

A Window is Open to Save U.S. Patents— Don't Let it Slam Shut



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“Patents are lobbied as an issue by large corporations as a luxury, when times are good and no other issues of corporate importance demand attention.... With Google’s attention diverted, that alone raises the prospects for those who would like to see the U.S. patent system resurrected.”



Those who discover and create in the first instance have been unable to succeed because there are those who implement their innovations without paying for the rights, which is just a sanitized way of saying there are a handful of giant companies that prey on innovators by taking whatever they want with impunity. The legal system has been complicit in this racket— in fact, the very cause of the problem. 35 U.S.C. 101 is simple and straightforward, and the intent of Congress is clear in the legislative history: everything made by man is supposed to be patent eligible, period.

It has been some time since everything made by man has been patent eligible in the United States, however, which is why various innovator constituency groups have been pleading for help from the U.S. Patent and Trademark Office (USPTO), from the courts and from Congress. The USPTO has come through to the greatest extent possible since Andrei Iancu became Director, first with a speaking and testifying tour where he said over and over again that 101 needed Congressional attention, then with positive guidance after the Federal Circuit's decision in *Berkheimer*, and then again twice in 2019, first with [Revised Patent Eligibility Guidance](#) in January 2019, and

then with voluminous examples in October 2019. Iancu and Commissioner for Patents Drew Hirshfeld have been very busy.

Getting on the Same Page

Sympathetic members of Congress heard the calls from Director Iancu to take action, and action was taken. Stakeholders were invited to roundtable events throughout the Spring of 2019, which led to the release of talking points, then principles, then draft language, and a promise of a bill by July. As we know, there was no bill introduced in the Senate IP Subcommittee in July as promised, but it would be introduced before the August recess. Then it would be introduced sometime after Labor Day. Then promises on an introduction date stopped. Now, sources have told IPWatchdog that the Senate IP Subcommittee is moving on from patent eligibility reform to copyright matters because those who support reform cannot agree.

Senator Thom Tillis (R-NC), who Chairs the Senate IP Subcommittee, and Senator Chris Coons (D-DE), the ranking member of the Senate IP Subcommittee, are prepared to work together with innovators to introduce a legislative fix to 101 and attempt to solve the patent eligibility crisis, yet factions within the pro-innovator community are [unable to agree](#).

Meanwhile, the implementer community (i.e., those who are not infringers because innovators can't even patent their inventions) are perfectly fine with the way 101 is and continue to tell Congress no reform is necessary. The implementers are on the same page.

Wouldn't it be nice if the innovators were on the same page? Frankly, given the state of patent eligibility and how decimated life sciences and software innovators have been over the past decade it is mystifying that an acceptable compromise cannot be achieved. Surely there must be an innovator position acceptable to everyone?

There must be an innovator position acceptable to everyone if a legislative fix has any chance. As Senator Tillis told the Intellectual Property Owners Association (IPO) recently, in order for there to be a bill introduced it must be one that can at a minimum pass the Senate IP Subcommittee, and without an innovator compromise that will be impossible.

“But Congress should do this because it is the right thing to do,” I hear frequently. In an ideal world that would be true, but holding onto such Pollyannaish views in Washington, D.C., is a recipe for failure. Passing legislation, any legislation, is

political. In the patent and intellectual property realm it is not “political” with a capital “P”, but rather political in terms of philosophy and ideology. That is why you see Republicans and Democrats crossing the aisle on issues dealing with patents and intellectual property. In fact, many times you will see Members of Congress agree on patents and IP when they agree on literally no other issue. But that doesn’t change the reality that legislation will not move if the votes are not present.

The Window

There is a window open for legislative action, and the innovator community is blowing it. [Google fired its lobbyists](#) in Washington, D.C., and then rehired all new lobbyists with an antitrust and economic background. Meanwhile, the Trump Administration has held roundtable talks about how to combat counterfeits in online marketplaces, which have been thinly veiled forums asking what, if anything, the government can do to punish Amazon for rampant counterfeits. Facebook has few friends in Washington, D.C. after the last election and its privacy issues, and its recent quarterly report shows expenses significantly up, that revenue growth slowed significantly and the CFO suggests that is likely to continue into the future.

Patents are lobbied as an issue by large corporations as a luxury, when times are good and no other issues of corporate importance demand attention. If and when antitrust regulators launch an investigation into Google’s practices that will become an existential threat; antitrust investigations always are. Google has been the largest voice for reforms that weaken the patent system and the patent grant. With Google’s attention diverted, that alone raises the prospects for those who would like to see the patent system resurrected.

With Amazon doing all things for all people, including delivering on Sundays, are patents really a priority? While it seems foolish at the moment to think of Amazon as in turmoil, powerful name brand trademark owners are unhappy and openly discuss how to avoid using Amazon. Particularly if there is a second Trump term, given the fact that there is no love lost between President Trump and Jeff Bezos, something to address online counterfeiting seems inevitable.

Facebook has too many issues on the horizon in the near term, including answering shareholder questions and closely monitoring the use of its network during the 2020 election, that it seems unlikely they will be able to focus on 101 reform. Retailers like J.C. Penny have been vocal with respect to the need for patent reform, but retailers are weakened – have you been to a mall lately? – and alone won’t have the clout.

Don’t Forfeit this Moment

The time is right for a legislative fix for the patent eligibility crisis facing real innovators in the life sciences and software industries. There is a unique opportunity for a legislative fix for 101, with many of those who have favored a weakened patent system no longer focused on the issue the way they once were, and partners in the Senate IP Subcommittee who actually, truly understand patents, the patent system and innovation.

A window is open; how long that window remains open is hard to know. But it would be a tragedy to forfeit this moment and watch such an opportunity pass without taking action.

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