

No. 2011-1301

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CLS BANK INTERNATIONAL,
Plaintiff-Appellee,

and

CLS SERVICES LTD.,
Counterclaim-Defendant-Appellee,

v.

ALICE CORPORATION PTY. LTD.,
Defendant-Appellant.

Appeal from the United States District Court for the District of Columbia
(Case No. 07-CV-0974, Judge Rosemary M. Collyer)

**BRIEF *AMICUS CURIAE* OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN SUPPORT OF PLAINTIFF-APPELLEE CLS BANK INT'L
AND URGING AFFIRMANCE**

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December 7, 2012

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CLS Bank International et al. v. Alice Corporation Pty. Ltd.

No. 2011-1301

CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, counsel for *amicus curiae* Matthew Schruers certifies the following:

1. The full name of every party or *amicus* represented by me is:
Computer & Communications Industry Association.
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: Not applicable.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are: Not applicable.

(continued)

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are: Matthew Schruers, see below.

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INTEREST OF *AMICUS CURIAE*¹

The Computer & Communications Industry Association (CCIA) is a trade association dedicated to open markets, open systems, and open networks, whose members participate in the information and communications technology industries, ranging from small entrepreneurial firms to the largest in the business. CCIA members employ nearly one million people and generate annual revenues exceeding \$200 billion.² CCIA members are substantially affected by the patent system and depend upon it to fulfill its constitutional purpose. Pursuant to the Court’s order of October 9, 2012 granting *en banc* hearing, CCIA submits the following brief *amicus curiae*.

SUMMARY OF ARGUMENT

This brief responds primarily to the first question presented: “What test should the court adopt to determine whether a computer-implemented invention is a patent ineligible ‘abstract idea’; and when, if ever, does the

¹ No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* made such a contribution.

² A complete list of CCIA’s members is available online at <http://www.ccianet.org/members.html>.

presence of a computer in a claim lend patent eligibility to an otherwise patent-ineligible idea?”

The decision in this case should be straightforward. The patents purport to govern an abstract idea: escrow. The dispute is whether the claims add an “inventive concept” sufficient to bring them within ambit of patentable subject matter. They do not. The panel majority seeks to avoid this conclusion by devising its own rule that patent claims are presumptively not abstract. It then finds sufficient concreteness to preserve its presumption in computer-implemented “shadow records,” thereby saving patents that are otherwise analogous to the abstract patent that the United States Supreme Court invalidated in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

The panel majority goes further. It not only justifies its rule by a sweeping policy claim, but further advocates disfavoring patent eligibility inquiries relative to the questions of patentability in Sections 102, 103, and 112.

The acceptance *en banc* expands the scope of the case by asking fundamental questions that deserve to be fully probed. These questions should be answered with the balanced, principled approach expressed by the Supreme Court in *Mayo Collaborative v. Prometheus Labs.*, 132 S. Ct. 1289

(2012) (hereinafter “*Prometheus*”), as distinct from the patentee-centric perspective of the panel decision.

ARGUMENT

I. The Panel’s Presumption of Patent Eligibility Is Unwarranted.

The panel majority instituted a rule that questionable subject matter is presumptively patent-eligible unless it can be shown to be “manifestly” abstract. *CLS Bank Int’l v. Alice Corp. Pty. Ltd.*, 685 F.3d 1341, 1352 (Fed. Cir. 2012). This rule has no basis in precedent and engineers a further expansion of the patent system at the fringes – the very area where the system has proven most controversial, least workable, and most litigation-prone. It resurrects the “concrete” and “tangible” language of *In re Alappat*, 33 F.3d 1526 (Fed. Cir. 1994), and *State Street Bank & Trust Co. v. Signature Financial Group*, 149 F.3d 1368 (Fed. Cir. 1998), language that this Court has not defined, that the Supreme Court has not adopted, and which therefore remains no more than a vague and abstract semantic weapon against the purported *bête noire* of abstraction. The panel majority does so despite the Federal Circuit’s *en banc* rejection of the “useful, concrete, and tangible result” test in *In re Bilski*. *In re Bilski*, 545 F.3d 943, 959 (Fed. Cir.

2008). Not stopping there, it adds “palpable” and “otherwise not abstract.” *CLS Bank*, 685 F.3d at 1351.

Ironically, the panel majority’s rule is founded on its apparent distaste for the controversy and litigation over 35 U.S.C. § 101. Yet that turmoil has been provoked by the expansionist doctrine of the now-discredited ruling in *State Street*, 149 F.3d 1368, which upset an accepted, noncontroversial exclusion of business method patents and opened the door to a flood of patents and years of public controversy.

The panel majority justifies its rule with a simple, unsubstantiated policy argument that without this rule congressional intent would be undermined. Yet exclusion of abstract ideas preceded the 1952 Patent Act, and there is no evidence that Congress intended to create a presumption against it or otherwise limit its effect.

Such a presumption also contradicts *Prometheus*, which makes clear that the overused phrase, “anything under the sun made by man,” is an out-of-context truncation from legislative history that served as a limitation, not an expansion. *Prometheus*, 132 S. Ct. at 1303-04; *see also Bilski*, 545 F.3d at 1000 (Mayer, J., dissenting).

Moreover, as Judge Rich’s landmark article explains, the Patent Act was described as a mere codification of existing law on the floor of the

Senate, and congressional intent only extended to trusting the patent attorneys who drafted the Act. Giles S. Rich, *Congressional Intent – Or, Who Wrote the Patent Act of 1952?*, in *Patent Procurement and Exploitation* (1963).

II. The Panel Decision Inappropriately Demotes Section 101 Inquiries.

The majority’s hostility to subject matter restrictions is also evidenced in its attempt to demote Section 101 as a threshold inquiry in favor of analysis under Sections 102, 103, and 112. *See CLS Bank*, 685 F.3d at 1348, 1350. Yet disfavoring Section 101 has no basis in Supreme Court precedent. Indeed, Section 101 was characterized in *Application of Bergy* as the first door through which the applicant must pass en route to securing a patent. *Bergy*, 596 F.2d 952, 960 (C.C.P.A. 1979), *vacated in part sub nom. Diamond v. Chakrabarty*, 447 U.S. 303 (1980). Ascertaining patent-eligibility under is not, as the panel decision suggests, “hunting for abstractions.” *CLS Bank*, 685 F.3d at 1351. Section 101 is a threshold inquiry compelled by Congress, which, incidentally, may avert the close and fact-intensive inquiry often demanded by the other thresholds in the Act.

Indeed, beginning with granting certiorari in *Lab. Corp. of America Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124 (2006), the Supreme Court

has shown a renewed and growing interest in patentable subject matter. It is inappropriate for this Court to respond by presumptively expanding the scope of its jurisdiction. This is different from adjudicating issues within the acknowledged purview of the patent system; the delineation of patentable subject matter determines when innovators, entrepreneurs, and businesses in general will be subject to the risk of infringement, whether from competitors or from patent assertion entities. It informs them when they are entering territory where costly legal assistance and searching may be advisable.

III. *Prometheus* Requires an Inventive Concept.

The *Prometheus* test requires an inventive concept beyond the abstract idea. *Prometheus*, 132 S. Ct. at 1292. This test distinguishes *Diamond v. Diehr*, 450 U.S. 175 (1981), from *Parker v. Flook*, 437 U.S. 584 (1978). The lack of inventive concept in Alice Corp.'s patents would normally be fatal, but the majority rescues the patents by contriving a presumption of eligibility. See *CLS Bank*, 685 F.3d at 1347-48. Instead of looking closely at the invention, the majority looks to the language in the claims and finds sufficient specificity (within the prolixity) to conclude the patents are not ineligible. *Id.* at 1353.

The panel majority and dissent agree that mere use of a computer is not enough, which should lay to rest the thought that a general-purpose computer might satisfy the “machine-or-transformation” test. However, the majority offers nothing specific beyond asserting that certain limitations in the claims are sufficient. *CLS Bank*, 685 F.3d at 1355. The decision points to “shadow” records, but these are nothing more than representations of the accounting between the parties, essential to any computer implementation. Mere limitations offer a patina of specificity, not an inventive concept; the manufactured presumption of patentability relieves the patentee of any meaningful obligation to do more than hire a clever attorney. Beyond the cleverness of drafting, nothing distinguishes Alice Corp.’s patents from the patent rejected in *Bilski*.

IV. The Court Should Provide Reasoned Guidance on the Limits of Patentable Subject Matter.

While the present case can clearly be decided under the principles of *Bilski* and *Prometheus*, the Court has invited broader guidance for determining what is an abstract idea in a computing environment. It also asks specifically whether the presence of a computer has any effect on patent eligibility, as well as whether the form of the claims should make a difference. The answer to both questions is no.

As both the panel majority and dissent acknowledge, the mere presence or recitation of a computer does not transform an abstract idea into patentable subject matter. Conversely, of course, the incorporation or inclusion of an abstract idea does not render an otherwise patentable process or system ineligible. These axioms are symmetrical. Thus, the presence or absence of general-purpose computer is no more determinative than the presence of human beings.

Nor should the form of the claims be determinative. The panel majority's deference to the claim formulation is remarkable and contrasts dramatically with the dissent's view. While long tracts could be written about the role of the claims, *see, e.g.*, Dan Burk & Mark Lemley, *Fence Posts or Sign Posts: Rethinking Patent Claim Construction*, 157 U. Pa. L. Rev. 1743 (2009), it is sufficient to say that the majority's vision of the claims is a lawyer's playground where large swaths of territory are ceded to clever draftsmanship, and patents become opaque and mysterious documents that disclose as little as possible, as *abstractly* as possible, and as remote from the actual invention as a good lawyer can safely engineer. This inevitably leads to the failure of the notice and disclosure functions, even in fields of physical endeavor. Lisa Larrimore Ouellette, *Do Patents Disclose Useful Information?*, 25 Harv. J.L. & Tech. 531 (2012). In the case of

computer-implemented innovation, it has led to claims that meaningful standards or limits are unworkable because lawyers will figure out how to game them: an argument that lawyers are too smart for judges.

The answer to the general question presented requires a further understanding of the problems that abstraction causes, (whether of language or subject matter) in what is statutorily a one-size-fits-all patent system. Economists have found major differences in how patents are used in different industries, *see* Wesley Cohen, et al., *Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)* (NBER Working Paper No. 7552 2002), and scholars have argued that there are tools for adapting the patent system to different technologies and environments, but nuanced and systematic adaptation has not yet found a home in patent jurisprudence. *See generally* Dan Burk & Mark Lemley, *The Patent Crisis and How the Courts Can Solve It* 110-130 (Univ. of Chicago Press 2009).

Prometheus recognizes the dynamics of cumulative innovation: that patents incentivize invention, that investments and innovation can build on patented invention, but that patents also constrain the freedom of follow-on innovators and limit opportunities for investment by others. Abstract ideas are not patentable because they are basic tools, *Gottschalk v. Benson*, 409

U.S. 63, 67 (1972), or building blocks, *Prometheus*, 132 S. Ct. at 1303, that if patented would unduly preempt too wide a range of future uses.

Professor Mark Lemley makes a strong case against functional preemption in a recent article on functional claiming, which rightly identifies functional claiming as particular problem in software. Mark Lemley, *Software Patents and the Return of Functional Claiming* (Stanford Public Law Working Paper No. 2117302, 2012). Why in software? Because the *abstract* nature of the language allows for functional claims that courts do not recognize as analogous to the means-plus-function language that triggers Section 112. But preemption is not an easy concept to work with, because it is seldom as straightforward as functional preemption. In *Life After Bilski*, 63 Stanford L. Rev. 1315 (2011), for example, Lemley et al. make an argument on preemption that is cited in *Prometheus*, yet the authors would have granted the patent in *Prometheus*, while the Supreme Court rejected it unanimously. See *Prometheus*, 132 S. Ct. at 1303 (citing Lemley et al., at 1342-44).

Furthermore, there is a difference between the sweeping functional preemption that Morse attempted in his notorious claim, see *Prometheus*, 132 S. Ct. at 1300, and the preemption of use and cumulative innovation that Benson spoke to:

Here the “process” claim is so abstract and sweeping as to cover both known and unknown uses of the BCD to pure binary conversion. The end use may (1) vary from the operation of a train to verification of drivers’ licenses to researching the law books for precedents and (2) be performed through any existing machinery or future-devised machinery or without any apparatus. *Benson*, 409 U.S. at 71-72.

What *Benson* really targets is the problem of parallel and cumulative congestion that is also associated with obviousness. However, actually demonstrating obviousness through a full PHOSITA exercise is a costly and cumbersome process that is often short-circuited in practice. Rebecca Eisenberg, *Obvious to Whom? Evaluating Inventions from the Perspective of PHOSITA*, 19 Berkeley Tech. L.J. 885, 891 (2004). Given the extreme abundance of innovation in software, computer programs cannot “readily be examined for adherence” to non-obviousness and other traditional criteria, as noted by the President’s Commission on the Patent System in 1966. See President’s Commission on the Patent System, *To Promote the Progress of Useful Arts in an Age of Exploding Technology* 12 (1966). Today the ease of creating software, the vast worldwide population of software developers, and ease with which software traverses the globe make for an increasingly poor fit with the line-drawing exercises of novelty and nonobviousness, and also with the high cost and slow processes of the patent system, particularly in the absence of an independent invention defense.

This is very different from the view of patents as free-standing product equivalents that generate no externalities. In this view, plainly expressed by Judge Rich in 1960, low quality did not matter:

Patents are not Nobel or Pulitzer prizes! They are not for exceptional inventors but for average inventors and should not be made hard to get.... Why must an invention be a commercially hot number to be patentable? If it is a total dud, how is the public injured by a patent on it? A monopoly on something nobody wants is pretty much of a nullity. That is one of the beauties of the patent system. The reward is measured automatically by the popularity of the contribution.

Giles S. Rich, *The Principles of Patentability*, 28 Geo. Wash. L. Rev. 393, 407 (1960).

From this sanguine perspective, innovation is not cumulative, and there is only one patent per product. Yet today RPX estimates that as many as 250,000 patents may read on a smartphone. RPX Corp., Registration Statement (Sec. & Exch. Comm'n Form S-1), at 59 (Sept. 2, 2011). The contrast between modern reality and Judge Rich's vision could not be more stark.

Information technology is a general-purpose technology that enables processes and systems at many levels of abstraction, creating potential and opportunity for overlap, preemption, and ambush. Abstract subject matter invites abstract terminology that allows claims to be described in many different terms, terms that in fast-moving fields have changed over time.

This leads to problems in identifying prior art and interpreting claims – “fuzzy boundaries” – and the failure of notice in individual cases and thus the ultimate breakdown of the disclosure function. James Bessen & Michael Meurer, *Patent Failure: How Judges, Lawyers, and Bureaucrats Put Innovators at Risk* (Princeton Univ. Press 2008); Peter Menell & Michael Meurer, *Notice Failure and Notice Externalities* (Boston Univ. School of Law, Law & Econ. Research Paper No. 11-58, 2012).

The failure of notice and disclosure functions is of particular concern in a regime that does not allow for independent invention or innocent infringement, leaving tens of millions of creators, such as individual app developers, and now hundreds millions, ultimately billions, of downstream users exposed to liability for vast numbers of patents. Ben Klemens, *The Rise of the Information Processing Patent*, 14 B.U. J. Sci. & Tech. L. 1 (2008). Unlike small patent applicants and owners, who enjoyed subsidized access to the system and services of lawyers on a contingency fee basis, small users and defendants are on their own. This opens up new opportunities for patent assertion entities that may shy from confronting the vast legal resources and access to prior art enjoyed by deep-pocketed targets. These entities can instead pursue startups or app developers that lack the resources to respond intelligently to mere threats of litigation. *See* Colleen

Chien, *Startups and Patent Trolls* (Santa Clara Univ. Legal Studies Research Paper No. 09-12, 2012).

V. Identifying Other “Important Clues” and Exclusions Would Clarify the Subject Matter Fog.

Other “important clues” can provide guidance on questions of subject matter. While the Supreme Court declined to adopt the machine-or-transformation test as an absolute rule in *Bilski*, it nonetheless acknowledged its value as a “useful and important clue.” *Bilski*, 130 S. Ct. at 3227. The Court reaffirmed its value as such in *Prometheus*, even though the test appeared to be over-expansive and therefore insufficient in that case. *Prometheus*, 132 S. Ct. at 1303.

CCIA supported the test in its *Bilski* amicus brief. This Court made an heroic effort to grapple with the problem of abstraction, made some progress, and should continue to do so. The challenge of abstraction is not a contentious problem best shunted aside, as the panel majority in this case believed. Thanks to the explosion of general-purpose technology and the vast quasi- and non-technological innovation it enables, abstraction has become a central problem in the patent system that radiates outward into many issues beyond subject matter eligibility.

Innovators deserve more guidance, and since innovation is indisputably the intent behind the patent system, the guidance should be based on ensuring that the benefits outweigh the costs and risks – and not just on a private basis, but on an aggregate (social) basis.

In this regard, bright-line exclusions (e.g., mathematical algorithms/formulas; see *Prometheus* at 21) have value because they give fair notice as to who needs to hire patent lawyers to guide the innovation process. Some lines may not be as bright as one might wish (including the “machine or transformation” test), but the population that can benefit from other “important clues” is vast. There are areas that have been or can be reasonably cordoned off, such as the historic exclusions like mental steps, printed matter, and methods of doing business. Obvious candidates for additional “important clues” include (a) what occurs within the human mind; (b) pure information processing within the box of the general-purpose digital computer; (c) pure communications between human beings; or (d) simple information exchange between computers and human beings or other computers. These are areas where innovation is inexpensive, indeed prolific, and there is no practical record of who did what first. These are areas that do not fit the paradigm of physically transformative technology. The indisputable importance of the computer is not, as the panel majority seems

suggests, sufficient reason to straightjacket *all* that it enables into the same regime as pharmaceuticals. Instead, the importance makes it all the more essential to get the treatment of computer-enabled innovation right, so that innovation is optimized and not unduly burdened.

There are also easy specific exclusions, such as symbolic manipulation and literary devices. Similarly, digital versus analog is a useful demarcation indicated in *Benson*, *see Benson*, 409 U.S. at 65, that may be useful in drawing a bright line to inform innovators.

VI. *CLS Bank v. Alice Corp.* Should Be Addressed in Terms of General Principles.

The question presented as to how the invention is claimed suggests an answer to the general question. In general, the form of the claim should not matter. However, if the claimed invention can be fully embodied in storage media, it is presumptively “inside the box” – i.e., processing information with no significant impact beyond the computer. Merely adding or compounding abstract ideas should not in itself change the outcome. Serving as an integral part of an external physical process, as in *Diehr*, means going outside the box, and so cannot be possibly be claimed as storage media.

The panel majority in this case apparently views “shadow records” as sufficient limitation to render the abstract idea concrete and patentable. Yet as the dissent’s plain English translation makes clear, shadow records are merely routine representational data. Symbolic representation is no less abstract than financial intermediation. Infusing the claims with metaphor and superfluities to create complexity (or the illusion thereof) is a lawyer’s game, and acceding to this strategy discredits the patent system and the rule of law.

CONCLUSION

While Congress has enacted a patent system, it has done so against an implicit understanding that our economy and society is based on the principle of free markets and unfettered competition. The complex and costly regime of privately enforced regulatory rights, subsidized by public funding of a judicial system, derogates from that principle in the name of innovation. Accordingly, the patent system must be justified by whether it works to support innovation. This Court is the designated steward for the patent system; it should not simply bump difficult interpretive questions to an inexpert and politically conflicted Congress.

For the foregoing reasons, the district court's decision finding the claims at issue to be ineligible subject matter, and ruling of summary judgment in favor of CLS Bank, should be affirmed.

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December 7, 2012

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) and Federal Circuit Rule 32(b). It is proportionally spaced, has a typeface of 14 points or more, and contains 3541 words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2012, I caused two (2) copies of the foregoing **BRIEF *AMICUS CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION** to be served via the overnight service of Federal Express on:

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