US INVENTOR OPPOSES PERA - DEMANDS PUBLIC POLICY JUSTIFICATION

PERA Codifies China's Lead in 37 of 44 Technologies Critical to US National Security

The Patent Eligibility Restoration Act of 2023 (PERA) was introduced in June 2023 by Senators Tillis and Coons. They now seek to mark it up. PERA must not become law without complete removal of Section 3(b)(1)(B)(i) and (ii) and its support at Section 2(5)(D)(v) and Section 2(5)(E)(i) and (ii).

In 2014, the Supreme Court invented an exception to patent eligible subject matter called the *abstract idea*. This decision made many software inventions ineligible for patent protection. No other country, including China, has a similar exception. In a 2017 study, ~1700 inventions were not granted patents in the US, but their companion applications were granted patents in Germany or China, and ~50% of patents challenged as *abstract ideas* are invalidated in the US. Investment that once fueled US startups has fled to startups in China, and Big Tech monopolized by stealing the inventions of startups. China now leads the world in 37 of 44 technologies critical to our national security and economic growth. 60% of those 37 technologies are directly related to the abstract idea that handicapped US innovation in fields of artificial intelligence, cybersecurity, 5G/6G, quantum computing, fintech and many other critical software related technologies.

While the PERA claims to abrogate the abstract idea exception, it does not. In fact, it codifies it, enshrining this national security disaster in black letter law. *What is the public policy justification for handicapping US innovation in ways no other country does?*

The *Abstract Idea*

The *abstract idea* test removes the computer from the patent and then looks at what is left. Once the computer is removed, only math or logic remain so the invention is deemed an *abstract idea*.

A method of evaluating claims called *insignificant extra solution activity* is used to determine if an inventor is just taking an *abstract idea* and adding a computer to make it eligible for patenting. The evaluation removes *conventional and routine* computer activities from the claim language, which are things like sending, receiving, printing, saving, etc. What's left is math or logic that can be performed with a pencil and paper, or in your mind, and the invention is deemed an abstract idea.

PERA's New Exception

The first step of PERA's exception declares all software inventions ineligible to patent if it "*is substantially economic, financial, business, social, cultural, or artistic, even though not less than 1 step in the process refers to a machine or manufacture.*" [(3)(b)(1)(B)(i)]. PERA explicitly disregards *conventional and routine* computer activities in the same way as *insignificant extra solution activity* testing does for the *abstract idea*.

The second part can return the invention to eligibility "*if the process cannot practically be performed without the use of a machine or manufacture.*" [(3)(b)(1)(B)(ii)] Since it is impossible to prove a negative, the inverse must be proven – can the invention be performed without computer (a machine)? To do that, *conventional and routine* computer activities must be removed from the claims to see what is left. Just like the *abstract idea* test, all that is left is math or logic. Math or logic can be performed with pencil and paper, or in your mind, which is a way in which the invention can be performed without a computer, thus the invention cannot be returned to eligibility. It is effectively the same test as the *abstract idea*, and it will bring the same results.

A Decade will Pass Before Congress Will Correct This Grave Error

PERA codifies what enabled China to take the lead in 60% of the 37 technologies in which they now lead the world. Congress will not open this section of law for at least a decade while the courts sort out what it means. By then the US will be so far behind in these critical technologies, it will be too late to catch up. PERA must not become law without removing Section 3(b)(1)(B)(i) and (ii) and its support at Section 2(5)(D)(v) and Section 2(5)(E)(i) and (ii).