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Congress Isn't Giving Up On Patent Eligibility Fix, Rep. Says

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Law360 (February 11, 2020, 11:16 PM EST) -- Though it's "very complicated," Congress continues to plug away at a patent eligibility bill, according to a Democratic lawmaker who said Tuesday that he's hopeful such legislation will materialize this session.

Rep. Hank Johnson, D-Ga., chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, spoke at an intellectual property conference in Washington, D.C., hosted by [Covington & Burling LLP](#) and Inventing America, a coalition of U.S. inventors and patent holders.

A bipartisan push on Capitol Hill last summer that would undo [U.S. Supreme Court](#) decisions restricting what can be patented has largely fizzled. The push, led by Republican Sen. Thom Tillis of North Carolina and Delaware Democratic Sen. Chris Coons, lost steam after the Senate failed to introduce a bill following a series of [three hearings](#) on reforms.

But Johnson told Law360 that the effort isn't dead yet and that the House and Senate continue plugging away on a proposed bill.

"It's a very complicated issue with a lot of moving parts, a lot of interests that need to be heard that have legitimate concerns that need to be accommodated," he said in an interview. "And so it's very complicated, but we're working our way through that process and hopefully before the end of this session of Congress we'll have something that stakeholders can all come together and agree on."

That contradicts comments Tillis made to the IPO Daily News at the end of January, when he said he didn't foresee a way to hammering out a bill this congressional session.

Johnson said the need for eligibility reform has not been quelled by recent positive evaluations of the U.S. patent system. Earlier at the conference, [U.S. Patent and Trademark Office](#) director Andrei Iancu [touted](#) a [U.S. Chamber of Commerce](#) survey that placed the U.S. in the top spot in the world for innovation and second for patents.

While Johnson said he was pleased by the rebound in the U.S.'s patent ranking, he expressed

concern about how long it will last in the absence of an overhaul to U.S. patent law.

One factor he said that contributed to the jump in the U.S. Chamber of Commerce ranking was administrative reforms Iancu had himself spearheaded, including changing the claim construction standard to align with the standard used in federal courts, along with guidance the agency issued on patent subject matter eligibility.

While Johnson said Iancu should be commended for those administrative actions, he also said they're no substitute for legislative action.

"If the perceived strength of the U.S. patent system can fluctuate dramatically based on administrative changes alone, it is reasonable to question whether the law needs to be changed to decrease the degree of regulatory authority delegated to the executive branch," he told conference attendees.

Johnson told conference attendees that lawmakers are also working on a legislative fix to the Federal Circuit's explosive [Arthrex](#) decision, which held that the Patent Trial and Appeal Board's structure [violates the Constitution's appointments clause](#) because PTAB judges don't have sufficient oversight.

Johnson said the Arthrex decision will likely cause uncertainty until the Supreme Court weighs in, so the best solution is for Congress to eliminate the uncertainty about the legality of PTAB proceedings.

To remedy the constitutional violation it identified, the Federal Circuit struck down part of the Patent Act that gave PTAB judges Title 5 protections from removal, which Johnson said troubled him because it incentivizes judges to adjudicate cases with an eye toward preserving their jobs.

"If the appointments clause requires that a presidentially appointed Senate confirmed officer have the last word in these cases, that power should be exercised transparently rather than through the ever-present threat of losing one's job," he said.

--Additional reporting by Ryan Davis. Editing by Adam LoBelia.