Unclear Intellectual Property Laws Are Stifling US Innovation

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U.S. intellectual property laws are so unclear that even experienced attorneys can't figure out which inventions are eligible for patent protection.

This lack of predictability means far less job-creating investments for U.S. companies that need patent protection to compete. Investors simply don't invest when they aren't certain that a company will be able to protect its intellectual property.

I've seen this predictability problem firsthand. I'm an IP lawyer and investor who recently taught a class at the Practicing Law Institute. My students included more than 300 attorneys, most very experienced in intellectual property law. But when I polled them, 90% said they weren't confident they could predict whether a software invention even qualifies for patenting.

And they weren't just being modest. Their lack of confidence was completely justified. I showed them three pairs of software patents — each consisting of a patent that had been upheld in court and one that had been struck down — and asked them to identify which one had been upheld. The majority of the class got it wrong two out of three times. Last year, the class got it wrong all three times.

This is a problem — and not just for these lawyers and their clients. When even trained IP experts can't tell what's eligible for a patent, the average American inventor and investor has no chance. The whole patent system has become unreliable.

Reliable patents are the cornerstone of U.S. innovation and technological progress. Without them, it would be too risky for inventors to put the time and money into developing new

products — and investors wouldn't have any incentive to fund them.

This crisis has been long in the making. For more than a decade, the U.S. court system has slowly eroded patent eligibility for high-tech inventions. It began with several U.S. Supreme Court decisions that created vague guidelines for patent eligibility.

Federal district and circuit courts have interpreted those rulings broadly to disallow patents on high-tech inventions — such as software algorithms and medical diagnostic tests — whose complex workings judges have been dismissed as abstract, laws of nature or natural phenomena. Sorting through these opinions, to figure out the rules, is no easy task. I've tried.

Based on the Supreme Court's rulings, lower courts now demand a level of specificity in patent claims that isn't borne out by law. The U.S. Code says that "any new and useful process, machine, manufacture, or composition of matter" should be eligible for patenting.

But companies whose innovations meet this statutory definition routinely have their patents challenged on the ground of allegedly being abstract. By my count, from 2018 to 2023, the U.S. Court of Appeals for the Federal Circuit, which has jurisdiction over patent matters, upheld software patent eligibility in just 14 of at least 96 cases where such patents were challenged on these grounds.

This situation creates a significant barrier to entry for young, innovative companies and intrepid investors looking to compete with established giants. And it sets patent owners up to fail.

As bleak as the situation may seem, a legislative fix could solve the problem. A bipartisan bill introduced by Sens. Thom Tillis, R-N.C., and Chris Coons, D-Del., called the Patent Eligibility Restoration Act, or PERA, would set clear standards for what is and isn't eligible for a patent. It would remove courts' discretion to deny patents based on ambiguous concepts like "abstract ideas" and "laws of nature," reestablishing predictability for patent owners and investors.

PERA seeks to remove the guesswork around what is or is not "abstract" by setting forth specific categories of inventions that are ineligible for patenting. If a category of invention falls within an exclusion, it cannot be patented.

Patents directed to "a mental process performed solely in the mind of a human being" or isolated mathematical formulas would not be eligible for patenting. Unmodified human genes or naturally occurring materials are not eligible for patenting. Nor could economic, financial, business, social, cultural or artistic inventions be patented if the invention involves simply doing it on a computer.

If an invention does not fall within a categorical exclusion, it can be patented. So too can categories of software inventions that can only function with the assistance of unique technology, such as software algorithms.

The reality is that every invention, no matter how innovative, stems from natural substances or abstract concepts when broken down to the core elements.

Any software algorithm, for instance, can be traced back to concepts and ideas that originate in the human mind. Without this mental foundation, software development would be impossible.

Similarly, fundamental innovations in the materials or life sciences industries often stem from naturally occurring phenomenon. Take aluminum alloys that make airplanes possible. Despite seemingly unnatural characteristics, these alloys are constructed from naturally occurring metals like zinc and copper.

Recognizing these realities, PERA would establish easy-to-understand criteria for patent eligibility, providing inventors with the certainty and predictability needed to take immense risks.

Without clear standards, more and more inventors will simply opt to keep their technologies secret or not develop them at all. The risk of pouring millions — or billions — of dollars into a new invention, only to have a court declare it patent ineligible at the eleventh hour, would be too high.

Right now, we're stifling innovation with unclear patentability rules. Even the experts in my class could not predict whether something is "abstract." And any innovation system that requires an investor to read hundreds of legal opinions to have any hope of knowing whether a company's IP is even eligible for patenting is broken.

It's high time for reform.

When I polled my class, 85% of the students agreed that intervention from Congress is necessary to fix patent eligibility. Tillis and Coons have already drawn up a solution. Everybody else just needs to vote "yes."