DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO-P-2021-0032]

Federal Register/Vol .86, No 129/ Friday July 9th, 2021/ Notices

Patent Eligibility Jurisprudence Study

Agency: United States Patent and Trademark Office, Department of Commerce

Action: Request for information

V 6.0

Table of Contents

Introduction……. 2

Summary of Arguments……..…… 4

My Interest…..…… 5

Authorities……... 6

Authority Comments……...…… 9

Generic Computer exclusion…….…… 20

Requested Information…….…….. 21

Topics for Public Comment…….…….. 22

Section I - Observations and Experiences……..... 22

Retroactive and Prospective Transition Provision……..... 24

Collecting, Displaying, and Manipulating Data exclusion……..... 25

Functional Claims exclusion…….. 26

Claim Construction……..... 35

Section II - Impact of Subject Matter Eligibility on the General Marketplace……. 39

Conclusion…… 42

Introduction

United States patent eligibility jurisprudence is a panel lottery and an unintelligible hash of validity goulash.

35 U.S. Code §101 - Inventions patentable:

Whoever **invents** or discovers any new and useful **process**, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

(July 19, 1952)

(35 U.S. Code Section §101 is also referred to as Alice Section §101, 101, and §101 in this document.)

35 U.S. Code §282 provides in relevant part – Presumption of Validity; Defenses:

(a) In General, **a patent shall be presumed valid**. Each claim of a patent (whether in 2 independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

(b) Defenses. The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

(1) Noninfringement, absence of liability for infringement or unenforceability.

(2) Invalidity of the patent or any claim in suit on any ground specified in part II [of this Title] as a condition for patentability.

(3) Invalidity of the patent or any claim in suit for failure to comply with—

(A) any requirement of section 112, except that the failure to disclose the best mode shall not be a basis on which any claim of a patent may be canceled or held invalid or otherwise unenforceable; or

(B) any requirement of section 251.

(4) Any other fact or act made a defense by this title.

https://www.govinfo.gov/content/pkg/USCODE-2011-title35/pdf/USCODE-2011-title35-partIII-chap29-sec282.pdf

Section §101 Judicial Exceptions –

"The judicial exceptions (also called "judicially recognized exceptions" or simply "exceptions") are subject matter that the courts have found to be outside of, or exceptions to, the four statutory categories of invention, and are limited to **abstract ideas, laws of nature and natural phenomena (including products of nature**). *Alice Corp. Pty. Ltd. v. CLS Bank Int'l,* 573 U.S. 208, 216, 110 USPQ2d 1976, 1980 (2014) (citing *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.,* 569 U.S. 576, 589, 106 USPQ2d 1972, 1979 (2013). See MPEP § 2106.04 for detailed information on the judicial exceptions."

See: https://www.uspto.gov/web/offices/pac/mpep/s2106.html

Summary of Arguments

Below, I provide a short summary of the arguments I am presenting for this action:

1) I am a systems scientist and engineer, and also an inventor, but not a patent attorney.
2) I have read opinions from various esteemed legal sources including U.S. Senators, Federal Judges both active and retired, patent lawyers, industry associations, and legal scholars.
3) I have referenced many of these legal sources in this document.
4) The Section §101 judicial exceptions created by the U.S. Supreme Court to patent eligibility are **unconstitutional**.
5) Congress created the patent laws in the 1952 patent act, and these are the U.S. patent laws which should be applied to U.S. patents and patent litigation cases.
6) Congress makes the patent laws, and courts cannot, and should not, read limitations into them which alter their sense and meaning.
7) The judicial exception word "abstract" is **undefined**.
8) My case was decided after the Berkheimer v HP case, and **the facts in my record evidence were completely ignored**.
9) I never had a fact finder review the record evidence in my case as did two thirds of all other patent cases before 2015.
10) My claim construction, which is a question of law, and expert testimony, were ignored.
11) The courts reversed themselves to invalidate my patents.
12) Generic computer references in a patent make the patent ineligible even though generic computers use a processor and the plain language of Section §101 specifically refers to a "process".
13) Congress said that functional patent claims were eligible in the 1952 patent act, but now, the courts have added the limitation that patents with functional claims are ineligible and invalid.
14) Computer software is made by the hands of man (or woman).
15) Computer software changes a generic computer into a special purpose computer.
16) Other graphical interface patents were judged to be new and eligible, but my patents which recite a "graphic interface" in the specification, were judged to be ineligible and invalid.

17) Collecting, displaying, and manipulating data patents were judged to be invalid and ineligible, and that functionality defines the utility and benefit of emerging artificial intelligence and quantum computing technologies.
18) Patent litigation is panel dependent because courts disagree on whether Section §101 is a matter of law or a question of fact.
19) Patent litigation is also panel dependent because "abstraction" is a subjective determination.
20) Section §101 litigation outcomes are no longer determined by the relative advantages that can be rightfully attributed to an invention, but by which advantages a judge subjectively believes is "something more".
21) Section §101 is not a patent litigation defense in 35 U.S. Code Section §282, presumption of validity; defenses.
22) Section §101 does not name Section §101 as a "condition for patentability".
23) Section §101 is contrary to the eligibility requirements of TRIPS Article 27.
24) I am saving my record evidence because Section §101 should be reformed and returned to the 1952 Patent Act laws created by Congress.
25) The Supreme Court should reverse itself, immediately, and make the transition provision both prospective and retroactive in effect for all cases and issued patents, past, present, and future.
26) Because the Section §101 "abstract" judicial exception limitation to patent eligibility is unconstitutional, undefined, and subjective, my case should be revived, retroactively, and I should be permitted to bring my case before a fact finder like a jury after over a decade of litigation.

My Interest

My interest in the U.S. patent system is to see that cases and issued patents that were found to be ineligible and invalid under Alice Section §101 as a matter of law, are reviewed retroactively, for facts, by fact finders, like a jury, under patent law 35 U.S. Code Sections §102, §103, and §112. The Section §101 judicial exceptions created by the United States Supreme Court and the subsequent expansion of Section §101 by the United States Federal Circuit are **unconstitutional**, **not named in Section §101 as a "condition for patentability", not listed as a defense in Section §282, and inconsistent with the international TRIPS Section 27 eligibility requirements.** Alice Section §101 has robbed inventors, like me, of our valuable patent rights.

See the "Chart of Post Alice Cases, as of March 1, 2019" information from Gibson Dunn below:

https://www.gibsondunn.com/wp-content/uploads/2019/03/Overview-of-Section-101-Patent-Cases-Decided-After-Alice-v-CLS-as-of-03-01-19.pdf

Authorities

Below are the U.S. Federal Government, legal, industry associations, and scholarly authorities whose writings and other testimony about Section §101 are referenced in this document.

The Honorable Senator Thom Tillis, Ranking Member of the Senate Committee on the Judiciary, Subcommittee on Intellectual Property (Senator Tillis)

https://www.tillis.senate.gov/

The Honorable Senator Chris Coons, Majority Member of the Senate Committee on the Judiciary, Subcommittee on Intellectual Property (Senator Coons)

https://www.coons.senate.gov/

The Honorable Retired Federal Circuit Chief Judge Paul Michel (Judge Michel)

https://www.ipwatchdog.com/people/chief-judge-paul-michel-cafc-ret/

The Honorable David Kappos (Hon. Kappos)

https://www.linkedin.com/in/david-kappos-57166113

Federal Circuit Chief Judge Honorable Kimberly Moore (Judge Moore)

http://www.cafc.uscourts.gov/judges/kimberly-moore-chief-judge

Federal Circuit Judge Honorable Pauline Newman (Judge Newman)

http://www.cafc.uscourts.gov/judges/pauline-newman-circuit-judge

Federal Circuit Judge Honorable S. Jay Plager (Judge Plager)

http://www.cafc.uscourts.gov/judges/s-jay-plager-circuit-judge

Federal Circuit Judge Honorable Richard Linn (Judge Linn)

http://www.cafc.uscourts.gov/judges/richard-linn-circuit-judge

Professor Adam Mossoff (Professor Mossoff)

https://www.law.gmu.edu/faculty/directory/fulltime/mossoff_adam

Professor Kristin Osenga (Professor Osenga)

https://www.ipwatchdog.com/author/kristen-osenga/

Professor Dennis Shasha (Professor Shasha)

https://cs.nyu.edu/~shasha/

Dr. David Lund (Dr. Lund)

https://www.ipwatchdog.com/author/david-lund/

Professor Chris Holman (Professor Holman)

https://law.umkc.edu/profiles/faculty-directory/christopher-holman.html

Dr. Raymond Mercado (Dr. Mercado)

http://www.raymondmercado.net/pagecv-1

Mr. Robert Armitage, Esq. (Mr. Armitage)

https://www.linkedin.com/in/bobarmitage

Mr. Russell Slifer, Esq. (Mr. Slifer)

https://www.slwip.com/people/russ-slifer/

Mr. John Battaglia, Esq. (Mr. Battaglia)

https://www.ipwatchdog.com/author/john-battaglia/

Mr. Michael Woodward, Esq. (Mr. Woodward)

https://www.ipwatchdog.com/author/michael-woodward/

Ms. Sherry Knowles, Esq. (Ms. Knowles)

https://www.kipsllc.com/sherry

Professor Daniel Brean (Professor Brean)

https://www.uakron.edu/law/faculty/directory/profile.dot?u=dbrean

Professor Dennis Crouch (Professor Crouch)

https://law.missouri.edu/person/dennis-d-crouch/

Professor David Taylor (Professor Taylor)

https://www.smu.edu/Law/Faculty/Profiles/Taylor-David-O

Professor Jason Rantanen (Professor Rantanen)

https://law.uiowa.edu/people/jason-rantanen

The American Bar Association (ABA)

https://www.americanbar.org/membership/join-now/?npclid=CjwKCAjw1JeJBhB9EiwAV612y4vLVT1Gwxji0y7GQFsA8lPFNt3cxqm8Eg3NHrw6E1XhfKmKv7D90BoCmfQQAvD_BwE&utm_source=google&utm_medium=sem&utm_term=aba&utm_campaign=mk21adsa&promo=mk21gacbc&extension=&gclid=CjwKCAjw1JeJBhB9EiwAV612y4vLVT1Gwxji0y7GQFsA8lPFNt3cxqm8Eg3NHrw6E1XhfKmKv7D90BoCmfQQAvD_BwE

Intellectual Property Owners Association (IPO)

https://ipo.org/

The American Intellectual Property Law Association (AIPLA)

https://www.aipla.org/

Intellectual Property Law Association of Chicago

https://www.iplac.org/

Ms. Barbara Fiacco, Esq. (Ms. Fiacco)

https://www.aipla.org/detail/news/2019/10/31/foley-hoag-partner-barbara-fiacco-named-president-of-aipla

https://foleyhoag.com/people/fiacco-barbara

International Business Machines (IBM)

https://www.ibm.com/us-en?ar=1

Integrated Technological Systems

U.S. Inventor

https://usinventor.org/

Authority Comments

Comments and opinions about Section §101 from the above legal references:

"WHY WOULD ANYONE IN THEIR RIGHT MIND….?"

Senator Tillis, Page 9

https://www.supremecourt.gov/DocketPDF/20/20-891/170498/20210315100432417_20210315-100223-95752944-00000328.pdf

"THE EMPEROR HAS NO CLOTHES"

Quoting Judge Plager on Page 10 of his dissent, Hans Cristian Anderson, and myself, with emphasis.

http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/16-2502.Opinion.7-20-2018.pdf

“MONSTROUS”

“THE HYDRA HAS GROWN ANOTHER HEAD”

“VALIDITY GOULASH”

Quoting Judge Moore on Pages 13, and 14 of her dissent, with emphasis.

http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/18-1763.Opinion.10-3-2019.pdf

“PATENT ELIGIBILITY LAW IS IN A STATE OF CRISIS”

“CONFUSION AND INCORRECT RESULTS”

“LACKS ADMINISTRABILITY”

“CONFUSION IS WIDELY RECOGNIZED AND LAMENTED”

“JUDGES HAVE SPOKEN LOUDLY ABOUT INCORRECT RESULTS”

Professor Taylor

https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i

See 01:16:27

“**For a court to treat a § 101 determination as a pure question of law that can be resolved on a motion to dismiss does violence to the integrated statutory framework of the Patent Act by converting § 101 from a threshold test into the sole legal criterion of patentability.”**

“The “overlap” between these determinations under both § 103 and § 101 has been noted by the Supreme Court, indicating the necessity to fully consider factual questions in both instances. *Mayo*, 566 U.S. at 90.”

“For instance, when a patent is granted because it embodies a solution that the prior art considered unworkable, impossible, or impractical, this is a necessary factual determination in resolving the “inventive concept” inquiry of step two of the *Alice-Mayo* test. **Glossing over issues such as these with conclusory findings, as the district court did in this case and other courts have done in other cases in which § 101 has been resolved too early in the litigation, misapplies the *Alice-Mayo* test, misconstrues § 101 as a threshold test, and ultimately undermines the function of the patent system in promoting the useful arts.”**

“The 2018 Index further concludes that the current state of § 101 jurisprudence in the U.S. “seriously undermines the longstanding world-class innovation environment in the U.S. and threatens the nation’s global competitiveness.” *Id*. **For many years, the United States was number one in the Index, but it fell to 10th place**

last year and again fell to 12th place this year in the 2018 Index of how global patent systems provide stable and effective security for all innovators. *Id*. at 35-37; *see also* Tiffany Hu, *US Drops to 12th in Patent Protection, Report Says*, Law360 (February 8, 2018), at https://www.law360.com/ip/articles/1010617/us-drops-to-12th-inpatent-protection-report-says?nl_pk=a9dc0a3c-f8e7-433d-94feac6c396d5149&utm_source=newsletter&utm_medium=email&utm_campaign=ip."

Dr. Lund and Professor Mossoff, pages 8, 13, 15. And 18

https://cip2.gmu.edu/wp-content/uploads/sites/31/2018/03/Cleveland-Clinic-v-True-Health-Brief-of-Law-Professors-as-Amici-Curiae.pdf

"Unfortunately, courts have applied the two-step "*Mayo/Alice* test" from the Supreme Court's recent § 101 cases in an **unbalanced and legally improper manner**. *See Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Mayo*, 566 U.S. at 66. These practices of the inferior courts include dissecting claims into particular elements and then **construing these elements in highly generalized terms with no evidentiary support.**"

"When the district court analyzed each claim limitation individually, it essentially embarked on a fact-based analysis—but it did so without considering any factual evidence. *See Nat. Alts.*, 2017 WL 3877808 at *6-7. **In considering without evidence the separate claim limitations, the court could not but ultimately rely on its gut reaction or basic sense of the "gist" of the invention. This violates a fundamental requirement in the Patent Act that has long served to ensure that innovation is properly secure under the law: the patentability tests are to be assessed according to the person having skill in the art at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005). To allow the § 101 analysis to be conducted devoid of the necessary expert input on relevant factual matters, claim construction, factual conclusions, and proper presumptions based on the Federal Rules of Civil Procedure causes the exceptions to swallow the rule under §101."**

BRIEF OF *AMICUS CURIAE* PATENT LAW SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL, pages 3, and 12
https://cip2.gmu.edu/wp-content/uploads/sites/31/2018/04/Natural-Alternatives-v-Creative-Compounds-Brief-of-Amicus-Curiae-Patent-Law-Scholars.pdf

"DETERMINING WHETHER AN INVENTION IS AN "ABSTRACT IDEA", FOR EXAMPLE, HAS PROVEN TO BE A TRULY UNPREDICTABLE TEST FOR ELIGIBILITY WITH MANY NOW VIEWING THE RESULTS AS REALLY TURNING ON THE LUCK OF THE DRAW DEPENDING ON WHICH EXAMINER OR JUDGE REVIEWS THEM"

"CONTINUING LACK OF CLARITY"

"LACK OF CLARITY IN THE LAW"

“CREATED HAVOCK IN THE PATENT LAW”

“NO REASON IN POLICY OR STATUTE”

Senator Coons

https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i

See:00:12:50

SUBJECTIVE, ARBITRARY, AND PANEL DEPENDANT

> **Unfortunately, the Supreme Court’s interpretation of patent eligibility in cases such as Mayo, Myriad and Alice overrides the subject matter categories set forth in the 1952 Patent Act. These cases undermine the fundamental principles of patent scope established by that statute which was intended to serve as the basis for our modern innovation economy when adopted.**
>
> **Once a patent is granted, the claimed subject matter should be presumed eligible.**

Quoting the AIPLA, see below:

https://www.aipla.org/advocacy/legislative/aipla-ipo-aba---ipl-joint-principles-paper-on-section-101

“AN UNINTELLIGIBLE HASH”

https://www.ipwatchdog.com/wp-content/uploads/2021/03/Tillis-Michel-Kappos-American-Axle-Amicus-Brief.pdf

Quoting the American Axle case Amicus Curiae submitted by Senator Tillis, Judge Michel, and Hon. Kappos, Page 5.

“PANEL LOTTERY”

https://www.supremecourt.gov/DocketPDF/17/17-1226/36018/20180220175936495_Petition%20for%20Writ_Front%20Row%20v.%20MLB.pdf

Quoting Front Row Technologies, LLC. Page 6.

“A PLAGUE”

"STATUTORY MISCONSTRUCTION"

"STATUTORY GAP"

"There is a yawning gap between the practice of patent litigation today and the statutory text that governs it. 35 U.S.C. §101 does not name §101 as a "condition for patentability" and 35 U.S.C. §282 does not specify it as a litigation defense."

"If Congress had intended for §101 to be a "condition for patentability" or available as a litigation defense, it could have specified it as such. But it did not.'

"The omission of any reference to §101 in §282 suggests that Congress intended to exclude §101 from the defenses available to litigants. "

Quoting US Inventor in:

https://usinventor.org/wp-content/uploads/16-2335-89.pdf, starts on Page 1.

Section 282 requires a presumption of validity and specifically lists the defenses that may be raised in response to claims of patent infringement. Section 282(b)(2) and (3) enumerates, in general, that a patent can be invalidated "on any ground specified in part II as a condition for patentability" or for failure to comply with "any requirement of section 112" or "section 251." **Only two sections of part II are labelled as a "condition for patentability": §§ 102 and 103, which relate to novelty and obviousness, respectively. None of those defenses, however, list subject-matter ineligibility under § 101. When enumerating the defenses, the plain language of § 282(b) categorically excludes any reference to patent eligibility and proper statutory construction eliminates subject-matter eligibility challenges as a defense to infringement.** Indeed, this comports with this Court's holding that § 101 is "only a threshold test" during patent prosecution at the agency and that, once satisfied, it allows for the patent applicant "to receive the Patent Act's protection." *Bilski v. Kappos*, 561 U.S. 593, 602 (2010). *Bilski* thus makes it clear that the § 101 threshold test is for determining eligibility during examination at the U.S. Patent and Trademark Office, and its omission from § 282 clarifies that that subject-matter eligibility is not a defense to patent infringement. **Moreover, once the invention is patented, the law requires the presumption of validity to attach**. *See* 35 USC § 282; *see also Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 95 (2011).

Quoting Integrated Technological Systems, pages 8, and 9

https://www.supremecourt.gov/DocketPDF/17/17-1590/47622/20180521170113509_Intergrated%20Technological%20Systems%20v.%20First%20Internet%20Bank%20of%20Indiana.pdf

"There **is a chasm between the plain text of § 282 and § 101** that the decisions in this case, and in *Versata Dev. Group, Inc. v. SAP Am., Inc.*, 793F.3d 1306 (Fed. Cir. 2015), simply cannot bridge.

As a result, when courts invalidate patents under § 101—as they currently are, "daily (if not hourly)"[9]—they are doing so on grounds unauthorized by the statute. The result is that many "meritorious invention[s]" are being deprived of "the patent protection [they] deserve and should have been entitled to retain."[10]

"This wave of patent invalidations cannot be allowed to continue. **They are contrary to the statute, because eligibility under § 101 is not a defense to patent infringement under § 282. *See infra* Sec. I.A-C. And they are the direct result of a test for eligibility that (apart from being applied in excess of the statute) has proven utterly unworkable—as courts, scholars, members of the bar, and even the former Director of the PTO all agree. *See infra* Sec. II. In spite of this Court's best efforts to articulate a reasonable test for subject matter eligibility in *Mayo/Alice*, the Federal Circuit and district courts have been unable to apply it. Their §101 jurisprudence since *Mayo/Alice* has been, to a great extent, a chronicle of their frustration and a tangle of subjective decision making."**

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER BY DR. MERCADO, AND TWENTY-FIVE INVENTOR CLUBS FROM AROUND THE UNITED STATES See page 5 and 6 of the pdf version
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084365

"The analysis developed in the 101 Decisions is contrary to Congressional intent, too restrictive, technologically incorrect, unsound from a policy standpoint, and bad law."

"Possibly even more disturbing, these cases never make it to a jury."

"The Alice test may well be called Death by Analogy"

"Without a definition of "abstractness," courts struggle to apply the abstractness exception uniformly, and it seems to be over-applied in complex or difficult technologies, such those involving software. See, e.g., fastacase.com, supra."

"Section 101, when correctly applied lays "predicate for the other provisions of patent law." Bergy, 596 F.2d at 960; see also Mayo, 132 S.Ct. at 1303-04."

BRIEF OF AMICUS CURIAE THE INTELLECTUAL PROPERTY LAW ASSOCIATION OF CHICAGO IN SUPPORT OF NEITHER PARTY See page 3, page 4-footnote 4, page 6, page 10, page 11

https://www.iplac.org/assets/docs/Briefs/Amicus_Briefs/Synopsys%20v%20Mentor%20Graphics%2005_30_17.pdf

"Amici here identify a further key insight: **when lower courts and the PTO apply the Mayo-Alice test to only a portion of a claim and do not evaluate the claimed invention as a whole, they are using a methodological approach that conflicts with this Court's existing precedents on determining patent eligibility under § 101."**

“There is no *ex ante* notice as to the specific legal analysis that judges or patent examiners will employ under the *Mayo-Alice* test.”

BRIEF OF 15 LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI page 2, page 5

http://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2017/02/TDE-v-AKM-Brief-of-15-Law-Professors-as-Amici-Curiae.pdf

“EVISCERATE PATENT LAW”

“SWALLOW ALL OF PATENT LAW”

“But lower courts, such as the District Court and Federal Circuit in this case, have not proceeded with caution and have not consistently applied § 101: conclusively finding *presumptively valid patent claims* invalid in the face of unrebutted declarant testimony without any resolution makes this apparent. See Matthew B. Hershkowitz, Patently Insane for Patents: A Judge-by-Judge Analysis of the Federal Circuit’s Post-Alice Patentable Subject Matter Eligibility of Abstract Ideas Jurisprudence, 28 Fordham Intell. Prop. Media & Ent. L.J. 109, 132 (2017)”

https://www.supremecourt.gov/DocketPDF/17/17-1590/47622/20180521170113509_Intergrated%20Technological%20Systems%20v.%20First%20Internet%20Bank%20of%20Indiana.pdf

Quoting Integrated Technological Systems, Page 22

“SWALLOWED ALL OF PATENT LAW”

https://www.ipwatchdog.com/2019/04/02/federal-circuit-just-swallowed-patent-law-chargepoint-v-semaconnect/id=107917/

Quoting Mr. Slifer

“SUBJECTIVE”

“UNCONSTITUTIONAL”

“THE SUPREME COURT HAS SHOWN EXTRAORDINARY JUDICIAL ACTIVISM”

“WITHOUT ANY LEGAL AUTHORIZATION”

“DOES NOT ALLIGN WITH YOUR STATUTORY LANGUAGE”

“VIOLATES THE U.S. CONSTITUTION”

“THE CONSTITUTION IS NOT SELF ENFORCING WE HAVE TO DEMAND IT”

Ms. Knowles

https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i

See 01:20:50

https://www.ipwatchdog.com/2019/01/16/sherry-knowles-scrutinizes-activist-supreme-court-unconstitutional-patent-eligibility/id=105228/

“DEROGATION OF PATENT ELIGIBILITY”

“What is at stake in this focus on patent eligibility in the United States is not just righting the ship on patent eligible subject matter, it is sending a clear message to the Supreme Court that it must not, and can never, alter the sense and meaning of federal legislation through judicial exceptions to federal statutes and/or conscious disregard for their literal wording and meaning. **Congress has the sole right to create federal legislation under the U.S. Constitution, and the American people have the right to demand that it be applied as written.**

It has also made the United States less competitive on a global basis and a less attractive country in which to carry out fundamental research.”

https://www.judiciary.senate.gov/imo/media/doc/Knowles%20Testimony.pdf

Ms. Knowles, Page 3.

The doctrine of statutory *stare decisis* (i.e., 150 years of court precedent), if at all, ONLY pertains to litigation between parties in court, according to the Supreme Court. It has NO effect at all on policy discussions in Congress. **Any entity arguing to Congress that it must maintain the Supreme Court’s judicially created exceptions and the *Alice* rubric because of the Court’s 150 years of statutory stare decisis is flat wrong as a matter of law. Even the Supreme Court does not believe that. Congress is free to legislate any patent policy it decides is in the country’s best interest regardless of prior Supreme Court law.** See *Kimble v. Marvel Entertainment* (135 S. Ct. 2401; 2015)

https://www.ipwatchdog.com/2019/06/03/sherry-knowles-responds-to-aclus-urgent-phone-briefing-and-letter-opposing-reform-to-section-101/id=109933/

Ms. Knowles

“**clarify the morass of conflicting judicial interpretations of patent-eligible subject matter…”**

IPO, page 6

https://www.scotusblog.com/wp-content/uploads/2016/04/ipoa-15-1182-ac.pdf

“HARMS ARE VERY BIG AND VERY IMPORTANT”

“UNCERTAINTY IS THE NUMBER ONE PROBLEM”

“SHAGRINNED”

“I CANNOT PREDICT WHETHER ELIGIBILITY WILL BE FOUND OR NOT FOUND”

“THE WRONG LAWGIVER”

“IT SEEMS TO ME CLEAR THAT ARTICLE 1, SECTION 8, CLAUSE 8 ASSIGNED THE POWER TO CONGRESS TO REGULATE THE AVAILABILITY OF PATENTS AND NOT TO THE SUPREME COURT”

“A TRULY AWFUL SITUATION”

“THE SUPREME COURT CASE LAW, IN MY OPINION, IS EXCESSIVELY INCOHERENT, INCONSISTENT AND CHAOTIC”

“THE COURT MADE A SERIES OF FUNDAMENTALLY ERONEUS APPROACHES TO THE ISSUE USING BROAD UNDEFINED TERMS LIKE ABSTRACT IDEA”

“JUDGEMENTS MAY DEPEND ON THE LUCK OF THE DRAW”

”WE’RE BLEEDING BADLY RIGHT NOW AND WE’VE BEEN DOING IT FOR NINE YEARS”

“TENTH”

Judge Michel, See: 00:20:44

https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i

https://www.govinfo.gov/content/pkg/CHRG-115hhrg32324/html/CHRG-115hhrg32324.htm

“OUR CURRENT PATENT ELIGIBILITY LAW TRULY IS A MESS.”

“THE SUPREME COURT, FEDERAL CIRCUIT, DISTRICT COURTS, AND USPTO ARE ALL SPINNING THEIR WHEELS ON DECISIONS THAT ARE IRRECONSILABLE, INCOHERIENT, AND AGAINST OUR NATIONAL INTEREST”.

“THE LAW NEEDS TO BE CORRECTED”

Hon. Kappos, See: 00:30:59

https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i

"**Patents should not be invalidated based on no more than *ipse dixit*.** The Federal Circuit has held that the patent examiner and the Patent Trial and Appeal Board cannot rely on unexplained "general knowledge" to reject patents as obvious under § 103: "[W]hen they rely on what they assert to be general knowledge to negate patentability, that knowledge must be articulated and placed on the record." *In re Lee*, 277 F.3d 1338, 1345 (Fed. Cir. 2002). There is no reason that unarticulated "general knowledge" about computers should be grounds for holding a patent ineligible under §101."

Jericho Systems page 15

https://patentlyo.com/media/2016/06/Jericho-Systems-Corp-v.-Axiomatics-Petition-for-Certiorari.pdf

"Unfortunately, the improper legal analysis in this case is not an anomaly, as evidenced by the inordinately high rates of rejections of patent applications and invalidations of issued patents in recent years. See infra Part I.C. Patent owners can no longer rely on their claims as a whole to define their invention, and lower courts and the PTO are using a methodology that makes the Mayo-Alice test highly indeterminate. As in this case, courts are now willy-nilly disintegrating claims into their separate elements and are ignoring important limitations."

BRIEF OF INTELLECTUAL PROPERTY LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER Pages 14 and 15
https://cip2.gmu.edu/wp-content/uploads/sites/31/2017/12/RecogniCorp-v.-Nintendo-Brief-of-IP-Law-Profs-as-Amici-Curiae.pdf

"Reconsideration is also needed to maintain international harmonization in the law of patent eligibility. The panel opinion and the present broad scope of the judicial exclusions represent an internationally discordant legal position irreconcilable with the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) administered by the World Trade Organization (WTO) and the consequential Directive 98/44/EC of the European Parliament."

https://www.scotusblog.com/wp-content/uploads/2016/04/15-1182.amicus.final_.pdf

See: BRIEF OF AMICUS CURIAE BY THE CHARTERED INSTITUTE OF PATENT ATTORNEYS IN SUPPORT OF THE PETITIONER, Page 4.

See file:

https://www.ipwatchdog.com/2020/04/27/flaws-supreme-courts-%C2%A7101-precedent/id=121038/

written by Judge Michel and Mr. Battaglia. I quote them below:"

> In an opinion that still carries wide precedential value today, the Supreme Court affirmed, confirming the patent-eligibility of the *Diehr* claims. Notwithstanding the "judicially created" or "implied" exceptions to §101, *Diehr*emphasized that the same interpretation principles applied to the patent-eligibility statute as with any other provision: The "common and ordinary meaning" of the words used therein applied, and "courts could not read into the patent laws limitations and conditions which the legislature has not expressed." *Id*. at 182 (citation omitted). *Diehr* also reiterated that it must interpret §101 mindful of Congress's intent that "statutory subject matter includes ***anything under the sun that is made by man."*** *Id*. at 182 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980); S. Rep. 1979, 82nd Cong. 2d Sess., 5 (1952); H.R. Rep. No. 1923, 82nd Cong., 2nd Sess. 6 (1952)). And it referred to the "historical purposes of the patent laws and §101 in particular," *Diehr*, 450 U.S. at 181, indicating courts must interpret §101 consistent with the Founders' vision for "liberal[ly]" encouraging "ingenuity," *Chakrabarty*, 447 U.S. at 308-09 ("The [Patent] ***Act embodied***

".

See also: https://www.heritage.org/economic-and-property-rights/report/the-constitutional-protection-intellectual-property?mkt_tok=ODI0LU1IVC0zMDQAAAF-shBYqQy-QD74K1k5lj6yrDzAdksiQLidtFTPaQZt8bEMoDlAb-0qMK2QcEuhUGXbCYxw_SK1EGSlUNQjLup5w7_cCfglqIcos36pBMfLIknfnZ_P

Professor Mossoff says:

"The Founding Era sources, as well as the overwhelming weight of 19th-century court decisions, official statements, and commentaries, confirm that intellectual property rights are property—both as a matter of basic legal doctrine and as a matter of constitutional principle. **Yet the Supreme Court for some unknown reason seems to have forgotten or lost sight of its own decisions and other relevant authorities in interpreting and applying the constitutional protections afforded by the Due Process Clauses and the Takings Clause to intellectual property rights.**

Despite this lack of reference to these long-standing precedents, it is notable that the Supreme Court has still consistently and repeatedly protected intellectual property rights under the Constitution. It should continue to do so, and the Supreme Court should give its modern decisions a firmer grounding in its own precedents and in the many historical sources from the Founding Era."

Generic Computer exclusion:

Methods that use a computer are patent eligible because computers use a **processor (one or more),** and Section §101 says very clearly: "Whoever **invents** or discovers any new and useful **process…".**

Processes are processed by a processor. See:

https://en.wikipedia.org/wiki/List_of_Intel_processors

https://en.wikipedia.org/wiki/List_of_AMD_processors

https://en.wikipedia.org/wiki/Motorola_68040

https://en.wikipedia.org/wiki/Texas_Instruments

Also, quoting IBM Page 4 and 5: See the link below where it says:
https://www.chamberlitigation.com/sites/default/files/scotus/files/IBM%20Amicus%20Brief%20--%20Alice%20Corp.%20v.%20CLS%20Bank%20International%20%28U.S.%20Supreme%20Court%29.pdf

"While it may be true that the steps required to implement an abstract idea on a computer are well established and thus likely within the capability of one skilled in the art, **the implementation of that idea on a computer, however minimal the effort, definitively separates that specific technological implementation from the idea itself.** Technology has enabled an astounding diminishment of the man-machine interface, but it has not erased the need for that interface and, as a result, **even the most problematic computer-implemented invention will be meaningfully different from and narrower than the associated abstract idea. Thus, computer-implemented inventions will always fall outside the abstract idea exception and are patent eligible under §101."**

Also, see page 35 of:

http://www.alicecorp.com/downloads/13-298%20tsacAdvancedBiologicalLaboratoriesSA-V2.pdf

where it says:

"This also demonstrates that the holding in In re Alappat, 33 F.3d 1526 (Fed. Cir. 1994) (en banc) is scientifically correct: **"such programming creates a new machine, because a general purpose computer in effect becomes a special purpose computer once it is programmed to perform particular functions pursuant to instructions from program software."** Id. at 1545."

Also, see page 8, in the AIPLA Amicus brief, in

https://www.chamberlitigation.com/sites/default/files/scotus/files/AIPLA%20Amicus%20Brief%20--%20Alice%20Corp.%20v.%20CLS%20Bank%20International%20%28U.S.%20Supreme%20Court%29.pdf

"**An inventor who transforms an algorithm into a computer program produces the means to cause the programmed computer or processor to operate differently as a machine**. It is the production of this specific, real-world result—the different operation of the computer or processor—**that is the *man-made step* which constitutes patent-eligible subject matter**. If it turns out the "man-made step" is already known, then the patent claim certainly fails, but under Sections 102 and/or 103, and not because the claim as a whole merely embodies an abstract idea."

Also see: **https://patentlyo.com/patent/2017/11/alice-trips-compliance.html**

From Professor Brean, on the Patently0 blog by Professor Crouch and Professor Rantanen:

"The United States is obligated under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) treaty to make patent rights available and enjoyable without discrimination as to the "field of technology" of the invention.[i] **No specific areas of technology may be singled out for unjustified special treatment.**"

Requested Information

I fall within category [1]. I am a United States inventor, patent owner, and investor in my own patents. I am not a patent attorney.

My name is: Mark A. Tornetta. I live in Windermere, Florida, USA. I am a United States citizen, and always have been. I hold a Bachelor of Science degree in Systems Science and Engineering from the Moore School of Electrical Engineering and Applied Sciences at the University of Pennsylvania.

This document is public, and not confidential.

Information in this document is believed to be reliable.

Notice to other U.S. inventors: please see my references.

I understand that "the state of patent eligibility jurisprudence in the United States" refers to the body of patent subject matter eligibility decisions issued by the U.S. Federal Judiciary.

I also understand that the U.S. Federal Judiciary is what it says in the link below:

https://en.wikipedia.org/wiki/Federal_judiciary_of_the_United_States :

Please see the information below as a further response to your Request for Information.

U.S. Patents Held and Applied: 2 - Real Estate Search and Location System and Method:

US 4,870,576: https://patents.google.com/patent/US4870576

('576), and,

US 5,032,989: https://patents.google.com/patent/US5032989 which is a continuation in part (CIP) patent ('989).

Foreign Patents Held and Applied: 0

Number of Patents Licensed: 2, both patents, '576, and '989.

Number of Patent Cases since 2010: 2 – REAL (Real Estate Alliance. Ltd.) vs. Diane Sarkisian and various other John and Jane Does (2005). Then later, Move vs. REAL (2007). My '989 patent was incorrectly found to be ineligible and invalid under Alice Section §101 in 2018. My '576 patent was never analyzed. The courts invalidated it, anyway.

See: https://www.ipwatchdog.com/2018/11/11/supreme-court-refuses-101-patent-eligibility-appeal/id=103115/

Number of Appeals to the Federal Circuit: **4**,

http://www.cafc.uscourts.gov/opinions-orders?populate=real+estate+alliance&field_origin_value=All&field_report_type_value=All&field_date_dropdown=date_range

http://www.cafc.uscourts.gov/search/node/Move%20REAL

Alice Section §101 Supreme Court writ of Certiorari petition: 1, 2018, which was denied. See:

https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-252.html

https://casetext.com/case/move-inc-v-real-estate-alliance-ltd-5

Topics for Public Comment

Section I – Observations and Experiences

1.) Please explain how the current state of patent eligibility jurisprudence affects the conduct of business in your technology area (s). Please identify the technology area (s) in your response.

The technology areas in my '576, and '989 patents are: **computer search and location** of property records in real estate databases using a graphical map interface to identify properties within selected geographic areas.

There is absolutely no reason to patent anything ever again in the U.S. (Actually, it is idiotic, and downright *stupid* to file a patent application in the U.S. today.) Patent litigation verdicts are now determined by judges without the benefit of field education or expertise, record evidence, or fact finders. All patents do today is teach big tech and other would-be infringers exactly how to do it. Senator Tillis agrees with me: "**Why would anyone in their right mind** risk millions if not billions of dollars to develop a product when they have no idea if they're eligible for protection? From a business perspective, it simply isn't worth the risk for many endeavors." See: Page 9, https://www.supremecourt.gov/DocketPDF/20/20-891/170498/20210315100432417_20210315-100223-95752944-00000328.pdf

United States patent eligibility jurisprudence is a panel lottery and an unintelligible hash of validity goulash.

No savvy investor would invest in an innovative patented technology as truth of fact is no longer a factor in the patent application or litigation process. Expert testimony, record evidence, claim construction, patent specifications, and other factors which **should be** judicially reviewed and considered for facts, are not considered, at all, and quite frankly, are ignored, on purpose, to invalidate patents by the courts. The panel of judges at the Federal Circuit who authored the opinion in my **fourth** appeal, set my **uncontroverted expert testimony** "aside" without ever reviewing any record evidence. My expert is a famous computer science professor at New York University who did review the record evidence in my case for **facts** and provided a signed affidavit to the courts.

Furthermore, Professor Mossoff said in his oral testimony at the 2019 Senate Hearings on Patent Eligibility that the American Bar Association (ABA) IP section did a study in 2015 of the Alice Section §101 decisions up until that time (2014) and **some 2/3 of patent decisions were made "without reference to any evidence whatsoever**". See: 2:43:54

https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i

Quoting Dr. Mercado on page 2:

https://www.supremecourt.gov/DocketPDF/17/17-997/35822/20180220091909785_17997%20Mercado%20am%20petn%20FINAL.pdf

"No sooner had Petitioners stepped through the courthouse doors than they were thrown back out again, their patents declared invalid on the pleadings. Cert. Pet. at 15. The phenomenon of "pleading invalidations" raised by Petitioners in their second question presented is by now familiar to inventors throughout the nation, **as patents are being routinely held invalid under §101 at the pleadings stage, *without any fact-findings to support such rulings***.2 **The reason**

for this phenomenon is plain: the Federal Circuit is hopelessly divided on whether the § 101 inquiry is a purely legal question ripe for resolution on the pleadings, or whether § 101 analysis involves substantial factual issues that would rarely, if ever, be appropriate for resolution on the Rule 12 stage. Compare, e.g., Intellectual Ventures I LLC v. Capital One Fin. Corp., 850 F.3d 1332, 1338 (Fed. Cir. 2017) (**"Patent eligibility under § 101 is an issue of law that we review without deference.**") (emphasis added); Secured Mail Sols. LLC v. Universal Wilde, Inc., 873 F.3d 905, 912 (Fed. Cir. 2017) (deciding § 101 question "at the motion to dismiss stage based on intrinsic evidence from the [patent's] specification without need for extraneous fact finding outside the record"), with Aatrix Software, Inc. v. Green Shades Software, Inc., 2018 WL 843288, at *5 (Fed. Cir. Feb. 14, 2018) ("**While the ultimate determination under § 101 is a question of law, like many legal questions, there can be subsidiary fact questions which must be resolved en route to the ultimate legal determination . . . Whether the claim elements or the claimed combination are well understood, routine, [and] conventional [at Mayo/Alice Step Two] is a question of fact.**") (emphasis added); Berkheimer v. HP Inc., 2018 WL 774096, at *5 (Feb. 8, 2018) ("**The question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field [at Mayo/Alice Step Two] is a question of fact**") (emphasis added).

Retroactive and Prospective Transition Provision

Mr. Armitage was also asked at the 2019 Senate Hearings on Patent Eligibility by Senator Coons if Section §101 reform should be applied retroactively or prospectively to which Mr. Armitage responded "both". Also, in his written testimony, he said:

Effect and Effective Date Provisions Should Apply to All Patents, Absent Opt-Out

The Supreme Court's development of its "implicit exception" jurisprudence over the past decade has produced unacceptable consequences, as painfully detailed above. Both patent applicants and patent owners should receive the benefit of a remedial action by Congress that would abrogate the implicit exception outright. Thus, the core of any transition provision ought to provide for immediate effect to the abrogation and immediate applicability to all issued U.S. patents, past, present, and future.

See: Senator Coons/Mr. Armitage at 1:42:20 - Both retroactive and prospective, all patents, now and forever.

https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-i

In 2014 AIPLA established a Section §101 Task Force to study the Section §101 problem and consider alternative solutions.

"I have to propose amendment be applied retroactively."

https://www.judiciary.senate.gov/meetings/the-state-of-patent-eligibility-in-america-part-II

Ms. Fiacco at 01:00:20

To invent any innovative technology, it takes … 1) the spark of invention, 2) funding, 3) resources, 4) planning, 5) research, 6) development, and, then 7) reduction to practice of that technology. This may take years or decades and cost personal fortunes or even billions of U.S. dollars. This is far too much money, time, and effort, and, even fool hardy, because courts with closed minds, no field education, and ***I know it when I see it attitudes*** can use the now judicially expanded Alice Section §101 to find patents of any kind ineligible, invalid, and unenforceable.

R&D: Alice Section §101 makes R&D costs and efforts **worthless**. Efficient infringement means the inventor pays for the R&D costs and efforts and not the infringer. The infringer saves the R&D cost and efforts and is thus more competitively positioned to fill the needs of the market.

Collecting, Displaying, and Manipulating Data exclusion

Conduct of Business: My business conduct has changed. In 2017, I invented a cloud hosted, artificially intelligent, robotic decision system. I abandoned my U.S. patent application because of my personal knowledge of the judicial expansion and uncertainty of Alice Section §101.

If I were to disclose the technical specifications of this or any other novel technology through a U.S. patent, the technology would immediately be copied, worldwide, with impunity.

My artificial intelligence robotics decision patent application or litigation would probably be found ineligible under Alice Section §101 because of the "collecting, displaying, and manipulating data" Alice Section §101 limitation. See:

https://www.uspto.gov/web/offices/pac/mpep/s2106.html

Both artificial intelligence, and quantum computing, derive their utility and benefits from "collecting, displaying, and manipulating data", **by definition**. See:

https://www.zdnet.com/article/quantum-computing-takes-another-big-step-towards-the-mainstream-in-this-new-research-lab/

Quoting the article above, it says:

“This is where AI and high-performance cloud computing come in. IBM will provide the Cleveland Clinic's researchers with access to tools like Deep Search, which can quickly run through and analyze structured and unstructured data; or to the IBM Functional Genomics Platform, a cloud repository that is continuously updated with hundreds of thousands of features for different viral genomes, so that scientists can better target specific molecules in drug design.”

Also,

https://www.ibm.com/products/watson-advertising-conversations , and:

https://www.ibm.com/quantum-computing/?p1=Search&p4=43700050386405725&p5=e&gclid=Cj0KCQjwxdSHBhCdARIsAG6zhlX47xO6fusWhwyMYDU-F_T5WstZZrUMyV85vPT2Ba8RQEguZFlXym8aAt08EALw_wcB&gclsrc=aw.ds

Functional Claims

Functional claims were eligible on the priority date of my patents (1985) and my patents did issue. **Congress required "a written description of the invention" (35 U.S.C §112(a)) be included in the patent specification at that time, NOT in the claims**. To quote Judge Moore regarding this Section §112 law change and the American Axle vs. Neapco case:

Judge Moore Calls Majority Analysis '**Validity Goulash'**

"Respectfully, there is a clear and explicit statutory section for enablement, §112. We cannot convert § 101 into a panacea for every concern we have over an invention's patentability, especially where the patent statute expressly addresses the other conditions of patentability and where the defendant has not challenged them….

Section 101 simply should not be this sweeping and this manipulatable. It should not be used to invalidate claims under standards identical to those clearly articulated in other statutory sections, but not argued by the parties. It should not subsume § 112. It should not convert traditional questions of fact (like undue experimentation) into legal ones. ***The majority's validity goulash is troubling and inconsistent with the patent statute and precedent. The majority worries about result-oriented claiming; I am worried about result-oriented judicial action."***

See: https://www.ipwatchdog.com/2019/10/04/cafc-rejects-method-manufacturing-propshafts-101-judge-moore-calls-majority-analysis-validity-goulash/id=114258/

Judge Moore goes on to say:

Alice Section §101 is "**monstrous enough**" and "**even if the claims are enabled, they would still be found ineligible because the claims themselves didn't teach *how*.**"

"This is now the law of §101. **The *hydra* has grown another head**." (A reference from Hesiods Theogeny.)

https://www.hklaw.com/en/insights/publications/2019/10/a-federal-circuit-quarrel-patent-eligibility-enablement-and-a-fiery

https://www.britannica.com/topic/Hydra-Greek-mythology

Also, patent claims should be "considered as a whole". See file: https://www.scotusblog.com/wp-content/uploads/2017/06/16-1288-Petition-for-Certiorari-Synopsys.pdf

where is says on Page 2:

"En route to its holding, the Federal Circuit ignored language in the patents' specification—a part of the patent in which Congress has required "a written description of the invention," 35 U.S.C. §112(a)—that expressly limited the patents to implementation on a computer. The Federal Circuit refused to consult the specification, notwithstanding over a century of this Court's contrary precedent, which instructs that the §101 inquiry must focus on whether the patent "application, ***considered as a whole***, contains no patentable invention." *Parker* v. *Flook*, 437 U.S. 584, 594 (1978) (emphasis added). The conflict created by the decision in this case will sow confusion in the already chaotic §101 jurisprudence and warrants this Court's immediate intervention."

Also see: https://www.hudson.org/research/15618-saving-functional-claiming-the-mismatch-of-112-reform-in-the-101-reform-debate

where it says in footnote 9 of the pdf version:

"**Functional claiming has been part of the Patent Act since 1952. See P.J. Federico, Commentary on the New Patent Act, reprinted in 75 J. Pat. & Trademark Off. Soc'y 161, 186 (1993).** Until 2011, the provision was denoted §112(6). The America Invents Act (AIA) renumbered section 112 for consistency, changing the number subparagraphs to letters. See Leahy-Smith America Invents Act, P.L. 112-29, 125 Stat. 297 (2011). Regardless of whether referring to modern times or prior to 2011, this essay will refer to § 112(f) for clarity."

Also see footnote 12 of the pdf file version of the link above where Hon. Kappos says:

See, e.g., David J. Kappos & Christopher P. Davis, Functional Claiming and the Patent Balance, 18 Stan. Tech. L.Rev. P365, 2 (2015) **("A system that rewarded only inventions easily expressed in structural language would discourage invention in vital technologies where functional expression is indispensable."**).

Litigation: Without fact finders in the patent litigation process, patent litigation is a failed process which tilts the scale of justice deeply in favor of the efficient infringer.

2.) Please explain what impacts, if any, you have experienced as a result of the current state of patent eligibility jurisprudence in the United States. Please include impacts on as many of the following areas as you can, identifying concrete examples and supporting facts when possible.

a. Patent prosecution strategy and portfolio management;

I feel that ALL U.S. patents are (probably) worthless today because of Alice Section §101.

"Why would anyone in their right mind risk millions if not billions of dollars to develop a product when they have no idea if they're eligible for protection?" quoting Senator Tillis, again. My patent prosecution strategy in NOT to disclose technology secrets through a U.S. patent or purchase or license any U.S. patents. U.S. patents are worthless because of the uncertainty of Alice Section §101. ***U.S. patents just tell competitors how to do it.***

See the "Chart of Post Alice Cases, as of March 1, 2019" information from Gibson Dunn below:

https://www.gibsondunn.com/wp-content/uploads/2019/03/Overview-of-Section-101-Patent-Cases-Decided-After-Alice-v-CLS-as-of-03-01-19.pdf

b. Patent enforcement and litigation;

See my notes above: 4 Federal Circuit appeals, 1 supreme court cert. petition, and over a decade of litigation to show a jury 2 pictures. No fact finder, ever, means that patent litigation is a very expensive joke. As far as enforcement goes, Alice Section §101 insures that almost all patents are unenforceable and invalid. The word "abstract" is **still, after over 10 years,** undefined by the courts.

See the link below: Flaws in the Supreme Court's §101 Precedent and Ways to Correct Them.pdf written by Judge Michel and Mr. Battaglia.

https://www.ipwatchdog.com/2020/04/27/flaws-supreme-courts-%C2%A7101-precedent/id=121038/

7. **The Scope or Meaning of Exceptions for an "Abstract Idea, Law of Nature, Natural Phenomenon**. As with other decisions, *Alice* declined to define the "precise contours" of an "abstract idea," and other decisions over time (both recent and dated) have split on whether the ineligible concept at issue did indeed constitute, for example, a "law of nature." *See, e.g., AAM*, 939 F.3d at 1365-68. In any event, given the breadth by which courts and parties alike have invoked the *Mayo-Alice* framework, the issue whether the cited "ineligible concept" is "directed to" an "***abstract idea***" or "***natural law***," for example—or whether the claim is directed to all or only a portion of such an ineligible "idea" or "law," or maybe none at all—will continue to present itself for consideration by both sides.

Also see the link below:
http://www.albanylawreview.org/Articles/vol81_1/329%20Woodward%20PRODUCTION.pdf

where it says:

"In 2014, the Supreme Court decided *Alice Corp. v. CLS Bank*,

1 **significantly expanding the use of the judicially created exceptions to patent eligibility in the lower courts and at the United States Patent and Trademark Office ("USPTO")**.

2 The two-step test set out by the Court entails rejecting or invalidating a patent as being directed to ineligible subject matter under 35 U.S.C. §101 through the use of the judicially created exceptions.

3 **In applying the *Alice* two-step test, courts have *arbitrarily* utilized inquiries in its eligibility analysis which have historically been reserved for patentability analysis.**

4 Additionally, the Court has failed to give any reasonable guidance as to what constitutes an "abstract idea."

Also see: https://www.supremecourt.gov/DocketPDF/20/20-891/170498/20210315100432417_20210315-100223-95752944-00000328.pdf
where Senator Tillis, Judge Michel, and the Hon. Kappos said on Page 2:

"These exceptions to patent eligibility have long been recognized as boundary conditions that limit the breadth of U.S. patent law. **But there are significant disagreements among jurists that have resulted in harmful errors of law regarding the contours of threshold testing of**

claimed inventions under Section 101 against those exceptions, one of which in particular, "abstract ideas," is undefined. With respect to Section 101 and its antecedents, this Court's guidance has been vital to promoting its interpretation. In 2012 and 2014, in *Mayo Collab. Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012) and *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014), this Court set forth a framework for resolution of Section 101 issues."

In 2017, the AIPLA (American Intellectual Property Law Association) wrote that Alice Section §101 judicial analysis is "subjective, arbitrary, and panel dependent" and that "at some level, all claims are based on an abstract idea". See file: 2018.02.28-AIPLA-2017-Federal-Circuit-Update-Final-v2.pdf below (There is no link to this file, but, I have it archived and can email to anyone that requests it):

Section 101

- **Analysis dictates re-characterizing the claims**
  - Capture the "basic thrust" of claims
  - What the claim is "directed to"
    - *Synopsis v. Mentor Graphics*, 839 F.3d 1138, 1150 (Fed. Cir. 2016)
  - Claims are considered in their entirety to ascertain their **character** as a whole
    - *Internet Patents v. Active Network*, 790 F.3d 1343, 1346 (Fed. Cir. 2015)

- Subjective, arbitrary and panel dependent
- Many cases turn on level of detail of the re-characterized claim
- At some level, all claims are based on an abstract idea

8

"

The clearest statement, AIPLA respectfully submits, is one that tells courts and practitioners to apply all of the sections of Title 35, United States Code, in weeding out bad patents and unpatentable applications. Allow the other sections of Title 35 to do their jobs, but AIPLA respectfully submits that the standard for what subjects are patent

eligible must remain a broad and simple one that encourages innovation, since no one can (or frankly should) anticipate its potential ambit. **As Chief Justice Burger wrote in Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980), Congress intended the Section 101 description of patentable subject matter to "include anything under the sun that is made by man." (emphasis added).**

See on Page 1: https://www.govinfo.gov/content/pkg/FR-2018-04-20/pdf/2018-08428.pdf

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2018–0033]

Request for Comments on Determining Whether a Claim Element Is Well-Understood, Routine, Conventional for Purposes of Subject Matter Eligibility

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Request for comments.

SUMMARY: The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) recently issued a decision regarding the inquiry of whether a claim limitation represents well-understood, routine, conventional activities (or elements) to a skilled artisan in the relevant field. Specifically, the Federal Circuit found that whether a claim element, or combination of elements, represents well-understood, routine, conventional activities to a skilled artisan in the relevant field is a question of fact. The

".

Also see: https://www.supremecourt.gov/DocketPDF/17/17-645/22767/20171206135009999_SC17-645-AB-amended.pdf

where it says on Page 4: "

> Judge Linn's observations are key to understanding why different individuals can use the same test to come to radically different conclusions. Particularly, when applying the *Alice Corp.* patent-eligibility test, the outcome is determined not by what a claim actually recites, but by the level of abstraction a particular judge views the claim as a function of the particular limitation(s) the judge capriciously chooses to ignore. The outcome is also determined not by virtue of the relative advantages that can be rightfully attributed to an invention, but by which advantages a judge subjectively believes is "something more."

".

See https://www.supremecourt.gov/DocketPDF/17/17-1226/36018/20180220175936495_Petition%20for%20Writ_Front%20Row%20v.%20MLB.pdf where it says on Page 6: "

> The exact argument Front Row raised on appeal, which its panel ignored, apparently is now the law of the Federal Circuit. This Court should grant this petition, vacate the Federal Circuit's ruling on Front Row's petition for rehearing, and instruct the Federal Circuit on the rules that should apply. If *Berkheimer* and *Aatrix Software* correctly state the law, Petitioner deserves the same treatment on remand. Until this Court acts, the application of 35 U.S.C. § 101 will remain subject to the "panel lottery" that exists now. That lottery is fundamentally unfair to patentees (or accused infringers) who receive "bad panels" inclined to vote for or against patent eligibility. The panel-specific nature of these crucial issues of patent law violates due process, which requires all patentees to be treated equally before the Federal Circuit and fact issues be reserved for juries after a complete record.

“.

Without fact finders in the patent litigation process, patent litigation is a failed process which tilts the scale of justice in favor of the efficient infringer.

c. Patent counseling and opinions;

I was instructed by other attendees of the 2019 Senate Hearings on Patent Eligibility, that I spoke to, that the entire U.S. patent application and U.S. patent litigation processes are **“crooked”** because of Alice Section §101, and to not patent anything else ever again. ***All a U.S. patent does is tell competitors how to do it.***

d. Research and development;

"Why would anyone in their right mind risk millions if not billions of dollars to develop a product when they have no idea if they're eligible for protection?” quoting Senator Tillis, again.

The uncertainty of Alice Section §101 makes R&D costs and efforts worthless. Efficient infringement means the inventor pays for the R&D costs and efforts and not the infringer. The infringer saves the R&D cost and efforts and is thus more competitively positioned to meet the needs of the market.

e. Employment; See: https://www.govinfo.gov/content/pkg/CHRG-115hhrg32324/html/CHRG-115hhrg32324.htm

Quoting Judge Michel from the article link above, where he says:

“I would like to stress that I am not affiliated with any company or any coalition or any other commercial entity. I am only interested in the economy of the country and our global competitiveness and in a well functioning patent system.”

“It is my judgment that as things have developed in just the last 3 years, **the United States patent system is now in a crisis mode**. It has been so beleaguered by various forces and reform efforts that it is no longer functioning effectively to incentivize the massive investment repeatedly needed in order to move technology forward. **The ranking globally of the U.S. patent system in strength has now fallen to tenth**. It was always first in all the prior years. And there are many other indications of problems in the system.”

“The uncertainty in the system is the biggest trouble of all,

because that deters the needed investment."

"The health of our intellectual property system is integral to the health of our Nation's economy. **It provides vital incentives that foster innovation, which in turn creates jobs. America's most intellectual property intensive industries generate millions of jobs. According to a Commerce Department report, these industries support at least 45 million United States jobs** and account for nearly 40 percent of our Nation's gross domestic product."

Further in this article, Judge Michel says:

"And I hope, finally, that the Congress will consider trying to clarify the meaning of eligibility in the statute in section 101. **The Supreme Court has provided some very good impetus for this, but its standards are too vague to produce consistent and fair results.** The Congress has a better capacity as a matter of national economic and innovation policy to state the limits of eligibility, and it should do so, in my opinion, by clarifying 101."

f. Procurement;

No comment.

g. Marketing;

No Comment.

h. Ability to obtain financing from investors or financial institutions;

Quoting Judge Michel, again, from the link above: "The uncertainty in the system is the biggest trouble of all, because that deters the needed investment."

i. Investment strategy;
"Why would anyone in their right mind risk millions if not billions of dollars to develop a product when they have no idea if they're eligible for protection?" quoting Senator Tillis, again. My patent prosecution strategy in NOT to disclose technology secrets through a U.S. patent or purchase or license any U.S. patents. U.S. patents are worthless because of the uncertainty of Alice Section §101. ***U.S. patents just tell competitors exactly how to do it.***

j. Licensing of patents and patent applications;

Valid U.S. patents are potentially worthless because of Alice Section §101. I would be a fool to buy a U.S. patent license. It is impossible to license a U.S. patent because of the uncertainty of Alice Section §101.

k. Product development;
Product development of a patented technology is potentially worthless. The inventor pays for research, development, and reduction to practice of the product(s), and his/her patent teaches competitors exactly how to do it. The competitors are more competitive because they don't have the additional research and development costs.

l. Sales, including downstream and upstream sales;
As far as sales are concerned, it is **impossible to sell to someone** when they can get the same product for less money or for free. Competitors don't have the original research and development and U.S. patent costs.

m. Innovation
Claim Construction
See pages 13 and 14 of:
https://cip2.gmu.edu/wp-content/uploads/sites/31/2018/03/Cleveland-Clinic-v-True-Health-Brief-of-Law-Professors-as-Amici-Curiae.pdf
where it says:

"The Supreme Court has also held that claim construction is a question of law with factual underpinnings. *Teva Pharm. USA Inc. v. Sandoz, Inc.*, 135 S.Ct. 831, 838 (2015) (identifying "claim construction as a practice with 'evidentiary underpinnings,' a practice that 'falls somewhere between a pristine legal standard and a simple historical fact'") (*quoting Markman v. Westview Instruments* 517 U.S. 370, 378 (1996))). Although as a written instrument, **the construction of a patent claim is ultimately a question of law**, that does not mean that courts can ignore the existence or relevance of underlying factual questions. *Id.* at 837. *Teva* is additionally relevant to the § 101 issue because it addressed the interaction of the Federal Rules of Civil Procedure with patent law doctrines. **When a doctrine is a question of law with underlying evidentiary or fact-based questions, the Rules apply the same as they would in any other circumstance. *Id.* at 838. Here, that means accepting well-pleaded facts in the complaint on a motion to dismiss as true and deferring resolution of contested facts until trial."**

Without fact finders in the patent litigation process, innovation is meaningless. After a decade of litigation, I could not prove that my patents were innovative because there was never a fact finder in my case. The courts reversed themselves:

> My patent claim construction requires that the word "display" be performed on a computer screen and also says that "zooming cannot be performed on a printed map". Both the Federal Circuit and District Court agreed with this, originally, in my patent claim construction appeal. "The claim also recites "zooming in on [an area] of the

displayed map." **Such zooming cannot be performed on a printed map. Accordingly, we agree with the district court the displaying must occur on the monitor**." Later, my District Court judge reversed himself and found my patents to be ineligible under Alice Section §101 with a 6th century paper atlas, and then, he retired.

Also, Judge Newman said, very clearly, that graphical user interfaces are patent eligible. My patents very clearly say just that in the beginning of the specification:

"There is provided a method for locating available real estate properties for sale, lease or rental using a database of available properties at a central location and remote stations ***which use a graphic interface*** to select desired regions on a map of the areas in interest."

Quoting the article below:

https://www.ipwatchdog.com/2017/01/18/cafc-graphical-user-interface-patent-eligible/id=77262/

"**The Federal Circuit completely agreed** with the district court's analysis, but added further that the graphical user interface does not represent a long known idea, which is a threshold criterion of abstract idea ineligibility."

See on Page 5: https://www.ipwatchdog.com/wp-content/uploads/2021/03/Tillis-Michel-Kappos-American-Axle-Amicus-Brief.pdf

Quoting the Amicus Curiae, above, submitted by Senator Tillis, Judge Michel, and Hon. Kappos

"**THE DISPARATE AND INCONSISTENT APPLICATION OF THE COURT'S JURISPRUDENCE HAS CREATED AN UNPREDICTABLE AND UNSTABLE U.S. PATENT SYSTEM CONTRARY TO THE ART. I, SEC. 8, CL. 8 CONSTITUTIONAL IMPERATIVE TO INCENTIVIZE INNOVATION**

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in **Article 1, Section 8, Clause 8**. James Madison provides insight for its significance in the Federalist Papers No. 43. ... **The clause recognizes the need for: uniformity of the protection of IP rights**, securing those rights for the individual rather than the state; and incentivizing innovation and creative aspirations.4 But in stark contrast to the Founders' intent, **misinterpretation of Section 101 of our patent laws has created an *UNINTELLIGIBLE HASH*. The instability and uncertainty in Section 101 patent eligibility undermines the very foundation of the patent system as originally constructed by the Constitution's framers."**

My understanding as an inventor, and not a patent attorney, is that the U.S. Congress makes the patent laws, not the U.S. Supreme Court. The judicial exceptions to patent eligibility created by the U.S. Supreme Court are thus, **unconstitutional**. Those judicial exceptions to patent eligibility also change the sense and meaning of Section §101. Those exceptions should be

abrogated immediately, and patents, like mine, that were invalidated by any of the judicial exceptions to eligibility should get the chance to be reviewed retroactively against patent laws 35 U.S. §102, §103, and §112, in court.

Quoting Judge Michel on Page 9 where he says: https://www.ipwatchdog.com/wp-content/uploads/2021/03/Tillis-Michel-Kappos-American-Axle-Amicus-Brief.pdf

"It is important for me, as a retired judge, to acknowledge that the courts alone created this problem. In my view, recent cases are unclear, inconsistent with one another and confusing. I myself cannot reconcile the cases. That applies equally to Supreme Court and Federal Circuit cases. Nor can I predict outcomes in individual cases with any confidence since the law keeps changing year after year. If I, as a judge with 22 years of experience deciding patent cases on the Federal Circuit's bench, cannot predict outcomes based on case law, how can we expect patent examiners, trial judges, inventors, and investors to do so? ".

It has taken over a decade to show a jury 2 pictures. Since 2005, the patent laws have changed over a dozen times, some, back and forth. What you have now is a kindergarten court system, changing the rules while playing the game. Just let me go to court and see who wins my case. My adversaries told a pack of lies to the Federal Circuit in my last appeal. There has never been a fact finder in my case. The facts should matter in patent litigation. I have saved all the record evidence in my case, and I am ready for trial, anytime.

a. Competition
   It is impossible to compete with lower cost or free alternatives that provide the exact same benefits. This is simple economics.

3.

Please explain how the current state of patent eligibility jurisprudence in the United States impacts particular technological fields, including investment and innovation in any of the following technological areas:

a. Quantum computing
b. Artificial intelligence
c. Precision medicine
d. Diagnostic methods
e. Pharmaceutical treatments
f. Other computer related inventions (software, business methods, computer security, databases and data structures, computer networking, and graphical user interfaces).

   The Alice/Mayo Section §101 judicial exceptions will most likely invalidate every patent in every field listed. There is some level of abstraction in each field. Abstraction is subjective and panel dependent. See my notes above.

4.

Please explain how your experiences with the application of subject matter eligibility requirements in other jurisdictions, including China, Japan, Korea, and Europe differ from your experiences in the United States.

No comment.

5.

Please identify instances where you have been denied patent protection for an invention in the United States solely on the basis of patent subject matter ineligibility, but obtained protection for the same invention in a foreign jurisdiction, or vice versa. Please provide specific examples, such as the technology(ies) and jurisdiction(s) involved, and the reason the invention was held ineligible in the United States or other jurisdiction.

No comment.

6.

Please explain whether the state of patent eligibility jurisprudence in the United States has caused you to modify or shift investment research and development activities, or jobs from the United States to other jurisdictions, or to the United States from other jurisdictions. If so, please identify the relevant modifications and their associated impacts.

No comment.

7.

Please explain whether the state of patent eligibility jurisprudence in the United States has caused you to change business strategies for protecting your intellectual property (e.g. shifting from patents to trade secrets, or vice versa). If so, please identify the changes and their associated impacts.

> All U.S. patents do today is teach big tech and other would-be infringers exactly how to do it. Senator Tillis agrees with me: "Why would anyone in their right mind risk millions if not billions of dollars to develop a product when they have no idea if they're eligible for protection? From a business perspective, it simply isn't worth the risk for many endeavors." See Page 9: https://www.ipwatchdog.com/wp-content/uploads/2021/03/Tillis-Michel-Kappos-American-Axle-Amicus-Brief.pdf

8.

Please explain whether you have changed your behavior with regard to filing, purchasing, licensing, selling, or maintaining patent applications and patents in the United States as a result of the current state of patent eligibility jurisprudence in the United States. If so, please describe how you changed your behavior.

U.S. patents are, for now, completely off the table.

> All U.S. patents do today is teach big tech and other would-be infringers exactly how to do it. Senator Tillis agrees with me: "Why would anyone in their right mind risk millions if not billions of dollars to develop a product when they have no idea if they're eligible for protection? From a business perspective, it simply isn't worth the risk for many endeavors." See Page 9 : https://www.ipwatchdog.com/wp-content/uploads/2021/03/Tillis-Michel-Kappos-American-Axle-Amicus-Brief.pdf

9.

Please explain how, in your experience, the status of patent eligibility jurisprudence in the United States has affected any litigation for patent infringement in the United States in which you (have) been involved as a party, as legal counsel, or as another participant (e.g., an expert witness). For example, please explain whether this jurisprudence has affected the cost or duration of such litigation, the ability to defend against claims of patent infringement, the certainty/uncertainty of litigation outcomes, or the likelihood of settlement.

United States patent eligibility jurisprudence means every patent is probably unenforceable and invalid as abstraction is undefined and subjective. There is no certainty in litigation outcomes because of Section §101. Facts do not matter. ***FACTS DO NOT MATTER!!!*** Why would infringers settle?

Section II

Impact of Subject Matter Eligibility on the General Marketplace

10.

Please identify how the current state of patent eligibility jurisprudence in the United States impacts the global strength of U.S. intellectual property.

United States patent eligibility jurisprudence means every patent is probably unenforceable and invalid as abstraction is undefined and subjective. U.S. patent eligibility jurisprudence is a panel lottery and an unintelligible hash of validity goulash. There is no certainty in litigation outcomes because of this. U.S. intellectual property protection is completely worthless because of Section §101.

11.

Please identify how the current state of patent eligibility jurisprudence in the United States impacts the U.S. economy as a whole.

See: https://www.govinfo.gov/content/pkg/CHRG-115hhrg32324/html/CHRG-115hhrg32324.htm

Quoting Judge Michel from the article link above, where he says:

"I would like to stress that I am not affiliated with any company or any coalition or any other commercial entity. I am only interested in the economy of the country and our global competitiveness and in a well functioning patent system."

"It is my judgment that as things have developed in just the last 3 years, the United States patent system is now in a crisis mode. It has been so beleaguered by various forces and reform efforts that it is no longer functioning effectively to incentivize the massive investment repeatedly needed in order to move technology forward. **The ranking globally of the U.S. patent system in strength has now fallen to tenth.** It was always first in all the prior years. And there are many other indications of problems in the system."

"The uncertainty in the system is the biggest trouble of all, because that deters the needed investment."

"The health of our intellectual property system is integral to the health of our Nation's economy. **It provides vital incentives that foster innovation, which in turn creates jobs. America's most intellectual property intensive industries generate millions of jobs. According to a Commerce Department report, these industries support at least 45 million United States jobs** and account for nearly 40 percent of our Nation's gross domestic product."

Further in this article, Judge Michel says:

"And I hope, finally, that the Congress will consider trying to clarify the meaning of eligibility in the statute in section 101. **The Supreme Court has provided some very good impetus for this, but its standards are too vague to produce consistent and fair results.** The Congress has a better capacity as a matter of national economic and innovation policy to state the limits of eligibility, and it should do so, in my opinion, by clarifying 101."

Please identify how the current state of patent eligibility jurisprudence in the United States impacts the global strength of U.S. intellectual property and the U.S. economy in any of the following areas:

a. Quantum computing
b. Artificial intelligence
c. Precision medicine
d. Diagnostic methods
e. Pharmaceutical treatments
f. Other computer related inventions (software, business methods, computer security, databases and data structures, computer networking, and graphical user interfaces).

In responding to this question, please provide concrete examples and supporting facts when possible.

United States patent eligibility jurisprudence means every patent is probably unenforceable and invalid as abstraction is undefined and subjective.

United States patent eligibility jurisprudence is a panel lottery and an unintelligible hash of validity goulash.

See the "Chart of Post Alice Cases, as of March 1, 2019" information from Gibson Dunn below:

https://www.gibsondunn.com/wp-content/uploads/2019/03/Overview-of-Section-101-Patent-Cases-Decided-After-Alice-v-CLS-as-of-03-01-19.pdf

I can only comment on: "Other computer related inventions (software, business methods, computer security, databases and data structures, computer networking, and graphical user interfaces)."

Any reference in a patent to a (generic) computer makes it invalid. The inventor needs to invent his/her own novel computer system.

Any reference in a patent to a business method makes it invalid.

Any reference in a patent to collecting, displaying, and manipulating data makes it invalid.

Graphical user interfaces are new and should be eligible, but my patents were still invalidated under Alice Section §101 even though it references a "graphic interface" in the specification.

See: https://www.ipwatchdog.com/2018/11/11/supreme-court-refuses-101-patent-eligibility-appeal/id=103115/

Patent eligibility is in a state of crisis in all fields of technology. There is no certainty of litigation outcomes.

13.

Please identify how the current state of patent eligibility jurisprudence in the United States affects the public. For example: does the jurisprudence affect, either positively or negatively, the availability, effectiveness, or cost of personalized medicine, diagnostics, pharmaceutical treatments, software, or computer implemented inventions?

I can only comment about computers and software. United States patent eligibility jurisprudence means every computer or software patent is probably unenforceable and invalid as abstraction is undefined and subjective.

Any reference in a patent to a (generic) computer makes it invalid. The inventor needs to invent his/her own novel computer system.

Any reference in a patent to a business method makes it invalid.

Any reference in a patent to collecting, displaying, and manipulating data makes it invalid.

Graphical user interfaces are new and should be eligible, but my patents were still invalidated under Alice Section §101 even though it references a "graphic interface" in the specification.

See: https://www.ipwatchdog.com/2018/11/11/supreme-court-refuses-101-patent-eligibility-appeal/id=103115/

Conclusion

I am not a patent attorney. But patent attorneys, industry associations, judges, law professors, and U.S. Senators have said very clearly that:

1) Section §101 is unconstitutional.
2) Courts have expanded Section §101 beyond the statute.
3) Court decisions are now inconsistent, incoherent, chaotic, and **incorrect** because of Section §101.
4) Section §101 is not a patent litigation defense in Section §282, presumption of validity; defenses.
5) Section §101 does not name Section §101 as a "condition for patentability".
6) Section §101 is contrary to the eligibility requirements of TRIPS Article 27
7) Section §101 court decisions are also now panel dependent.
8) Section §101 needs fixing because of the subjectivity and uncertainty surrounding it.
9) The Supreme Court should reverse itself on Section §101, abrogate the judicial exceptions, and make the transition provision retroactive and immediately applicable to all cases and all issued U.S. patents past, present, and future.
10) Section §101 uncertainty stops the necessary investment required in new technologies.
11) Intellectual property industries account for 45 million U.S. jobs and nearly 40% of the U.S. gross domestic product.
12) Section §101 is bad law from the wrong lawgiver.
13) **"WHY WOULD ANYONE IN THEIR RIGHT MIND….?"**

Ms. Knowles said in the article below:

https://www.ipwatchdog.com/2019/01/16/sherry-knowles-scrutinizes-activist-supreme-court-unconstitutional-patent-eligibility/id=105228/

"**SCOTUS has developed its own common case law that is insolubly inconsistent with the U.S. statute, and by doing so it is acting illegally. There is no other way to describe it.**"

And as quoted earlier in the 2019 Senate Hearings on Patent Eligibility, she said:

"THE CONSTITUTION IS NOT SELF ENFORCING WE HAVE TO DEMAND IT"

Respectfully, please, let me be the one to say, with emphasis:

1) **"I demand that the judicial exceptions to patent eligibility be abrogated, immediately, because they are unconstitutional and change the sense and meaning of Section §101."**
2) **"I demand that the patent laws provided in the 1952 Patent Act be the laws applied retroactively and prospectively to all cases and issued patents, past, present, and future, again, because they were provided by the U.S. Congress."**
3) **"I demand that the core of any Section §101 reform or reversal transition provide for the immediate applicability to all cases and issued U.S. patents, past, present, and future."**
4) **"I demand that ALL issued patents that were found to be invalid under Section §101 as a matter of law are further analyzed by a fact finder, like a jury, under a complete factual evidentiary record."**
5) **I demand that the U.S. Federal Judiciary, the U.S. Senators, the U.S. Congress, the U.S. President, and all the other U.S. Government staff who swore to defend the U.S. Constitution solve this problem, immediately. The courts created this problem. They were wrong. Fix it!!!!!!!**
6) **I have valuable patent rights that were illegally taken from me. I demand to get them back and go to trial!**

United States patent eligibility jurisprudence is a panel lottery and an unintelligible hash of validity goulash.

Thank you for the opportunity to submit this document.

Respectfully submitted by:

Mark A. Tornetta

Inventor of U.S. patents 4,870,576 and 5,032,989

Real Estate Search and Location System and Method