

## Restoring America's Leadership in Innovation Act of 2018

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On June 28, 2018, Representatives Thomas Massie (R-KY-4), Marcy Kaptur (D-OH-9) and Dana Rohrabacher (R-CA-48) introduced H.R. 6264, the "Restoring America's Leadership in Innovation Act of 2018." The bill ambitiously seeks to curtail or repeal numerous provisions of the 2011 America Invents Act ("AIA") as well as certain recent Supreme Court cases.

The bill calls for the explicit repeal of the AIA's version of 35 U.S.C. § 102 and the AIA's post-issuance review provisions. Section 3 specifies that "a person shall be entitled to a patent where the inventor is first to conceive of the invention and diligently reduces the invention to practice" and that "a person shall be entitled to a one-year grace period before filing an application for a patent, as the grace period existed before the date of the enactment of the Leahy-Smith 24 America Invents Act under section 102 of title 35, United States Code, and with the same meaning of the terms 'in public use' and 'on sale in this country' as interpreted before the enactment of the Leahy-Smith America Invents Act."

Section 4 calls for repeal of the *inter partes* and post-grant review statutes in their entirety. In doing so, the bill explicitly declines to reinstate *inter partes* reexaminations. Accordingly, the only post-grant invalidity proceeding that would remain under the proposed law would be *ex parte* reexamination.

The bill also seeks to overturn numerous Supreme Court decisions from the past 20 years. Section 7 would effectively overturn the Supreme Court's recent patent eligibility jurisprudence by limiting patent ineligible subject matter to subject matter that "exists in nature independently of and prior to any human activity, or exists solely in the human mind."

Section 9 would overturn the Supreme Court's decision in *Impression Products Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523 (2017) by amending 35 U.S.C. § 261 to define patents as being a "private property right" which would be "freely transferable." Thus, allowing patent holders to license patents without being subject to patent exhaustion.

Section 12 would overturn the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) by setting a new and more lenient standard for the grant of a permanent injunction. The bill would require that a district court, upon a finding of infringement, presume the existment of irreparable harm and that such presumption would only be overcome by clear and convincing evidence.

The bill would make several other changes to the AIA. Section 5 would abolish the Patent Trial and Appeal Board and reinstate the Board of Patent Appeals and Interferences. Section 6 would end diversion of fees received by the PTO to the U.S. treasury. Section 10 would abolish the procedure of automatically publishing patent applications 18 months after the filing date. Section 11 would require that the validity of an issued claim be given the presumption of validity in every forum and that invalidity must be established under the clear and convincing evidence standard. Section 13 would reinstate the best mode requirement.

While this bill is highly unlikely to become law, it is worth noting that some members of Congress are interested in repealing key provisions of the AIA.

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