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Potential Intellectual Property Issues on the Table in the 115th Congress

Over the past decade, intellectual property issues have often taken center stage in Congress. The America Invents Act, passed in 2011, changed patent landscape in many ways, most notably by changing the U.S. patent system from “first to invent” to “first inventor to file” and by creating new post-grant proceedings—such as Inter Partes Reviews and Covered Business Method Reviews—in which the validity of issued patents may be challenged. In 2016, Congress enacted the Defend Trade Secrets Act, creating for the first time a federal cause of action for trade secret misappropriation. And there is a long list of unenacted bills implicating IP rights over the last several years: the PATENT Act, the STRONG Patents Act, the TROL Act, the Innovation Act, the Trade Protection Not Troll Protection Act, the SHIELD Act, and the Stop Online Piracy Act—to name just a few. Because IP issues do not tend to break along traditional party lines, many of these bills were co-sponsored by members of both parties, and some drew wide bipartisan support.

As the Republican-controlled 115th Congress gets to work, it appears that intellectual property issues may remain on the forefront. This week, [in a speech at the National Press Club](#) in Washington, DC, House Judiciary Chairman Bob Goodlatte (R-Va.) announced his agenda for the next two years. Chairman Goodlatte’s speech indicated that the House Judiciary Committee is likely to pursue legislative action affecting both the patent and copyright realms.

Rep. Goodlatte’s plans regarding patent-related issues appear to align with several common themes in legislation introduced over the last few years—for example, reducing the cost of patent litigation and discouraging “abusive” litigation activity. In his speech, Rep. Goodlatte stated that his intended reforms “will help alleviate the wasteful burden of unnecessarily expensive litigation costs, thereby freeing small businesses to flourish, unleash innovation, and create new jobs for Americans.”

Although a patent-specific bill has yet to be introduced in the 115th Congress, it would not be surprising for certain elements of the [Innovation Act of 2013](#)—which was introduced by Rep. Goodlatte, passed the House by a 325-91 vote, and ultimately stalled in the Senate—to reappear in one or more bills this year. Certain provisions of the Innovation Act, such as the imposition of tougher pleading standards for patent cases, have seemingly been rendered moot by recent changes in the Federal Rules of Civil Procedure. But others, such as cost-shifting for discovery and a presumption of so-called “loser pays” fee shifting, as well as end-user protection from infringement allegations, remain contentious issues.

In addition to legislation governing patent litigation, we may also see legislation proposed to alter the substantive patent laws as well—including possible amendment of 35 U.S.C. § 101, which governs patent eligibility. Several major intellectual property groups, including the American Bar Association (ABA) Section of Intellectual Property Law, the American Intellectual Property Law Association (AIPLA), the

Intellectual Property Owners Association (IPO), and the Pharmaceutical Research and Manufacturers of America (PhRMA), have recently expressly support for amending Section 101, with IPO even releasing a draft amendment of the statute. This portion of the patent statute has not been amended by Congress since it was first included in the Patent Act of 1952.

As for copyright, Chairman Goodlatte and Ranking Member John Conyers (D-MI) introduced in December [a proposal](#) to “reform” and modernize the operation of the US Copyright Office, through measures such as granting the Copyright Office autonomy and requiring it to maintain an up-to-date digital, searchable database of all copyrighted works. Goodlatte stated that this proposal is the first of “numerous policy proposals” to reform aspects the copyright system, and that the Judiciary Committee intends to “build upon its review of our nation’s copyright laws to ensure that America’s global leadership in creativity and innovation continues in the 21st century and beyond.”

It does not look like IP issues will be left on the sideline in what may be a busy and active 115th Congress. Stay tuned to Capital Insights for more updates as IP legislative proposals unfold.