

## Patent Legislation To Watch In 2015

By **Ryan Davis**

*Law360, New York (January 02, 2015, 2:47 PM ET)* -- After a bill aimed at cracking down on so-called patent trolls stalled in Congress last year, attorneys expect lawmakers to make a major push to enact legislation on the issue in the coming months, and also possibly weigh measures to clarify patent eligibility and extend the life of some drug patents.

Here are some of the patent-related measures Congress may grapple with this year:

### Patent Reform

A patent reform bill designed to curb abusive litigation overwhelmingly passed the Republican-controlled House of Representatives in 2013, but stalled in the Democratic Senate. With both houses now in the hands of Republicans and President Barack Obama in support of legislation, the stars seem to be aligning for a patent bill to be enacted in 2015, attorneys say.

"I do feel strongly that patent reform will be passed next year," Mark Scarsi of Milbank Tweed Hadley & McCloy LLP said in a December interview. "It's one of the things the new Congress can do to show they can work together and really accomplish something."

Several high-ranking lawmakers have said that patent reform will be one of their priorities for 2015, so there is little doubt that it will be on the agenda, possibly soon after the new Congress convenes in January. However, with no bills on the table at this point, it is unclear what any patent reform legislation may ultimately look like.

The version of the bill that passed the House included numerous provisions that will now be revisited and debated anew, including measures requiring losing parties in patent cases to pay the prevailing parties fees in more cases, raising pleading standards for patent complaints, and putting limits on discovery.

It is an open question about whether all of those provisions will find their way into a new bill, particularly since there have been several important developments in patent law since Congress last addressed the issue in the spring, which could lead lawmakers to decide legislation in those areas is not necessary.

For instance, the U.S. Supreme Court has issued rulings that expand fee-shifting and make it easier

to invalidate computer-related patents involving abstract ideas, seen as a favorite of trolls. In addition, the new patent review proceedings at the Patent Trial and Appeal board have proven to be a very effective way to invalidate patents, which will likely be used more often to target patents wielded by nonpracticing entities, regardless of what Congress does.

All of those developments "have given a lot of folks solace that things are being done to make sure there are no abuses in the system," said Bart Showalter of Baker Botts LLP.

While patent reform legislation has stalled in Congress, numerous states have passed their own bills aimed at nonpracticing entities, mostly dealing with what they are required to include in licensing demand letters sent to potential infringers.

But now that there is a "hodgepodge" of such bills across the country, Congress should step in and set a uniform national standard, said Marylee Jenkins of Arent Fox LLP.

"I see that as an important issue that should be thought about and addressed in some fashion," she said.

It appears that many in Congress feel there is a need for further action to blunt the impact of abusive litigation by nonpracticing entities, and attorneys said they hope lawmakers will carefully consider the potential impact of any changes they make to patent law.

"I think there is a lack of circumspection by legislators in general, who think there will be no unintended consequences of passing law after law after law," said Robert Fischer of Fitzpatrick Cella Harper & Scinto LLP.

He pointed to the fee-shifting provision in the bill that passed the House in 2013, which stated that the losing party in patent cases must pay its opponent's fees unless the court finds that its positions were "reasonably justified." Although touted by proponents as a way to discourage patent trolls from filing frivolous suits, Fischer said such a provision could boomerang on accused infringers, requiring them to pay damages and attorneys' fees if they lose.

"Here's the problem: What happens if the troll wins? There's a sense that trolls always lose, and that's not the case," he said. "It may just be raising the stakes for everyone and exacerbating the problem they think they're solving."

On fee-shifting and other issues, there is clearly an appetite in Congress to do something to curb abusive litigation, "but there's an increased awareness of the need to do it delicately and with a proper balance," said Teresa Stanek Rea of Crowell & Moring LLP.

"Congress has an appreciation of the fact that any legislation cannot be overarching, because there will be unintended consequences," she said.

Regardless of what form the legislation takes, the halls of Congress are once again expected to be full of talk about patents this year, attorneys said.

"I definitely see patent reform for 2015, without a doubt," Jenkins said.

## **Patent Eligibility**

While it may not happen this year, attorneys said they expect Congress to start giving more attention to the idea of rewriting Section 101 of the Patent Act, which defines the types of inventions that are eligible for a patent.

As it stands now, the statute provides a fairly expansive definition of what is patent-eligible. However, the U.S. Supreme Court has struggled to interpret that language in numerous high-profile cases in recent years, including in the cases known as *Alice*, where the justices rejected a patent on an abstract idea implemented using a computer, and *Myriad*, which struck down a patent on isolated DNA.

Some commentators have suggested that if Congress made it more explicit what Section 101 covers, there would be greater certainty in patent eligibility, though changing the wording would likely invite a bruising battle.

"With respect to *Alice* and *Myriad*, there has been some discussion about possibly amending or modifying 101, and that is something that might be looked at by Congress," Jenkins said, though she noted that she would be hesitant to change the statute, "which has served us so well for so many years."

Section 101 currently states that "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" is eligible for a patent, although the courts have carved out some exceptions, including products of nature and abstract ideas.

Exactly what qualifies for those exceptions has often vexed the courts, and rewriting Section 101 could bring more clarity on the issue.

"Patentable subject matter is a very important aspect of the IP system, and some people only think true clarification can come with a legislative fix," Rea said.

The U.S. Patent and Trademark Office recently issued guidelines to examiners on how to apply the Supreme Court's recent decisions and the courts are grappling with how to interpret them in numerous cases. As a result, Rea said the idea of Congress amending the statute is likely "only a glimmer in someone's eye" at this point, but it could get traction if industry groups start pushing lawmakers to make a change.

## **Drug Patent Terms**

In December, Sens. Orrin Hatch, R-Utah, and Michael Bennet, D-Colo., introduced the Dormant Therapies Act, which they said would end the "ticking patent clock conundrum" that requires pharmaceutical companies to make a priority of drugs that can be brought to market quickly.

The law would provide 15 years of U.S. Food and Drug Administration marketing exclusivity for certain types of drugs classified as "dormant therapies," or those that treat long-term conditions like Alzheimer's, epilepsy, and multiple sclerosis, for which there are no satisfactory treatments.

The senators said it takes an average of 14 years of research and development from the time a drug is discovered to when it reaches a patient, which consumes much of the 20-year life of a patent. As a result, drugmakers often focus on drugs that can be brought to market quickly, rather than those that

can help people with complex conditions.

Proponents say the expanded exclusivity created by the bill would create new incentives to create dormant therapy drugs. The measure could be an attractive one for lawmakers, said Baldassare Vinti of Proskauer Rose LLP.

"It's easy for legislators to rally around, because in theory, it sounds really good," he said. "It provides more freedom in the way of patent protection."

The bill may find little opposition in Congress, but if passed, it could spur fights over what qualifies as a dormant therapy, he said. For now, "if you represent companies in the pharmaceutical area, this bill is very near and dear to your heart," he said.

--Editing by John Quinn and Patricia K. Cole.

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