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109TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 109–673

PILOT PROGRAMS FOR PATENT JUDGES

SEPTEMBER 21, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 5418]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5418) to establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. PILOT PROGRAM IN CERTAIN DISTRICT COURTS.

(a) ESTABLISHMENT.—

(1) IN GENERAL.—There is established a program, in each of the United States district courts designated under subsection (b), under which—

(A) those district judges of that district court who request to hear cases under which one or more issues arising under any Act of Congress relating to patents or plant variety protection must be decided, are designated by the chief judge of the court to hear those cases;

(B) cases described in subparagraph (A) are randomly assigned to the judges of the district court, regardless of whether the judges are designated under subparagraph (A);

(C) a judge not designated under subparagraph (A) to whom a case is assigned under subparagraph (B) may decline to accept the case; and

(D) a case declined under subparagraph (C) is randomly reassigned to one of those judges of the court designated under subparagraph (A).

(2) SENIOR JUDGES.—Senior judges of a district court may be designated under paragraph (1)(A) if at least 1 judge of the court in regular active service is also so designated.

(3) RIGHT TO TRANSFER CASES PRESERVED.—This section shall not be construed to limit the ability of a judge to request the reassignment of or otherwise transfer a case to which the judge is assigned under this section, in accordance with otherwise applicable rules of the court.

(b) DESIGNATION.—The Director of the Administrative Office of the United States Courts shall, not later than 6 months after the date of the enactment of this Act, designate not less than 5 United States district courts, in at least 3 different judicial circuits, in which the program established under subsection (a) will be carried out. The Director shall make such designation from among the 15 district courts in which the largest number of patent and plant variety protection cases were filed in the most recent calendar year that has ended, except that the Director may only designate a court in which—

(1) at least 10 district judges are authorized to be appointed by the President, whether under section 133(a) of title 28, United States Code, or on a temporary basis under other provisions of law; and

(2) at least 3 judges of the court have made the request under subsection (a)(1)(A).

(c) DURATION.—The program established under subsection (a) shall terminate 10 years after the end of the 6-month period described in subsection (b).

(d) APPLICABILITY.—The program established under subsection (a) shall apply in a district court designated under subsection (b) only to cases commenced on or after the date of such designation.

(e) REPORTING TO CONGRESS.—

(1) IN GENERAL.—At the times specified in paragraph (2), the Director of the Administrative Office of the United States Courts, in consultation with the chief judge of each of the district courts designated under subsection (b) and the Director of the Federal Judicial Center, shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the pilot program established under subsection (a). The report shall include—

(A) an analysis of the extent to which the program has succeeded in developing expertise in patent and plant variety protection cases among the district judges of the district courts so designated;

(B) an analysis of the extent to which the program has improved the efficiency of the courts involved by reason of such expertise;

(C) with respect to patent cases handled by the judges designated pursuant to subsection (a)(1)(A) and judges not so designated, a comparison between the 2 groups of judges with respect to—

(i) the rate of reversal by the Court of Appeals for the Federal Circuit, of such cases on the issues of claim construction and substantive patent law; and

(ii) the period of time elapsed from the date on which a case is filed to the date on which trial begins or summary judgment is entered;

(D) a discussion of any evidence indicating that litigants select certain of the judicial districts designated under subsection (b) in an attempt to ensure a given outcome; and

(E) an analysis of whether the pilot program should be extended to other district courts, or should be made permanent and apply to all district courts.

(2) TIMETABLE FOR REPORTS.—The times referred to in paragraph (1) are—

(A) not later than the date that is 5 years and 3 months after the end of the 6-month period described in subsection (b); and

(B) not later than 5 years after the date described in subparagraph (A).

(3) PERIODIC REPORTING.—The Director of the Administrative Office of the United States Courts, in consultation with the chief judge of each of the district courts designated under subsection (b) and the Director of the Federal Judicial Center, shall keep the committees referred to in paragraph (1) informed, on a periodic basis while the pilot program is in effect, with respect to the matters referred to in subparagraphs (A) through (E) of paragraph (1).

(f) AUTHORIZATION FOR TRAINING AND CLERKSHIPS.—In addition to any other funds made available to carry out this section, there is authorized to be appropriated not less than $5,000,000 in each fiscal year for—

(1) educational and professional development of those district judges designated under subsection (a)(1)(A) in matters relating to patents and plant variety protection; and

(2) compensation of law clerks with expertise in technical matters arising in patent and plant variety protection cases, to be appointed by the courts designated under subsection (b) to assist those courts in such cases.

Amounts made available pursuant to this subsection shall remain available until expended.

PURPOSE AND SUMMARY

The purpose of H.R. 5418, a bill to "establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges" is to authorize the creation of a patent specialists' pilot program at the U.S. district court level, which is intended to improve the adjudication of patent disputes. The bill's sponsors intend for the periodic and final results of this ten year study to be used to identify and pursue additional improvements in the trial level adjudication of patent cases. The ultimate goal of H.R. 5418 is to make the resolution of patent issues at the trial level more efficient, predictable, and reliable.

BACKGROUND AND NEED FOR LEGISLATION

> "One of the most significant problems facing the United States patent system is the spiraling cost and complexity associated with enforcement of patent rights." (The Advisory Commission on Patent Law Reform, Report to the Secretary of Commerce 75 (1992))

As the above quote indicates, the problems associated with providing efficient, stable, and predictable adjudication of patent disputes present issues of long-standing concern. The complex and dynamic nature of patent law along with the increasing sophistication of technologies, which tend to underlie determinations of prior art and whether material is patentable, present unique challenges to those responsible for adjudicating these disputes. These are particularly acute at the trial court level where judges tend to be generalists and lay jurors tend to be unfamiliar with patent law concepts and untrained in the sophisticated technologies that frequently lie at the heart of litigation.

Over the years, judges, patent professionals and patent owners have identified a number of judicial and litigation reforms without endorsing one proposal to the exclusion of others. Still, the vast majority of structural reforms have something in common: they share a widespread perception that patent litigation has become too expensive, too time-consuming, and too uncertain.

The value of a United States patent

The five rights traditionally associated with owing a patent are the right to make, use, sell, import, and offer to sell the patented invention. Most of the value of a patent is derived not from the conveyance of a positive right to make or use the invention; rather, it is derived from the ability to exercise the right to sue an infringer, to obtain damages for infringement, and to obtain injunctions against further infringement. These rights are frustrated and/or effectively denied when the judicial system is unable to efficiently process and correctly resolve patent cases.

One measure of the value of patents is the increasing role that intellectual property, especially patents, plays in the valuation of American corporations. As recently as 1978, intangible assets, such as intellectual property, accounted for 20 percent of corporate assets with the vast majority of value (80 percent) attributed to tangible assets such as facilities and equipment. By 1997, the trend reversed: 73 percent of corporate assets were intangible and only 27 percent were tangible.

An increased recognition that the majority of a company's value resides in the ownership and management of intellectual property has raised the stakes for litigants and public officials. It is in the interests of consumers and competitors that invalid patents not be issued. To the extent a patent is invalid, it should not be given effect. It is in the interests of patent owners that they be allowed to benefit from the full value of their industry and creativity.

Characteristics of the United States Patent Dispute Adjudicative System

U.S. district courts are trial courts that possess general civil and criminal jurisdiction. Title 28 of the United States Code grants U.S. district courts exclusive, original jurisdiction of "any civil action arising under any Act of Congress relating to patents."

Within the United States, the adjudication of patent interpretation and enforcement disputes typically commences with the filing of a case in an appropriate U.S. district court. Patent cases constitute an insubstantial number of the total cases filed. Of that amount, the overwhelming majority of cases are typically settled or decided by motion with the rest, approximately 100 cases, going to trial in a given year. Due to their novelty and complexity, the cases that are tried tend to be resource-intensive and account for a disproportionate share of district court judges' time and effort. As with other civil and criminal cases, the standard practice is to randomly assign patent cases to the various judges within a district.

Given this background—the relative infrequency of patent litigation, early settlement of most suits, and random assignment of cases—district court judges generally receive little exposure to actual patent claim trials. One judge from the U.S. District Court in Chicago, historically one of the top five busiest district courts in terms of patent case filings, reported his personal patent case workload never exceeded five percent of his calendar.

In the United States, the right of a patent litigant to demand a jury trial is well-established. Indeed, the 7th Amendment to the U.S. Constitution guarantees that right. Nevertheless, fewer than three percent of all U.S. patent cases are actually decided by jury. Congress established the Court of Appeals for the Federal Circuit (CAFC) in 1982, motivated, in large part, by the desire to restrict the practice of forum shopping in order to achieve a standardized patent practice across the nation. As a result, all appeals of patent cases litigated in federal district courts are now directed to the CAFC as opposed to the twelve circuit courts of appeals, as was the prior practice. While some commentators have taken issue with what they regard as a pro-patent holder inclination by the CAFC, there can be little doubt that the CAFC has succeeded in the objective of ameliorating many of the negative effects of forum shopping. The CAFC's practice is to apply a de novo review standard in claim construction.

Problems

It has been noted the right of exclusivity, which is critical to protecting the economic benefit and inherent value of a patent, can be protected only "if patent owners have effective and inexpensive access to an efficient judicial system" to enforce their patent. There is substantial evidence that the adjudication of patent cases is nei-

ther effective nor inexpensive. The Honorable James F. Holderman of the District Court in Chicago has written of what he perceives to be "institutional ineptitude" in the manner that district courts enforce patent rights.

According to Kimberly A. Moore,[1] Associate Professor of Law at George Mason University, and the author of an article entitled, "Are District Court Judges Equipped to Resolve Patent Cases?," "district court judges improperly construe patent claim terms in 33 percent of the cases appealed to the Federal Circuit." This national reversal rate contrasts dramatically with the less than 10 percent overall reversal rate for all other types of cases, both civil and criminal, which are reviewed by the regional Courts of Appeals.

Further, Professor Moore has reported that her "data show that errors in district court claim constructions require reversing or vacating judgments in 81 percent of these cases." She goes on to suggest that the adjudication system would be improved if an expedited appeal of claim construction issues could be provided to the CAFC rather than requiring district judges to proceed with a lengthy and expensive patent litigation that is premised on a "frequently erroneous claim construction."

There is a growing perception that non-traditional small litigants (commonly derided as "patent trolls") have begun to use increasingly aggressive litigation tactics to assert tenuous but expensive patent claims. A September 14, 2005, article in the Wall Street Journal described a speculative environment that has resulted in some patent cases having their litigation expenses financed by outside investors. The report stated, "[l]ured by the potential returns, hedge funds and other institutional investors now are bankrolling businesses that buy up patent portfolios. More law firms, including some branching out from product-liability and malpractice work, are taking cases on a contingency basis."[2]

Support for H.R. 5418

The Judicial Conference has expressed no formal position on the case assignment mechanism proposed in H.R. 5418. Nevertheless, the amendment in the nature of a substitute reported by the Committee contained changes intended to ensure the continued random assignment of cases among judges in participating districts and to prevent forum-shopping by litigants. A number of patent related trade associations, which include AIPLA, IPO, BSA, CEA, ACT, BIO, and PhRMA have expressed support for the enactment of H.R. 5418, as amended by the Committee.

HEARINGS

On October 6, 2005, the Subcommittee on Courts, the Internet, and Intellectual Property conducted an oversight hearing entitled "Improving Federal Court Adjudication of Patent Cases." The subject of that hearing was a draft bill authored by Rep. Darrell Issa. Testimony was received from four witnesses who testified as individuals and not as representatives of an organization. The wit-

[1] On May 18, 2006, Kimberly A. Moore was nominated by President George W. Bush to serve as a United States Circuit Judge for the Federal Circuit. On September 5, 2006, she was confirmed to the court.

[2] "Aggressive Patent Litigants Pose Growing Threat To Big Business," WSJ, A1, September 14, 2005.

nesses included a Federal district court judge, a professor of law, and two private attorneys, one who possessed extensive experience in patent litigation and a second that had unique institutional insight into the structural considerations impacted by various reform proposals. H.R. 5418 was subsequently introduced by Reps. Darrell Issa and Adam Schiff on May 18, 2006.

COMMITTEE CONSIDERATION

On July 27, 2006, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill, H.R. 5418, without amendment by voice vote, a quorum being present. On September 13, 2006, the Committee met in open session and ordered favorably reported the bill, H.R. 5418 with an amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes there were no recorded votes during the consideration of H.R. 5418.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(I) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 5418, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

SEPTEMBER 20, 2006.

Hon. F. JAMES SENSENBRENNER Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5418, a bill to establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople.

Sincerely,

DONALD B. MARRON,
Acting Director.

Enclosure.

H.R. 5418—A bill to establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges

Summary: H.R. 5418 would authorize the appropriation of $5 million per year to create a pilot program within the federal court system to increase the expertise of district judges presiding over patent and plant variety protection cases. CBO estimates that implementing H.R. 5418 would cost $23 million over the 2007–2011 period, subject to appropriation of the necessary amounts. Enacting H.R. 5418 would have no effect on direct spending or revenues.

H.R. 5418 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no direct costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of the bill is shown in the following table. The cost of this legislation falls within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—				
	2007	2008	2009	2010	2011
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Authorization Level	5	5	5	5	5
Estimated Outlays	4	4	5	5	5

Basis of estimate: Assuming that H.R. 5418 is enacted near the beginning of fiscal year 2007 and that the authorized amounts will be appropriated for each year, CBO estimates that implementing this bill would cost $4 million in 2007 and $23 million over the 2007–2011 period.

H.R. 5148 would authorize the appropriation of $5 million per year to educate judges who accept patent and plant variety protection cases. Appropriated amounts could also be used to hire additional staff with expertise in such matters. The bill would direct the Administrative Office of the U.S. Courts to establish a pilot program, in at least five U.S. district courts, that would allow judges to request cases involving alleged violations of patent or plant variety protection law. CBO estimates that this procedural change would have no significant effect on the federal budget.

Intergovernmental and private-sector impact: H.R. 5418 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Daniel Hoople. Impact on State, Local, and Tribal Governments: Melissa Merrell. Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Robert A. Sunshine, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5418 will require the Director of the Administrative Office of the Courts to select five district courts to par-

ticipate in a 10-year pilot program that is intended to provide enhanced expertise among designated judges in the trial-level adjudication of patent cases.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The Committee reported H.R. 5418, a bill "[t]o establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges," with an amendment in the nature of a substitute that included non-controversial agreed-upon changes.

The following three paragraphs describe the bill as introduced and reported, without amendment, by the Subcommittee on Courts, the Internet, and Intellectual Property on July 27, 2006.

The succeeding two paragraphs describe specific changes included in the substitute amendment reported favorably by the Committee on September 13, 2006.

Sec. 1. Pilot Program In Certain District Courts. This section requires the Director of the Administrative Office of the Courts to designate not fewer than five U.S. district courts to participate in a 10-year pilot program that would permit district judges to request assignment of patent-related cases, permit the Chief Judge to designate requesting judges to hear such cases, allow "undesignated" judges to decline such cases, and require random assignment of such cases to either all of the judges of the district court or only the designated judges in certain instances.

This section authorizes not less than $5,000,000 for each of the 10 fiscal years to be expended for the educational and professional development of designated judges and to compensate law clerks who possess expertise in technical matters that arise in patent cases. The section also requires the Director of the Administrative Office of the Courts to compile information on the pilot program and to provide periodic reports to the Judiciary Committees of the House of Representatives and the Senate.

To mitigate the concern that pilot districts might become attractive as magnets for forum-shopping litigants, the amendment in the nature of a substitute included changes to section 1(b) of the introduced version of this legislation. Specifically, section 1(b) was divided into two subsections: section 1(b)(1) conditions pilot district designation on a requirement the district be authorized "at least 10 district judges . . . to be appointed by the President while section 1(b)(2) requires "at least three judges of the court" to make the request to be designated as patent specialists pursuant to the bill.

Additional refinements were made to the reporting requirements contained in the legislation as introduced. Specifically, section 1(e) of the amendment in the nature of a substitme adopted by the Committee added language that was included in the Class Action Fairness Act.[3] This language requires the Director of the Administrative Office of the Courts to consult with the Director of the Fed-

[3] P.L. No. 109–2.

eral Judicial Center in addition to consulting with the chief judge of each participating district in preparing the required reports for Congress. The amendment also adds elements to the report, including comparisons of: (a) the rate of reversal by the Federal Circuit on issues of claim construction and substantive patent law among designated and non-designated judges; (b) the time to final disposition by trial or summary judgment among designated and non-designated judges; and (c) whether any evidence indicates that litigants have sought to "ensure a given outcome" by the use of forum-shopping in the pilot districts.

CHANGES IN EXISTING LAW BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee notes H.R. 3509 makes no changes to existing law.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, SEPTEMBER 13, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. And a working quorum, but not a reporting quorum, is present.

Before starting up, let me say that it is not the intention of the Chair to call up the FISA bill today, but we will do three bills: the "Firearms Corrections and Improvements Act," the "Patent Expertise Among District Judges Act," and the "Wright Amendment Modernization Act."

Since we do not have a reporting quorum present, the Chair now says the next item on the agenda is H.R. 5418, to establish a pilot program in certain United States District Courts to encourage enhancement of expertise in patent cases among District judges.

The Chair recognizes the Chair of the Subcommittee on Courts, the Internet, and Intellectual Property, the gentleman from Texas, Mr. Smith, for a motion.

Mr. SMITH. Mr. Chairman, the Subcommittee on Courts, the Internet, and Intellectual Property reports favorably the bill, H.R. 5418, and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, H.R. 5418 will be considered as read and open for amendment at any point.

[The bill, H.R. 5418, follows:]

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109TH CONGRESS
2D SESSION

H. R. 5418

To establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges.

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 2006

Mr. ISSA (for himself and Mr. SCHIFF) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PILOT PROGRAM IN CERTAIN DISTRICT COURTS.

(a) ESTABLISHMENT.—

(1) IN GENERAL.—There is established a program, in each of the United States district courts designated under subsection (b), under which—

(A) those district judges of that district court who request to hear cases under which

one or more issues arising under any Act of Congress relating to patents or plant variety protection must be decided, are designated by the chief judge of the court to hear those cases;

(B) cases described in subparagraph (A) are randomly assigned to the judges of the district court, regardless of whether the judges are designated under subparagraph (A);

(C) a judge not designated under subparagraph (A) to whom a case is assigned under subparagraph (B) may decline to accept the case; and

(D) a case declined under subparagraph (C) is randomly reassigned to one of those judges of the court designated under subparagraph (A).

(2) SENIOR JUDGES.—Senior judges of a district court may be designated under paragraph (1)(A) if at least one judge of the court in regular active service is also so designated.

(3) RIGHT TO TRANSFER CASES PRESERVED.—This section shall not be construed to limit the ability of a judge to request the reassignment of or otherwise transfer a case to which the judge is assigned

1 under this section, in accordance with otherwise ap-
2 plicable rules of the court.
3 (b) DESIGNATION.—The Director of the Administra-
4 tive Office of the United States Courts shall, not later
5 than 6 months after the date of the enactment of this Act,
6 designate not less than 5 United States district courts,
7 in at least 3 different judicial circuits, in which the pro-
8 gram established under subsection (a) will be carried out.
9 The Director shall make such designation from among the
10 15 district courts in which the largest number of patent
11 and plant variety protection cases were filed in the most
12 recent calendar year that has ended.
13 (c) DURATION.—The program established under sub-
14 section (a) shall terminate 10 years after the end of the
15 6-month period described in subsection (b).
16 (d) APPLICABILITY.—The program established under
17 subsection (a) shall apply in a district court designated
18 under subsection (b) only to cases commenced on or after
19 the date of such designation.
20 (e) REPORTING TO CONGRESS.—
21 (1) IN GENERAL.—At the times specified in
22 paragraph (2), the Director of the Administrative
23 Office of the United States Courts, in consultation
24 with the chief judge of each of the district courts
25 designated under subsection (b), shall submit to the

Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the pilot program established under subsection (a). The report shall include an analysis of—

(A) the extent to which the program has succeeded in developing expertise in patent and plant variety protection cases among the district judges of the district courts so designated;

(B) the extent to which the program has improved the efficiency of the courts involved by reason of such expertise; and

(C) whether the pilot program should be extended to other district courts, or should be made permanent and apply to all district courts.

(2) TIMETABLE FOR REPORTS.—The times referred to in paragraph (1) are—

(A) not later than the date that is 5 years and 3 months after the end of the 6-month period described in subsection (b); and

(B) not later than 5 years after the date described in subparagraph (A).

(3) PERIODIC REPORTING.—The Director of the Administrative Office of the United States Courts,

in consultation with the chief judge of each of the district courts designated under subsection (b), shall keep the committees referred to in paragraph (1) informed, on a periodic basis while the pilot program is in effect, with respect to the matters referred to in subparagraphs (A), (B), and (C) of paragraph (1).

(f) AUTHORIZATION FOR TRAINING AND CLERKSHIPS.—In addition to any other funds made available to carry out this section, there is authorized to be appropriated not less than $5,000,000 in each fiscal year for—

(1) educational and professional development of those district judges designated under subsection (a)(1)(A) in matters relating to patents and plant variety protection; and

(2) compensation of law clerks with expertise in technical matters arising in patent and plant variety protection cases, to be appointed by the courts designated under subsection (b) to assist those courts in such cases.

Amounts made available pursuant to this subsection shall remain available until expended.

○

Chairman SENSENBRENNER. And the Chair recognizes the gentleman from Texas, Mr. Smith, to strike the last word.

Mr. SMITH. Thank you, Mr. Chairman. I do move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, patent litigation is too expensive, too time consuming and too unpredictable. H.R. 5418 addresses these concerns by authorizing the establishment of a pilot program in certain U.S. District Courts to encourage the development of expertise in patent cases among District judges. On average, less than 1 percent of all cases in U.S. District Courts are patent cases and District Court judges have a patent case to through trial only once every 7 years.

Nevertheless, these cases account for nearly 10 percent of complex cases and demand a disproportionate share of attention and judicial resources. Not surprisingly, the rate of reversal at the Federal circuit remains uncomfortably high. The idea behind H.R. 5418 is simple: Practice makes perfect, or at least better.

Judges who are able to focus more attention on patent cases are more likely to render decisions that will not be reversed on appeal. This bill is a product of an extensive oversight hearing on proposals to improve patent litigation that was conducted by the Subcommittee last fall. Introduced by Representatives Issa and Schiff, the bill was unanimously reported by the Subcommittee on July 27.

H.R. 5418 will require the director of the Administrative Office of the Courts to select five District Courts to participate in the 10-year program. It contains provisions designed to ensure the continued random assignment of cases among the specialized courts so as to prevent the pilot districts from becoming magnets for forum-shopping litigants.

The legislation also would provide the Committee and the courts with the opportunity to assess on a periodic basis: one, whether the program succeeds in developing greater expertise among participating District judges; two, the extent the program contributes to improving judicial efficiency in deciding these cases; and three, whether the program should be extended, expanded or made permanent.

Mr. Chairman, I understand the sponsors have continued to work with the stakeholders on the bill and that Representative Issa plans to offer an amendment that contains agreed-upon changes. H.R. 5418 is a good bill and one that I believe deserves our support, Mr. Chairman. I want to thank Mr. Issa and Mr. Schiff again for introducing this legislation.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from California, Mr. Berman, is recognized for 5 minutes for an opening statement.

Mr. BERMAN. Thank you, Mr. Chairman. I am sorry I didn't get here to hear my Chairman's opening statement.

Chairman SENSENBRENNER. The Subcommittee Ranking Member is recognized.

Mr. CONYERS. No, I yield to Mr. Berman of the Subcommittee.

Chairman SENSENBRENNER. Then I will re-set the clock for your benefit, too.

Mr. BERMAN. Thank you, Mr. Chairman.

Let me make it quick. I think this is a very interesting idea that Mr. Issa has come up with. He and Mr. Schiff have introduced and adapted the legislation to deal with some of our concerns about this becoming a way of forum-shopping in terms of amendments that they are going to propose. It is a pilot program to try and enhance the quality of judicial decision-making in complicated patent cases.

My biggest reservation about the bill is that it is not part of comprehensive patent reform legislation. While I think this is a good idea or an interesting idea and it should be tried, I think the Committee's primary responsibility should be, and still is, marking up a comprehensive patent reform legislation which deals with many of the problems that now exist in the patent system.

With that, I will yield back. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Without objection, all Members' opening statements may be placed in the record at this point.

Are there amendments? The gentleman from California, Mr. Issa?

Mr. ISSA. Mr. Chairman, I have an amendment at the desk in the form of a substitute.

Chairman SENSENBRENNER. The clerk will report the amendment in the nature of a substitute.

The CLERK. "Amendment in the nature of a substitute to H.R. 5418, offered by Mr. Issa of California and Mr. Schiff of California. Strike all after the enacting clause and insert the following"——

[The amendment follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 5418 OFFERED BY MR. ISSA OF CALIFORNIA AND MR. SCHIFF OF CALIFORNIA

Strike all after the enacting clause and insert the following:

1 **SECTION 1. PILOT PROGRAM IN CERTAIN DISTRICT**
2 **COURTS.**
3 (a) ESTABLISHMENT.—
4 (1) IN GENERAL.—There is established a pro-
5 gram, in each of the United States district courts
6 designated under subsection (b), under which—
7 (A) those district judges of that district
8 court who request to hear cases under which
9 one or more issues arising under any Act of
10 Congress relating to patents or plant variety
11 protection must be decided, are designated by
12 the chief judge of the court to hear those cases;
13 (B) cases described in subparagraph (A)
14 are randomly assigned to the judges of the dis-
15 trict court, regardless of whether the judges are
16 designated under subparagraph (A);

1 (C) a judge not designated under subpara-
2 graph (A) to whom a case is assigned under
3 subparagraph (B) may decline to accept the
4 case; and
5 (D) a case declined under subparagraph
6 (C) is randomly reassigned to one of those
7 judges of the court designated under subpara-
8 graph (A).
9 (2) SENIOR JUDGES.—Senior judges of a dis-
10 trict court may be designated under paragraph
11 (1)(A) if at least 1 judge of the court in regular ac-
12 tive service is also so designated.
13 (3) RIGHT TO TRANSFER CASES PRESERVED.—
14 This section shall not be construed to limit the abil-
15 ity of a judge to request the reassignment of or oth-
16 erwise transfer a case to which the judge is assigned
17 under this section, in accordance with otherwise ap-
18 plicable rules of the court.
19 (b) DESIGNATION.—The Director of the Administra-
20 tive Office of the United States Courts shall, not later
21 than 6 months after the date of the enactment of this Act,
22 designate not less than 5 United States district courts,
23 in at least 3 different judicial circuits, in which the pro-
24 gram established under subsection (a) will be carried out.
25 The Director shall make such designation from among the

1 15 district courts in which the largest number of patent
2 and plant variety protection cases were filed in the most
3 recent calendar year that has ended, except that the Direc-
4 tor may only designate a court in which—
5 (1) at least 10 district judges are authorized to
6 be appointed by the President, whether under sec-
7 tion 133(a) of title 28, United States Code, or on a
8 temporary basis under other provisions of law; and
9 (2) at least 3 judges of the court have made the
10 request under subsection (a)(1)(A).
11 (c) DURATION.—The program established under sub-
12 section (a) shall terminate 10 years after the end of the
13 6-month period described in subsection (b).
14 (d) APPLICABILITY.—The program established under
15 subsection (a) shall apply in a district court designated
16 under subsection (b) only to cases commenced on or after
17 the date of such designation.
18 (e) REPORTING TO CONGRESS.—
19 (1) IN GENERAL.—At the times specified in
20 paragraph (2), the Director of the Administrative
21 Office of the United States Courts, in consultation
22 with the chief judge of each of the district courts
23 designated under subsection (b) and the Director of
24 the Federal Judicial Center, shall submit to the
25 Committee on the Judiciary of the House of Rep-

1 resentatives and the Committee on the Judiciary of
2 the Senate a report on the pilot program established
3 under subsection (a). The report shall include—
4 (A) an analysis of the extent to which the
5 program has succeeded in developing expertise
6 in patent and plant variety protection cases
7 among the district judges of the district courts
8 so designated;
9 (B) an analysis of the extent to which the
10 program has improved the efficiency of the
11 courts involved by reason of such expertise;
12 (C) with respect to patent cases handled by
13 the judges designated pursuant to subsection
14 (a)(1)(A) and judges not so designated, a com-
15 parison between the 2 groups of judges with re-
16 spect to—
17 (i) the rate of reversal by the Court of
18 Appeals for the Federal Circuit, of such
19 cases on the issues of claim construction
20 and substantive patent law; and
21 (ii) the period of time elapsed from
22 the date on which a case is filed to the
23 date on which trial begins or summary
24 judgment is entered;

1 (D) a discussion of any evidence indicating
2 that litigants select certain of the judicial dis-
3 tricts designated under subsection (b) in an at-
4 tempt to ensure a given outcome; and
5 (E) an analysis of whether the pilot pro-
6 gram should be extended to other district
7 courts, or should be made permanent and apply
8 to all district courts.
9 (2) TIMETABLE FOR REPORTS.—The times re-
10 ferred to in paragraph (1) are—
11 (A) not later than the date that is 5 years
12 and 3 months after the end of the 6-month pe-
13 riod described in subsection (b); and
14 (B) not later than 5 years after the date
15 described in subparagraph (A).
16 (3) PERIODIC REPORTING.—The Director of the
17 Administrative Office of the United States Courts,
18 in consultation with the chief judge of each of the
19 district courts designated under subsection (b) and
20 the Director of the Federal Judicial Center, shall
21 keep the committees referred to in paragraph (1) in-
22 formed, on a periodic basis while the pilot program
23 is in effect, with respect to the matters referred to
24 in subparagraphs (A) through (E) of paragraph (1).

1 (f) AUTHORIZATION FOR TRAINING AND CLERK-
2 SHIPS.—In addition to any other funds made available to
3 carry out this section, there is authorized to be appro-
4 priated not less than $5,000,000 in each fiscal year for—
5 (1) educational and professional development of
6 those district judges designated under subsection
7 (a)(1)(A) in matters relating to patents and plant
8 variety protection; and
9 (2) compensation of law clerks with expertise in
10 technical matters arising in patent and plant variety
11 protection cases, to be appointed by the courts des-
12 ignated under subsection (b) to assist those courts
13 in such cases.
14 Amounts made available pursuant to this subsection shall
15 remain available until expended.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. The gentleman from California, Mr. Issa, is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman.

I want to reiterate my thanks to the Chairman of the Subcommittee, Mr. Smith; certainly, the Ranking Member, Mr. Berman; and my partner in this piece of legislation, Mr. Schiff of California.

This was an idea that came out of our hearings, came out of experience, came out of the problems we heard both from the industry and from District Court judges throughout the country, but it became a worthwhile piece of legislation through the cooperative effort on a bipartisan basis, and the input of District Court judges, of the American Intellectual Property Law Association, of the BIO organization, of the Business Software Alliance, of the California Health Care Institute, the Consumer Electronics Association, the Information Technology Industry Council, the Intellectual Property Owners Association, the Pharmaceutical Research and Manufacturers Association, the Software Information Research Association, and many, many others.

So I am proud to say that this is something that got better as it went along. The substitutes today, the amendment in the form of a substitute today deals in two primary areas. One is that in order to ensure that this not end up being forum-shopped or that it not end up being in small districts, the change will require that in order to be a member of the patent pilot program, you must be a district that has at least 10 judges and at least three opting in.

Thus, even if hypothetically all of the cases went to those three, you would have a 33 roughly percent, recognizing that there is no requirement in this legislation that bills or that litigation be sent to any of these judges. It would undoubtedly be a number lower than that, but high enough to begin to show us the effectiveness of this augmentation.

Additionally, the study language was much further refined in order to work with the VAO on their challenges and also to reflect the Congress's desire to have continued jurisdiction over this pilot as it goes along.

With that, Mr. Chairman, seeing that there is no, as far as I know, no opposition to the bill, I would simply yield back, while encouraging all of you to vote for it and move it along to the Senate.

Mr. Chairman, today the Senate will be dropping the companion bill of what we pass here today.

I yield back.

Chairman SENSENBRENNER. The Chair advises the gentleman from California, it is in violation of the rules to refer to actions in the other body, even when there are actions.

[Laughter.]

Mr. ISSA. Noted, Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from California, Mr. Schiff, seek recognition?

Mr. SCHIFF. Mr. Chairman, briefly to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. Thank you, Mr. Chairman.

I wanted to compliment my colleague, Mr. Issa, for his work and leadership on this bill. I was pleased to join him because I think this is a worthy proposal that is narrowly drafted and will provide us with valuable and important insight on the operation of patent litigation in the Federal system.

The pilot program is designed to enhance expertise in patent cases among District judges, provide District Courts with resources and training to reduce the error rates in patent cases and help reduce the high cost and lost time associated with patent litigation. It has broad support and we consulted very closely with the Administrative Office of the Federal Courts, the representatives of the judiciary. The discussions led to a number of amendments that address concerns over the creation of a specialized court, the need to maintain generalist judges, random case assignment, and other issues.

I do join my colleague, Mr. Berman, in acknowledging that this does not mitigate the need to have more comprehensive reform, which I know we all support, but I think this is a step in the right direction and I urge support for the substitute.

I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on agreeing to the amendment in the nature of a substitute.

Those in favor will say "aye."

Opposed, "no."

The ayes appear to have it. The ayes have it. The amendment in the nature of a substitute is agreed to.

A reporting quorum is not present. We are one short of a reporting quorum. The Chair will instruct the staff on both sides of the aisle to get the dragnet out so that we can finish our work and be gone.

[Intervening business.]

Chairman SENSENBRENNER. The unfinished business is the motion to report favorably the bill H.R. 5418, to establish a pilot program in certain United States District Courts to encourage enhancement in expertise in patent cases among District judges.

The amendment in the nature of a substitute offered by Mr. Issa had been adopted. A reporting quorum is present. The question occurs on the motion to report the bill, H.R. 5418, favorably as amended.

All in favor say "aye."

Opposed, "no."

The ayes appear to have it. The ayes have it, and the motion to report favorably is agreed to.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendments adopted here today.

Without objection, the staff is directed to make any technical and conforming changes, then all Members will be given 2 days as provided by the House rules in which to submit additional dissenting, supplemental or minority views.

The purpose for this markup having been completed, without objection, the Committee stands adjourned.

[Whereupon, at 10:46 a.m., the Committee was adjourned.]

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