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Pending Patent Legislation: What to Expect if It Passes

In 2025, Congress is occupied with serious legislative issues, among which are some pending patent issues. Time will tell if these pending pieces of patent legislation, some of which have been pending for a year or more, will see the light of day in the current Congressional Session. However, it is worth at least taking a look at these proposed pieces of legislation to determine and understand how the patent laws may be affected by their potential passage.

There are at least four pieces of proposed patent legislation that are pending:

The ETHICS Act (Eliminating Thickets to Increase Competition Act)[1]

This legislation was introduced with bipartisan support from Senators Peter Welch (D-VT), Josh Hawley (R-MO), and Amy Klobuchar (D-MN) and basically limits the number of drug patents that can be asserted by the patent holder of the drug patents. This Act would apply to Abbreviated New Drug Application (ANDA) or 505(b)(2) or biosimilar drug applications (BLA) litigation. The Act states that a person who brings a patent infringement action under 35 U.S.C. section 271 (e), described in subparagraph (B) (generic or biosimilar), can only assert one patent per PATENT GROUP. A PATENT GROUP is defined as meaning two or more commonly owned patents or patent applications subject to a terminal disclaimer.

If passed, this Act would affect the strategies employed by patent litigators as to which patent to assert in such litigations; additionally, patent prosecutors will need to more carefully consider whether terminal disclaimers should be filed in responses to overcoming Obviousness Type Double Patenting (OTDP) rejections. It may become more beneficial to argue away OTDP rejections by asserting the non-obviousness of the invention, thereby avoiding creating a PATENT GROUP.

This legislation has not moved out of the Judiciary Committee, as of the time of this post.

The PERA Act (The Patent Eligibility Restoration Act)[\[2\]](#)

The purpose of this Act is to eliminate some of the frustration expressed by not only patent practitioners but by the very federal circuit justices, themselves, on how to deal with the issue of patentable subject matter under Section 101. Specifically, due to the holdings in two famous patent cases, *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012) and *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014), certain exceptions to patentability restricted what was eligible as “patentable subject matter.” In order to alleviate the confusion that has surrounded the issue of what is patentable, this legislation creates a list of excluded subject matter. Such subject matter as mathematical formulas, fundamental human activity, natural processes and products made independent of human activity, and mental processes would be specified as not patentable, thereby predicting the eligibility of patent protection with more certainty.

This legislation passed through the Senate Judiciary Committee on a bipartisan basis but is still awaiting a full Senate vote. One of the sponsors of the bill, Thom Tillis (R-NC), predicted it will be “marked up” and then made available for a vote.

The PREVAIL Act (Promoting and Respecting Economically Vital American Innovation Leadership)[\[3\]](#)

This legislation seeks to make changes to the scope of Post Grant Review and Inter Parties Review (IPR) at the Patent Trial and Appeal Board (PTAB). There are three reforms that this Act seeks to implement. The first is to ensure that parties trying to file and invoke an IPR be with standing to bring a declaratory judgment action in district court. In particular, those parties would be ones that have been sued or threatened to be sued with patent infringement claims. The second is to increase the burden of proof from the “preponderance of the evidence” to “clear and convincing evidence” for actions, such as IPRs, at the PTAB. The third and final is to establish an additional estoppel by not allowing parties to raise invalidity defenses in district court actions, if those invalidity

defenses could have been raised in an IPR action. In addition, in order to balance the objections of the generic pharmaceutical industry and patent advocacy groups, the PREVAIL Act was amended to allow Non-Practicing Entities (NPEs) to make appearances at IPR proceedings, under certain circumstances (where an interested party is not involved, for example).

This legislation has been pending for years, without a full vote.

The RESTORE Act (The Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive Patent Rights Act) (of 2024)[4]

This bill caused a great deal of controversy and debate in past legislative sessions. In short, it states that courts should be able to grant permanent injunctions when a patent is infringed. This has always been the case in patent infringement cases, but due to some opposition, in particular from NPEs, some pressure has arisen to limit the use of permanent injunctions in patent litigation.

The proponents of the legislation argue that permanent injunctions incentivize companies, in particular large companies, to undergo licensing negotiations related to settling patent litigation or threatened patent litigation for infringement. On the other hand, those who oppose this legislation argue that NPEs are most severely affected by permanent injunctions.

There has been no noticeable movement for this legislation in the current Congress.

Conclusion

Although none of these pieces of legislation has been passed, and some not even brought up for full Senate voting, it remains diligent to monitor them since each one would have an impact on U.S. patent law. We will update this post with any additional information.

[\[1\]](#) (S.2276) (H.R. 3269)

[\[2\]](#) (S.2140) (H.R. 9474)

[\[3\]](#) (S.2220)

[\[4\]](#) (S.4840)

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