



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

September 25, 2015

S. 1137 PATENT Act

As ordered reported by the Senate Committee on the Judiciary on June 4, 2015

SUMMARY

S. 1137 would change administrative and judicial processes that support the protection of intellectual property rights. The bill also would require reports by the Administrative Office of the United States Courts (AOUSC) and the Government Accountability Office (GAO). Finally, S. 1137 would authorize the Federal Trade Commission (FTC) to seek civil penalties in cases involving certain letters claiming infringement of existing patents.

CBO estimates that enacting S. 1137 would increase federal revenues from the new authority to collect civil penalties; therefore, pay-as-you-go procedures apply. However, we expect those collections would be insignificant. Enacting the bill would not affect direct spending. CBO estimates that discretionary spending would increase by \$3 million over the 2016-2020 period.

S. 1137 would impose a mandate as defined in the Unfunded Mandates Reform Act (UMRA) on both public and private entities that pay patent fees. Based on information from PTO, CBO estimates that the average annual cost to comply with the mandate would be about \$14 million, with less than \$200,000 of those costs accruing to public entities. Therefore, the cost for public and private entities to comply with the mandate would fall well below the annual thresholds established in UMRA for both intergovernmental and private-sector mandates (\$77 million and \$154 million in 2015, respectively, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Assuming appropriation of the necessary amounts, CBO estimates that implementing S. 1137 would cost \$3 million over the 2016-2020 period, mainly for reports and administrative costs incurred by the AOUSC associated with new judicial procedures. Implementing S. 1137 also would increase operating costs at the Patent and Trademark Office (PTO) by about \$70 million over the 2016-2020 period, CBO estimates. Under

current law, the PTO is authorized to collect fees sufficient to offset its operating expenses; therefore, the net budgetary effect of PTO's actions to implement S. 1137 would be negligible, assuming appropriation actions consistent with the agency's authorities.

The costs of this legislation fall within budget functions 370 (commerce and housing credit) and 750 (administration of justice).

BASIS OF ESTIMATE

For this estimate, we assume that S. 1137 will be enacted near the end of calendar year 2015, that appropriations actions will be consistent with this legislation, and that spending will follow historical patterns for similar activities.

Administrative Office of the United States Courts

S. 1137 would make several adjustments to judicial procedures for patent infringement cases, including:

- Determining which parties may join a suit;
- Determining when a court is required to grant a motion to stay an action in a patent case; and
- Requiring the courts to award the prevailing party reasonable fees and other expenses incurred in connection with such cases.

The bill also would require the AOUSC to develop rules and procedures related to the discovery of evidence in lawsuits for patent infringement. CBO expects that, by requiring inventors to be more specific in pleadings to the court, awarding attorney fees to the prevailing party, and limiting discovery early in an infringement proceeding, the bill would affect the decisions of inventors to initiate lawsuits for patent infringement.

Based on information from the relevant agencies, CBO estimates that implementing the provisions that would require the AOUSC to adjust procedures for patent infringement cases and the GAO and the AOUSC to prepare several reports on patent issues would cost \$3 million over the 2016-2020 period, assuming appropriation of the necessary amounts.

Patent and Trademark Office

S. 1137 would change procedures that PTO has in place to examine patent applications, award patents, and determine the validity of a patent that has already been granted. Among other things, the bill would specify that the agency use methods similar to those used in district courts to evaluate the validity of a patent and would change the procedures the PTO uses to assign administrative judges to panels that review the validity of a patent. The bill also would require the agency to develop new databases to make information about patent ownership and litigation available on its website. Finally, the bill would require PTO to conduct a study and prepare a report on transparency in certain patent transactions.

Based on information from the PTO, CBO estimates that implementing S. 1137 would cost about \$14 million per year. The bulk of that cost, about \$10 million annually, would stem from the addition of 35 administrative judges (and support staff) to meet the bill's requirements regarding the makeup of panels that review the validity of existing patents. S. 1137 would require that only one of the judges that participated in the decision to accept a patent challenge be allowed to sit on the panel that reviews the challenged patent.

Another provision of S. 1137 would broaden the definition of "micro entity" to include applicants that are institutions of higher education (or their employees) or by nonprofits that hold patents on behalf of institutions of higher education. Under current law, micro entities are entitled to a reduction in fees that PTO charges for various activities ranging from filing a patent application to keeping a patent in force. Based on information from PTO, CBO estimates that fee collections at the agency would fall by about \$16 million per year as a result of the broader definition.

CBO estimates that the net budgetary effect of those provisions affecting PTO would be negligible because we expect PTO to adjust its fees sufficient to offset the changes in its operating costs, assuming appropriation actions consistent with the agency's authority. Until those adjustments are in place, however, we expect that PTO would reduce its spending level to match actual collections, as required under current law.

Federal Trade Commission

S. 1137 would establish as an unfair or deceptive act sending letters claiming infringement of a patent when those letters include certain false or misleading claims or claims that lack a reasonable basis in fact or in law. The bill would authorize the FTC to seek civil penalties for violations of the new prohibitions.

Based on information from the FTC, CBO estimates that enacting S. 1137 would increase federal revenues from the added authority to collect civil penalties. However, we expect those collections would be insignificant because of the small number of cases that the agency probably would pursue.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Because enacting the bill would increase revenues, pay-as-you-go procedures apply. However, those increases would be less than \$500,000 in every year.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

S. 1137 would impose a mandate as defined in UMRA on both public and private entities because CBO expects that PTO would increase fees to offset the costs of implementing the bill. The requirement to pay those fees would be a mandate because the federal government controls the patent and trademark system, and no reasonable alternatives to the system exist.

Based on information from PTO, CBO estimates that the average annual cost to comply with the mandate would be about \$14 million, with less than \$200,000 of those costs accruing to public entities. Therefore, the cost for public and private entities to comply with the mandate would fall well below the annual thresholds established in UMRA for both intergovernmental and private-sector mandates (\$77 million and \$154 million in 2015, respectively, adjusted annually for inflation).

PREVIOUS CBO ESTIMATE

On July 10, 2015, CBO transmitted an estimate for H.R. 9, the Innovation Act, as ordered reported by the House Committee on the Judiciary on June 11, 2015. The bills are similar; any differences in estimated costs reflect differences in the bills' language.

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