October 14, 2021

Docket No. PTO-P-2021-0032: Patent Eligibility Jurisprudence Study

Comments of the Wikimedia Foundation

The Wikimedia Foundation is a non-profit organization that supports and hosts a number of free, collaborative knowledge projects. From Wikipedia, a free online encyclopedia and one of the top-ten most-visited websites globally, to Wikidata, an open knowledge base of structured data, we maintain the servers, build the software, and design the technology that keep these projects running. Together with the volunteers in the Wikimedia Movement, we aim to provide the essential infrastructure for free knowledge and ensure that there is equitable participation in knowledge worldwide.

At the Wikimedia Foundation, we work to give access to knowledge to everyone, for free, forever. We fight against censorship and promote open licenses to ensure our materials can be used and remixed globally. In the U.S., we have received demands from—and fought back against—non-practicing entities asserting overbroad patents that should not have been granted in the first place. Most recently, we brought a declaratory judgment action to the Northern District of California after receiving a demand letter from a non-practicing entity claiming to own a patent covering predictive text technology.[1]

As a non-profit organization, developer of innovative technology, and provider of free access to knowledge, the Wikimedia Foundation supports existing laws and Supreme Court decisions that prohibit patents on abstract ideas, laws of nature, and natural phenomena.

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[1] Mike Masnick, *Predictive Text Patent Troll Tries To Shake Down Wikipedia,* Techdirt (April 6, 2020), https://www.techdirt.com/articles/20200402/17061944228/predictive-text-patent-troll-tries-to-shakedown-wikipedia.shtml. Notably, another non-profit organization, the Internet Archive, received a similar demand from the same non-practicing entity.

The Patent Act permits patents on "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101. The Supreme Court has long held that this provision implicitly prohibits patents on abstract ideas, laws of nature, and natural phenomena because they are the "basic tools of scientific and technological work." As such, "[m]onopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it, thereby thwarting the primary object of the patent laws."[2]

We agree: expanding patent-eligibility to include the basic tools of technological work would impede innovation more than it would promote it.

First, existing laws that prevent companies from patenting abstract ideas, laws of nature, and natural phenomena have overwhelmingly benefited members of the public who seek to contribute to and access free knowledge.

For example, genomic data for COVID-19 is unpatented and freely available to researchers.[3] That was not true of genomic data for severe acute respiratory syndrome (SARS) in 2003. At that time, the Supreme Court had not yet clarified that naturally occurring genetic sequences are ineligible for patent protection. As companies raced to obtain patents on the SARS genetic sequence, the U.S. Centers for Disease Control and Prevention was forced to file its own defensive patent applications to "give the industry and other researchers reasonable access to the samples."[4]

As another example, the Supreme Court's decision in *Alice v. CLS Bank* allowed the Electronic Frontier Foundation to save an amateur photography website, Bytephoto.com.[5] The site hosts user-submitted photos and runs weekly competitions where the winning photo is the one that receives the most votes. For providing that basic functionality, a patent owner, Garfum, sued Bytephoto based on a patent that applied the basic idea of a competition by popular vote to modern computer networks.

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[2] *Alice Corp. Pty. v. CLS Bank Int'l*, 573 U.S. 208, 216, (2014) (citations and internal quotations omitted).
[3] *E.g.*, https://app.terra.bio/#workspaces/pathogen-genomic-surveillance/COVID-19.
[4] Paul Elias, *Race to Patent SARS Virus Renews Debate*, ASSOCIATED PRESS (May 5, 2003), https://apnews.com/article/145b4e8d156cddc93e996ae52dc24ec0.
[5] EFF, *Photographer Attacked by Ludicrous Online Voting Patent*, https://www.eff.org/alice/photographer-attacked-ludicrous-online-voting-patent.

EFF filed a motion to dismiss the lawsuit based on *Alice*. Shortly before the hearing on EFF's motion, the patent owner dropped the lawsuit, and Bytephoto was saved.

These laws help ensure that people have the freedom to create, develop, provide, maintain, and use technology that allows them to access and share information with each other.

Second, laws against patenting abstract ideas have enabled non-profit organizations like the Wikimedia Foundation to spend less money on legal fees and more on their core missions, such as hosting and maintaining the world's largest online encyclopedia. We know from firsthand experience how harmful wrongly-granted patents can be. When patent assertion entities obtain (and assert) U.S. patents that broadly cover basic ideas performed by conventional computers, we have to decide whether to accede to their unscrupulous demands and risk becoming a target for others in the future or incur the exorbitant costs and additional risks of litigation. By applying the laws that prohibit patents on abstract ideas, the U.S. Patent & Trademark Office can prevent this harm from occurring to the Wikimedia Foundation and others like us.

Third, as a technology developer, supporter of collaborative knowledge projects, and provider of infrastructure for accessing knowledge, our success does not depend on obtaining patents on abstract ideas, laws of nature, or natural phenomena. For example, MediaWiki—the free and open source 'wiki' software that we develop—demonstrates how technological innovation is possible without obtaining patents. We use MediaWiki to power the Wikimedia projects, where hundreds of thousands of people every month contribute to documenting the world's knowledge. We also distribute MediaWiki for anyone to use, and we know it has been used by numerous other organizations and companies, including parts of the U.S. government. Aside from the fact that current law protects space for innovation and reduces money wasted on legal fees, patent eligibility jurisprudence in the U.S. has not caused us to change our practices, strategies, or investments with respect to MediaWiki or any other technology developed or maintained by the Wikimedia Foundation.

In conclusion, the Wikimedia Foundation supports the current state of patent eligibility jurisprudence with respect to its prohibition on patenting abstract ideas, laws of nature, and natural phenomena. This prohibition benefits non-profit organizations such as ours by enabling them to develop and maintain technology in furtherance of their missions. It also helps protect them from vexatious patent

litigation. Lastly, the prohibition on patenting abstract ideas, laws of nature, and natural phenomena has not in any way impaired the Wikimedia Foundation's ability to innovate or otherwise accomplish its charitable mission.