

NEW PATENT REFORM BILLS INTRODUCE CHANGES TO DAMAGES AND VIRTUAL MARKING

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The Patent Reform Act of 2005 proposed by Texas congressman Lamar Smith was characterized as the most comprehensive change to U.S. patent law since 1952, but never passed. The Patent Reform Act of 2005 was revolutionary because it proposed moving to a "First to File" system and changes to money damages for infringement. A similar bill, the Patent Reform Act of 2007, was proposed but did not pass. There are a number of bills currently pending, including House of Representatives bill H.R. 1260 and Senate bill S. 515; both of these bills were proposed by the 111th Congress which also introduce a number of far-reaching potential changes to United States' patent law.

H.R. 1260, introduced March 3, 2009, is entitled "Patent Reform Act of 2009" and was sponsored by Rep. John Conyers of Michigan and cosponsored by Howard Berman of California, Robert Goodlatte of Virginia, Sheila Jackson-Lee of Texas, Michael Simpson of Idaho and Lamar Smith of Texas. A committee hearing was held by the House Judiciary on April 30, 2009 regarding this bill, but the bill has not been reported out of committee and there is currently no committee report. H.R. 1260 was introduced to make changes to a number of patent provisions, including damage provisions in 35 U.S.C. § 284 which currently provides scant guidance to courts. The proposed changes were introduced to reduce damage awards, make damage awards more predictable and allow for damage appeals to be more easily resolved. The court could select a method to calculate a reasonable royalty by using factors including (1) entire market value, (2) established royalty based on marketplace licensing, and (3) valuation calculation if neither (1) nor (2) are chosen. The court may also consider any other relevant factors. S.1260 also introduces a study of patent damages to be conducted including patent damage awards in cases dating back to 1990.

S.515, introduced March 3, 2009, is also entitled "Patent Reform Act of 2009" and is sponsored by Sen. Patrick Leahy of Vermont and eleven other co-sponsors. A committee hearing was held on April 2, 2009 by the Senate Judiciary Committee and the bill was reported out and recommended that the bill be passed on May 12, 2009. While S.515 includes a section regarding changes to damages, S.515 also has an in-depth travel expense test program section to allow the Patent and Trademark Office to better assist in paying for travel expenses for "hotelers," employees who work away from Alexandria, VA. S.515 further includes, most significantly, a provision which allows "virtual marking" and would amend 35 U.S.C. § 287(a). An internet site providing the word "patent" or "pat." and a patent number would be acknowledged as patent marking.