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Trading Technologies, ChargePoint Ask High Court for Help with Federal Circuit's Conflicted Approach to Patent Eligibility



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“The Judicial Branch has embarked on a crusade against certainty and breadth of eligibility stemming from a lack of perceived guidance from this Court.” – Amicus brief of US Inventor



Trading Technologies International, Inc. (TT) has filed a [second petition](#) with the U.S. Supreme Court asking it to review a [Federal Circuit holding](#) that computer-implemented inventions that do not improve the basic functions of the computer itself are directed to abstract ideas and therefore patent ineligible. The present petition relates to U.S. Patent Nos. [7,685,055](#) (the “’055 patent”); [7,693,768](#) (the “’768 patent”); and [7,725,382](#) (the “’382 patent”). The [petition](#) TT filed in September relates to Patent Nos. [7,533,056](#), [7,212,999](#), and [7,904,374](#). The patents are all from the same family as three other patents [found patent eligible](#) by the CAFC in 2017. The latest petition argues that the Federal Circuit “simply declined to address conflicting Federal Circuit authority involving the same patent family or the line of other Federal Circuit decisions adopting and applying that authority’s reasoning,” and, therefore, clarification is needed from the High Court.

The company’s argument may also get a boost from another petition filed recently appealing the controversial decision in [ChargePoint v. Semaconnect](#), in which the Federal Circuit held that a vehicle charging station was not patent eligible.

Trading Technologies Petition and *Amici*

Like the previous petition, the questions TT is presenting here are:

1. Whether computer-implemented inventions that provide useful user functionality but do not improve the basic functions of the computer itself are categorically ineligible for patent protection.
2. Whether the Court should overrule its precedents recognizing the “abstract idea” exception to patent eligibility under the Patent Act of 1952.

The arguments are also identical, focusing on the intra-circuit conflict on patent eligibility:

While one line of Federal Circuit decisions holds computer-implemented inventions to be ineligible if they do not make hardware-like improvements to computers' basic functions, another line holds the opposite. Several decisions have even upheld patent protection for interactive graphical interfaces, in plain and open conflict with the decision below.

Namely, TT compares the line of cases beginning with [Enfish, LLC v. Microsoft Corp.](#), which has focused on the distinction between claims that “purport to improve the functioning of the computer itself” and those that are directed to the mere use of a computer to provide functionality to users, with a conflicting line of cases, such as [Data Engine Technologies LLC v. Google LLC](#), which the petition says “correctly recognizes that the functionality provided to users by computer-implemented inventions provides a basis for patent eligibility, irrespective of whether those inventions improve the computer’s basic functions,” TT wrote in its petition.

Additionally, the Federal Circuit case law interpreting the term “abstract idea” is what Federal Circuit Judge Plager has described as “a ‘definitional morass’ that ‘renders it near impossible to know with any certainty whether the invention is or is not patent eligible.’” In addition to Plager, former Federal Circuit Judge Paul Michel and Judge Richard Linn have lamented the impossibility of the abstract idea concept and the state of patent eligibility law today. Citing [two separate IPWatchdog articles](#), TT’s petition recounts Judge Michel’s statements in recent years alternately referring to patent eligibility jurisprudence as being in a state of “chaos” that is “devastating American business” and observing that “with ’22 years on the Federal Circuit and nine years since dealing with patent cases,’ ‘I cannot predict in a given case whether eligibility will be found or not found.’” TT further noted that in recent cases like [Aatrix Software, Inc. v. Green Shades Software, Inc.](#), the current Federal Circuit judges have begged for guidance. In *Aatrix*, Lourie said, “the law needs clarification by higher authority” than the Federal Circuit.

A Judicial Crusade

Two *amici* have weighed in on TT’s first petition to the Supreme Court now, urging the Court to grant review. [US Inventor’s brief](#) laments the failure of the courts thus far to provide a reliable framework for assessing patent eligibility and accuses the judicial branch of embarking on a “crusade against certainty”:

The Judicial Branch has embarked on a crusade against certainty and breadth of eligibility stemming from a lack of perceived guidance from this Court. There are numerous conflicting decisions in the computer implemented patent area that cannot be reconciled. Most decisions focus on the “abstract idea” exception. The result is less certainty and less investment in the United States.

The brief goes on to argue that the petition should be granted in order to 1) reconcile the “competing and conflicting views” among the three branches of government—the USPTO, Congress and the Federal Courts; and 2) to curb harm to U.S. innovation, particularly to independent inventors.

Eschewing *Alice*

The [brief of International Game Technology](#), “the world leader in gaming technology and development,” argues that the Federal Circuit has created chaos in the field of software patents and that the abstract idea exception is unworkable. Citing recent decisions such as *ChargePoint, Inc. v. SemaConnect, Inc.*; *Chamberlain Group, Inc. v. Techtronic Indus. Co.*; and *American Axle & Mfg., Inc. v. Neapco Holdings LLC*, the brief argues that “in a string of recent decisions, the Federal Circuit has inexplicably determined that various concrete, material objects are in fact “abstract ideas” not eligible for patent protection” and points to the largely unprecedented “public rebuke” the *American Axle* decision drew from Representative Doug Collins. The brief implores the court to adopt the “practical application” approach to patent eligibility, which will at once curtail the “abstract idea” exception and avoid preemption of abstract ideas. The practical application requirement is recognized in *State Street*, as rooted in *Diehr*, and by the USPTO’s revised Section 101 guidance, says the brief, adding;

In sum, eschewing the two-step *Alice* test in favor of a “practical application” approach will largely reinstate the clarity of *Diehr* and *State Street*, recognizing that ideas, mathematical principles, and algorithms are patentable provided that they are (1) embodied in a practical application that is (2) new and nonobviousness. By abrogating the hostility to conceptual inventions in *Bilski* and the difficult two-step test in *Alice* in favor of a simplified “practical application” principle, all of the confusing “conventionality” inquiries of the *Alice* test – inquiries that have no bearing on whether a “practical application” of an abstract idea is embodied in the claims – will be transposed to the novelty and non-obviousness analysis where they belong. This restoration of the proper statutory regime of the Patent Act will enable U.S. patent law to once again respect software- based applications embodying abstract ideas.

***ChargePoint* Petition**

On October 21, ChargePoint, Inc., represented by Supreme Court expert Carter Phillips of Sidley Austin, [filed a petition for a writ of certiorari](#) that addresses similar questions to the Trading Technologies petitions. ChargePoint is asking the Court to weigh in on:

1. Whether a patent claim to a new and useful improvement to a machine or process may be patent eligible even when it “involves” or incorporates an abstract idea; and
2. Whether the Court should reevaluate the atextual exception to [35 U.S.C. §101](#).

In early 2019, the Federal Circuit broadly interpreted Section 101 in *ChargePoint v. SemaConnect*. In reviewing the claimed vehicle charging apparatus, the court found the invention to be ineligible for a patent because, in the view of the CAFC, it was an abstract idea. The court held that “the broad claim language would cover any mechanism for implementing network communication on a charging station, thus preempting the entire industry’s ability to use networked charging stations. This confirms that claim 1 is indeed “directed to” the abstract idea of communication over a network to interact with network-attached devices.”

The petition rests on two arguments. First, ChargePoint argues that certiorari is warranted because the CAFC’s decision conflicts with *Diamond v. Diehr*. In this case, the CAFC held that the patents were not valid because the face of the claims involve the abstract idea of communication over a network, even though the claims are directed at charging stations for electric vehicles with network functionality. Yet in *Diehr*, the patentee claimed a rubber curing process with one of the steps including an abstract mathematical algorithm, and the Supreme Court nonetheless found the claims patent eligible. According to the Court, the claims as a whole simply incorporated an abstract idea, a mathematical formula, and were not aimed at patenting the mathematical formula itself. ChargePoint also argues that the Court also reaffirmed this decision in *Alice Corp. v. CLS Bank Intern.*, by drawing a dividing line between claims of abstract ideas and claims that only incorporate abstract ideas.

Second, ChargePoint argues that the Court must reconsider the implicit non-statutory exception to Section 101, arguing that today the federal courts are invalidating patents at break-neck speed outside of the scope of Congressional intent. ChargePoint contends that the CAFC itself admitted that it invented a new and useful improvement of a machine in line with Section 101, and therefore the Federal Circuit’s decision is not based in law. ChargePoint cites the dissent in the recently decided case of *Athena Diagnostics, Inc. v. Mayo Collaborative Services, LLC*, which explains that Congress

amended the Patent Act after WWII “to replace the ill-defined and judicially-created invention requirement with the more workable anticipation and obviousness tests codified in [§102](#) and [§103](#).” ChargePoint asserts that the Court never implemented the amendment, however, continuing to apply “the discredited, judge-made ‘invention requirement’ under the new name of inventive concept.” Regarding its patents, ChargePoint stands firm that even with judicially-created requirements, there is no warrant in the lawful statutory text to deny its rights to patents as granted by Congress.

Patent invalidation by the federal courts and the Patent Trial and Appeal Board (PTAB) has gone up by 914% after *Alice*, says the petition, with the CAFC’s Section 101 jurisprudence now comprising 156 cases compared with 19 on the day of the *Alice* decision. In a last attempt to sway the Court, ChargePoint argues that the warning issued by the Court in *Alice*, “to tread carefully in construing the exclusionary principle that laws of nature, natural phenomena, and abstract ideas are not patentable, because otherwise the principal might swallow all of patent law,” [has now become a reality](#), and is therefore [desperately in need of review](#).

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