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Gavel to Gavel: Bill seeks to reform patent review processes

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H.R. 4370, sponsored by Ken Buck (R-CO4) and Deborah Ross (D-NC2), represents the latest legislative attempt to reform the Patent Trial and Appeal Board (PTAB) at the U.S. Patent and Trademark Office (PTO). Among its most significant provisions is the escalation of the evidentiary standard required for patent invalidation – good news for patent holders.

In an infringement lawsuit in federal district court, the defendant often argues that the infringed patent is invalid, that the PTO never should have issued it in the first place. According to the Supreme Court, in *Microsoft Corp. v. i4i Ltd. P’ship*, to find a patent invalid, the patent challenger must present “clear and convincing” evidence to the court – a standard just shy of the familiar “beyond a reasonable doubt” from criminal cases. In other words, the court presumes that the patent is valid but has the authority to invalidate it if the evidence is especially good.

However, the patent challenger can avoid the “clear and convincing” burden by seeking invalidation at the PTAB. The PTAB is a tribunal consisting of the PTO director, some other PTO officers, and at least 100 administrative patent judges. In panels of three, they conduct inter partes (“between parties”) reviews of live patents. After hearing evidence from the challenger and the patent holder, the panel decides whether to kill the patent. They use a standard of “preponderance of evidence” – that is, more likely than not – a lower threshold than “clear and convincing.” By law, patents survive more easily in federal courts than at the Patent Office.

The difference in evidentiary standards is one reason (among many) that patent holders view the PTAB as dangerous. From October 2022 to June 2023, the PTAB reviewed 902 patents, and in 35% of cases (314 of the 902), at least one patent claim was invalidated, and in about 80% (251) of those cases, the entire patent was thrown out. Ignoring settlements and cases the PTAB declined to hear, the PTAB invalidated claims thrice as often as it upheld them.

The proposed legislation, H.R. 4370, Section 4(e), would require PTAB petitioners to present “clear and convincing” evidence, the same standard as in the courts. In other words, the proposed legislation would buttress patent holders’ ability to enforce their patents and lower their risk of invalidation by the PTO.

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