Alice-Insanity (Part One), or Why the *Alice-Mayo* Test Violates Due Process of Law

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"*Alice-Mayo*, as is practiced by the USPTO and the Federal Circuit, is an exercise in capriciousness as well as a rote, near cliché babbling of meaningless words that falsely portend to be a cognizable standard of patent eligibility."

The Fifth Amendment of the U.S. Constitution guarantees, *inter alia*, that no person shall be deprived of property (including intellectual property), without due process of law. For instance, it is settled law that a federal statute may be so arbitrary and capricious as to violate due process. Similarly, it is settled that an administrative agency, e.g., the U.S. Patent and Trademark Office (USPTO), cannot escape the due process of law requirement when processing patent applications. In theory (less in reality), due process of the law extends to judicial as well as political branches of government, and judgments that violate constitutional limitations and guarantees are void or voidable.

The term "in theory" is used because the Supreme Court has ***never*** held that federal appellate court decisions must comply with Fifth Amendment due process. The Federal Circuit has never held that it is decisions must comply with due process. As Judge Moore observed in her *American Axle* dissenting opinion, "I am troubled by the deprivation of property rights without due process."

Adhering to due process is apparently beneath the dignity of most appellate judges. However, blame the Supreme Court, which turns a blind eye to the issue.

The important message every reader should take from this article is that there is a big difference between void and voidable, and every person disputing an *Alice-Mayo* assault on their clients' constitutionally-protected intellectual property needs to expressly raise the due process issue. *Alice-Mayo*, as is practiced by the USPTO and the Federal Circuit, is an exercise in capriciousness as well as a rote, near cliché, babbling of meaningless words that falsely portend to be a cognizable standard of patent eligibility.

The Supreme Court's *Alice Corp.* Decision Has Rules

Assuming that the *Alice Corp*. decision actually passes constitutional muster under *Henry Schein, Inc. v. Archer & White Sales, Inc*., 586 U.S. ____ (2019) (it doesn't), there are still rules to *Alice Corp*. that the Federal Circuit ignores at a whim.

Rule Number 1: "Abstract" is not just whatever a judge says it is. The underlying business method of a claim must be well-known, routine, and conventional. Not just individual parts of the business method dissected from the whole, but the business method as a whole, ordered combination.

Rule Number 2: There must be evidence that the underlying business method is well-known, routine, and conventional. In *Alice Corp.*, the Supreme Court relied on textbooks published in 1896. The Supreme Court's *Bilski* decision also relied on published textbooks. See, e.g., *Alice Corp.*, 573 U.S. at 219. The Supreme Court *never* declared anything to be well-known/well-understood, routine, and conventional (i.e., "abstract) without evidence on the record. Furthermore, the Supreme Court's *Alice Corp.* and *Bilski* decisions never dismissed a single claim limitation because said claim limitation could theoretically be performed by a human mind or because the claim limitations could be performed by a computer. The entire "mental steps" doctrine the Federal Circuit capriciously and inconsistently applies is an erroneous adaptation of pre-1952 judicial precedent that has no foundation in the current Patent Law, and that was expressly rejected in *Bilski*.

Rule Number 3: While the application of a computer to a business method is insufficient to make a claim patent eligible, the application of a computer to a business method does not cause an underlying process that is novel and non-obvious to be patent-ineligible. "The introduction of a computer into the claims ***does not alter*** the analysis." (emphasis added) *Alice Corp*. at 508.

"Does not alter" means "does not alter."

Rule Number 4: The underlying principle of *Alice Corp*. is to prevent preemption of an abstract idea, i.e., "not inhibit further discovery by improperly tying up the future use of" the fundamental building blocks of human ingenuity.

Rule Number 5: Only if: (1) there is evidence that the underlying algorithm / business method is well-known, routine, and conventional as a whole, ordered combination, and (2) the underlying algorithm / business method covers a previously-known building block of human ingenuity does one search for an "inventive concept." Again, it is to be appreciated that, in neither Step 1 nor Step 2, the introduction of a computer into a claim ***does not alter*** the eligibility analysis. *Id*. at 508.

The *Alice Corp*. Test Has Gaps

First, there is no objective test as to what constitutes a "building block of human ingenuity." What is certain, however, is that examiners and judges are not competent to make such a determination. Whether a thing is a "building block of human ingenuity" requires a fact-based inquiry and evidence. Examiners are not considered to be one of ordinary skill in the technology they examine, and judges are experts in nothing but the law. ***Evidence is needed.***

Second, the Supreme Court inserted the term "inventive concept" into the *Alice-Mayo* test without clarifying what an inventive concept is. Without going into mush deserving detail, ***the search for the elusive 'inventive concept' is garbage***. Yes, it's supposed to be "an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent

upon the [ineligible concept] itself,'" but the Federal Circuit has proved itself completely incapable of defining (outside circular reasoning and capricious dictates) any of the terms "abstract idea," "significantly more," and "inventive concept."

The Federal Circuit Has Made an Unholy Mess of *Alice Corp*.

Now, turning to the Federal Circuit's adaptation of *Alice Corp*., instead of at least attempting to fill in the gaps, the Federal Circuit has made an unholy mess that further violates constitutional due process of law.

An "abstract idea" is whatever a panel of three black-robed, technologically-ignorant, liberal arts majors says it is. Further, the Federal Circuit has not once attempted to qualify or quantify the term "significantly more." Still further, no one in over 170 years of patent jurisprudence has ever managed to define what "invention" means or what an "inventive concept" is. That includes every district court judge that ever lived, every Federal Circuit judge that ever lived, and every Supreme Court justice that ever lived.

"Inventive concept," as used by U.S. courts and the USPTO, has no meaning – it is merely the means to a capricious veto of a patent claim.

Similarly, the term "significantly more," as used by the USPTO and Federal Circuit, is another capricious standard. No court to date has provided a limiting principle as to what is "significantly more." If this statement is in error, the author begs for clarification in the form of a non-circular definition consistent with Supreme Court precedent.

The only government employees who are, as a rule, honest about *Alice-Mayo* are patent examiners – not including examiners in TC3600. Ask the next patent examiner you talk with to define "inventive concept." Examiners freely state they do not have the slightest idea what an "inventive concept" is. No USPTO training material defines the term "inventive concept." There is no adult supervision, as

USPTO leadership and the Patent Trial and Appeal Board (PTAB) are so confounded they refuse to even attempt a definition. No living judge or justice has ever attempted a definition in any published opinion that was not circular. The late, great Judge Giles Rich endlessly mocked the idea of "invention," and co-wrote the 1952 Patent Act with the express purpose of ridding the United States of the tyranny of capriciousness that is "invention."

"Invention," "spark of invention," "inventive concept" etc. are synonyms for capriciousness. The public has far too long been subjected to one capricious decision after another that claims are "abstract" because they lack an "inventive concept." However, every court decision that invalidates a patent based on the "inventive concept" standard is an exercise in capriciousness and a violation of due process of law.

Every patent attorney and agent needs to demand that the USPTO and the courts define these *Alice-Mayo* terms they merely pretend to understand. Every patent attorney and agent needs to assert that, in the absence of objective standards, their clients' constitutional rights are violated. Preserve the issue by raising the issue in order to argue these decisions are voidable.