To: 2014_Interim_Guidance
From: Renjun Bian
Date: 3/6/2015
Re: Comments on Abstract Idea Examples

Dear Sir or Madam,

Thank you so much for releasing the *2014 Interim Guidance on Subject Matter Eligibility* and two sets of supplementary examples regarding nature-based product and abstract idea. I think they are a good indicator of how to define subject matter eligibility after *CLS Bank v. Alice* while need some adjustments on *Abstract Idea Examples*. Analyses of Step 2A and 2B in these examples seem using similar standards and duplicating each other. With this comment, I am writing to express my own opinion and suggest a probably easier-analyzing way to apply the whole Step Two of *Mayo* test.

In Step 2B of Example Three and Four, I recognized that "technical" factors including "technical problem", "technical means", and "technical effects", are most often used as "additional limitations" to prove that a claim is "significantly more" than an abstract idea. For example, in Example Four, the claim is "significantly more" than judicial exceptions and thus eligible since it solves a "technical problem" of "extend[ing] the usefulness of the [global positioning] technology into weak-signal environments and providing the location information for display on the mobile device" by a "technical means" of improving the signal-acquisition sensitivity of the receiver and receives a "technical effect" with "improve[ing] an existing technology (global positioning)."

I pretty agree with considering these clear and easy-applying "technical" factors when determining "significantly more" in Step 2B. However, I also notice that these factors are applied randomly when examining Step 2A. Take Example Two and Eight as instances, the claim of Example Two is concluded not directed to a judicial exception since it uses a "technical means" that "is necessarily rooted in computer technology" to solve a "technical problem" "specifically arising in the realm of computer networks" while the claim of Example Eight is judged as an abstract idea only because it is "similar to the concepts involving human activity relating to commercial practices" without any analysis of "technical" factors.

This kind of arbitrary use will cause inconsistency and unfair. The citation or ignoring of "technical" factors may lead to opposite conclusions. If we take the analysis of "technical" factors out when determining judicial exceptions in Example Two, its claim is definitely based on a concept "similar to the concepts involving human activity relating to commercial practices": same visually perceptible elements indicate same origin, which is a totally abstract idea that human beings have been acted for centuries, legally or illegally. On the other hand, if we apply "technical" factors in Step 2A of Example Eight, its claim indeed solves a problem "with piracy of digital copyrighted media", which is a "technical problem" that is particular to the Internet, and should not be held as an abstract idea.

Therefore, using “technical” factors in Step 2A is unnecessary and detrimental. The hurdle of Step 2A should be lowered and more claims should be allowed to be passed to Step 2B, where “technical” factors apply. As the *Interim Guidance* said, “at some level all inventions embody, use, reflect, rest upon, or apply a law of nature, nature phenomenon, or abstract idea.” It is hard to draw a bright line about to what degree a claim should be held “abstract idea.” In addition to the clearer and more effective standard we have already had in determining “significantly more”, it is better to set a low standard in Step 2A and let every possible claim pass the “abstract idea” test and be sentenced by these “technical” factors in Step 2B.

Hope my advice will help.

Best,

Renjun Bian
Master of Laws (LL.M.)
UC Berkeley School of Law