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Social Media and Patent Eligibility



By PETER M. BRODY AND JENNIFER KWON

As social media has become increasingly prevalent—with membership and valuations in the billions for the most popular networks—social media companies have been increasingly diligent in protecting their inventions. For example, Facebook is the assignee of over 1300 U.S. patents and patent applications for diverse aspects of its social networking site (e.g. electronic invitations, ranking search results, tracking the reach of content, advertising) and beyond (e.g. analyzing and transcoding multimedia content, communicating location information from one mobile device to another, presenting directions on a map, data distribution and storage). In addition to seeking patents for its own inventions, Facebook has been very active in acquiring intellectual property assets, having spent hundreds of millions of dollars in the past several years to acquire patents from companies such as IBM, AT&T, Microsoft, AOL and Friendster.

Correspondingly, litigation involving patents covering social media also has increased. Social media companies actively growing their patent portfolios could be in a position to enforce their portfolios against other social media companies. For instance, in 2012 Yahoo! Inc. sued Facebook, stating that “Facebook’s entire social network model . . . is based on Yahoo’s patented social

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networking technology.”¹ (The case quickly settled when the companies agreed to form a strategic alliance that included a patent cross-license.) In addition, non-practicing entities such as Parallel Iron and Acacia subsidiary Unified Messaging Solutions LLC, among many others, have increasingly commenced actions against social media companies such as Facebook, LinkedIn, Twitter and others. In fact, the risk of suit is not limited to companies built around providing social media platforms: The subject and scope of patents relating to social media applications could potentially cover businesses in other fields and industries that, for instance, have an online presence and use and analyze data or that develop business processes through the use of social media.

As patent protection becomes increasingly important and patent litigation becomes increasingly prevalent in the social media field, a topic of particular significance is patent eligibility under 35 U.S.C. § 101. The law concerning eligibility of software patents has undergone a recent and rapid evolution that is still very much continuing—most notably with the U.S. Supreme Court’s recent decision in *Alice Corp. Pty. Ltd. v. CLS Bank Int’l* and its subsequent application. The still-evolving principles and standards of patent eligibility could greatly affect and inform the strength of and benefits afforded by social media patents, as they are typically directed to software and computer-implemented inventions.

State of Law Prior to *Alice*

In order for an invention to be patent eligible, it must fit within one of the categories set forth in 35 U.S.C. § 101:

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.”

The Court has long recognized that § 101 employs broad language.² Section 101 has been described by the

¹ *Yahoo! Inc. v. Facebook, Inc.*, No. 3:12-cv-01212 (N.D. Cal. complaint filed Mar. 12, 2012), at 6.

² See *Diamond v. Chakrabarty*, 447 U.S. 303, 308-09, 315-16 (1980).

Court as “a dynamic provision designed to encompass new and unforeseen inventions,”³ and the Court has “cautioned that courts ‘should not read into the patent laws limitations and conditions which the legislature has not expressed.’”⁴ Nevertheless, three judicially created exceptions for patent eligible subject matter have long been recognized: laws of nature (such as an algorithm), physical phenomena (such as a new mineral discovered in the earth or a new plant found in the wild) and abstract ideas (such as the law of gravity).⁵

In the past, though the Court acknowledged that an invention “is not unpatentable simply because it contains a law of nature or a mathematical algorithm,”⁶ software patents were generally considered to be patent ineligible.⁷ It was not until 1981 in *Diamond v. Diehr* that the Court held software to be patent eligible for the first time, finding that although the claims at issue employed a well-known mathematical equation, they sought “only to foreclose from others the use of that equation in conjunction with all of the other steps in their claimed process.”⁸

In the decades that followed, software patents became increasingly prevalent and increasingly abstract.⁹ In 2008, the Federal Circuit in *In re Bilski* stated that “a claimed process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing.”¹⁰ In practice, this meant that a claim incorporating a law of nature or abstract idea was “surely” patent eligible as long as the claim required some sort of hardware, such as computer processor, or the law of nature or abstract idea was applied in a way that caused some sort of real-life transformation (e.g. from uncured rubber to cured rubber or grain meal into purified flour). The patent eligibility requirements of § 101 had become vestigial, essentially a non-requirement since the standard could easily be met by wording the claims in certain ways—a risk specifically warned against by the Su-

preme Court in the past.¹¹ Throughout this period, patents increasingly became the preferred method of protecting software—a software patent could be broadly drafted to prevent others from using the inventor’s idea, unlike a copyright whose protection was limited to the creator’s particular expression of the idea—and the number of software patents and applications skyrocketed.

Starting with its review of the Federal Circuit’s *In re Bilski* decision in 2010, however, the Supreme Court has increasingly breathed new life into a patent eligibility requirement that had essentially become dead-letter law. After a decades-long silence,¹² the Court has addressed the § 101 analysis in four of its last five terms.¹³ In each case, the foundation of the court’s analysis was consideration of its precedents under § 101. In *Bilski v. Kappos*, the Court rejected the machine-or-transformation test as the sole test for determining patent eligibility, stating that it was merely an important and useful clue.¹⁴ The Court provided additional guidance in *Mayo*: After noting that the claims set forth laws of nature, the Court considered the question of “whether the claims do significantly more than simply describe these natural relations. To put the matter more precisely, do the patent claims *add enough* to their statements of the [laws of nature] to allow the processes they describe to qualify as patent-eligible processes that *apply natural laws*?”¹⁵

Alice and Its Progeny

Most recently, on June 19, 2014, the Court issued its decision in *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*,

¹¹ See *Flook*, 437 U.S. at 593 (rejecting a standard that would “make the determination of patentable subject matter depend simply on the draftsman’s art”).

¹² The Court’s last decision addressing the § 101 analysis was in *Diehr* in 1981, though § 101 has come up since then: In *Lab. Corp. of America Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124 (2006), the Court dismissed cert as having been improvidently granted, but in an uncommon move, Justice Breyer, joined by Justice Stevens and Justice Souter, drafted a dissenting opinion addressing the § 101 analysis; and in *JEM Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124 (2001), the Court addressed the question of whether plants are eligible for utility patents.

¹³ *Bilski v. Kappos*, 561 U.S. 593 (2010) (holding that claims directed to a process for hedging risk when buying and selling commodities in the energy market are patent ineligible); *Mayo Collaborative Servs. v. Prometheus Labs.*, 132 S. Ct. 1289 (2012) (holding that claims directed to a process for determining whether the dosage level of a drug is too low or too high are patent ineligible); *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) (holding, *inter alia*, that a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated); *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014). In addition, during this period the Court in several cases granted certiorari, vacated the judgment and remanded to the Federal Circuit for further consideration in light of the Court’s recent decisions. *Mayo Collaborative Servs. v. Prometheus Labs.*, 561 U.S. 1040 (2010) (remanded for further consideration in light of the Court’s decision in *Bilski*); *Classen Immunotherapies, Inc. v. Biogen IDEC*, 561 U.S. 1040 (2010) (same); *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S.Ct. 694 (2012) (remanded for further consideration in light of the Court’s decision in *Mayo*); *WildTangent, Inc. v. Ultramercial, LLC*, 132 S. Ct. 2431 (2012) (same).

¹⁴ *Bilski*, 130 S. Ct. at 3226.

¹⁵ *Mayo*, 132 S. Ct. at 1296-97 (emphasis added).

³ *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 135 (2001).

⁴ *Chakrabarty*, 447 U.S. at 308 (quoting *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 199 (1933)).

⁵ *Chakrabarty*, 447 U.S. at 309 (citations omitted).

⁶ *Parker v. Flook*, 437 U.S. 584, 590 (1978).

⁷ See, e.g., *Gottschalk v. Benson*, 409 U.S. 63 (1972) (an algorithm used solely to convert binary code decimal numbers to equivalent pure binary numbers executed on a general purpose computer not patent eligible); *Flook*, 437 U.S. 584 (use of a formula to calculate an alarm limit using a general purpose computer not patent eligible).

⁸ *Diamond v. Diehr*, 450 US 175, 187 (1981) (concerning a “process for curing synthetic rubber which includes in several of its steps the use of a mathematical formula and a programmed digital computer”) (the “other steps” included continuously taking measurements and making recalculations in order to determine the ideal cure time).

⁹ See, e.g., *In re Lowry*, 32 F.3d 1579, 1583 (Fed. Cir. 1994) (finding claims directed to data structures with “specific electronic structural elements which impart a physical organization on the information stored in memory” to be patent eligible); *State St. Bank & Trust Co. v. Signature Fin. Grp.*, 149 F.3d 1368, 1373 (Fed. Cir. 1998) (finding that claims directed to a computer program which calculated, among other values, a final share price for mutual funds in a portfolio produced “a useful, concrete and tangible result” and therefore were patent eligible).

¹⁰ *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008).

unanimously holding that claims directed to a computerized scheme for mitigating “settlement risk” are not patent eligible under § 101. The claims at issue in *Alice Corp.* generally concerned a computerized platform through which a trusted third party, acting as an escrow or intermediary, can verify that each party to a financial transaction is able to perform its obligations under the transaction, before the parties actually perform. In so finding, the Court applied the two-part inquiry outlined by the Court in *Mayo*.

First the Court considered whether the claims at issue contained a patent-ineligible concept, that is, a law of nature, physical phenomena, or abstract idea. The Court determined that the claims set forth an abstract idea, drawing heavily on its decision in *Bilski* to find that the claimed concept of intermediated settlement is “a fundamental economic practice long prevalent in our system of commerce.”¹⁶

Having determined that the claims were drawn to a patent-ineligible abstract idea, the Court undertook the next step of the inquiry and examined whether other elements of the claims contained an inventive concept sufficient to transform the claimed abstract idea into a patent-eligible application of the abstract idea. The Court found that nothing in the claims rose to that level. In so finding, the Court specifically stated that the generic computer implementation of the claims was insufficient to supply the necessary inventive concept to transform an abstract idea into a patent eligible invention, and it noted that the process could be carried out on existing computers.¹⁷

Following the Court’s decision in *Alice*, the lower courts have been enthusiastically applying § 101 and the analysis set forth in *Mayo* and confirmed in *Alice*, including in a slew of Federal Circuit decisions (several of which are discussed below) that help inform how software patents will be treated by courts going forward.

The Federal Circuit has acknowledged that not “all claims in all software-based patents will necessarily be directed to an abstract idea.”¹⁸ The court’s phrasing of this notion in the negative, however, suggests that a patent-eligible claim directed to software will be the exception to the rule.

Indeed, since *Alice*, a patent has survived § 101 review at the Federal Circuit in just one case. In *DDR Holdings, LLC v. Hotels.com, LP*, the Federal Circuit found claims directed to systems and methods of generating a composite Web page that combines the “look and feel” of a host website (e.g. logos, colors, fonts) and the content of a third-party merchant’s website to be patent eligible, stating that the claims “recite a specific way to automate the creation of a composite web page by an ‘outsource provider’ that incorporates elements from multiple sources in order to solve a problem faced by websites on the Internet.”¹⁹

In *Ultramercial*, despite having upheld the claims at issue under § 101 twice before (both before and after the Court’s decision in *Mayo*), the post-*Alice* Federal Circuit held that claims directed to a method for provid-

ing free access to copyrighted media content after viewing an advertisement merely recited an abstract idea along with “routine additional steps such as updating an activity log, requiring a request from the consumer to view the ad, restrictions on public access, and use of the Internet,” and therefore were patent ineligible.²⁰ Regarding the use of a computer and the Internet, the court noted that the claims merely required a general purpose computer, not a novel machine, and that “[g]iven the prevalence of the Internet, implementation of an abstract idea on the Internet in this case is not sufficient to provide any ‘practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.’”²¹

In *Digitech Image Techs., LLC v. Electronics For Imaging, Inc.*, the Federal Circuit held that claims directed to “device profiles,” which included information regarding chromatic and spatial characteristics of source and input devices, were not patent eligible because they were directed solely to “information in its non-tangible form,” not to “any tangible embodiment of this information (i.e., in physical memory or other medium) or . . . any tangible part of the digital processing system.”²² The court additionally held that claims directed to methods for generating such device profiles were not patent eligible, as they “recite[d] an ineligible abstract process of gathering and combining data that does not require input from a physical device. . . . Without additional limitations, a process that employs mathematical algorithms to manipulate existing information to generate additional information is not patent eligible.”²³

Similarly, in *Content Extraction and Transmission LLC v. Wells Fargo Bank, National Association*, the Federal Circuit held that claims concerning extracting data from documents, recognizing specific information from those data and storing that information in memory in an ATM were directed merely to the patent ineligible ideas of data collection, recognition and storage.²⁴

How Will This Affect Social Media Patents?

Certain Software Inventions Are Still Patent Eligible—but Software Patents Likely Will Be Harder to Get

The Court’s decision in *Alice Corp.* will certainly limit the patent eligibility of software patents. Patents directed to software and computer-implemented inventions will be harder to obtain at the USPTO. After *Alice* was decided, the USPTO issued new guidelines applying greater scrutiny to inventions related to business methods and software and, accordingly, is granting fewer such patents. The USPTO has even withdrawn notices of allowance, returning applications for further prosecution and issuing office actions regarding § 101.²⁵ And as the cases summarized above indicate, software patents are increasingly likely to be success-

²⁰ *Ultramercial*, 772 F.3d at 715-16.

²¹ *Id.* at 716-17 (quoting *Mayo*, 132 S. Ct. at 1297).

²² *Digitech Image Techs., LLC v. Elecs. For Imaging, Inc.*, 758 F.3d 1344, 1349 (Fed. Cir. 2014).

²³ *Id.* at 1351.

²⁴ *Content Extraction and Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343 (Fed. Cir. 2014).

²⁵ USPTO, *Update on USPTO’s Implementation of ‘Alice v. CLS Bank’*, DIRECTOR’S FORUM: A BLOG FROM USPTO’S LEADERSHIP

¹⁶ *Alice Corp.*, 134 S. Ct. at 2356.

¹⁷ *Id.* at 2360.

¹⁸ *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014).

¹⁹ *DDR Holdings v. Hotels.com LP*, 773 F.3d 1245, 1259 (Fed. Cir. 2014).

fully challenged under § 101 during litigation. Gone are the days when a draftsman could broadly claim an idea or a result and survive § 101 review simply by adding a “computer processor” limitation.

Software patents, however, have not been categorically eliminated.²⁶ To be patent eligible, the claims of a software patent “must contain ‘enough’ to transform [an] abstract idea [or law of nature] into a patent-eligible invention.”²⁷ For instance, in *Alice Corp.*, the Court specifically indicated that inventions which “improve the functioning of a computer itself” or “effect an improvement in any other technology or technical field” would be patent eligible.²⁸ Aside from these examples, however, what exactly is “enough” is unclear. As most decisions thus far have relied heavily on comparing the inventions at issue to those in precedents when undertaking this analysis, the best guidance comes from prior decisions regarding what is and is not enough to satisfy § 101.

Claims directed merely to the basic functions associated with prominent aspects of social media networks, such as data mining and online advertising, are unlikely to be patent eligible. Post-*Alice*, the Federal Circuit has found claims directed to data, data collection and storage and organizing and manipulating data to be invalid under § 101, stating that “[w]ithout additional limitations, a process that employs [an abstract idea] to manipulate existing information to generate additional information is not patent eligible.”²⁹

Additionally, technology must be integral to the claims; it is insufficient to broadly and generically claim well understood, routine and conventional uses of a general purpose computer, the Internet or other common technology to perform an abstract idea or law of nature.³⁰ For instance, in *DDR Holdings* the Federal Circuit emphasized that “the claims at issue . . . specify how interactions with the Internet are manipulated to yield a desired result—a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink. . . . When the limitations of the . . . asserted claims are taken together as an ordered combination, the claims recite an invention that is not merely the routine or conventional use of the Internet.”³¹ By contrast, merely reciting a user interface

accessible using a general purpose computer in a claim will not be enough.³²

Finally, the driving concern of the § 101 analysis is pre-emption—“that patent law not inhibit further discovery by improperly tying up the future use of these building blocks of human ingenuity.”³³ The Federal Circuit in *DDR Holdings* emphasized this, stating that the claims “recite a specific way to automate the creation of a composite web page” and “do not attempt to preempt every application of the idea of increasing sales by making two web pages look the same. . . . In short, the claimed solution amounts to an inventive concept for resolving this particular Internet-centric problem, rendering the claims patent eligible.”³⁴ By contrast, in *Ultramercial* the claims merely “[n]arrow[ed] the abstract idea of using advertising as a currency to the Internet,” which “is not sufficient to provide any ‘practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.’ ”³⁵

Alice and the decisions that have followed underscore that, going forward, it will be increasingly important to scrutinize carefully what an invention does and to choose claim language that clearly identifies and is narrowly tailored to the inventive aspect—in short, to demonstrate that an actual invention resides in the application of the abstract idea or natural law.

Section 101 Will Continue to Be an Increasingly Important Tool Against Frivolous Infringement Claims and ‘Bad Patents’

Though the recent jurisprudence regarding § 101 may diminish a company’s ability to secure and enforce patents relating to social media, there may be a silver lining as § 101 becomes an increasingly important tool against frivolous allegations of patent infringement and so-called bad patents. For instance, the number of merit decisions for lack of patent eligible subject matter under § 101 has steadily increased since 2011,³⁶ following the Supreme Court’s decisions in *Bilski* in 2010 and *Mayo* in 2012. We expect this trend to continue post-*Alice*.

As patent-eligible software patents become the exception to the rule, there may be a decrease in the number of cases brought against social media companies. Indeed, fewer patent cases have been filed against prominent social media companies in the eight months after *Alice* was decided than were filed in the same period in 2013-2014 (Facebook: six versus 12; Twitter: one

(Aug. 4, 2014), http://www.uspto.gov/blog/director/entry/update_on_uspto_s_implementation.

²⁶ *Ultramercial*, 772 F.3d at 715. There is a minority faction of the Court, however, that continues to believe that any claim which merely describes a business method should be patent ineligible due to its failure to qualify as a process under § 101. See *Alice Corp.*, 134 S.Ct. at 2360-61 (Justice Sotomayor’s concurrence, joined by Justice Ginsburg and Justice Breyer); *Bilski*, 130 S. Ct. at 3231, 3258 (Justice Stevens’ concurrence, joined by Justice Ginsburg, Justice Breyer and Justice Sotomayor; Justice Breyer’s concurrence, joined in part by Justice Scalia).

²⁷ *Alice Corp.*, 134 S.Ct. at 2360.

²⁸ *Id.* at 2359-60.

²⁹ *Digitech*, 758 F.3d at 1351; *Wells Fargo*, 776 F.3d at 1348. Also see the discussion of *Morsa v. Facebook, Inc.*, *infra*.

³⁰ *DDR Holdings*, 773 F.3d at 1258-59 (making a comparison to the claims in *Ultramercial*, which merely implemented an abstract idea on the internet); see also *Wells Fargo*, 776 F.3d at 1347-48 (citing *Alice*, 134 S.Ct. at 2359) (claims directed to an abstract idea implemented using a computer and a scanner not patent eligible).

³¹ *Id.* at 1259.

³² See, e.g., *Ultramercial*, 772 F.3d at 716; *DietGOAL Innovations LLC v. Bravo Media LLC*, 33 F. Supp. 3d 271 (S.D.N.Y. 2014) (claims directed to a system and method for computerized meal planning, that claimed a user interface and a database, held to be patent ineligible).

³³ *Alice Corp.*, 134 S. Ct. at 2354.

³⁴ *DDR Holdings*, 773 F.3d at 1259.

³⁵ *Ultramercial*, 772 F.3d at 716 (quoting *Mayo*, 132 S. Ct. at 1297).

³⁶ There were five merit decisions for lack of patent eligible subject matter in 2011; seven in 2012; and 14 in 2014. Owen Byrd & Brian Howard, Lex Machina 2013 Patent Litigation Year in Review, at 11 (May 2013), available at <http://pages.lexmachina.com/2013ReviewLandingPage.html> (registration required). There were just two such decisions in 2007, 2008 and 2010, and five such decisions in 2009. *Id.*

versus six). Companies may be more sensitive to litigation if their patents are more likely to be invalidated—especially as social media companies develop their patent portfolios not only through filing and prosecuting patents but also through acquiring patents that issued in the years where § 101 was scarcely enforced. This could encourage cross-licensing and strategic alliances, instead of litigation, among practicing companies in the social media space. And while nonpracticing entities that are merely seeking an early settlement may not be similarly discouraged from filing suit, they may be willing to settle for less money.

Additionally, as the scope of patent eligible inventions narrows, courts may increasingly be amenable to deciding § 101 issues early on in the case—even prior to claim construction—before a defendant undertakes a majority of the expenses related to litigation.³⁷ For instance, in *Morsa v. Facebook, Inc.*, the Central District of California granted Facebook’s motion for judgment on the pleadings that the asserted claims of patents directed to targeted online advertising were invalid under § 101.³⁸ Notably, the court found that the § 101 issue was ripe despite the early stage of litigation (claim con-

struction disputes had been identified but had not yet been briefed). Though the claims had not yet been construed, the court proceeded since the claim construction disputes were not relevant to the § 101 inquiry.³⁹ The court also rejected the plaintiff’s argument that he intended to add additional claims after discovery is complete, noting that the deadline to assert claims had long passed and plaintiff had not made a showing of good cause for the court to grant leave to add additional claims.⁴⁰ Therefore, early motions may have the added benefit of forcing plaintiffs (including non-practicing entities that are merely seeking an early settlement and therefore do not give much thought to the merits of a case prior to filing) to formulate theories regarding the merits of the case early on—perhaps further discouraging frivolous litigation or encouraging early settlement.

In sum, the recent and rapid evolution of the law of patent eligibility under § 101 will undoubtedly have significant ramifications for social media companies, in terms of their invention-protection strategies and their exposure to the risk of infringement litigation.

³⁷ See, e.g., Order Granting Defendant’s Motion for Judgment on the Pleadings, *Morsa v. Facebook, Inc.*, No. 14-cv-161-JLS (C.D. Cal. Dec. 23, 2014); *DietGOAL Innovations*, 33 F. Supp. 3d at 289 (finding that claim construction was not a prerequisite to determination under § 101).

³⁸ The court found that the claims were directed to the patent-ineligible abstract ideas of “targeting advertisements to certain consumers, and using a bidding system to determine

when and how advertisements will be displayed”; and that the claims otherwise included “conventional steps, specified at a high level of generality” that were “insufficient to supply an inventive concept to otherwise abstract claims.” Order at 15.

³⁹ Order at 8.

⁴⁰ Order at 9. The court noted that such an argument “would preclude the Court from ever considering a Motion to Dismiss or Motion for Judgment on the Pleadings, given that a Plaintiff could *always* seek to the Court’s leave to assert new claims before trial.” *Id.* (emphasis in original).



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