

Featured Article

Breaking *State Street Bank*: Redefining the Scope of Patentable Subject Matter for the 21st Century

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Just over twenty-five years ago, the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims merged to create the United States Court of Appeals for the Federal Circuit. The mandate of the new court was to unify the patent laws and shore up the rights of patentees in the face of a public perception that such rights were being eroded. Armed with nationwide jurisdiction over patent appeals, the court has been a staunch defender of patent protection and has moved to expand patent rights.

Recently, however, the pendulum of public—and political—opinion appears to be swinging in the opposite direction. Both houses of Congress are considering sweeping patent reform legislation that, by many accounts, will severely weaken patent protection. Moreover, the Supreme Court, after several decades of near silence in the patent area, has demonstrated an increased willingness to hear matters of patent law and has issued a string of rulings making it significantly easier to challenge patent validity and limiting the scope of potential remedies for patent infringement.¹ Even the Federal Circuit has shown a willingness to reconsider its own long-standing, pro-patent precedent.²

In a series of three recent cases, the Federal Circuit has signaled that it is reconsidering and may be prepared to significantly circumscribe another fundamental aspect of patent law—the scope of patentable subject matter. The Federal Circuit's reevaluation comes nearly a decade after the court's decision in *State Street Bank* paved the way for the explosion of "business method" patents, provoking a heated and often visceral reaction from the patent bar and the public to certain now-infamous grants, such as Amazon's "oneclick" patent and Priceline's "reverse auction" patent. The reexamination of precisely what subject matter is entitled to patent protection, and conversely what is not, promises to have profound implications both for the procurement of new patents and for litigation over presently existing patent rights.

This article will look at two recently decided Federal Circuit cases, *In re Comiskey* and *In re Nuijten*, and one case that the court is scheduled to consider *en banc*, *In re Bilski*. Each of

these cases addresses the issue of patentable subject matter, and together they hold the potential for a significant change in the Federal Circuit's patentable subject matter jurisprudence.

Patentable Subject Matter

As codified by the Patent Act, "[w]hoever 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 therefor, subject to the conditions and requirements of this title."³ Subject matter patentability under § 101 of the Patent Act functions, in certain respects, as a gate-keeper. A patent application that claims a patentable "process, machine, manufacture, or composition of matter" under § 101 does not automatically issue as a patent. Subject matter patentability is merely the initial hurdle that must be passed before an application will be evaluated for additional requirements, such as utility, novelty, and non-obviousness.

Section 101 has been interpreted broadly. The United States Supreme Court, for instance, found that "Congress intended statutory subject matter to 'include anything under the sun that is made by man.'"⁴ There are, however, limits to what is embraced by § 101.⁵ Indeed, it is a fundamental tenet of patent law that "[t]he laws of nature, physical phenomena, and abstract ideas have been held not patentable."⁶ This tension has given rise to a string of Supreme Court and Federal Circuit decisions that have attempted to resolve the often murky contours of patentable subject matter.

State Street Bank and the Emergence of Business Method Patents

Nearly a decade ago, the Federal Circuit decided the watershed case of *State Street Bank*, holding that methods of conducting business fall within the "process" category of § 101 and are not so abstract as to be unpatentable.⁷ Prior to *State Street Bank*, Supreme Court decisions had "rejected a 'purely literal reading' of the process provision [of § 101] and emphasized that not every 'process' is patentable."⁸ The Supreme Court had articulated a limited view of the patentability of processes, requiring a process practiced without a particular apparatus to result in the "[t]ransformation and reduction of an article 'to a different state or thing.'"⁹ The Supreme Court further limited the patentability of processes containing mathematical algorithms by assuming that all algorithms were undoubtedly within the public domain, and holding that patentability cannot be found "unless there is some other inventive concept in [the algorithm's] application."¹⁰

The Supreme Court's 1981 decision in *Diamond v. Diehr* seemed at the time to be an outlier in § 101 jurisprudence.

In *Diehr*, the Supreme Court allowed a patent to issue on a process that used a mathematical formula, machinery, and a computer for molding uncured synthetic rubber into finished cured products.¹¹ The *Diehr* Court held that “when a claim containing a mathematical formula implements or applies that formula in a structure or process which, when considered as a whole, is performing a function which the patent laws were designed to protect . . . the claim satisfies the requirements of § 101.”¹²

The Federal Circuit’s decision in *State Street Bank*—seventeen years after *Diehr*—carried the earlier ruling a step further. The *State Street Bank* court held that although mathematical algorithms are not patentable in and of themselves, a patent may issue when a mathematical algorithm is reduced to a practical application that produces a useful and concrete result.¹³ Additionally, the Federal Circuit directed that an analysis of statutory subject matter “should not focus on which of the four categories of subject matter a claim is directed to . . . but rather on the essential characteristics of the subject matter, in particular, its practical utility.”¹⁴ Finally, the court took the opportunity to put an end to the “ill-conceived” “‘business method’ exception to statutory subject matter,” holding that business methods are “subject to the same legal requirements for patentability as applied to any other process or method.”¹⁵ *State Street Bank* has been generally acknowledged as the seminal pronouncement of the Federal Circuit’s modern thinking on patentable subject matter, and it opened the door to business method patents by placing them on the same playing field as any other invention.

A few months after *State Street Bank*, the Federal Circuit decided *AT&T Corp. v. Excel Communications*.¹⁶ That case also addressed patentable subject matter, holding that any useful process can be patentable, even if it does not involve a “physical transformation”¹⁷—seemingly declining to follow the Supreme Court’s exhortation in *Gottschalk* that a process practiced without a machine must somehow result in a physical transformation of an article to be patentable.¹⁸ *AT&T* clarified that a “physical transformation . . . is not an invariable requirement [of patentability], but merely one example of how a mathematical algorithm may bring about a useful application.”¹⁹ The court held that, “[b]ecause § 101 includes processes as a category of patentable subject matter, the judicially-defined proscription against patenting of a ‘mathematical algorithm,’ to the extent such a proscription still exists, is narrowly limited to mathematical algorithms in the abstract.”²⁰ Thus, *AT&T* further expanded the potential patentability of mathematical algorithms and business methods.

Following *State Street Bank* and *AT&T*, the proliferation of business method patents has been astronomical. In the approximately two-hundred and ten years from 1790 until the Federal Circuit’s decision in *State Street Bank*, the Patent and Trademark Office (USPTO) issued 4,114 patents in class 705,²¹ the class containing most business method patents.²² In the ten years since the decision in *State Street Bank* the USPTO has issued over 11,751 patents in class 705,²³ an increase of

roughly 6,000% on an annualized basis. Many of these patents have been the object of public mockery and scorn. Consider, for example, I.B.M.’s Patent No. 6,329,919, which issued on December 11, 2001. That patent claims “an apparatus, system, and method for providing reservations for restroom use,” particularly on an airplane. The patent was dedicated to the public by I.B.M. following a widespread public backlash.²⁴

Breaking State Street Bank

Two cases recently before the Federal Circuit have started a process of reshaping the contours of *State Street Bank*, and a third, which will be considered by the *en banc* court in the near future, may be the method by which the Federal Circuit breaks *State Street Bank*. These cases are not necessarily exceptional based on the patent applications being considered. What makes them exceptional is that they represent a renewed focus of the Federal Circuit on the obscure and often overlooked issue of patentable subject matter.

In re Nuijten

On September 20, 2007 the Federal Circuit decided an appeal from the Board of Patent Appeals and Interferences (which hears appeals from the final decisions of the patent examiners who consider new patent applications) on the issue of patentable subject matter.²⁵ Nuijten sought to patent a technique for reducing the distortion of electronic signals caused by electronic watermarking. Several of Nuijten’s claims were allowed by the USPTO, including claims covering a medium for storing the signals and an arrangement for embedding supplemental data in the signal.²⁶ Nuijten appealed the rejection of several of his claims, specifically those that covered the resulting encoded signals produced by his process. One of the claims, claim 14, was directed to “[a] signal with embedded supplemental data, the signal being encoded in accordance with a given encoding process”²⁷ The claim had been rejected by the examiner for lack of patentable subject matter under § 101 on the ground that a “signal” does not fit within any of the four categories of statutory patentable subject matter.

The Board of Patent Appeals and Interferences upheld the examiner’s rejection of claim 14 on § 101 grounds. The Board explained that a signal “has no physical attributes and merely describes the abstract characteristics . . . and, thus, it is considered an [unpatentable] ‘abstract idea.’”²⁸ The Board also pointed out that the subject matter of claim 14 fell into none of the four statutory categories of patentable subject matter contained in § 101 (process, machine, manufacture, or composition of matter).²⁹

The Federal Circuit upheld the Board’s rejection of several claims, including claim 14. The court explained that “transitory electrical and electromagnetic signals propagating through some medium, such as wires, air, or a vacuum” are “not encompassed by any of the four enumerated statutory categories [of § 101].”³⁰ Nuijten argued that “a signal must

have sufficient physical substance to be discerned and recognized by a recipient,”³¹ and the Federal Circuit agreed to the extent that a signal requires a “physical carrier . . . upon which the information is embedded.”³² However, as a matter of course, the court construed claim 14’s language as claiming no particular physical structure. The Federal Circuit’s ultimate issue with claim 14 was that the claim did not specify what physical carrier was to be used, and required only “some physical carrier of information.”³³

After the court determined that claim 14 of Nuijten’s application did not contain a defined physical form, it held that “transitory embodiments [of signal transmission] are not directed to statutory subject matter.”³⁴ Interestingly, the court cited to *State Street Bank* for the propositions that “the [claimed] subject matter must fall into at least one category of statutory subject matter” and if a claim falls outside of all four subject matter categories it is not patentable, no matter how new or useful the subject matter of the claim may be.³⁵ The Federal Circuit then addressed each of the four statutory categories of patentable subject matter in regards to Nuijten’s claim 14, finding that a signal fits within no category and ultimately upholding rejection of the claim.

The panel’s decision, however, was not unanimous. In a detailed dissent, Judge Linn “disagree[d] with the majority’s holding that the claims in suit are not directed to statutory subject matter under 35 U.S.C. § 101.”³⁶ Judge Linn argued that “[n]o matter what form the signal of claim 14 may take, it must involve ‘some physical carrier of information’ that is created or manipulated through human activity . . . it must signal,” and therefore should be patentable.³⁷ Both a petition for rehearing and for rehearing *en banc* were denied by the Federal Circuit, again, over Judge Linn’s dissent.

In re Comiskey

On the same day as *In re Nuijten*, the Federal Circuit decided *In re Comiskey*.³⁸ In *Comiskey*, the patent applicant appealed from the decision of the Board of Patent Appeals and Interferences, which had affirmed the examiner’s rejection of claims as obvious. Comiskey’s application “claimed a method and system for mandatory arbitration involving legal documents, such as wills or contracts,” and required “resolution by binding arbitration of any challenge or complaint concerning any unilateral document . . . [or] contractual document.”³⁹ Generally, the claims required enrolling people and legal documents in the system, incorporating arbitration language requiring mandatory arbitration into the legal document, requiring a person with a complaint to submit a request for an arbitration resolution, conducting the arbitration, and determining an award or a decision on the contested issue. Certain claims in the application, such as claim 17, added the additional requirement of using a computer in the process, but claim 1 had no such requirement.

Although the examiner’s rejection and the Board of Patent Appeal’s decision to affirm were based on obviousness, the

Federal Circuit, of its own accord, asked the parties to brief an additional issue: whether or not the subject matter of the claimed invention was patentable under § 101. Ultimately, the Federal Circuit upheld the examiner’s rejection of claim 1, based on a failure to claim patentable subject matter.

The Federal Circuit found it “clear that the present statute does not allow patents to be issued on particular business systems—such as a particular type of arbitration—that depend entirely on the use of mental processes.”⁴⁰ The court noted that Congress and the Constitution did not intend to award patents on systems that depend on human intelligence alone for their operation.⁴¹ The court “established that the application of human intelligence to the solution of practical problems is not in and of itself patentable,” thus rejecting those claims of the Comiskey patent that the court found merely applied human intelligence to a problem (independent claims 1 and 32).⁴² The Federal Circuit cited to the Supreme Court’s decision in *Parker v. Flook* for the proposition that an unpatentable mental process does not become a patentable invention simply by adding “post-solution activity.” Were the opposite true, “[a] competent draftsman could attach some form of post-solution activity to almost any mathematical formula; the Pythagorean theorem would not have been patentable, or partially patentable, because a patent application contained a final step indicating that the formula, when solved, could be usefully applied to existing surveying techniques.”⁴³

Comiskey’s patent, however, included additional claims that described more than purely mental processes and mental processes with post-solution activity. Claims 17 and 46 (among others) of Comiskey’s application differentiated themselves by adding the use of a computer to the otherwise unpatentable mental process.⁴⁴ The court found that this addition allowed those claims to meet the requirements of § 101, bringing them into the territory of potentially patentable subject matter, but was careful to note that “the other requirements for patentability, including non-obviousness, must still be satisfied.”⁴⁵ The court went on to cite *KSR v. Teleflex* for the proposition that “[t]he routine addition of modern electronics to an otherwise unpatentable invention typically creates a prima facie case of obviousness,” paving the way for an alternate ground of rejection for these claims.⁴⁶ Ultimately, the Federal Circuit decided not to address the issue of obviousness with respect to the claims it found contained patentable subject matter, instead remanding to the Board of Patent Appeals to make that determination. But the court’s citation to *KSR* and *Leapfrog Enters. v. Fisher-Price* may be seen by the Board as a clear indication of how the Federal Circuit expects that issue to be decided.

In re Bilski

Finally, the Federal Circuit recently granted *sua sponte* a hearing *en banc* to review the patentability of a business method patent application. Bilski filed an appeal to the Federal Circuit from the decision of the Board of Patent Appeals rejecting his application for an “Energy Risk Management Method.”⁴⁷

Bilski's method "relates to a method practiced by a commodity provider for managing (i.e., hedging) the consumption risks associated with a commodity sold at a fixed price."⁴⁸ Generally, Bilski's claim 1 describes a method of identifying consumers of a commodity with a certain risk profile, identifying a "market participant" that provides the commodity but has an opposite risk profile, and initiating a series of transactions between the two parties such that the risks balance. Bilski's method involves no explicit calculations, and does not claim the use of a computer to implement the hedging process. The examiner, in a final rejection, reasoned as follows: "the invention is not implemented on a specific apparatus and merely manipulates [an] abstract idea and solves a purely mathematical problem without any limitation to practical application."⁴⁹ The process neither transforms matter or energy nor uses an apparatus to carry out specified steps.

The *en banc* hearing is being convened by the Federal Circuit ostensibly to decide the applicable standard for subject matter patentability under § 101. Similar to its procedure when it heard *Festo v. Shoketsu Kinzoku Kogyo Kabushiki, en banc*, the Federal Circuit posed a number of questions to the patent bar and solicited briefing on these issues for its *en banc* consideration. These questions include the following:

- "What standard should govern in determining whether a process is patent-eligible subject matter under . . . § 101?"
- What are the limitations on patentability of a claim that "constitutes an abstract idea or mental process?"
- Does "a claim that contains both mental processes and physical steps create patent-eligible subject matter?"
- "Whether a method or process must result in a physical transformation of an article or be tied to a machine to be patent-eligible subject matter under § 101?"
- Should the Federal Circuit reconsider (and possibly overturn) its decisions in *State Street Bank* and *AT&T*?⁵⁰

Interestingly, the Board of Patent Appeals did not believe the outcome in this case was controlled by the Federal Circuit's decisions in *State Street Bank* or *AT&T* because, in the view of the Board, those cases involved "the 'special case' of transformation of data by a machine."⁵¹ Yet the Federal Circuit has seized on *In re Bilski* as an opportunity to reconsider those same decisions.⁵²

By the time the Federal Circuit stopped accepting *amicus curiae* briefs on April 7, 2008, almost forty had been filed by parties including the Federal Circuit Bar Association, the American Intellectual Property Law Association, numerous other

intellectual property advocacy groups, legal scholars, members of the pharmaceutical industry, information technology and business consulting firms, and many others. Strikingly, these numerous *amicus curiae* briefs advocate positions that vary both across and within industries, indicating that there is no clear consensus among potential stakeholders as to how these important issues should be decided.

Implications and Conclusions

These three recent statutory subject matter cases are attracting wide attention not only because of their collective ability to redefine the limits of patentable subject matter under § 101, but also because they come at a time of tremendous importance to the Federal Circuit's position relative to the Supreme Court. The Federal Circuit has at times been referred to as the "supreme court of patents," because of its exclusive appellate jurisdiction and the fact that in the past three decades the Supreme Court (until recently) has rarely granted *certiorari* on issues of patent law.

In light of the Supreme Court's recent attention to patent law, however, the Federal Circuit seems to sense the immanency of the Court granting *certiorari* on the issue of § 101 patentability. Notably, less than two years ago, in June 2006, the Supreme Court briefly considered *LabCorp v. Metabolite*, a case that might have had a profound impact on § 101 jurisprudence. After agreeing to hear the case, the Court dismissed *certiorari* as "improvidently granted."⁵³ In a dissent from the decision to dismiss *certiorari*, Justice Breyer, joined by Justice Stevens and Justice Souter, noted that "[*State Street Bank*] does say that a process is patentable if it produces a 'useful, concrete, and tangible result.' But this Court has never made such a statement and, if taken literally, the statement would cover instances where this Court has held the contrary."⁵⁴ Both of the September 20, 2007 decisions (*In re Comiskey* and *In re Nuijten*) contain detailed histories of the patent system and the requirements of § 101 patentability, cite back to nineteenth century Supreme Court decisions, and read more like patent treatise entries or law review articles than typical Federal Circuit decisions. In light of the Supreme Court's recent penchant for reversing the Federal Circuit—and the apparent skepticism of several justices regarding the legal basis of the holding in *State Street Bank*—the appeals court may be seeking to stake-out a more conservative position, firmly rooted in centuries of precedent, in order to stave off Supreme Court intervention.

The Federal Circuit may also be attempting to clear up perceived anomalies in its § 101 jurisprudence that have arisen as historic standards are applied to modern, more ethereal inventions. Gone are the days when patents focused on plow shears and ceramic doorknobs. Today's inventions are often difficult to conceptualize in tangible terms, but may nonetheless be innovative, useful, and, arguably, worthy of patent protection. In the words of Judge Linn, the great difficulty with cases such as the three discussed in this article is that they require the courts

to “reconcile cutting-edge technologies with a statute, the language of which dates back to the beginning of the Republic.”⁵⁵ As the pendulum of public opinion swings, the courts have struggled, and will continue to struggle, to establish precedents that create stability and predictability despite the ever-accelerating pace of advancement in many important technical fields.

Regardless of how the Federal Circuit rules in *In re Bilski*, the immediate effect of the *In re Comiskey* and *In re Nuijten* decisions will likely be an increased emphasis on artful drafting of claims, as patent prosecution attorneys seek to shield applications from unpatentability under a refined § 101 standard. From a litigation perspective, practitioners should expect to see more subject matter challenges under § 101. In particular, combining a § 101 challenge with a obviousness argument—brought under the more liberal obviousness standards set out in *KSR* and developed by the Federal Circuit in *Comiskey*—may provide defense attorneys with an important new weapon in the armamentarium of patent challenges. This alone may be enough to effectively break *State Street Bank*, even in the absence of an explicit judicial reversal of the opinion by the Federal Circuit in the highly-anticipated *In re Bilski* decision.

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¹ See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007); *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746 (2007).

² See, e.g., *In re Seagate Tech., LLC*, 497 F.3d 1360, 1369 (Fed. Cir. 2007) (reconsidering *Underwater Devices*, which was “announced shortly after the creation of the court, and at a time ‘when widespread disregard of patent rights was undermining the national innovation incentive’”).

³ 35 U.S.C. § 101.

⁴ *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

⁵ *Id.* (“This is not to suggest that § 101 has no limits or that it embraces every discovery.”).

⁶ *Id.*

⁷ *State St. Bank & Trust Co. v. Signature Fin. Group*, 149 F.3d 1368 (Fed. Cir. 1998).

⁸ *In re Comiskey*, 499 F.3d 1365, 1375 (Fed. Cir. 2007) (citing *Parker v. Flook*, 437 U.S. 584, 589 (1978)).

⁹ *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972).

¹⁰ *Parker v. Flook*, 437 U.S. 584, 594 (1978).

¹¹ *Diamond v. Diehr*, 450 U.S. 175, 178 (1981).

¹² *Id.* at 192. In an extended dissent, Justice Stevens argued that even the *Diehr* inventors had discovered nothing new, and had

merely used a computer to calculate curing time in a process that had been patented many years earlier by Charles Goodyear. See *id.* at 206–07 (Stevens, J., dissenting).

¹³ *State Street Bank*, 149 F.3d at 1373.

¹⁴ *Id.* at 1375.

¹⁵ *Id.*

¹⁶ *AT&T Corp. v. Excel Commc'ns, Inc.*, 172 F.3d 1352 (Fed. Cir. 1999).

¹⁷ *Id.* at 1355–58.

¹⁸ 409 U.S. at 70.

¹⁹ *AT&T Corp.*, 172 F.3d at 1358.

²⁰ *Id.* at 1356.

²¹ See USPTO Patent Full-Text and Image Database – Advanced Patent Search (available at <http://patft.uspto.gov/netahtml/PTO/search-adv.htm>) (using search query “CCL/705/\$ and ISD/1/1/1790->4/14/1999”).

²² See USPTO - U.S. Patent Classification System - Classification Definitions (available at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/def/705.htm>) (“This is the generic class for apparatus and corresponding methods for performing data processing operations, in which there is a significant change in the data or for performing calculation operations wherein the apparatus or method is uniquely designed for or utilized in the practice, administration, or management of an enterprise, or in the processing of financial data.”).

²³ See USPTO Patent Full-Text and Image Database – Advanced Patent Search (available at <http://patft.uspto.gov/netahtml/PTO/search-adv.htm>) (using search query “CCL/705/\$ and ISD/4/15/1999->3/4/2008”).

²⁴ See, e.g., Troy Wolverton, IBM Flushes Restroom Patent, CNET News.com (Oct. 11, 2002) (available at <http://www.news.com/2100-1017-961803.html>); Brian Osborne, IBM Quietly Relieves Itself of Bathroom Patent, Geek.com (Oct. 14, 2002) (available at <http://www.geek.com/ibm-quietly-relieves-itself-of-bathroom-patent/>).

²⁵ See *In re Nuijten*, 500 F.3d 1346 (Fed. Cir. 2007).

²⁶ *Id.* at 1351.

²⁷ *Id.*

²⁸ *Id.* at 1351–52.

²⁹ *Id.* at 1352.

³⁰ *Id.*

³¹ *In re Nuijten*, 500 F.3d at 1353.

³² *Id.*

³³ *Id.* (emphasis in original).

³⁴ *Id.*

³⁵ *Id.* (quoting *State Street Bank*, 149 F.3d at 1375).

³⁶ *Id.* at 1358 (Linn, J., dissenting).

³⁷ *In re Nuijten*, 500 F.3d at 1368 (Linn, J., dissenting),

³⁸ *In re Comiskey*, 499 F.3d 1365 (Fed. Cir. 2007).

³⁹ *Id.* at 1368.

⁴⁰ *Id.* at 1378.

⁴¹ *Id.* at 1378–79.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *In re Comiskey*, 499 F.3d at 1380.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Ex Parte Bilski*, Appeal No. 02-2257 (B.P.A.I. Mar. 8, 2006), *1 n.1 (Pat. App. 2006).

⁴⁸ *Id.* at *1.

⁴⁹ *Id.* at *3 (quoting the examiner who rejected Bilski's application).

⁵⁰ *In re Bilski*, No. 07-CV-1130, 2008 BL 31183 (Fed. Cir. Feb. 15, 2008).

⁵¹ *Ex Parte Bilski*, Appeal No. 02-2257 (B.P.A.I. Mar. 8, 2006), *5 (Pat. App. 2006).

⁵² *In re Bilski*, No. 07-CV-1130, 2008 BL 31183 (Fed. Cir. Feb. 15, 2008).

⁵³ *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 126 S. Ct. 2921 (2006).

⁵⁴ *Id.* at *2928.

⁵⁵ *In re Nuijten*, 500 F.3d at 1358 (Linn, J., dissenting).

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