

## **OPPOSE NEW POST-GRANT REVIEW PROVISION WHICH ALLOWS LIMITLESS ADMINISTRATIVE PATENT CHALLENGES**

**Current Law** – There currently is no administrative post-grant review procedure at the PTO, though limited challenges (e.g., reexamination) are allowed. Someone wishing to challenge a patent in court will have to infringe the patent and wait for the patent owner to sue, or have a real and substantial controversy with the patent owner involving the right to use the patented invention sufficient to confer declaratory judgment jurisdiction. In court, the patent carries with it a presumption of validity.

The Patent Reform Act of 2007 would continue and expand reexamination and add a new post-grant review procedure that would allow a member of the public to challenge a patent, on any ground of invalidity, throughout the life of the patent. Under the provision, the standard of evidence required to establish invalidity is a preponderance of evidence.

An administrative post-grant system which allows for challenges throughout the life of a patent should be opposed for the following reasons:

- The open-ended post grant review provision in the Patent Reform Act would have a chilling affect on investment and licensing. The legislation would allow broad-based patent challenges under a low legal threshold throughout the full term of the patent, and permits repeated challenges of the same patent.
- The legislation provides no incentive for competitors to diligently survey the patent landscape and to mount their challenge promptly after the patent is issued. Instead, such competitors could use the proceeding to exert economic pressure on patent owners by delaying patent challenges until the economic stakes are high, and use evidence discovered during the proceeding as “ammunition” for legal arguments that are held in reserve for later district court litigation.
- In the aggregate, the proposed new proceeding goes beyond what is necessary to ensure meaningful public participation in the patent quality review process. Because the legislation lacks incentives to challenge patents promptly after grant – many challenges could come only after the patent owner has made significant investments based upon the presumed validity of the patent.
- For companies which rely on their patents to generate the capital necessary to bring a product to market, the potential for multiple challenges to key patents will have a chilling effect on investment.
- The open-ended nature of the post grant provision in the legislation provides an opportunity to subject patent owners to additional harassment which creates uncertainty in the marketplace.