

Fed. Circ. Judges Look To Congress For Patent '101 Eligibility Fix

By [Ryan Davis](#) · [Listen to article](#)

Law360 (November 17, 2025, 8:09 PM EST) -- One current judge and one retired judge from the Federal Circuit said at a conference Friday that they believe legislation is the best path to getting more clarity on which inventions are eligible for patents but that proposals now being considered likely need tweaks and compromises.

U.S. Circuit Judge Richard Linn and former U.S. Circuit Judge Kathleen O'Malley said at Cleveland State University College of Law's IP+ Conference that they don't think the [U.S. Supreme Court](#) is willing or able to sort out the contentious issues surrounding patent eligibility, but expressed measured optimism that Congress could do that, with a bill like the [Patent Eligibility Restoration Act](#).

"We need to find a better test, even if it's a compromise and not everybody wins, because we'll all be better off," said Judge Linn, who took senior status in 2012.

He said the Supreme Court's [2014 decision](#) on patent eligibility in [Alice v. CLS Bank](#)  "is just an abomination and has caused tremendous problems."

In that case, the court held that abstract ideas implemented using a computer are not patent eligible, and it has been cited hundreds of times to find patents invalid. Judge Linn said the ruling has led to "the morass that we're in," because it didn't set out a broad principle that can be applied to the facts of a case.

Instead, he said, courts look to other cases where patents have been found either eligible or ineligible under Alice. Then they try to determine if the facts are closer to one case or another, and "to me, that's absurd," and not how any other area of law operates, Judge Linn said.

"I would like to see some sort of a legislative solution," he said. "The Federal Circuit can't really do anything."

O'Malley, who retired from the Federal Circuit in 2022, agreed that revising the law is the best way to address patent eligibility, saying "I think we need to get behind some of these legislative changes, and maybe try to get them to be a little better."

"The problem with legislation," she said, is that "it has to be imperfect, because you have to get buy-in from so many different areas. But I think it's better than nothing."

Technology companies that are frequently sued for patent infringement tend to oppose changes to current law, since eligibility challenges can be an effective way to shut down suits, while drugmakers that seek to use strong patents to recoup research and development costs generally support revising the standards for patent eligibility.

"We need to look to the legislature to fix this because I don't think the Supreme Court will," O'Malley said. I think that we have to recognize that if you're going to get tech and pharma to agree on anything, it's going to have to be narrow. It can't be a complete fix."

U.S. Sen. Thom Tillis, R-N.C., the lead sponsor of the Patent Eligibility Restoration Act, said at a hearing last month that he hopes to have the legislation ready for a vote before he retires from Congress in just over a year.

The bill would effectively overrule Supreme Court decisions that prohibit patents on inventions that are directed to broad categories like abstract ideas and laws of nature, and would instead establish narrower categories of inventions that cannot be patented, including mathematical formulas and mental processes.

O'Malley said she views the bill as an effort to mimic the European system by listing categories that are not patent eligible, and said "I do think PERA is on the right track. It needs some more tweaking."

She added that she's been surprised that the measure keeps being reintroduced and discussed, and so "I think we might see something in the next year and a half on patent eligibility."

Other speakers on the panel with the judges said they didn't view the bill's prospects as favorably. Dennis Crouch, a professor at University of Missouri School of Law who writes the Patently-O blog, said the measure in its current form is "not politically viable because it's

so strongly favoring one set of interests."

Yet he said he thinks there's a chance to get legislation passed if "major changes" were made to the proposal, or if U.S. Commerce Secretary Howard Lutnick, a prolific inventor who has spoken about the importance of strong patents, champions it.

Donald Chisum, the author of the Chisum on Patents treatise, said he has "deep ingrained skepticism" about any patent legislation being enacted, since such measures so rarely advance in Congress.

The judges said that despite the difficulty of getting a bill through the legislature, they believe that is more likely to result in positive changes on patent eligibility than the Supreme Court weighing in on the issue again.

Judge Linn said he was recently asked what patent law issue the high court should take up, "and my answer was none."

"Be careful what you wish for, because the Supreme Court is just not in familiar territory with patent cases," he said.

O'Malley said she believes that many of the justices are skeptical of the basic idea of intellectual property and granting exclusive rights to inventions.

"I don't think they're bad at patent law. I don't think they care about patent law," she said. "I think what they believe is that from the very beginning, there never should have been patents."

--Editing by Janice Carter Brown.