

The Limited Monopoly™

The Gears of Government: How New Laws Are Implemented in Our Patent System

by Robert Gunderman, PE and John Hammond, PE

Patent Reform- The America Invents Act

Patent reform in the United States, known as the America Invents Act (AIA), is now law. Public Law 112-29 to be specific. On September 16, 2011 President Barack Obama signed the Leahy-Smith America Invents Act into law, making yet more sweeping changes to our government as we know it. There are many changes coming to the U.S. patent system as a result, one of the most visible being the change from “first to invent” to “first inventor to file.” There are many other changes as well, some of which have already been implemented and others with effective dates that vary by section or provision of the law, with implementation spanning an 18 month period. The substance of these many changes can be found at www.patenteducation.com under “AIA Seminar” and in our October 2011 column¹.



“The gears of progress and innovation need to turn freely”

The United States Code is currently divided into 51 titles, and is a collection of the federal laws of the United States.

Copies can be obtained online from the Government Printing Office (GPO)². The title that we care about most (for our patent practices), of course, is title 35 – Patents. Other popular titles include title 26 (Internal Revenue Code), title 11 (Bankruptcy), title 29 (Postal Service), and other thrillers. It is interesting to note that the United States Code was the result of a many year codification project in the 1920’s, resulting in the approval of the United States Code by Congress in 1926.

The U.S. Code – 35 U.S.C.

The Leahy-Smith America Invents Act (H.R. 1249) contains 37 sections and 57 total pages. The Act begins by stating its purpose “To Amend title 35, United States Code, to provide for patent reform.” When an Act of Congress such as the America Invents Act is presented as an “enrolled bill” and signed by the President, it is enacted into law. When this happens, the original bill is sent to the Office of the Federal Register, and then distributed as “slip laws” by the Government Printing Office (GPO), and published as United States Statutes at Large. The United States Code structures these laws by subject matter, and the entire codification process is maintained by the Office of the Law Revision Counsel of the U.S. House of Representatives.

The Code of Federal Regulations – 37 C.F.R.

The Code of Federal Regulations follows the United States Code, and is considered administrative law. Every regulation in the CFR is based on language in the appropriate title of the United States Code. The CFR is published by the Office of the Federal Register. There are currently 50 titles in the Code of Federal Regulations, with title 37 being Patents, Trademarks and Copyrights. The Code of Federal Regulations provides further details on the language contained in the U.S. Code. When new laws are passed, agencies, acting under the Administrative Procedure Act, generate detailed rules and regulations by way of a public process. This process is being undertaken right now by the United States Patent and Trademark Office as they create and modify rules to implement

the America Invents Act. Essentially, proposed rules are created and presented to the public in the Federal Register as “Notices of Proposed Rulemaking.” The Federal Register is the official daily publication for rules, proposed rules, and notices of federal agencies and organizations, as well as for executing orders and other presidential documents. As part of the rule making process, there is a 60 day period during which the public can comment on any given proposed rule. Comments may also be made by way of the United States Patent and Trademark Office website. Officials from the United States Patent and Trademark Office then consider these public comments in their final rulemaking.

The Manual of Patent Examining Procedure (MPEP)

The MPEP is a book that provides examiners, practitioners, and applicants with a reference work on practices and procedures related to the prosecution of patent applications before the United States Patent and Trademark Office. The MPEP does not have the force of law or the force of the rules, but is used extensively by the patent law community. It is several thousands of pages long, and no doubt will require extensive updating with the new law. The MPEP staff at the United States Patent and Trademark Office is responsible for updating the MPEP, and no doubt will be quite busy in the coming months. There has been a great deal of discussion regarding using a more open and public approach to editing the MPEP, but as of today, a select staff at the USPTO is ultimately responsible for its revisions.

Meshing of the Gears

Given the sequence of bureaucratic steps – lawmaking, rulemaking, and defining operational procedures, it is easy to understand why key provisions of the America Invents Act will not become effective until 18 months after its enactment. With all of the changes taking place in our patent system, we truly hope that the changes go well and ultimately benefit the United States and our spirit of individualism, inventiveness, and self-sufficiency. The gears of progress and innovation need to turn freely, and not lock up due to poor design.



1. See also “[The Limited Monopoly™](#)” October 2011.
2. www.gpo.gov

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