



AMERICAN CONTINENTAL GROUP

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## PATENT & TRADEMARK POLICY REPORT AUGUST 5, 2022



### I. Congressional Developments:

- On Wednesday, Senate Judiciary IP Subcommittee Ranking Member Thom Tillis (R-NC) introduced legislation that is intended to provide clarity to patent eligibility law in the United States. The *Patent Eligibility Restoration Act of 2022* would define the scope of patent eligible subject matter and all exceptions in Chapter 10 of Title 35. Specifically, the bill would restore patent eligibility to important inventions across many fields, such as diagnostics, gene-based medicine, AI, and other software-based technologies, while simultaneously resolving concerns over patenting of mere ideas, the mere discovery of what already exists in nature, and social and cultural content that is beyond the scope of the patent system as a system aimed at promoting technology-based innovation. Stakeholders have called on Congress to intervene on Section 101 after a series of decisions from the Supreme Court – namely *Prometheus v. Mayo Clinic* and *Alice Corporation v. CLS Bank* – led to a great deal of confusion by lower courts and uncertainty in the innovation and investment communities. Stakeholders had hoped that the high court would resolve some of these issues by taking up the *American Axle* case, but the Supreme Court decided not to hear it. Of note, Senator Tillis’ bill is intended to abrogate all judicially-created exceptions to eligibility and the case law interpreting those exceptions. In a statement announcing the bill’s introduction, Senator Tillis underscored that passing patent eligibility reform remains one of his “top legislative priorities” during his second term. More info. [here](#).

### Headlines and Highlights:

- Senate Judiciary IP Subcommittee Ranking Member Tillis introduces legislation to improve clarity of patent eligibility law.
- Senate Judiciary IP Subcommittee Chairman Leahy and Ranking Member Tillis introduce *Patent Examination and Quality Improvement Act of 2022*.
- Tim Wu reportedly leaving post in White House soon.
- ITC to investigate Lenovo, Acer, and other companies for allegedly infringing upon patents through their video devices.
- EU antitrust enforcers reportedly probing Google Play Store rules.
- In editorial, Yale professor Stephen L. Carter pushes back on criticism of AbbVie’s patents on Humira.

- On Tuesday, Senate Judiciary IP Subcommittee Chairman Patrick Leahy (D-VT) and Ranking Member Thom Tillis introduced the *Patent Examination and Quality Improvement Act of 2022*. The bipartisan legislation seeks to evaluate and improve the patent examination process and the overall quality of patents issued by the USPTO. Specifically, it would require the Comptroller General of the U.S. to submit a report to the Senate and House Judiciary Committees within one year after the bill was enacted evaluating patent examination improvement. Through the study, the Senate Judiciary IP Subcommittee leaders are interested in reviewing the need for greater clarity in terms of what constitutes patent quality, the setting of patent quality metrics, and how the quality of work product performed by patent examiners is measured within the office. After the Comptroller General finalizes the report, the bill directs the USPTO Director to develop guidance for patent examiners focused on patent examination improvement. It also requires the USPTO Director to submit to Congress a report with a 5-year IT modernization plan and detailing how the Office will improve the technical training of patent examiners with respect to emerging areas of technology, among other items. More info. [here](#).
- Over the weekend, Senator Amy Klobuchar (D-MN), Chair of the Senate Judiciary Antitrust Subcommittee, said that her antitrust bill, the American Innovation and Choice Online Act, will have to wait until after the August recess to get a floor vote. During a Saturday appearance on Symone Sanders' MSNBC show, Klobuchar said that [last] Thursday she and Schumer "talked about having this vote in the fall. We're not going to be able to do it this week [before recess]." While many thought that the bill may never come to the floor, Schumer's office on Thursday stated, "Sen. Schumer is working with Sen. Klobuchar and other supporters to gather the needed votes and plans to bring it up for a vote." Read more [here](#) and [here](#).

## II. Administration Updates:

- On Wednesday, the U.S. International Trade Commission (ITC) announced plans to investigate Lenovo, Acer, and other companies for allegedly infringing upon patents by selling certain video devices and products. More info. from *Reuters* [here](#).
- On Tuesday, *POLITICO* reported that Tim Wu, the White House advisor on antitrust enforcement, is expected to leave his position in the coming months and return to teaching at Columbia Law School. Read more [here](#).

## III. USPTO Updates:

- Effective August 6<sup>th</sup>, USPTO will begin requiring all UPSTO.gov account holders to verify their identities as a condition for filing electronic trademark forms. When verifying identities, account holders will also need to choose a user role. According to USPTO, this move to mandatory verification will enable USPTO to shut down accounts used by bad actors for fraudulent filings and prevent them from creating new unverified accounts. More info. [here](#) and [here](#).

## IV. Judicial Updates:

- News surfaced this week that Liberty Tax Service has sued companies behind AMC's hit show "Better Call Saul" for allegedly infringing its trademarks and Statute of Liberty logo

in depicting the “Sweet Liberty Tax Services” in a recent episode. The complaint raises concern that “out of all the names defendants could have used,” they chose “not to be original at all, but instead rip off the famous Liberty Tax trademarks.” The lawsuit seeks a halt to any infringements, in addition to unspecified punitive and triple damages. Read more [here](#).

## V. International Updates:

- News surfaced this week that EU antitrust enforcers are investigating Google Play Store rules. Two sources told *POLITICO* that Google’s rivals have received confidential questionnaires from Brussels, probing billing terms and developer fees for the Play Store. Developers had raised concern that fees for access to the Play Store were as high as 30 percent and they were restricted from using alternative billing systems to collect payment from users. However, late last month, Google announced that it would allow certain app developers to use alternative billing systems when collecting payments from users in Europe, and that it would reduce developer fees. The European Commission declined to comment to *POLITICO* on the matter. Read more [here](#).
- On Monday, *Reuters* reported that France, Italy, and Spain have expressed their support for legislation within the European Union that would ensure Big Tech firms partly finance telecom infrastructure. EU regulators were reportedly looking into this in May, but this would be the first time that three governments have expressed a joint position on the issue. In a joint paper, the three governments said the six largest content providers accounted for 55% of internet traffic. “This generates specific costs for European telecom operators in terms of capacity, at a time they are already hugely investing in the most costly parts of the networks with 5G and Fiber-To-The-Home,” the document said. It urged that European telecom networks and large online content providers pay fair shares of network costs. Read more [here](#).

## VI. Industry Updates:

- In a *Bloomberg* editorial, Stephen L. Carter, a professor of law at Yale University, attempts to push back on the narrative from critics that AbbVie’s patents on the Humira drug are anti-competitive and constitute a so-called “patent thicket.” He points out that since 2007, federal law has allowed the Food and Drug Administration (FDA) to approve biologic applications even if an infringement suit has been filed. Furthermore, once the agency gives its blessing to a “biosimilar” drug, the maker has the right to launch the biosimilar even as the suit moves forward. Despite this rule, no competitors have decided to launch. Professor Carter also cites Judge Easterbrook’s remarks on the matter stating that as long as the patents in question are valid, asserting them in litigation cannot be considered a violation of antitrust law. Finally, Professor Carter underscores that AbbVie has agreed to settle each of its lawsuits under terms that allow biosimilars into market in 2023 – way ahead of the expiration of the last of the patents on the drug. Read the full editorial [here](#).