressing extraterritorial infringement under § 271(f)
- *Global-Tech Appliances v. SEB SA*, 563 U.S. 754 (2011) – addressing the knowledge and specific intent required for active inducement of infringement
- *Akamai Techs. v. Limelight Networks*, 134 S. Ct. 2111 (2014) – addressing indirect infringement where no single entity performs all of the steps of the asserted patent claim
- *Cuozzo Speed Techs v. Lee*, 136 S. Ct. 2131 (2016) – addressing appellate review of PTAB institution decisions and the appropriate claim construction standard to apply during post-grant reviews

Whether the STRONGER Patent Act can get traction remains to be seen, but it illustrates a continued effort by some members of Congress to modify the U.S. patent system. Stay tuned to [Capital Insights](#) for more updates as IP legislative proposals unfold.