

Broad Alliance of High Tech Start-Ups and Growing Concerns Urges Supreme Court to Preserve Critical Patent Protection for Innovative Software

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Forty-one companies, four individuals, and a pro-patent organization joined in an amicus brief filed in *Alice Corp. v. CLS Bank Int'l* (Case No. 13-298) arguing that the “abstract ideas” exception to patent eligibility must be construed narrowly. As the first-named amicus is Trading Technologies International, Inc., the brief will be referred to herein as the “TT brief.” [TT_Alice_CLS_amici](#)

Beginning from first principles, the TT brief notes that the Constitution provides for patent protection to “promote the Progress of Science and useful Arts” and that Congress has accordingly provided for a broad scope of patentable subject matter. As a result, the limitations placed on patentable subject matter are largely Court-created rather than being drawn from a literal interpretation of either statute or the Constitution. The TT brief makes this point in quite strong terms, arguing that “[t]he judicial exceptions to Congress’s expansive definition of patent-eligible subject matter thus lie at the farthest edge of the judicial power, perilously close to the border separating permissible interpretations of statutes from impermissible encroachments on Congress’s Article I authority.”

The TT brief further notes that the question at bar is not whether the claims are directed to novel, useful, and non-obvious subject matter, but only as to “whether computer-implemented inventions that are not directed to a scientific truth should be deemed ineligible **even if** such inventions are novel, non-obvious, and otherwise patentable.”^[1] *Amici* argue that the answer must be a resounding “no.” Thus, the TT brief suggests that no computer-implemented claim should be found patent-ineligible merely for being directed to an abstract idea. Furthermore, as argued by the TT brief and the Rader-Linn-Moore-O’Malley dissent from the Federal Circuit’s decision below, any invention can be boiled down to an abstract idea. If the elements used to implement the idea are not found to be themselves inventive, then many claims – not merely software claims – will be found to be patent-ineligible on the basis of this test.

Additionally, the TT brief takes direct issue with the finding in the Federal Circuit’s plurality opinion that “a computer is just a calculator capable of performing mental steps faster than a human could.” Rather, *amici* make the argument that computers are no longer merely machines capable of performing rapid calculations (and thus of implementing arbitrarily complex mathematical relationships), but are now “highly configurable machines capable of being turned into new and

different machines through how they are programmed.” On this basis, applying the abstract ideas exception to invalidate a broad swath of software patents would preclude patent protection for an area in which much innovation is still occurring: the creation of new specialized machines through the development of improved software.

Like the Moore-Rader-Linn-O’Malley dissent from the Federal Circuit’s opinion, the TT brief focuses on the fact that many issued patents rely on the patent-eligibility of software and the settled expectations of patentees would be disrupted by an expansion of the application of the abstract idea test. The TT brief takes the argument one step further, by noting that programmable processors are being used in more of the things we buy, and that software is being used to improve those things. For example, the novelty of a self-parking car is in the software used to maneuver the vehicle, not in the sensors used to gather the information or the control systems used to direct power to the wheels.

The argument continues by suggesting that the “abstract idea” exception to patent-eligibility should be limited to inventions that can be implemented entirely in the human mind, and thus has no bearing on claims that recite hardware components. Likewise, claims directed toward “scientific truths” that have always existed and thus cannot be invented, are not patent-eligible. But these two exceptions have no bearing on the patent-eligibility of a software-configured computer that performs specific tasks, so long as those tasks are not mere scientific truths.

Since the TT brief argues that a process performed on a computer cannot be abstract, *amici* emphasize the fact that both Alice and CLS Bank stipulated that the claims at issue must be performed on a computer. By contrast, the plurality below minimized this stipulation by making its own finding that “the requirement for computer implementation could scarcely be introduced with less specificity.” Accordingly, the two positions seem to be based on whether software patents are seen as (legitimate) claims directed to specially-configured machines or as claims to mental processes that happen to be implemented in machines.

1 Amicus Brief at 4 (emphasis in original) (defining “scientific truth” as a shorthand for laws of nature, natural phenomena and pure mathematical laws or axioms).

2 See MPEP 2106 (II.B) (explaining that neither necessary data-gathering steps nor extra-solution activity that is not central to the invented method can convey patent-eligibility to a method that otherwise lacks it).