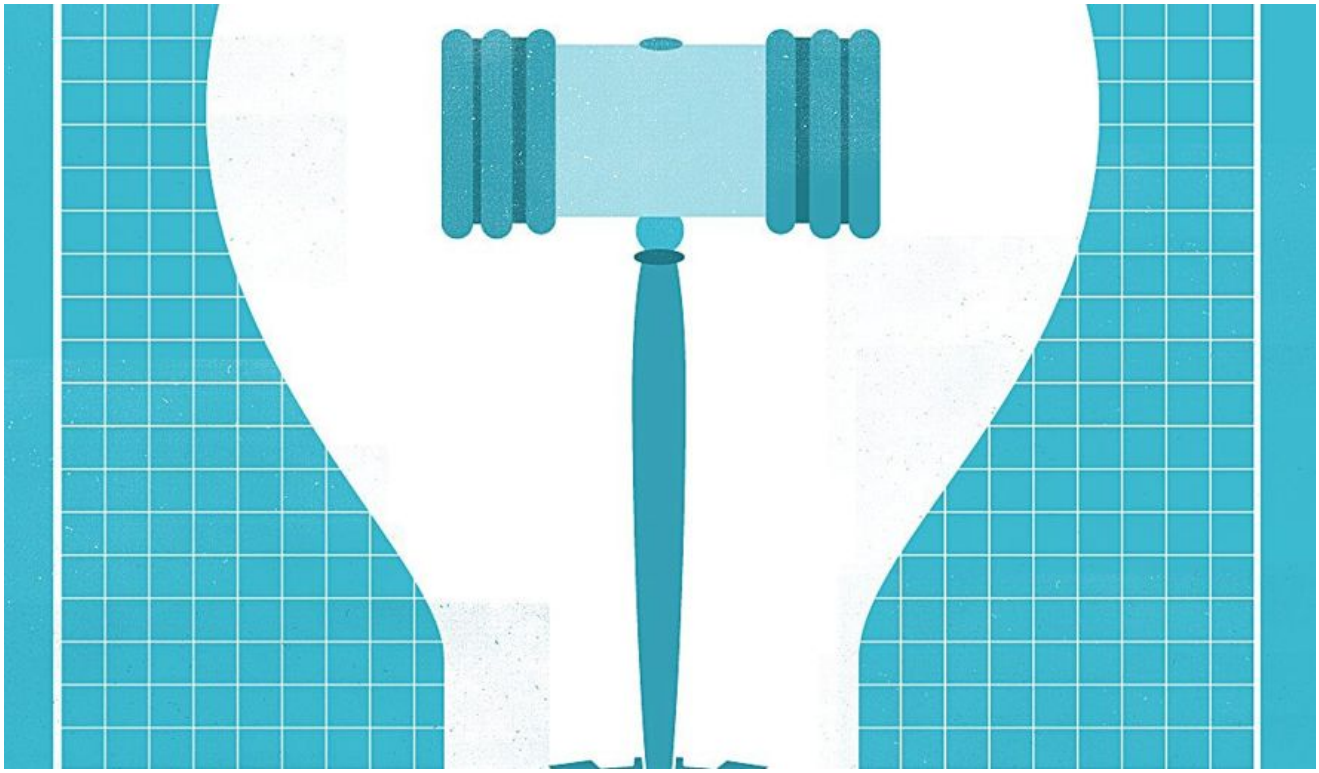
Weighing the patent system

It is time to confront the bias against patent owners in patent ‘reform’ legislation



Changing Patent Protection Laws Illustration by Linas Garsys/The Washington Times more >

By Adam Mossoff - - *Thursday, March 24, 2016*

ANALYSIS/OPINION:

As the push for legislation making broad and wide-ranging revisions to the patent system has stalled, its advocates have shifted tactics. They have carved out the provision in H.R. 9 (the tendentiously named “Innovation Act”) that revises the rules for how patent owners can bring lawsuits and have introduced it as its own bill: the VENUE

Act. This bill is proffered as a solution to the widely condemned practice of an unduly large number of patent lawsuits filed in a federal district court located in Marshall, Texas, a small town in eastern Texas. The problem is that this bill, just like the Innovation Act from which it was born, is neither balanced nor fair. It is time to directly confront the one-sided, biased rhetoric of the entire "reform" narrative that has gone almost unchecked inside the Beltway for several years.

The VENUE Act is the latest proposal in a multiyear campaign by certain companies and interest groups to revise the rules of the patent system. The fundamental problem is that this campaign has created an entirely one-sided narrative about patent "reform": all the problems are caused by patent owners and thus the solutions require removing the incentives for patent owners to be bad actors in the innovation economy. This narrative is entirely biased against patented innovation, the driver of America's innovation economy for over 200 years that has recognized benefits. As a result, it has produced an equally biased policy debate that inexorably leads to the same conclusion in every "reform" proposal arising from this campaign: these vital property rights must be weakened, watered down, or eliminated when it comes to their licensing in the marketplace or enforcement in courts.

This point is dramatically evidenced in the allegedly fair and purportedly noncontroversial VENUE Act. In responding to some patent owners in choosing some judges (and juries) in eastern Texas who are accused of being more receptive to patent owners vis-a-vis alleged infringers, the bill revises the legal rules for all patent owners suing alleged infringers. The bill makes it harder for patent owners to select a venue like that in eastern Texas for a lawsuit, and it raises some concerns about collateral damage to valid patent owners who need to hold infringers accountable in court.

Aside from these concerns, the more fundamental problem is that the VENUE Act reflects ongoing bias against patent owners in the policy debates. Disputes over patent rights are like all disputes, whether a contract dispute, property dispute, or more prosaically an argument between spouses. In all such disputes, everyone recognizes that bad behavior can occur on both sides. By focusing only on restricting the rights of patent owners, the VENUE Act is just as unbalanced as H.R. 9 and the other bills that have stalled for the same reasons.

In this narrower bill to address litigation abuse, for instance, it is an "Alice in Wonderland" state of affairs to be talking only about stopping abuse of the courts by patent owners while blatantly ignoring the same abuse by challengers of patents in the administrative review programs run by the Patent Trial and Appeals Board (PTAB). It is

widely recognized that the PTAB is incredibly biased against patents in both its procedural and substantive rules. The Supreme Court recently agreed to hear just one of many appeals that are currently working their way through the courts that explicitly address these concerns. There is legitimate outcry about hedge fund managers exploiting the PTAB's bias against patents by filing petitions to invalidate patents after shorting stocks for bio-pharmaceutical companies that own these patents. The PTAB has been called a "death squad" for patents, and with a patent invalidation rate between 79 percent to 100 percent, this is not entirely unjustified rhetoric.

The absence of any acknowledgment that reform of the PTAB is just as pressingly important as venue reform by those pushing for the VENUE Act is a massive elephant in the room. Unfortunately, it is unsurprising. But this is only because it is the latest example of a strikingly one-sided, biased narrative of the past several years about patent "reform."

Valid reform is balanced and fair, improving a legal system by correcting abuses by all the relevant stakeholders who strategically exploit the legal rules. It is unhealthy for the patent system and for innovation to myopically focus only on abuses by some patent owners without addressing, let alone even acknowledging, the exact same abuses by users or infringers of patented innovation. Like the Innovation Act that came before it, the VENUE Act is not reform: it is a one-way ratchet that only weakens property rights in inventions for all innovators.

• *Adam Mossoff is a professor at George Mason University School of Law.*

Copyright © 2017 The Washington Times, LLC. Click here for reprint permission.