

From: Tom Boyden

Sent: Thursday, March 7, 2019 10:40 AM

To: Eligibility2019

Subject: 101 Mayhem

3/7/2019

Dear Director Iancu:

I would like to thank you for your initiative to resolve the 101 mayhem. Your subject matter eligibility guidance will help with most of the 101 problems if interpreted and implemented properly by the examiners and PTAB judges. Therefore, the highest risk to your subject matter eligibility guidance is the interpretation and implementation by the examiners and PTAB judges. The following are suggestions on how to further improve the guidance and how to ensure its correct interpretation and implementation.

1. In the article <https://www.ipwatchdog.com/2019/01/28/directo...id=105649/>, an “examiner wrongly thought that the new guidance created a new ‘practical application’ burden that needed to be met by an applicant to overcome an existing Section 101 rejection. This is contrary to the guidance actually identifying an alternative path to establishing that a claim is patentable under Section 101 ‘if the judicial exception is integrated into a practical application of the judicial exception.’” This shows how easily confused some examiners can be. Hence, it is critically important to include in the guidance or its training material the purpose of the guidance. For example: “In addition to predictability, the purpose of the guidance is to provide alternative paths to patent eligibility, thereby substantially reducing the number of 101 rejections”.

This high-level clarification right in the general purpose of the guidance will set a clear tone for the guidance and avoid confusion such as described in the referenced article.

2. The guidance states that a claim is patent eligible if it does not recite an abstract idea (i.e. mathematical concept, etc.) “on its own or per se”. For computer implemented inventions, it is a real possibility, and even likelihood, that some examiners will ignore the “on its own or per se” requirement and will interpret this as a claim being patent ineligible if it recites an element that uses a mathematical concept. All computer implemented inventions include elements that use mathematical concepts at some level. Therefore, some examiners will wrongly continue issuing 101 rejections for computer implemented inventions, whereas, this is clearly not the intent of the guidance.

It is critically important that the guidance or its training material provides at least one example of a claim for a computer implemented invention that recites only a mathematical concept that is not patent eligible (i.e. a method comprising adding A and B to result in C). It is further critically important that the guidance or its training material provides at least one example of a claim for a computer implemented invention that recites elements that use mathematical concepts, but do not recite mathematical concepts “on their own or per se”, that is patent eligible (i.e. a method comprising: receiving or

generating a, b, and c using some process or analysis; generating data structure A including a, b, and c; accessing data structure B in a memory of a computer; evaluating data structure A and data structure B to determine at least partial match; causing the computer or a device controlled by the computer to perform some operation based on the determination).

3. The guidance mentions that:

“a judicial exception has not been integrated into a practical application: ... [if it] merely includes instructions to implement an abstract idea on a computer, or merely uses a computer as a tool to perform an abstract idea”.

This language is clearly directed to fundamental business practices, organizing human activities, and other well-established human practices that use a computer merely as a tool (see the Supreme Court opinion in *Alice v. CLS Bank International*, 134 S. Ct. 2347 (2014)). This language is clearly not directed to computer implemented inventions (i.e. artificial intelligence, robotics, autonomous vehicles and devices, image processing, databases, computer/video games, computer simulations, content processing, and many more) that arise out of or are inherently implemented on a computer. It is unimaginably irrational to attempt to make computer implemented inventions that arise out of or are inherently implemented on a computer patent ineligible simply because they are implemented on a computer.

Therefore, it is critically important to include in the new guidance or its training material an explanation that the language stating that “a judicial exception has not been integrated into a practical application: ... [if it] merely includes instructions to implement an abstract idea on a computer, or merely uses a computer as a tool to perform an abstract idea” applies only to fundamental business practices, organizing human activities, and other well-established human practices that use a computer merely as a tool and that computer implemented inventions (i.e. artificial intelligence, robotics, autonomous vehicles and devices, image processing, databases, computer/video games, computer simulations, content processing, and many more) that arise out of or are inherently implemented on a computer are patent eligible as the patent law explicitly states.

4. It has been a long trend that many examiners routinely label all non-hardware elements of a computer implemented invention as abstract ideas with no, marginal, or incomplete analysis and label all hardware elements as “additional elements”. The examiners then merely state that the “additional elements” are well-known and do not add anything to the abstract ideas. This initial misclassification of abstract ideas and “additional elements” then prevents examiners from ever analyzing whether non-hardware elements are well understood, routine, or conventional as required in step 2B of the *Alice/Mayo* framework, since the analysis of whether an element is well understood, routine, or conventional applies only to the “additional elements”. This is an irresponsible practice and examiners who practice this should be identified and educated to correct their practice. It is critically important to clearly state in the guidance or its training material that only non-hardware elements that recite an abstract idea “on its own or per se” are abstract ideas and all other non-hardware elements are “additional elements”.

5. It is often the case in computer implemented inventions that a data structure, combination of data structures, element including a data structure, process that operates on a data structure, process that uses a data structure, or other element related to a data structure provides crucial novelty and enables a novel system. It has been a long trend that many examiners routinely label data structures or anything related to data structures as abstract ideas with no, marginal, or incomplete analysis. Since many computer implemented inventions use data structures, these inventions were unjustly doomed to patent ineligibility right from the start.

In the guidance's groupings of abstract ideas, the only one that has any relation to data structures is "Mathematical concepts—mathematical relationships, mathematical formulas or equations, mathematical calculations". Since a data structure IS an arrangement—often very complex —of data stored in memory, a data structure IS NOT a mathematical relationship, mathematical formula or equation, or mathematical calculation. Hence, a data structure is not an abstract idea. Further, many data structures – especially complex ones such as trees, graphs, neural networks, variously linked nodes, variously linked data structures, etc.—are embodiments of a practical application described under prong 2 of the guidance as patent eligible. Therefore, it is critically important to clearly state in the guidance or its training material that data structures are not abstract ideas and that inventions reciting data structures are patent eligible.

6. It has been a recent trend to issue blanket 101 rejections with no, marginal, or incomplete analysis in art units dealing with artificial intelligence inventions. This is an irresponsible practice and examiners who practice this should be identified and educated to correct their practice. It is beyond belief that the United States would cripple itself by limiting innovation in a crucial field such as AI, especially in view of the heated global race for dominance in this field. It is critically important to clearly state in the guidance or its training material that artificial intelligence inventions are patent eligible.

Sincerely,

Tom Boyden

tombayden@comcast.net

From: Tim Cate

Sent: Tuesday, March 5, 2019 11:24 AM

To: Eligibility2019

Subject: Public Response on Eligibility 2019

Director Iancu:

I would like to thank you for your initiative to resolve the 101 mayhem. Your subject matter eligibility guidance will help with most of the 101 problems if interpreted and implemented properly by the examiners and PTAB judges. Therefore, the highest risk to your subject matter eligibility guidance is the interpretation and implementation by the examiners and PTAB judges. The following are suggestions on how to further improve the guidance and how to ensure its correct interpretation and implementation

I wholeheartedly support your effort to resolve the 101 ambiguity and mayhem that currently exists within our courts. I am currently following a patent infringement case between Strikeforce Technologies vs Secure Authority, in which the appeal decision handed down by the Federal Court of appeals was made in support of Secure Authority, declaring "Affirmed", under Rule 36. The judges apparently could not even be bothered to provide an explanation to their decision, and instead applied the court's "bypass" Rule 36, allowing them to simply move it out of their court, in complete disregard to precedence set by SCOTUS and USPTO rulings!

I personally feel that the 3 judge panel failed to completely understand the patented technology, and legal precedence in the underlying issues within the infringement lawsuit, and therefore sought to escape such embarrassment by simply using the Rule 36 available to them! We must seek complete and undeniable clarification within the powers of SCOTUS and USPTO, to correct this issue, and prevent such in the future! We totally support your effort!

Thank you again for your effort, and for taking the time solicit feedback on the issues.

Respectfully,

Timothy W. Cate

Concord, NH

From: Charles Crabb

Sent: Tuesday, March 5, 2019 11:41 AM

To: Eligibility2019

Subject: Thank you for your initiative to resolve the 101 mayhem

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Respectfully,

Charles Crabb

Charles Crabb

sdcrcbs@gmail.com

(858)-722-4408

From: David Forbes

Sent: Friday, March 8, 2019 11:32 AM

To: Eligibility2019

Subject: re: 101 Mayhem

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Sincerely,

David J .Forbes

Concerned citizen/ IT security worker.

From: MARK LEVSKY

Sent: Wednesday, March 6, 2019 11:16 AM

To: Eligibility2019

Subject: 101 and Patent Defense

Dear Senator Iancu,

I would like to thank you for your initiative to resolve the 101 mayhem. Your subject matter eligibility guidance will help with most of the 101 problems if interpreted and implemented properly by the examiners and PTAB judges. Therefore, the highest risk to your subject matter eligibility guidance is the interpretation and implementation by the examiners and PTAB judges. I feel this disconnect is adversely impacting innovation as validated patents as infringed upon and company's owning those patents faced with significant financial burdens trying to get them enforced. The following are suggestions on how to further improve the guidance and how to ensure its correct interpretation and implementation

I wholeheartedly support your effort to resolve the 101 ambiguity and mayhem that currently exists within our courts. I am currently following a patent infringement case between Strikeforce Technologies vs Secure Authority, in which the appeal decision handed down by the Federal Court of appeals was made in support of Secure Authority, declaring "Affirmed", under Rule 36. The judges apparently could not even be bothered to provide an explanation to their decision, and instead applied the court's "bypass" Rule 36, allowing them to simply move it out of their court, in complete disregard to precedence set by SCOTUS and USPTO rulings! These patents from Strikeforce have undergone PTAB and IPR reviews and been validated several times, yet by using Rule 36 the court didn't even bother to provide any justification of their decision. I fully appreciate the courts workload and time required to craft and write a formal decision, but don't the parties deserve some sort of explanation versus just an "Affirmed?".

I personally feel that the 3 judge panel failed to completely understand the patented technology, and legal precedence in the underlying issues within the infringement lawsuit, and therefore sought to escape such embarrassment by simply using the Rule 36 available to them! We must seek complete and undeniable clarification within the powers of SCOTUS and USPTO, to correct this issue, and prevent such in the future! We totally support your effort!

Thank you again for your effort, and for taking the time to solicit feedback on the issues.

Very Respectfully,

Mark Levsky

38 crossroads lane

Glastonbury, CT 06033

From: WARD, STEPHEN L

Sent: Wednesday, March 6, 2019 10:19 AM

To: Eligibility2019

Subject: Alice 101

Director lancu:

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In regard to an issue that I've become quite passionate about and I have found that you are in fact connected with, I felt compelled to reach out to you as you are now, in my opinion, considered to be "The voice of reason". The situation involving patent law and the legal system has become quite the debacle as I'm sure you have come to realize. The arduous task of obtaining a patent for various reasons can be quite daunting in any one of a number of ways. Having a patent, it was my understanding, gave one legal leverage to conduct business freely knowing your vision of entrepreneurial endeavour would be supported and protected by the system in place. It is with great dismay to find that Alice 101 and Article 36 are a ways and means to circumvent the law, By The Law. It was my understanding that the United States Patent Office IS a legal entity providing protection from patent infringement only to find that through Alice 101 and Article 36 our court system can disregard ANY patent by giving it a name; Abstract. If necessity is "The Mother Of Invention" then Alice 101 and Article 36 is the Doctor performing the abortion as anyone with a patent-able idea will find it much easier to to steal someone elses "brain child" and become profitable. I find it to be legal theft and diminishing regard for what has made our country what it is today. Another step in the decline of our modern civilization. Please find fairness in this issue as you become more immersed in it.

Thank you for any consideration in this matter,

Sincerely,

Stephen Lea Ward

http://www.DuPont.com/corp/email_disclaimer.html

From: Darin Wayne
Sent: Wednesday, March 6, 2019 10:10 AM
To: Eligibility2019
Subject: Darin Anderson Resolving the 101 mayhem

Director Iancu:

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THE AUTHOR

Mark Marrello is a partner at Imperium Patent Works, LLP. While earning his M.S. and B.S. in Electrical Engineering, Mark worked at Qualcomm Incorporated as a Senior Radio Frequency Integrated Circuit Engineer. Mark's responsibilities included the design, test, and production ramp up of cutting edge multi-mode and multi-band communication devices. After attaining his M.S. in Electrical Engineering, Mark transitioned to Qualcomm's in-house legal department and began attending law school in the evening. Upon attaining his J.D., Mark became the second attorney at Bridgelux Incorporated where he singularly managed all intellectual property matters including building a broad patent and trademark portfolio, managing litigation issues, negotiating licensing agreements, drafting business and employee contracts, and advising the executive team on a variety of strategic initiatives. Mark is admitted to practice before the United States Patent & Trademark Office, all California State Courts, and the United States District Courts for the Northern and Southern Districts of California.

For more information or to contact Mark, please visit his [Firm Profile Page](#).

Tags: Director Andrei Iancu, Guest Contributor, intellectual property, patent, patent eligibility, patent eligible, Patentability, patentability requirements, patentable subject matter, patents, Section 101, Section 101 Guidance, software patent, software patents, technology, USPTO

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