Tillis and Coons Bill Would Eliminate all Judicial Exceptions to Patent Eligibility (ipwatchdog.com)

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As predicted by former United States Court of Appeals for the Federal Circuit Chief Judge Paul Michel last month, Senators Chris Coons (D-DE) and Thom Tillis (R-NC) have introduced the first of what Michel said will be multiple bills aimed at fixing the U.S. patent system. Today's bill,

the Patent Eligibility Restoration Act of 2023, would eliminate all judicially-created exceptions to U.S. patent eligibility law.

Tillis first introduced the bill last August, and Coons announced he would co-sponsor the legislation in September 2022 at a Council for Innovation Promotion (C4IP) event. As part of today's announcement, C4IP Co-Chairs and former U.S. Patent and Trademark Office (USPTO) Directors David Kappos and Andrei Iancu applauded the bill, calling it "much needed legislation to foster the development of next-generation technologies across many innovative industries, including artificial intelligence, medical diagnostics, quantum computing, and telecommunications, to name a few."

The bill's text articulates the following statutory exceptions to eligibility:

(D) The following inventions shall not be eligible for patent protection:

(i) A mathematical formula that is not part of an invention that is in a category described in subparagraph (B).
(ii) A mental process performed solely in the mind of a human being
(iii) An unmodified human gene, as that gene exists in the human body.
(iv) An unmodified natural material, as that material exists in nature.
(v) A process that is substantially economic, financial, business, social, cultural, or artistic.

With respect to the exception in paragraph (v), the text explains that "process claims drawn solely to the steps undertaken by human beings in methods of doing business, performing dance moves, offering marriage proposals, and the like shall not be eligible for patent coverage, and adding a non-essential reference to a computer

by merely stating, for example, ‘’do it on a computer’ shall not establish such eligibility.”

Further, any process that requires the use of a machine, including a computer, to be performed, shall be eligible for patent protection under the bill.

The bill also repeatedly takes pains to distinguish Section 101 from Sections 102, 103 and 112.

Tillis said in the press release sent out today that the text strikes a balance between clarifying that the eligibility standard should be broad while also addressing concerns “by enumerating a specific but extensive list of excluded subject matter. “Passing patent eligibility reform remains one of my top legislative priorities during my second term,” Tillis said.

Coons said he was proud to join as a sponsor of the bill and that patent eligibility confusion has compromised the United States’ “competitive edge.”

“Critical technologies like medical diagnostics and artificial intelligence can be protected with patents in Europe and China, but not in the United States,” Coons said.

While the likelihood of the bill being passed remains unclear, Michel said in May that the mere introduction of such legislation could speed change along. He explained:

“The three biggest problems are all about to be the subject of bipartisan bills in the Senate, and the House will follow suit. I think when the bills are introduced and get cosponsored by numerous people of both parties, and then they start holding hearings, that will create a huge amount of momentum, and when the courts see the

momentum, they will start acting on their own – particularly the Federal Circuit."

IPWatchdog Founder and CEO Gene Quinn said the bill would be a welcome reset of the patent community:

"This bill would once and for all reassert Congressional authority to decide what is and what is not patentable, taking the legislative prerogative away from the Supreme Court. We all know the Supreme Court is not supposed to legislate, but for years the judicial exceptions to patentability— which by their very nature are extra-statutory— have been used to prevent the patenting of innovations that the law enacted by Congress allowed to be patented. If this bill passes it will nullify all Supreme Court precedent relating to patent eligibility, and specifically overrule *Mayo, Myriad* and *Alice*. The Federal Circuit and Supreme Court would need to start from scratch, and that would be a very good thing because the Supreme Court has painted the entire industry into a corner and they refuse to modify, elaborate or clarify their nonsensical approach to patent eligibility. It is far past time for a reset."

IPWatchdog will share more commentary on the bill as we gather it.