AIPLA Committee – IP Practice in the Far East Seminar in Hong Kong Sponsored by IPD May 12, 2006

Understanding United States Patent Reform Proposals

Speaker: Ron Harris
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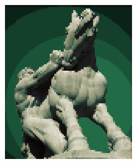
CALL TO ACTION

FEDERAL TRADE COMMISSION

To Promote Innovation:
The Proper Balance of Competition and Patent Law and Policy

A Report by the Federal Trade Commission
October 2003



AIPLA
American Intellectual Property Law Association
2001 Jefferson Davis Highway • Suite 203 • Arlington, Virginia 22202

AIPLA Response

to the

September 2004

Resolution 102-2: Substantive Provisions for Implementation of a First-Inventor-to-File Standard (Omnibus Resolution)

RESOLVED, that the Section supports, in principle, in the context of ratification of an international harmonization treaty involving at least Japan or major European countries that mandates U.S. adoption of a first-inventor-to-file system, eliminating from U.S. patent law:

(1) abandonment as set forth in 35 U.S.C. §102(c) as a basis for a loss of right to patent;

(2) premature foreign patenting as set forth in 35 U.S.C. §102(d) as an element of prior art or a basis for a loss of right to patent;

(3) an inventor's forfeiture of his or her right to patent an invention once placed "in public use or on sale" as set forth in 35 U.S.C. §102(b) by providing that no such loss of right to patent an invention can arise unless the invention had become reasonably and effectively accessible to persons of ordinary skill in the art more than one year before the inventor sought a patent for the invention;

(4) prior art as set forth in 35 U.S.C. §102(f), under which non-public knowledge of the inventor, not otherwise qualifying as prior art, can render an invention made by such inventor obvious, by:

(A) repealing section 102(f) and

(B) codifying elsewhere in Title 35 that the right to seek and obtain a patent is solely the right of the individual or individuals who made the invention for which a patent is sought (or, where applicable, the assignee of such inventor);

A PATENT SYSTEM
FOR THE 21ST CENTURY

NATIONAL RESEARCH COUNCIL

US Patent Reform has its Origins in the FTC & NAS Reports

- U.S. Federal Trade Commission Report

  18-month publication for all applications, post-grant review, PTO financing, prior user rights, and require actual notice for willful infringement.

- National Academy of Sciences Report

  Open-ended, flexible system; post-grant review; "harmonizing" reforms ("first-inventor-to-file"); and, eliminating "subjective elements" from patent litigation (*i.e.*, in willful infringement, inequitable conduct, and best mode analyses).

Major Reforms Generally Endorsed by:

American Intellectual Property Law Association$^{\Delta}$

ABA Section of Intellectual Property Law$^{\Delta}$

Intellectual Property Owners$^{\Delta}$

Business Software Alliance ("BSA")*$^{\Delta}$

Major Remaining Point of Disagreement:

Apportionment of Damages

Δ - trying to streamline application process, enhance patent quality, and reduce litigation cost and risk of treble damages and attorneys' fees

* - trying to reduce damages royalty base and availability of injunctive relief

Patent Reform Act of 2005

House Committee Print on April 14, 2005.

House bill H.R. 2795 introduced June 8, 2005…

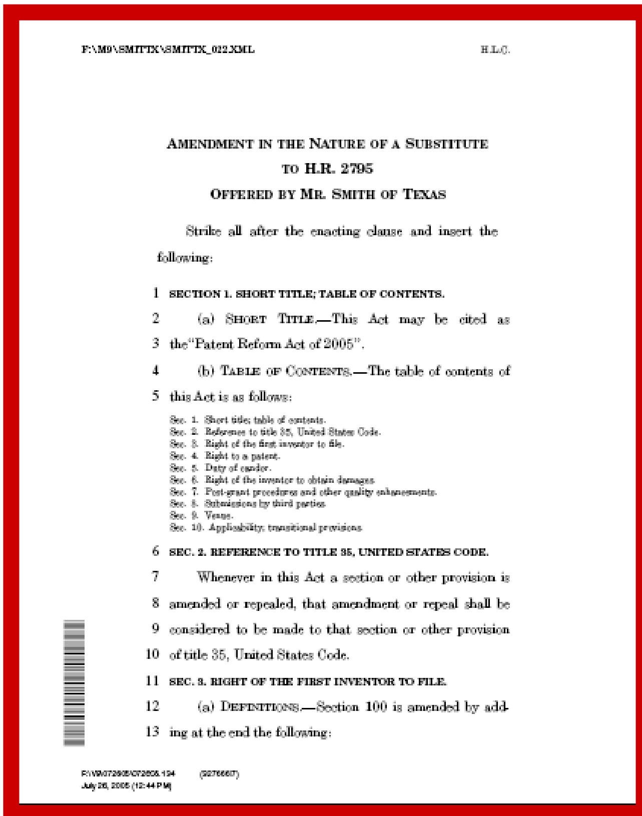
…followed by Amendment in the Nature of a Substitute to H.R. 2795, published July 26, 2005.

Coalition Print distributed September 1, 2005.

H.R. 5096, introduced April 6, 2006.

A Senate bill is still to come…

Two Relevant Texts:



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AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 2795
OFFERED BY MR. SMITH OF TEXAS

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.
2 (a) SHORT TITLE.—This Act may be cited as
3 the "Patent Reform Act of 2005".
4 (b) TABLE OF CONTENTS.—The table of contents of
5 this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Reference to title 35, United States Code.
Sec. 3. Right of the first inventor to file.
Sec. 4. Right to a patent.
Sec. 5. Duty of candor.
Sec. 6. Right of the inventor to obtain damages.
Sec. 7. Post-grant procedures and other quality enhancements.
Sec. 8. Submissions by third parties.
Sec. 9. Venue.
Sec. 10. Applicability; transitional provisions.

6 SEC. 2. REFERENCE TO TITLE 35, UNITED STATES CODE.
7 Whenever in this Act a section or other provision is
8 amended or repealed, that amendment or repeal shall be
9 considered to be made to that section or other provision
10 of title 35, United States Code.
11 SEC. 3. RIGHT OF THE FIRST INVENTOR TO FILE.
12 (a) DEFINITIONS.—Section 100 is amended by add-
13 ing at the end the following:

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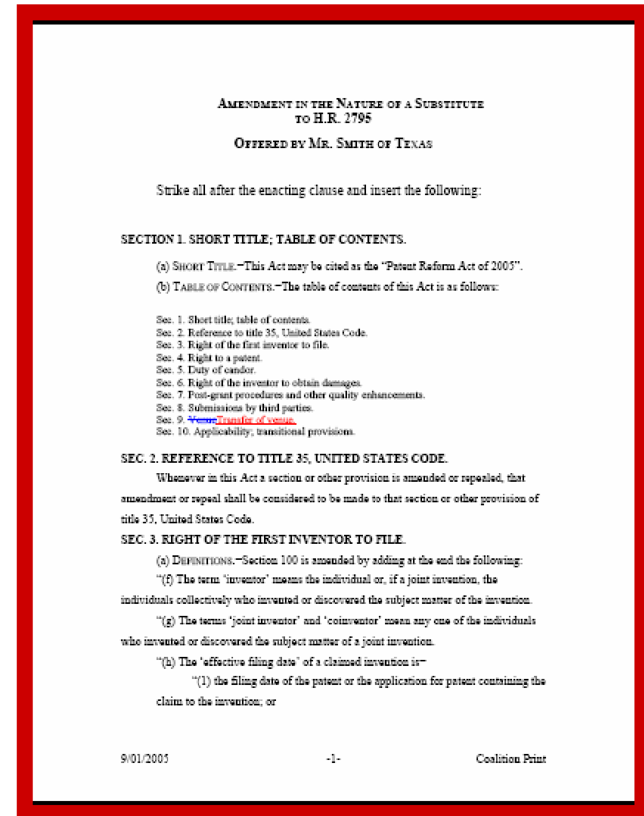
July 26, 2005 (12:44 PM)

Amendment in the Nature of a Substitute to H.R. 2795 ("Substitute")



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(a) DEFINITIONS.—Section 100 is amended by adding at the end the following:

"(f) The term 'inventor' means the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention.

"(g) The terms 'joint inventor' and 'coinventor' mean any one of the individuals who invented or discovered the subject matter of a joint invention.

"(h) The 'effective filing date' of a claimed invention is—

"(1) the filing date of the patent or the application for patent containing the claim to the invention; or

9/01/2005 -1- Coalition Print

Coalition Print (marked-up version of Substitute supported by 37 companies, AIPLA and IPO)

Major Changes in Patent Reform

Streamline Application Process and Improve Patent Quality by Implementing:

1. First-Inventor-to-File
2. Filing by Assignee
3. Simplification of Prior Art
4. Publication of all Applications
5. 3rd Party Pre-Examination Submission of Prior Art
6. Post Grant Opposition
7. Limit on Reexamination Estoppel

Reduce Litigation Risk and Cost by Implementing:

1. Provision for Transfer of Venue
2. Universal Prior User Rights
3. Repeal of 35 U.S.C. § 271(f)
4. Definition of Royalty Base for Combination Inventions
5. Limits on Willful Infringement
6. Limits on Inequitable Conduct Defense
7. Elimination of Best Mode

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9/01/2005 -1- Coalition Print

Streamline Application Process and Improve Patent Quality

First-Inventor-to-File Principle for Awarding Patents: Not *Just* for Harmonization

- Independent inventors oppose but the tide is against them.
- Current law is unfair to the first to invent.
  - Now the first to invent (even if also first to file) can be denied a patent because of the costs, documentation requirements, complexities, and technicalities of patent interferences.
- Current law is unfair to "small entities."
  - Recent studies report small entities would *gain* patents under a first-inventor-to-file rule, while shedding the burdens of interferences.
- Current law is unfair to the public.
  - When "priority of invention" is contested, the public must wait for years to determine who will own the patent and who might be excluded under it.

First-Inventor-to-File and Filing by Assignee

- The first inventor to file would be entitled to the patent. The assignee can file but the inventor(s) must be named.
- One-year grace period for "disclosures" by inventor or others who obtained from inventor - Under Coalition Print provision, subsequent pre-filing disclosure by such "others" does not bar a patent.
- No collision between one's own disclosure and filing
- Retains common assignment and joint research agreement ("JRA") exceptions to obviousness, and *adds* these exceptions for novelty, too

Simplification of Prior Art

- Prior art would include patents, publications or information otherwise publicly known, except as disclosed through the inventor for up to one year.
- Information is "publicly known" if it was (1) reasonably and effectively accessible through its use, sale or disclosure by other means or (2) is embodied, or otherwise inherent, in subject matter that has become reasonably and effectively accessible. Per sec. 10(g)(3), use, sale, or offer for sale does not invalidate if not "reasonably and effectively accessible": litigation should be less expensive.

Provision to Watch for Non-US Priority Document Filers

- "effective filing date" under proposed 35 U.S.C. § 102(a)(1)(A) includes a foreign priority date no more than one year before a corresponding PCT designation (§ 365) or direct Paris Convention filing (§ 119(a)-(d)).
- Sec. 10(h) states that "effective filing date" would *no longer* include such filing dates if the USPTO Official Gazette ever declares that "both" the EPC and Japanese laws give inventors a one-year novelty grace period.

Publication of All Applications

- Recommended by both FTC and NAS.
- Currently, applicants can request that applications not being filed abroad not be published (≈ 10% of all applications).
- With pendency in some technical areas exceeding five years, competitors can be ambushed by late granted patents; thus, will improve certainty.
- Publication will also improve patent validity.

3rd Party Pre-Examination Prior Art Submission

- Anyone can submit patents or publications of relevance during examination.
- Must concisely describe the relevance of each submitted document
- Submission cannot interfere with ongoing examination (in Coalition Print must be filed before first Office action on the merits).
- Existing ban on pre-grant opposition remains, but should improve patent quality.

Post-Grant Oppositions
(Recommended by both FTC and NAS)

- Nine month window from patent grant
- Any issue of validity a court could consider
- Parties can submit affidavits of prior use.
- Affiants and declarants can be cross-examined.
- Can amend claims but intervening rights exist
- Burden of proof is "preponderance of the evidence," not "clear and convincing evidence."
- Decision in 12 months (exceptionally, 18 months).
- Appeal to Court of Appeals for the Federal Circuit
- Estoppel as to issues actually raised

Limits on Reexamination Estoppel

- Current 35 U.S.C. § 315(c) prevents accused infringer from raising invalidity arguments based on art formerly raised, or that could have been raised, during an unsuccessful reexamination.
- New language limits such estoppel to art that was *actually* raised during the reexamination.
- Encourages removal of invalid patents without litigation to reduce litigation expenses

Reduce Litigation Risk and Cost

Venue
(Substitute to H.R. 2795)

- Modifies existing special patent venue statute
- Allows filing suit only in judicial district where:
  1) defendant resides (or is incorporated),
  2) defendant has committed acts of infringement and has a regular and established place of business, or
  3) if plaintiff is a non-profit educational institution, anywhere defendant is subject to personal jurisdiction
- Would often restrict patentees from bringing actions where they are located and where significant evidence relating to the case may be located
- Would often force patentees to travel to a distant judicial district to bring suit

Transfer of Venue
(Coalition Print)

- No change to patent venue statute
- But it would require a court to grant a motion to transfer if:
  1) the action was not brought in the district where—
     a. patentee resides or has its principal place of business,
     b. defendant is incorporated or has its principal place of business;
  2) neither party has substantial evidence or witnesses in the district where the action was brought; *and*
  3) the action has not been previously transferred.

Universal Prior User Rights

- Recommended by FTC to protect parties from claims first introduced in a continuing application
- Now, prior user rights exist only for those commercially using a business method at least one year before a patent application is filed by another.
- Would enlarge prior user rights to apply to all inventions, both products and processes, if at least substantial preparation for commercial use was made by filing date (to promote US industry)
- Opposed by some in university community

Repeal of 35 U.S.C. § 271(f)
(Coalition Print)

- Infringement due to foreign sales when component of a patented invention is supplied from the U.S. with knowledge it will be combined
- *Eolas v. Microsoft*, 399 F.3d 1325 (Fed. Cir. 2005) (software duplicated overseas infringes if master copy made in US) – limit to "tangible" items?
- An outright repeal (Coalition Print) will hopefully achieve a compromise all stakeholders can join.
- Repeal opposed by ABA/IPL and some companies

Royalty Base for Compensatory Damages (Generally)

- Goal is to foster consistency by the courts in determining damages for patent infringement
- Damages should reflect the value contributed by the patented invention to an infringing product, no more and no less.
- Related to the "entire market value rule" (expanded base): **Damages can be based on the entire value of an infringing product or process if the patented feature is the "basis for customer demand."** ***Rite-Hite Corp. v. Kelley Co., Inc.***
- Codifies the "apportionment" doctrine (limited base): **Courts should distinguish "non-patented elements, manufacturing process, or business risks" from value arising from the patented invention.** ***Georgia-Pacific Corp. v. United States Plywood Corp.***

Limits on Royalty Base (cont.)
(Substitute to H.R. 2795)

"In determining a reasonable royalty (a) in the case of a combination, the court shall consider (b) if relevant and among other factors, the portion of the realizable value that should be credited to (c) the inventive contribution as distinguished from other features of the combination, the manufacturing process, business risks, or significant features or improvements added by the infringer."

Limits on Royalty Base (cont.)
(Substitute to H.R. 2795's Implications)

- Favored by IT/software industries
- Example given for support: Alexander Graham Bell's invention of the telephone —
  - the speaker was old,
  - the microphone was old,
  - the wiring used to connect the signals was old,

    therefore, Bell's "inventive contribution" should not include the value of any of these components in consideration of any damages.
- Then how much will damages be???

Codify Common Law Royalty Base (cont.)
(Coalition Print)

"In determining a reasonable royalty [for any invention] consideration shall be given to, (a) among other relevant factors, the portion of the realizable profit or value that should be credited to the (b) contributions arising from the claimed invention as distinguished from contributions arising from features, manufacturing processes or improvements added by the infringer and from the business risks the infringer undertook in commercialization."

Codify Common Law Royalty Base (cont.)

(Coalition Print's Implications)

- The patent owner must establish the economic contribution to a product or process arising from the patented invention.
- The infringer can distinguish any economic contributions it has added to the product or process.
- Damages must be limited to contributions arising from the patented invention.

Limits on Willful Infringement

- FTC found that some companies forbad the reading of their competitors' patents for fear of treble damage liability, and recommended that deliberate copying or actual notice be a predicate for liability for willful infringement.
- NAS found willful infringement to be one of the *subjective* elements that increase cost and decrease predictability of patent infringement litigation and recommended its elimination or significant modification.
- Both bills adopt the FTC recommendation and permit finding of willful infringement only if an infringer intentionally copies a patented invention, or continues to infringe after receiving a specific notice, without justification – thus increased damages may not be awarded based merely on the knowledge of a patent or its contents.

Inequitable Conduct Today

- Material misstatement or omission with *subjective* intent to defraud most commonly by failure to cite important prior art. (Other examples: concealing early offers for sale or public uses).
- Current (1) "Reasonable examiner" and (2) "prima facie"/"inconsistent with" standards can broadly work to make the entire patent ***unenforceable*** – ***thus, always pled***.

Narrow Inequitable Conduct by Adopting “But-For” Test

- Subjective intent remains
- But if all claims in a patent are held valid—“inequitable conduct” defense is barred.
- If court has invalidated one or more patent claims in an infringement action—

  1. accused infringer may move to amend the pleadings
  2. to establish that “but for” *patent owner’s* misconduct (presumed in Coalition Print),
  3. invalidated claims would not have issued in the patent

Elimination of Best Mode

- 35 U.S.C. § 112: must disclose best mode *subjectively* known to the inventor at time of filing
- Requirement (1) is unique to the United States; (2) often presents a difficult issue at the time of application; and (3) increases the cost of discovery.
- Best mode is eliminated (in accord with FTC & NAS - seen as least costly of the three subjective issues).

Measures Removed from H.R. 2795 but not Dead

- Limitations on injunctions - Committee Print removed presumption of irreparable harm and factors whether patentee uses the invention. H.R. 2795 stays appealed injunctions upon showing of (1) no irreparable harm and (2) balance of the hardships does not favor patentee [like preliminary injunction] (*See* H.R. 5096 and pending "eBay" opinion).
- Limits on number of continuations (now subject of proposed USPTO administrative rule)
- Second window to initiate a post-grant opposition when threatened with suit (in H.R. 5096)

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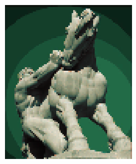

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Conclusions

Consensus exists that major changes are needed in United States patent law.

Patent law serves many constituencies who must agree on a fair and balanced package.

Coalition Print is close to achieving a consensus, except for a few critical issues.

For More Information:

United States House of Representatives

House Committee Print - April 14, 2005

see **www.harrispatents.com/housecommitteeprint.pdf**

House Hearings on Committee Print - April 20 & 28, 2005

see **http://judiciary.house.gov/Oversight.aspx?ID=143**

see **http://judiciary.house.gov/Oversight.aspx?ID=148**

H.R. 2795 (original House bill) - June 8, 2005

see **www.harrispatents.com/HR2795.pdf**

House Hearings on H.R. 2795 - June 9, 2005

see **http://judiciary.house.gov/Hearings.aspx?ID=112**

Amendment in the Nature of a Substitute to H.R. 2795 ("Substitute to H.R. 2795") (a modified version of H.R. 2795) - July 26, 2005

see **www.harrispatents.com/AINSHR2795.pdf**

House Hearings on Amendment in the Nature of a Substitute to H.R. 2795 - Sept. 15, 2005

see **http://judiciary.house.gov/hearings.aspx?ID=122**

Coalition Mark-Up of the Substitute (Coalition Print) (coalition comprises AIPLA, IPO and 37 major corporations) - Sept. 1, 2005,

see **www.harrispatents.com/coalitionmarkup090105.pdf**

H.R. 5069 (*inter alia*, pre-grant submissions, "second window" of opposition, big limits on injunctions, willfulness and venue) - April 6, 2006

see **http://www.harrispatents.com/HR5069.pdf**

H.R. ____ (by Rep. Issa) (judicial pilot program to designate certain federal judges as patent specialists: compare district court (~53%) versus ITC (~23%) claim construction reversal rates on appeal) - Feb. 15, 2006

see **http://www.harrispatents.com/HRIssa.pdf**

House Hearings on Patent Quality Enhancement in the Information-Based Economy – April 5, 2006

see **http://judiciary.house.gov/Oversight.aspx?ID=231**

More Information (cont.)

<u>United States Senate</u>

Senate Hearings on "The Patent System Today and Tomorrow" and "Perspectives on Patents" - April 25, 2005

see **http://judiciary.senate.gov/hearing.cfm?id=1475**

Senate Hearings on "Patent Law Reform: Injunctions and Damages" - June 14, 2005

see **http://judiciary.senate.gov/hearing.cfm?id=1535**

Senate Hearings on "Perspectives on Patents: Harmonization and Other Matters" - July 26, 2005

see **http://judiciary.senate.gov/hearing.cfm?id=1582**

Senate patent reform bill – pending (will post when available)…

see **www.harrispatents.com/senatebill.pdf**

<u>Untied States Supreme Court and Court of Appeals for the Federal Circuit</u>

eBay v. MercExchange, brief for petitioner

see **www.harrispatents.com/eBayUSSCtpetitionerbreif.pdf**

eBay v. MercExchange, brief for respondent

see **www.harrispatents.com/eBayUSSCtrespondentbreif.pdf**

eBay v. MercExchange, transcript of oral argument, March 29, 2006

see **https://www.aipla.org/Content/ContentGroups/About_AIPLA1/AIPLA_Reports/20065/eBayTranscript.pdf**

eBay v. MercExchange, pending (will post when available ~June, 2006)

see **www.harrispatents.com/eBayopinion.pdf**

Eolas v. Microsoft, 399 F.3d 1325 (Fed. Cir. 2005)

see **www.harrispatents.com/EolasvMicrosoft.pdf**

Kinik v. ITC, 362 F.3d 1359 (Fed. Cir. 2004)

see **www.harrispatents.com/kinikvitc.pdf**

More Information (cont.)

United States Patent and Trademark Office

Proposed rule limiting number of continuation applications

see **http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/focuspp.html#continuation**

Proposed rule limiting number of examined claims to 10

see **http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/focuspp.html#claims**

Thank you.

Questions or Comments:

Ron C. Harris, Jr.

The Harris Firm - IP Counseling, Prosecution & Litigation

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