Eagle Forum Event Participants Delve into Patent Eligibility “Goulash” (ipwatchdog.com)

Eagle Forum Event Participants Delve into Patent Eligibility ‘Goulash’

By **James Edwards**
October 10, 2021

0
Print Article

Andrei Iancu

The extreme uncertainty that U.S. patent eligibility "validity goulash" jurisprudence has caused is wreaking havoc on inventors, especially those working on emerging technologies. It is also hindering patent owners' ability to enforce their property rights, investment and licensing deal-making, and giving China advantages in global competitiveness. And it's likely to get worse before it gets better.

Those were takeaways from the Eagle Forum Education & Legal Defense Fund's (EFELDF) "The Sorry State of Patentability: 'Anything Under the Sun Made by Man' No More" program in Washington, D.C. The September 29 event's panelists considered patent eligibility from the *Chakrabarty* decision, which ruled a manmade living microorganism was patent-eligible, to dubious, damaging, judicially-created exceptions in such cases as *Bilski*, *Mayo*, *Alice*, *Myriad* and *American Axle*. The participants made painfully clear that the *Alice-Mayo* Framework doesn't work and course correction is long overdue.

Former U.S. Patent & Trademark Office (USPTO) director Andrei Iancu made the case, in his dinner speech, of the harm Section 101's confusion inflicts across the board in America's patent system. He highlighted the damage to America's competitiveness and security. He hammered how courts continue post facto to invalidate U.S. patents on critical innovations that China and other countries deem patent-eligible subject matter.

Iancu told a story in his forthright remarks about inventor Philo Farnsworth. He said young Farnsworth came up with a vacuum tube and, as a teenager, broadcast electronic photographs. His inventions were critical to the development and proliferation of television. Years later, Farnsworth was gratified watching the Apollo 11 moon landing live on TV.

David Kappos

Eagle Forum ELDF president Ed Martin presented the "Phyllis Schlafly Friend of American Invention Award" to four leaders of efforts to restore Section 101's threshold character and to improve certainty regarding patent eligibility. Awardees were Senator Chris Coons, Senator Thom Tillis, former USPTO director David Kappos, and former Federal Circuit Chief Judge Paul Michel. Watts received the award on behalf of Senator Tillis, and Matthew Dowd, founding partner of Dowd Scheffel, was presented the award on behalf of Judge Michel.

Senators Coons and Tillis held extensive hearings on Section 101 and continue to facilitate stakeholder negotiations on a legislative fix. They included an independent inventor as a witness. Kappos and Judge Michel tirelessly foster stakeholder dialogue and educate the public on the dire state of patent eligibility law. Senator Tillis, Judge Michel and Kappos jointly filed an amicus brief with the Supreme Court on behalf of *American Axle*'s certiorari petition. Senators Coons, Tillis, Tom Cotton and Mazie Hirono urged the USPTO to seek public input on the state of patent eligibility jurisprudence, which led to a request for information.

From left: Andy Baluch, Katherine Chotkowski and Manus Cooney.

Panelists included Smith Baluch partner and former USPTO advisor Andy Baluch, InterDigital vice president of licensing Kimberly Chotkowski, American Continental Group partner and former Senate Judiciary staff director Manus Cooney, Cravath, Swaine & Moore partner and former USPTO director David Kappos, Biotechnology Innovation Organization federal affairs senior director David Lachmann, Dinsmore & Shohl partner Brian O'Shaughnessy, Innovation Alliance executive director Brian Pomper, Qualcomm senior vice president Laurie Self and Senate IP Subcommittee minority chief counsel Brad Watts. EFELDF patent policy advisor James Edwards conducted the panel session, and Mr. Martin emceed both panel and dinner programs.

The event was sponsored by Acacia Research Group, the Biotechnology Innovation Organization, Dinsmore & Shohl, the Innovation Alliance and InterDigital.

The theme for the program conjured the Supreme Court reference in *Chakrabarty* to "anything under the sun that is made by man" as being eligible for a patent under Section 101. The panel discussion dwelt mostly on the patent "validity goulash" — a phrase coined by Federal Circuit Judge Kimberly Moore in her *American Axle & Manufacturing v. Neapco Holdings* dissent — that courts and the Patent Trial and Appeal Board continue to cook in patent eligibility jurisprudence.

To learn more about EFELDF, visit the website here .