

IP Bills Have Momentum In New Congress

By Ryan Davis

Law360, New York (November 05, 2014, 12:53 AM ET) -- With the frenzy of Tuesday's election in the rearview mirror, the now Republican-controlled Congress can get to work on pushing pressing intellectual property legislation across the finish line, including measures aimed at cracking down on patent trolls and creating a federal private right of action for trade secrets theft.

The Republican Party won control of the U.S. Senate in Tuesday's midterm elections, taking seats held by Democratic incumbents in several key battleground states to secure majority control.

The GOP had needed to reel in six seats to retake the Senate following eight years of Democratic control, and by late Tuesday had done just that in Arkansas, Colorado, Iowa, Montana, South Dakota and West Virginia to push them to victory.

Legislation to combat abusive patent suits stalled in the Senate this spring when it was under Democratic control, and attorneys say that its prospects might be slightly better with the Senate now in Republican hands. Nevertheless, the bill has enough bipartisan support that congressional leaders on both sides of the aisle are expected to tackle it in the coming months.

In advance of the election, several key lawmakers have said patent reform is one of their priorities in the next Congress, and "the consistent theme is 'this isn't dead and we're going to try again,'" Arthur Gollwitzer of Michael Best & Friedrich LLP said.

"I'm confident that Congress will again take up patent reform next session and that it will be high on the agenda," he said.

Because patent reform legislation has high-level proponents among both Democrats and Republicans, it is "one of the top 10 bills that has a chance of moving," Rich Gold of Holland & Knight LLP said.

Although measures targeting patent trolls are all but certain to be introduced and debated in Congress, it is anyone's guess whether lawmakers can craft a bill with enough support to pass both houses, Gold said.

"It's a challenging time to for getting major legislation through Congress," he said. "In other times, this may not have been considered major legislation, but now it is. It just takes a herculean effort to get people to the table."

If a bill makes it to President Barack Obama, he is widely expected to sign it, since he has urged Congress several times to take action on patent trolls, including in his State of the Union address this year.

In a speech in October, the president reiterated his call for patent reform, calling suits by owners of "phony patents" who make "bogus claims" of infringement "one of the biggest problems that we've been working on."

Patent reform appeared to be on a fast track last year, after a sweeping bill sponsored by House Judiciary Committee Chairman Bob Goodlatte, R-Va., passed the House 325-91 in December, with broad support from both Democrats and Republicans.

The measure took a much slower course in the Senate, where Judiciary Committee Chairman Patrick Leahy, D-Vt., attempted to write his own bill that omitted some of the provisions of the Goodlatte bill, including language mandating that losing parties in patent litigation pay their opponents' legal fees in most situations.

The fee-shifting provision, which critics said could discourage the filing of meritorious patent suits by small businesses unable to pay their opponents fees if they lose, appeared to be the most controversial part of the bill. After putting off a vote several times to work on the issue, Leahy pulled the bill from the committee's agenda in May.

Leahy later said that Senate Majority Leader Harry Reid forced him to withdraw the bill because of objections among groups representing the pharmaceutical industry and trial lawyers. Leahy said he was "furious" about the move and vowed to reintroduce the bill.

Tuesday's Republican victory puts Sen. Mitch McConnell, R-Ky., in place as majority leader, and attorneys say he will likely be less reluctant than Reid was to allow the measure to come to the floor.

But the main stumbling block earlier this year may just have been that there was a tight time frame to debate fee-shifting and other provisions and vote on the a bill before lawmakers turned their attention to the election, Gold said.

With more time for debate following the election, "I don't think those issues are insurmountable," he said.

Patent reform measures introduced in the next Congress might look somewhat different from what was under consideration earlier this year as a result of recent patent decisions by the U.S. Supreme Court, including one that made it easier for judges to award attorneys' fees to prevailing parties in patent cases, attorneys say.

If lawmakers feel the Supreme Court decisions addressed their concerns, they might rethink including the contentious fee-shifting provision, according to Andrew Williams of McDonnell Boehnen Hulbert & Berghoff LLP

"It will be interesting to see if there is the same sort of broad support for patent reform next year," he said.

Combined with other Supreme Court decisions making it easier to invalidate computer-related patents that claim abstract ideas, and a slew of decisions by the Patent Trial and Appeal Board invalidating

patents, defendants in patent cases have more weapons at their disposal than when Congress debated patent reform several months ago, according to Paul Devinsky of McDermott Will & Emery LLP.

"The landscape has changed a lot, so even if we don't have a bill that is as sweeping as the Goodlatte bill and is more along the lines of the Leahy bill, that's probably good enough," he said.

It's unclear what form the bill will take, but there's little chance the patent debate on Capitol Hill will end anytime soon, Devinsky said.

"There's going to be another wave of patent reform in the next Congress," he said.

There could be action, too, on long-discussed legislation that dramatically changes American trade secrets law. With companion bills sitting in both houses — one of which has already made it through committee — Congress could be poised to finally make those discussions a reality in the coming year.

In the simplest terms, the two bills — the House's Trade Secrets Protection Act and the Senate's Defend Trade Secrets Act — would create a system of federal trade secrets law by allowing for private civil lawsuits under the pre-existing Economic Espionage Act, which currently provides only for criminal cases lodged by prosecutors.

Tuesday's GOP Senate takeover might help their prospects a bit, but that's not necessarily because of the particular party that took over. Remember, these bills were both introduced by bipartisan groups of lawmakers, they're being pushed heavily by a broad group of businesses and lobbyists, and the Obama administration has previously said it's committed to toughening trade secrets protections.

Without a clear partisan divide on the question, the real advantage for the effort to federalize trade secrets from Tuesday's election might be simply if it lessens the general deadlock that's gripped Congress for years.

"Trade secret protection is not a partisan issue, so it's more about the ability to get things done generally than one outcome or the other," said Mark Klapow, a partner at Crowell & Moring LLP's Washington, D.C., office and an expert in trade secrets law. "There is a consensus that trade secret misappropriation is a threat to our economy and indeed the global economy."

Those proponents on both sides of the aisle see a lot to like in the pending bills. For one, they say they'll unify an area of law that's governed by varying state laws; for another, they give litigants easier access to federal courts, which proponents say are better equipped to handle things like out-of-state discovery.

One point of contention could be beefed up ex parte seizure provisions, which allow for "seizure of any property used, in any manner or part, to commit or facilitate the commission of a violation." A few Democrats voiced concern over the measures in a House hearing last month, and a large group of law professors have warned that they could be abused. Zoe Lofgren, a Democrat who previously led the charge for a private right of action, was one of those who flagged the provisions as worrisome.

TSPA was reported out of committee last month and is waiting for a full House vote; DTSA is sitting before the Senate Judiciary Committee, which will presumably be chaired by bill co-sponsor Orrin Hatch, R-Utah, in the coming session. Whether they make it through this newly elected Republican-dominated Congress is unclear, but Klapow sees something getting through eventually.

“There are still important debates around the finer points, but overall I think some trade secret legislation that follows the bills that have been the subject of serious debate is likely in the future,” Klapow said. “The question is whether the future is next year or five years from now.”

-- Additional Reporting by Bill Donahue. Editing by John Quinn and Chris Yates.

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