

THE PATENT REFORM ACT

SECURING AMERICAN INNOVATION – CREATING AMERICAN JOBS

Breaking Down The Manager's Amendment To The Patent Reform Act – Calculating Damages

The Patent Reform Act (S. 515), as amended by the Manager's Amendment, will address concerns that damage awards sought in patent infringement cases are often excessive and disconnected from the actual harm that compensatory damages are intended to measure. Damages are intended to compensate a patent holder for the infringement of patent rights, but the current damages statute is vague, and provides little guidance to judges and juries determining the proper damage award.

More Certainty In Damages Calculations And Enhanced Damages

The Patent Reform Act, as amended by the Manager's Amendment, will include a **rigorous gate keeping role for the court**, pursuant to which judges will assist the legal basis for the specific damages theories and jury instructions sought by the parties.

The **gate keeping provisions will ensure consistency, uniformity, and fairness in the way that courts administer patent damages law**, without encroaching on the parties' Seventh Amendment rights to have patent damages determined by the jury.

The Patent Reform Act will also permit a party to request (and require a court to grant, absent good cause) that the trial be sequenced such that the trier of fact decides questions of validity and infringement prior to damages.

Improving The Law Of Willfulness And Enhanced Damages

The Patent Reform Act will require **that a party may only be found to have willfully infringed a patent if the plaintiff demonstrates by clear and convincing evidence that the infringer acted with objective recklessness** and the objectively-defined risk was either known or so obvious that it should have been known by the infringer.

The Patent Reform Act, as amended by the Manager's Amendment, will also **require that allegations of willfulness be pled with particularity**. The bill will also limit the use of vague pre-suit notifications and will prohibit mere knowledge of a patent from being the basis of a willfulness finding. The Patent reform Act will not allow the failure to obtain advice of counsel to be used to show willfulness or inducement.

Support For Compromise On Calculation Of Damages

"Among other important changes, these provisions maintain the compromise on the determination of reasonable royalty damages for patent infringement...The Administration is eager to see patent reform enacted this congressional session." -- *Commerce Secretary Gary Locke, April 20, 2010*

"Importantly, the recent compromise also preserves the changes to the damages provisions of S. 515 agreed to during the Senate Judiciary Committee markup...The Judiciary Committee [] adopted the procedural 'gatekeeper' approach that the Innovation Alliance supports, which remains in the newest version of the legislation." – *The Innovation Alliance, March 5, 2010*

"This bipartisan compromise contains numerous improvements in U.S. patent law, including [] clarification of the gate-keeping responsibilities of district courts in determining damages...Its enactment would substantially improve the patent system of the United States, and we support that enactment." -- *American Bar Association, Section of Intellectual Property Law, March 26, 2010*

Background on the Patent Reform Act

The Patent Reform Act was introduced in the Senate on [March 3, 2009](#), by Senator Patrick Leahy (D-Vt.) and Senator Orrin Hatch (R-Utah). The Senate Judiciary Committee held a hearing about needed reforms to the nation's patent system on [March 10](#). The Committee considered amendments to the legislation during business meetings on [March 26](#) and [March 31](#), and on [April 2](#), a bipartisan majority of the panel voted to advance the legislation to the full Senate for consideration. A Committee Report to accompany the legislation was filed on [May 12](#).

On [March 4, 2010](#), Leahy, Hatch and others unveiled compromise legislation addressing outstanding concerns involving first-window post-grant review, inter partes review, willfulness, interlocutory appeals, PTO funding, and supplemental examinations.