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Patent Reform: A View from the Trenches

Plenary Session: The Politics of Intellectual Property
Friday, June 16, 2006
AALS Mid-Year Meeting

I. Why Now?

A. Usual theories

1. National Academics Report
2. Federal Trade Commission Report
3. Innovation and Its Discontents

B. More likely accounts

1. End result of rise of software and business method patenting
2. Section 101 reform pushed into the entirety of the Patent Act
3. Tort reform in the state of Texas

II. Comparison with Recent Patent Reform Efforts

A. American Inventors Protection Act of 1999

1. Partial pre-grant publication
2. Patent term restoration to compensate for USPTO delays
3. Inter partes reexamination

B. This round of patent reform is far more contentious

1. AIPA showcased struggle between independent inventors and industry
2. Patent reform in 2006 pits industry against industry

III. Industry Dynamics

A. Pharmaceutical Industry

1. Traditionally Republican
2. Supports strong patent rights
3. Backed by AIPLA due to professional interests, personalities

B. Software Industry

1. Traditionally Democratic
 - a. Although political shift is on
 - b. Witness Microsoft, Gates donations to Republicans
2. Supports weaker patent rights
3. Response to political situation
 - a. Recruit financial services industry to its view
 - b. Traditional large donor to Republican party

IV. Other Reasons for Increased Contentiousness

A. Rise of K Street

1. 45,000 registered lobbyists

B. Limited Staff Knowledge

1. Senate B 1 staffer
2. House B 3.5 staffer
- C. Lack of guiding principles for Members
- D. Hill environment is more mean-spirited

V. Dramatis Personae

- A. USPTO
- B. AIPLA
- C. Universities
- D. Legal Academics
- E. Other Voices via Hearings
- F. Chairman Smith

VI. Decreased Influence of USPTO

- A. Substance of Legislation
 1. Primarily a litigation bill
 2. Yet the USPTO has been remarkably quiet, even on prosecution topics
- B. Image
 1. Low Patent Quality = Laughingstock Status
 2. Remarks of House Republicans

“The PTO is unable to meet the demands of an increasing number of patent applications. With the increased funding the office has received in the past, there is no measurable increase in the performance. The PTO has been unsuccessful”
 3. Remarks of Senate Democrats

“The PTO has failed to provide a thorough business plan that demonstrates how resources will be used and what results will obtain. Second, PTO management has not been sufficiently innovative”
- C. Politics
 1. Department of Commerce = Bush Administration
 2. Fight between interest groups during election year
 3. Follow the Money

VII. USPTO Environment

- A. Combination of Despair and Defiance
- B. Remarks of Undersecretary Dudas
 1. “Perception Is Not Reality”
 2. “Quality Is Not Decreasing”
 3. Myth that “Evil Trolls Are Suddenly Taking Over Our Patent System”
 4. “Business Method Patents Are Not Proliferating”
- C. Remarks of Commissioner Doll

“I truly believe that that if we don’t make dramatic changes to the patent examination process, the system will almost become useless by the year 2010 or 2011 When you you’ve got 1.3 million cases in the backlog, and it’s taking

[four to six] years to take a first office action, you=ve got to ask the question: Is the patent system still actually working, or are we just stamping numbers on the applications as they come through?@

- D. Rulemaking Proposals
 - 1. Limit continuation practice
 - 2. Introduce representative claiming practice

VIII. Role of the AIPLA

- A. Experienced lobbyists
- B. Very influential on the House side
- C. Probably less so on the Senate side
- D. AFront group@ for PhRMA

IX. Role of Universities

- A. Wisconsin Alumni Research Foundation
- B. Impact of Bayh-Dole Act
- C. Traditional Interests
 - 1. Ensure that pre-filing date publications lack patent-defeating effect
 - 2. Typically sides with independent inventors
- D. Primary Influence
 - 1. H.R. 2795 starts with first-to-file system with one-year grace period
 - 2. Coalition Print would restore Rule 131 practice
 - 3. Sui generis, ungainly hybrid

X. Role of Legal Academics

- A. De minimus
- B. Role of National Academies, FTC Reports, Innovation and Its Discontents
- C. AIPLA drafted H.R. 2795
- D. Resulting legislation most closely resembles decades-old Presidential Commission reports
- E. Where did new issues come from?
 - 1. Effort to balance political spoils by making the pie bigger
 - 2. E.g., inclusion of venue provisions in order to appease the Business Software Alliance

XI. Role of Hearings

- A. At some level, pointless
- B. Impact
 - 1. Staffer gets uninterrupted time with Member for preparation
 - 2. Good press for the Member
 - 3. Member feels involved
 - 4. Forces stakeholders to formalize positions

XII. Role of Head of Committee

- A. Representative Lamar Smith
- B. Constituents cannot escape from Beaumont
- C. Seeks consensus approach

XIII. Predictions

- A. Not during an election year
- B. Consensus approach is not going to work
- C. Look to the 110th Congress