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New EU Guidelines for Patenting AI and Machine Learning Technologies: Comparison With U.S. Approach

Navigating EPO and USPTO Rules to Maximize Patent Protection

TUESDAY, JANUARY 8, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Aliza G. Carrano, Partner, **Finnegan Henderson Farabow Garrett & Dunner**, Washington, D.C.

Susan Y. Tull, Partner, **Finnegan Henderson Farabow Garrett & Dunner**, Washington, D.C.

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Finnegan, Henderson, Farabow, Garrett & Dunner, LLP

New EU Guidelines for Patenting AI and Machine Learning Technologies: Comparison With U.S. Approach

January 8, 2019

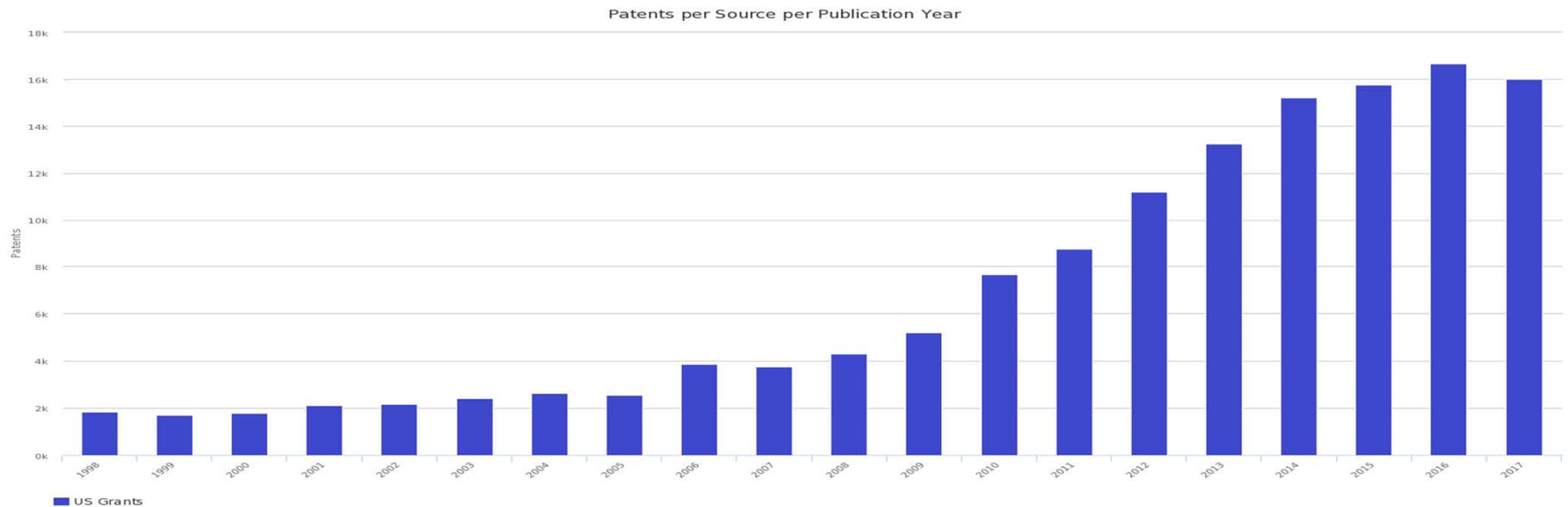
Presented by
Susan Y. Tull and Aliza George Carrano

- **Growth of patent protection for AI and ML in the U.S. and EU**
- **New EU Guidelines**
- **Comparison of EU Guidelines with current U.S. patent law**
- **Maximizing patent protection in the U.S. and EU**
- **Data rights and privacy concerns with AI**

GROWTH OF PATENT PROTECTION FOR AI AND ML IN THE U.S. AND EU

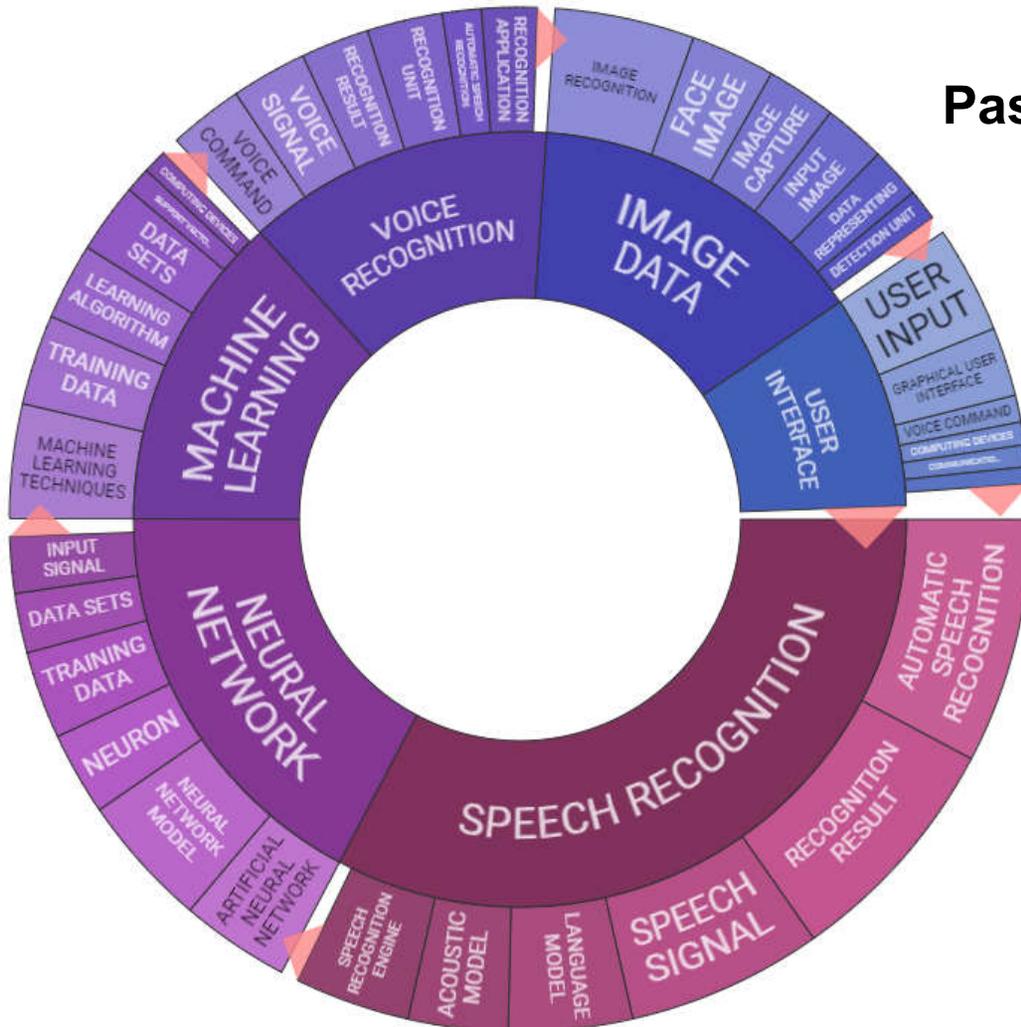
Growth of Patent Protection for AI in the U.S.

U.S. Patent Grants for AI (20 Years)



AI Patents - Keyword Clustering

U.S. Patents Grants for AI
Past 10 Yrs (Jan 2007 – Oct 2017)



NEW EU GUIDELINES

Patentability in the EU

- There are four basic requirements for patentability:
 - i. there must be an “invention”, belonging to any field of technology;
 - ii. the invention must be “susceptible of industrial application”;
 - iii. the invention must be “new”;
 - iv. the invention must involve an “inventive step”.

Art. 52(1)

What is an “invention”?

- The EPC contains a non-exhaustive list of things that are not inventions (Art. 52(2)):
 - Discoveries
 - Scientific theories
 - **Mathematical methods**
 - Aesthetic creations
 - Schemes, rules and methods for performing mental acts, playing games or doing business
 - Programs for computers
 - Presentations of information

November 1, 2018 EPO Guidelines on AI

EPO updated Guidelines for Examination to provide specific guidance on AI

- Inserted under Guidelines addressing mathematical models
 - AI and machine learning are largely unpatentable and are *per se* “of an abstract mathematical nature”
 - EPO will look very closely at whether claimed subject matter has a technical character as a whole because expressions such as “neural network” and “reasoning machine” usually refer to abstract models

Section 3.3.1 of Part G

November 1, 2018 EPO Guidelines on AI

- The application of the field of technology of the AI will determine whether invention has a technical character
 - use of a neural network in a heart-monitoring apparatus for the purpose of identifying irregular heartbeats = TECHNICAL CONTRIBUTION
 - Classifying abstract data records or even "telecommunication network data records" without any indication of a technical use being made of the resulting classification = NOT TECHNICAL PURPOSE

COMPARISON OF EU GUIDELINES WITH CURRENT U.S. PATENT LAW

What Can Be Patented in the U.S.

- System Architecture (neural network; expert/knowledge system)
- Data Processing (problem solving; reasoning; planning; discovery)
- Learning/Training (machine/deep learning; back propagation; supervised/unsupervised)
- AI-Embodied Apparatus or Method (autonomous vehicles; smart home/IoT devices; security/fraud prevention; virtual personal assistants)

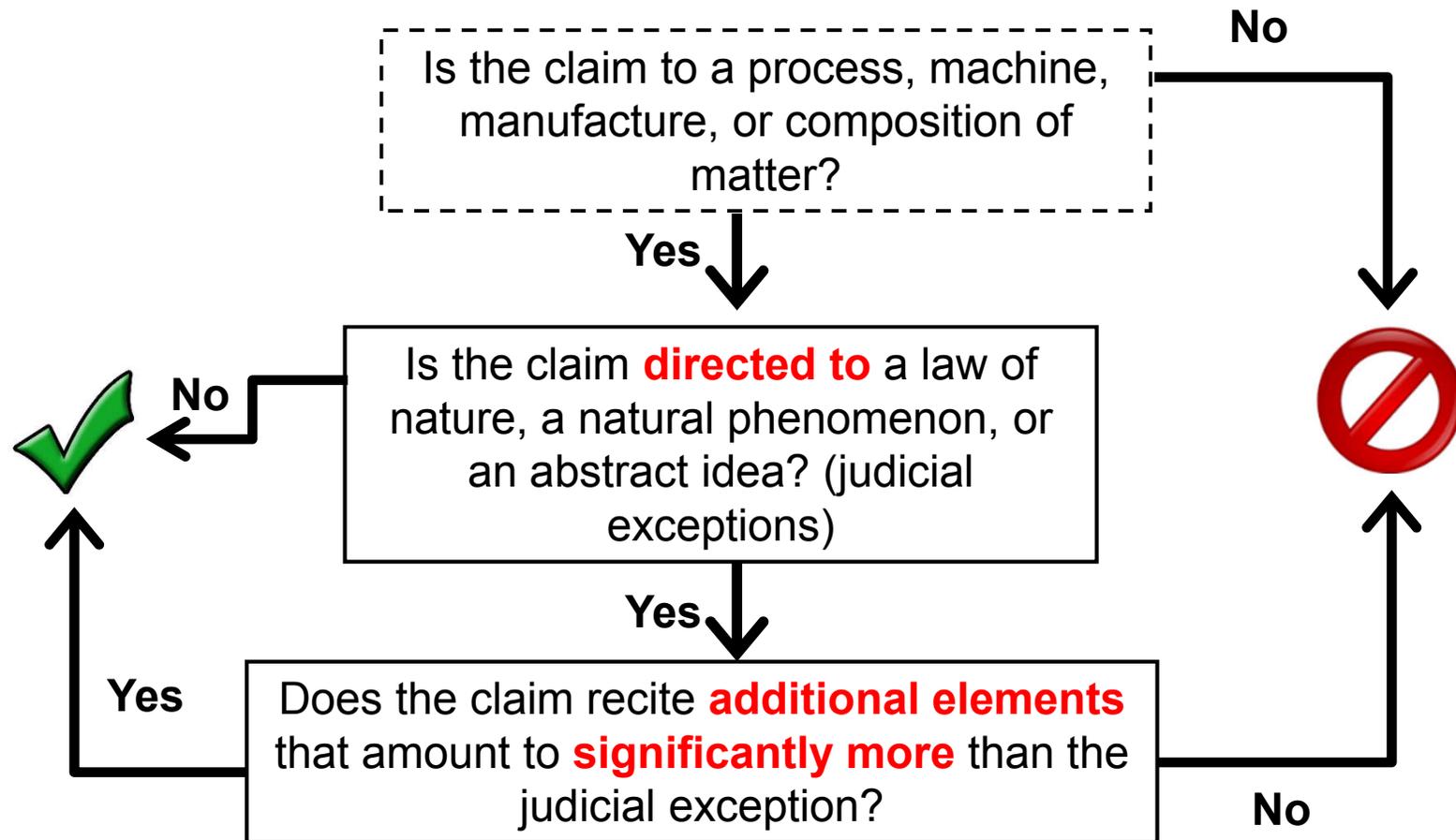
Patent Eligible Subject Matter in the U.S.

- To be eligible for a patent, the subject matter of the claim must be directed to a **process, machine, manufacture, or composition of matter**. See 35 U.S.C. §101.
- **Judicial Exceptions to Patent Eligibility**
 - **Abstract ideas** (e.g., mathematical algorithms)
 - Laws of nature
 - Natural phenomena

***Alice Corp. v. CLS Bank International*, 34 S. Ct. 2347 (2014)**

- A court must ***first*** “determine whether the claims at issue are ***directed to a patent-ineligible concept.***” 134 S. Ct. at 2355.
- If so, the court must ***then*** “***examine the elements of the claim to determine whether [they contain] an ‘inventive concept’ sufficient to ‘transform’ the claimed abstract idea into a patent-eligible application.***” *Id.* at 2357 (quoting *Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1298 (2012)).
 - This inventive concept must do more than simply recite “well-understood, routine, conventional activity.” *Id.* at 2359.

Alice/Mayo Test



USPTO Reference Guides

<https://www.uspto.gov/sites/default/files/documents/ieg-qrs.pdf>

March 2018: Eligibility Quick Reference Sheet Identifying Abstract Ideas (Part 1)

"Fundamental Economic Practices" – MPEP 2106.04(a)(2) Part (I)	
A. Concepts Relating To Agreements Between People Or Performance Of Financial Transactions <ul style="list-style-type: none"> Billing insurance companies and organizing patient health information [Salwan][†] Conditioning and controlling access to data based on payment [Smartflash][†] Coordinating loans [LendingTree][†] Creating a contractual relationship [BuySAFE] Hedging [Bilski claims 1-3 & 9] Local processing of payments for remotely purchased goods [Inventor Holdings] 	<ul style="list-style-type: none"> Offer-based price optimization [OIP Tech] Processing an application for financing a purchase [Credit Acceptance] Rules for conducting a wagering game [Smith]
B. Concepts Relating To Mitigating Risks <ul style="list-style-type: none"> Financial instruments that are designed to protect against the risk of investing in financial instruments [Chorna][†] Mitigating settlement risk [Alice] Hedging [Bilski claims 1-3 & 9] 	
"Certain Methods of Organizing Human Activity" – MPEP 2106.04(a)(2) Part (II)	
A. Concepts Relating To Managing Relationships Or Transactions Between People, Or Satisfying Or Avoiding A Legal Obligation <ul style="list-style-type: none"> Arbitration [Comiskey] Creating a contractual relationship [BuySAFE] Generating rule-based tasks for processing an insurance claim [Accenture] Hedging [Bilski claims 1-3 & 9] Managing a stable value protected life insurance policy [Bancorp] Mitigating settlement risk [Alice] Processing loan information [Dealertrack] Tax-free investing [Fort Properties] 	<ul style="list-style-type: none"> Collecting information, analyzing it, and displaying certain results of the collection and analysis [Electric Power Group] Collecting, transmitting, analyzing, & storing data to detect fraudulent and/or invalid clicks based on the time between two requests by the same device or client [Ziif v. Google][†] Creating an index, and using that index to search for and retrieve data [Int. Ventures v. Erie Indemnity I: '434 patent] Encoding and decoding image data [RecogniCorp] Filtering content [BASCOM] Identification of unwanted files in a particular field [Int. Ventures v. Erie Indemnity II][†] Measuring delivery of real-time information for commercial purposes [Two-Way Media '686 patent] Monitoring delivery of real-time information to users [Two-Way Media '622 patent] Organizing and manipulating information through mathematical correlations [Digitech] Parsing and comparing data [Berkeimer] Providing a vehicle valuation through the collection and use of vehicle information [Audatex N. America][†] Receiving, authenticating, and publishing data [Easyweb Innovations][†] Receiving, screening, and distributing e-mail [Int. Ventures v. Symantec '050 patent] Selecting and sorting information by user interest or subject matter [Evolutionary Intelligence][†] Sending information, directing sent information, and monitoring and accumulating records about receipt of sent information [Two-Way Media '187 and '005 patents] Tailoring content based on information about the user [Int. Ventures v. Cap One Bank '382 patent] Using a marking affixed to the outside of a mail object to communicate information about the mail object [Secured Mail Solutions]
B. Concepts Relating To Advertising, Marketing, & Sales Activities Or Behaviors <ul style="list-style-type: none"> Generating menus on a computer [Ameranth] Structuring a sales force or marketing company [Ferguson] Using advertising as an exchange or currency [Ultramercial] Using an algorithm for determining the optimal number of visits by a business representative to a client [Maucorps] 	<ul style="list-style-type: none"> Organizing and manipulating information through mathematical correlations [Digitech] Parsing and comparing data [Berkeimer] Providing a vehicle valuation through the collection and use of vehicle information [Audatex N. America][†] Receiving, authenticating, and publishing data [Easyweb Innovations][†] Receiving, screening, and distributing e-mail [Int. Ventures v. Symantec '050 patent] Selecting and sorting information by user interest or subject matter [Evolutionary Intelligence][†] Sending information, directing sent information, and monitoring and accumulating records about receipt of sent information [Two-Way Media '187 and '005 patents] Tailoring content based on information about the user [Int. Ventures v. Cap One Bank '382 patent] Using a marking affixed to the outside of a mail object to communicate information about the mail object [Secured Mail Solutions]
C. Concepts Relating To Managing Human Behavior <ul style="list-style-type: none"> Budgeting [Int. Ventures v. Cap One Bank '137 patent] Filtering content [BASCOM] Managing a game of bingo [Planet Bingo][†] Mental process that a neurologist should follow when testing a patient for nervous system malfunctions [Meyer] 	<ul style="list-style-type: none"> Organizing and manipulating information through mathematical correlations [Digitech] Parsing and comparing data [Berkeimer] Providing a vehicle valuation through the collection and use of vehicle information [Audatex N. America][†] Receiving, authenticating, and publishing data [Easyweb Innovations][†] Receiving, screening, and distributing e-mail [Int. Ventures v. Symantec '050 patent] Selecting and sorting information by user interest or subject matter [Evolutionary Intelligence][†] Sending information, directing sent information, and monitoring and accumulating records about receipt of sent information [Two-Way Media '187 and '005 patents] Tailoring content based on information about the user [Int. Ventures v. Cap One Bank '382 patent] Using a marking affixed to the outside of a mail object to communicate information about the mail object [Secured Mail Solutions]
D. Concepts Relating To Tracking or Organizing Information <ul style="list-style-type: none"> Billing insurance companies and organizing patient health information [Salwan][†] Cataloging labor data [Shortridge][†] Collecting and organizing information about available real estate properties and displaying this information on a digital map that can be manipulated by the user [Move v. Real Estate Alliance][†] Classifying and storing digital images in an organized manner [TL Comms.] 	<ul style="list-style-type: none"> Organizing and manipulating information through mathematical correlations [Digitech] Parsing and comparing data [Berkeimer] Providing a vehicle valuation through the collection and use of vehicle information [Audatex N. America][†] Receiving, authenticating, and publishing data [Easyweb Innovations][†] Receiving, screening, and distributing e-mail [Int. Ventures v. Symantec '050 patent] Selecting and sorting information by user interest or subject matter [Evolutionary Intelligence][†] Sending information, directing sent information, and monitoring and accumulating records about receipt of sent information [Two-Way Media '187 and '005 patents] Tailoring content based on information about the user [Int. Ventures v. Cap One Bank '382 patent] Using a marking affixed to the outside of a mail object to communicate information about the mail object [Secured Mail Solutions]
E. Other Concepts <ul style="list-style-type: none"> Relaying mailing address data [Return Mail] Testing operators of any kind of moving equipment for any kind of physical or mental impairment [Vehicle Intelligence][†] Virus screening [Int. Ventures v. Symantec '610 patent] 	

[†] indicates a non-precedential decision that was issued with a written opinion

March 2018: Eligibility Quick Reference Sheet Identifying Abstract Ideas (Part 2)

"An Idea 'Of Itself'" – MPEP 2106.04(a)(2) Part (III)	
A. Concepts Relating To Data Comparisons That Can Be Performed Mentally Or Are Analogous To Human Mental Work <ul style="list-style-type: none"> Anonymous loan shopping [Mortgage Grader] Collecting and comparing known information [Clasien] Comparing data to determine a risk level [Perkin-Elmer][†] Comparing information regarding a sample or test subject to a control or target data [Ambr/Myriad CAFC] Comparing new and stored information and using rules to identify options [Smartgene][†] Diagnosing an abnormal condition by performing clinical tests and thinking about the results [Grams] Obtaining and comparing intangible data [CyberSource] 	<ul style="list-style-type: none"> Mental process for logic circuit design [Synopsys] Organizing and manipulating information through mathematical correlations [Digitech] Parsing and comparing data [Berkeimer] Relaying mailing address data [Return Mail] Retaining information in navigation of online forms [Internet Patents] Storing, gathering, and analyzing data [TDE Petroleum][†] Using categories to organize, store and transmit information [Cyberfone][†]
B. Concepts Relating To Organizing Or Analyzing Information In A Way That Can Be Performed Mentally Or Is Analogous To Human Mental Work <ul style="list-style-type: none"> Collecting and analyzing information to detect misuse and notifying a user when misuse is detected [FairWarning] Collecting, displaying, and manipulating data [Int. Ventures v. Cap One Financial] Collecting information, analyzing it, and displaying certain results of the collection and analysis [West View][†] Collection, storage, and recognition of innovations Creating an index, and using that index to retrieve data [Int. Ventures v. Erie Indemnity I: '434 patent] Data recognition and storage [Content Watch] Determining a price, using organizational hierarchies [Verzata] Encoding and decoding image data [Int. Ventures v. Erie Indemnity II][†] Identification of unwanted files in a particular field [Int. Ventures v. Erie Indemnity I: '434 patent] 	<ul style="list-style-type: none"> Organizing and manipulating information through mathematical correlations [Digitech] Parsing and comparing data [Berkeimer] Relaying mailing address data [Return Mail] Retaining information in navigation of online forms [Internet Patents] Storing, gathering, and analyzing data [TDE Petroleum][†] Using categories to organize, store and transmit information [Cyberfone][†]
C. Concepts Described As Ideas Having No Particular Concrete Or Tangible Form <ul style="list-style-type: none"> Assigning hair designs to balance head shape [Brown][†] Determining a price, using organizational and product group hierarchies [Verzata] Displaying an advertisement in exchange for access to copyrighted media [Ultramercial] 	
D. Other Concepts <ul style="list-style-type: none"> Delivering user-selected media content to portable devices [L'Oréal/Levi v. Amazon.com] 	
"Mathematical Relationships / Formulas" – MPEP 2106.04(a)(2) Part (IV)	
A. Concepts Relating To Mathematical Relationships Or Formulas <ul style="list-style-type: none"> The Arrhenius equation [Diehr] An algorithm for converting binary coded decimal to pure binary [Benson] An algorithm for calculating and comparing regions in space [Coffelt][†] A formula describing certain electromagnetic standing wave phenomena [Mackay Radio] A formula for computing an alarm limit [Flook] A mathematical formula for hedging [Bilski claims 4-8, 10, 11] 	B. Concepts Relating To Performing Mathematical Calculations <ul style="list-style-type: none"> An algorithm for calculating parameters indicating an abnormal condition [Grams] Calculating the difference between local and average data values [Abele] Managing a stable value protected life insurance policy [Bancorp] Organizing and manipulating information through mathematical correlations [Digitech] Using an algorithm for determining the optimal number of visits by a business representative to a client [Maucorps]

Current through July 2018

Recent CAFC Decisions on “additional elements”

Berkheimer v. HP* and *Aatrix Software v. Green Shades Software

- Two recent 2018 decisions addressing early motions based on § 101
- Under step 2 of *Alice/Mayo* analysis, if “additional elements” are well-understood, routine, and conventional, invention is NOT subject matter eligible
- “Whether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination”
- These CAFC decisions reduce likelihood of prevailing on motion to dismiss or motion for summary judgment on § 101 grounds
- Increase likelihood that trial or decision by finder-of-fact is required

USPTO Memo addressing *Berkheimer* (April 19, 2018)

- For PTO, an additional element (or combination) represents well-understood, routine, conventional activity **only** when the examiner can readily conclude that the element(s) is “widely prevalent or in common use in the relevant industry”
- Examiner must “expressly support” rejection with citation to:
 - 1) A statement by the applicant in the specification or during prosecution,
 - 2) A court decision holding elements conventional,
 - 3) A written publication demonstrating the well-understood, routine, conventional nature of the additional elements, or
 - 4) A statement that the examiner is taking official notice of conventional nature
- If challenged by applicant, examiner should reevaluate
 - If examiner has taken official notice and applicant challenges, the examiner must provide one of the items (1)-(3) above or an affidavit or declaration with facts and reasoning

April 19, 2018 USPTO Guidelines

USPTO issued Memorandum addressing *Berkheimer/Aatrix*

- Does the additional element (or combination of elements) represent well-understood, routine, conventional activity?
 - If yes, claims are patent ineligible
 - If no, if claims are directed to improvements, then can be patent eligible
- For PTO, examiners consider whether element is widely prevalent or in common use in industry
 - Factual determination
 - Follow same analysis as §112(a) for enablement and written description
 - Different from 102/103 analysis
 - Examiner must cite to an admission by the applicant in the specification, or something said during prosecution, court cases holding elements conventional, or a written publication establishing, that the element or elements are well understood, routine or conventional for rejection

January 7, 2019 USPTO Guidelines on § 101

Revised first step of examination procedure under *Alice/Mayo*:

- Provided groupings of subject matter that are abstract
 - **Mathematical concepts** - mathematical relationships, mathematical formulas or equations, mathematical calculations
 - **Certain methods of organizing human activity** – includes commercial or legal activity, marketing, managing personal relationships
 - **Mental processes** – concepts performed in the human mind (including an observation, evaluation, judgment, opinion)
- If claim does not recite subject matter that falls within one of these groupings, typically does not recite abstract idea

January 7, 2019 USPTO Guidelines

Revised first step of examination procedure under *Alice/Mayo*:

- Clarified that claim is not “directed to” a judicial exception if the judicial exception is ***integrated into a practical application*** of that exception
 - “A claim that integrates a judicial exception into a practical application will apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception”
 - Provides examples of what it means to integrate a judicial exception into a practical application

Example *Alice* § 101 Rejection

The courts have noted that “collecting information, analyzing it, and displaying certain results of the collection and analysis” is a method of organizing human activity, and is thus an abstract idea (Electric Power Group). The claim discloses comparable judicial exceptions such as collecting information

- Is AI’s goal to replicate human activity?

USPTO Examination Statistics In View of *Alice*

- 36,000+ published apps rejected based on *Alice*, with 5,000+ apps becoming abandoned¹

Tech Center	101 Rejections Before Alice (2014)	% of 101 Rejections After Alice (July 2016)
1600 Biotech & Chemistry	11%	10%
2100 Computer Engineering	14%	11%
2400 Networks & Video	9%	14%
2600 Communications	7%	8%
2800 IC, Electrical, Optical	2%	3%
3600 Business Methods	12%	25% (but in e-commerce is 85+%)

¹Source: Bilski Blog (<http://www.bilskiblog.com/blog/2016/06/two-years-after-alice-a-survey-of-the-impact-of-a-minor-case-part-2.html>)

AI Challenges Based on Subject Matter

At the USPTO

- Section 101 rejections more common
- Greater scrutiny on functional claiming
- Higher standard for obviousness

At the EPO

- More objections that claims are “non-technical”
- Higher standard for inventive step
- Fewer office actions before oral proceedings

Now more than ever, what works at one patent office can work at the other

MAXIMIZING PATENT PROTECTION IN THE U.S. AND EU

Coordinating Patent Drafting

- Collaboration between U.S. and EP attorneys **during drafting** can avoid problems during prosecution
- Best to collaborate before U.S. first filing to ensure EP application is entitled to priority date

Avoiding Patent Eligibility Problems

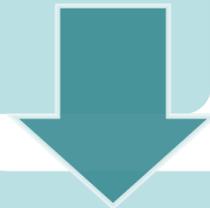
Joint drafting techniques

- Direct applications away from problematic technology centers/classes
- Avoid business-method related terminology
- Emphasize technical advantages



Drafting techniques for the USPTO

- Evaluate the USPTO guidelines and court decisions for framing the application



Drafting techniques for the EPO

- Mention technical problem solved and technical effects
- Make sure classification of invention avoids pure machine learning or AI

U.S. Application Drafting Strategies

- Recite specific elements and/or ordered combination; focus on technological solution or aspects
 - Avoid terminology that reads on mental thoughts

OK	Better
<i>“determining a crash occurrence”</i>	<i>“analyzing sensor data to determine if received sensor value exceeds a deceleration threshold ”</i>

U.S. Application Drafting Strategies

Claims

- Recite more than conventional computer processing steps or functions
- Claim application or use of data, not just generation
- Include implementation details in claims
- Consider means-plus-function claiming if novelty is in the algorithm
- Consider drafting claims as a computer-readable medium
- Consider using different types of claims, e.g., CRM claims, method claims, functional claims

U.S. Application Drafting Strategies

Specification

- Focus specification on technical aspects of invention
- Identify problems in the art and explain the invention's specific improvements over the prior art
- Avoid characterizing any claim elements as conventional, routine, or commercially available
- Avoid using overly abstract language to describe invention
- If the individual steps are “well known,” then emphasize that the combination of these steps (i.e., the claimed process) is far from routine and conventional

Other Issues to Consider Before U.S. Filing

Include multiple dependencies in the dependent claims (with a Preliminary Amendment)?

MPF elements

Remove the term “invention” from the application

File U.S. and EP applications around the same time?

Other Issues to Address Before EP Filing

Define all terms that may be considered unclear

Provide different levels of generalisation

- e.g. *biasing member* → *spring* → *helical spring*

Consider adding means-plus-function language

Mention technical problem and technical advantages

Add multiple claim dependencies

Include claims in all relevant categories

- e.g. apparatus, method, computer-readable medium

European Prosecution Strategy

Have realistic expectations for claim scope

- Narrowing amendments often lead to allowance

Consider aligning EP claims with U.S. claims at time of EP phase entry

- Sidestep objections in PCT Written Opinion
- Pre-empt patent eligibility objections

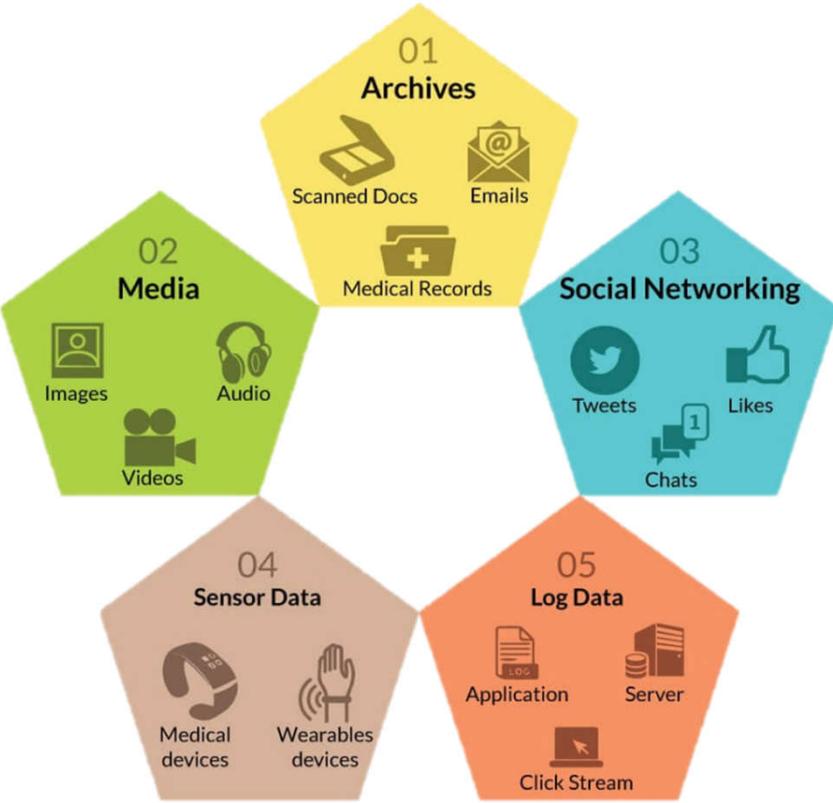
Review U.S. file wrapper before responding to Search Opinion and Office Actions

- Look for an amendment that will appease the EPO

File divisionals to pursue broader claims

DATA RIGHTS AND PRIVACY CONCERNS WITH AI

AI and Big Data



Data Privacy and AI

- Privacy of the individual v. Use of AI
- Is it possible to use AI and protect people's data at the same time?
- AI challenges associated with data protection
 - Fairness and discrimination
 - Purpose limitation
 - Data minimization
 - Transparency and the right to information

EU General Data Protection Regulation (GDPR)

- Went into effect May 25, 2018
- Requires companies to be transparent about how data for individuals in the EU is handled
- Requires permission from individuals before using their personal data
- Individuals have the right to ask companies what information they are collecting
- Individuals have the right to request that their personal information that was collected be deleted
- An individual that suspects misuse of information can complain to the national data protection regulator, which must investigate
- Companies can be fined up to 4 percent of global revenue — equivalent to about \$1.6 billion for Facebook

California Consumer Privacy Act of 2018

- Affects companies that collect large amounts of personal information, e.g., Google, Facebook
- Requires disclosure of types of data collected and its use
- Requires the disclosure only of the “category” of a third-party that receives personal information, not the identity of the third-party itself
- Allow consumers to opt out of having their data sold
- No discrimination to consumers exercising their right to opt out under the Act
- Law goes into effect January 1, 2020

Speaker Information



Susan Tull is a partner in our DC office

Susan has been involved in all phases and forums of litigation. Her patent litigation, appeals, and post-grant proceedings practices focus on technologies related to consumer products, software, AI, medical devices, automotive, and other mechanical and electrical systems. Susan focuses her practice on patent litigation and client counseling in the mechanical, computer science, electrical, and medical device fields. Susan has researched and written extensively on patenting artificial intelligence and software as a medical device.

Contact Susan:
susan.tull@finnegan.com



Aliza George Carrano is a partner in our DC office

Aliza is a registered patent attorney, focusing her practice on complex patent litigation before the U.S. district courts and the U.S. International Trade Commission (ITC). She works on litigation matters in a variety of technologies, primarily in the electrical, software, optical technology, wireless technology, business methods, and mechanical fields. She has researched and written extensively on intellectual property issues concerning artificial intelligence.

Contact Aliza:
aliza.carrano@finnegan.com

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