

DECEMBER 22, 2021

Top Section 101 Patent Eligibility Stories of 2021

Holland & Knight Section 101 Blog
Anthony J. Fuga



It's that time of the year again. Take your rapid test, [light a fire](#) and gather with family and friends to discuss the top patent eligibility stories of 2021 (or debate "The Holiday" vs. "Love Actually").

No. 3: More of the Same

This year felt normal from a §101 perspective. The U.S. Court of Appeals for the Federal Circuit invalidated patents directed to [data privacy](#), [customer loyalty systems](#), [credit card fraud](#), [transmitting and storing data](#), and [retailer finder fees](#). None of these decisions surprised me. Our Holland & Knight patent litigation team again got in on the §101 fun, both at the [district court](#) and the [Federal Circuit](#).

Sure, there were controversies, but there weren't many. The *Yu v. Apple* decision, where the Federal Circuit held a digital camera patent

to be invalid for only claiming the abstract idea of enhancing photos, did cause some [uneasiness among commentators](#). But that case didn't dominate the headlines like others – e.g., *American Axle* – did in previous years, and this is even with Judge Pauline Newman's with dissent in *Yu v. Apple* where she raised a flag on the current state of § 101 jurisprudence: "inconsistency and unpredictability of adjudication have destabilized technologic development in important fields of commerce."

Despite Judge Newman's warning, this year felt somewhat predictable, at least from a §101 perspective.

No. 2: Calls for Patent Eligibility Consistency Intensify

Maybe I'm wrong about No. 3 above, because the calls for patent eligibility consistency continued to ring loudly. Early in the year, Andrei Iancu [called for §101 reform](#) during his farewell speech, stating that "all of us – the Administration, Congress, the courts, and stakeholders – we must all work to ensure we support and protect this American innovation renaissance."

Then, this summer, the U.S. Patent and Trademark Office (USPTO) invited "[stakeholders to submit written comments](#)" on the current state of patent eligibility jurisprudence and how it impacts U.S. investment and innovation. I'm sure all written comments were respectful.

And we saw similar comments from Kathi Vidal, President Joe Biden's nominee for USPTO director. During her recent hearing before the Senate Judiciary Committee, [Vidal stated](#) that, if confirmed, she would focus on "strengthening the value of IP" and address patent eligibility, noting that patent eligibility deserves attention because "the law is not set."

Vidal noted that clarity on patent eligibility could come from Congress or from the U.S. Supreme Court, which leads us to ...

No. 1: The Supreme Court Continues to Ignore Section 101 ... for Now

As Vidal noted during her hearing, many are looking to the Supreme Court to address patent eligibility. So far, the Court has said no thanks with a notable exception: *American Axle & Manufacturing v. Neapco Holdings*. The Supreme Court called for the views of the Solicitor General, and those views should be submitted any time now. My current prediction is that the Solicitor General recommends granting cert – and that the Supreme Court agrees.

If you think I could be correct and want to catch up on the *American Axle* case, we've written and discussed the case extensively:

- [Federal Circuit Narrows Its Prior Decision; Court Is Still Torn on Section 101 Patent Eligibility](#)
- [A Federal Circuit Quarrel: Patent Eligibility, Enablement and a Fiery Dissent](#)
- [A "Bitterly Divided" Federal Circuit Declines to Stay Decision Invalidating Car Driveshaft Patent](#)
- [American Axle Split Opinion Refuels Drive to Reform Eligibility Law](#)
- [Section 101 Patent Eligibility at the Supreme Court: Where Are We?](#)
- [Will 2021 Be The Year the Supreme Court Again Addresses Section 101 Eligibility?](#)

As always, thank you for reading the blog this year. I hope you and your families have a great holiday season. We'll be back in 2022, and Go Blue!