

2007-1130
(Serial No. 08/833,892)

United States Court of Appeals
for the
Federal Circuit

IN RE RENARD L. BILSKI
and RAND A. WARSAW

*Appeal from the United States Patent and Trademark Office, Board
of Patent and Interferences*

**BRIEF FOR *AMICUS CURIAE* HOUSTON
INTELLECTUAL PROPERTY LAW ASSOCIATION IN
SUPPORT OF BILSKI IN FAVOR
OF REVERSAL**

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APRIL 7, 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re Renard L. Bilski and Rand A. Warsaw v. _____

No. 2007-1130

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

amicus _____ certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Houston Intellectual Property Law Association

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

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3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

None

April 4, 2007
Date

Howard L. Speight
Signature of counsel
Howard L. Speight
Printed name of counsel

Reset Fields

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Interests of the Amicus Curiae

The Houston Intellectual Property Law Association (HIPLA) is an association of about 600 lawyers and other professionals who work in the Houston, Texas area. The practice of most of the HIPLA membership relates in substantial part to the field of intellectual property law. Founded in 1961, HIPLA is one of the largest regional associations of intellectual property practitioners.

On February 15, 2008, this Court entered an Order inviting *amicus curiae* briefs in accordance with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29 to address certain questions posed in the Order. The Order also indicated that briefs by *amicus curiae* could be filed without leave of Court.

Questions Presented and Brief Answers

The Court identified the following five questions in its February 15, 2008 Order setting this matter for en banc consideration:

1. Whether Claim 1 of the 08/833,892 patent application claims patent-eligible subject matter under 35 U.S.C. § 101?
2. What standard should govern in determining whether a process is patent-eligible subject matter under Section 101?
3. Whether the claimed subject matter is not patent-eligible because it constitutes an abstract idea or mental process; when does a claim that

- contains both mental and physical steps create patent-eligible subject matter?
4. 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 Section 101?
 5. Whether it is appropriate to reconsider *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), and *AT&T Corp. v. Excel Commc'ns, Inc.*, 172 F.3d 1352 (Fed. Cir. 1999) in this case and, if so, whether those cases should be overruled in any respect?

HIPLA believes these questions should be answered as follows:

1. Yes. Claim 1 does not fall under any of the exclusions from patent-eligibility and it satisfies the standard for process.
2. The standard that should govern in determining whether a process is patent-eligible subject matter under Section 101 is the standard established by the Supreme Court in *Diamond v. Diehr*, 450 US 175 184 (1981): “Transformation and reduction of an article ‘to a different state or thing’ is the clue to the patentability of a process claim that does not include particular machines.”
3. The claimed subject matter is patent-eligible because it is not an abstract idea and it is patent-eligible whether or not it constitutes a mental

- process. Neither 35 U.S.C. § 101 (hereinafter “Section 101”) nor applicable Supreme Court precedent exclude from patentable subject matter mental processes or claims that contain both mental and physical steps.
4. No. Neither Section 101 nor Supreme Court precedent require that a patent-eligible method or process result in a physical transformation or be tied to a machine.
 5. Yes. The “useful, concrete and tangible result” test of *State Street* and *AT&T* should be abandoned. Further, *State Street* and *AT&T* should be overruled to the extent that they are inconsistent with the answers to questions 1-4 above. The business method exception to patentability, which was abandoned in *State Street*, should not be revived.

Summary of Argument

It is evident from the opinion (hereinafter “BPAI Opinion”) of the Board of Patent Appeals and Interferences (hereinafter “BPAI”) in this matter that the United States Patent and Trademark Office (hereinafter “USPTO”) has strayed far from the standards for patentability under Section 101 set forth by the Supreme Court. This Court should restore clarity to Section 101 analysis, abandon the *State Street* test for patentability, and return to the Supreme Court’s formulation for patent-eligibility in *Diamond v. Diehr*. Under that analysis, the *Bilski* claims are

patent-eligible, whether or not they include, or are entirely made up of, mental processes.

Argument

(1) Whether Claim 1 of the 08/833,892 patent application claims patent-eligible subject matter under 35 U.S.C. § 101?

Yes. Claim 1 claims patent-eligible subject matter under Section 101 because the claimed process does not fall under any of the exclusions from patent coverage identified by the Supreme Court and because it satisfies the general rule established by the Supreme Court for assessing the patentability of processes.

Claim 1 is set out below:

A method for managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price comprising the steps of:

- (a) initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumer;
- (b) identifying market participants for said commodity having a counter-risk position to said consumers; and
- (c) initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions.

Claim 1 does not fall under the three exclusions from patent coverage identified by Supreme Court in *Diamond v. Diehr*, 450 U.S. 175 (1981), discussed

below. Clearly, it does not cover a law of nature or a natural phenomena. It is not analogous to a new mineral or the law of gravity.

Further, it does not claim an abstract idea, because it does not merely claim a principle in the abstract. See section (2) of this brief. A principle in the abstract can be discerned in Claim 1 – that commodity consumption risks can be managed by shifting risks from commodity consumers to market participants for the commodity. If Claim 1 merely recited that principle in the abstract, it would be a claim to an abstract idea, and it would not be patentable subject matter under Section 101.

However, Claim 1 describes how the risks are shifted. Transactions both between the commodity provider and the consumers of the commodity and between the commodity provider and market participants are initiated. The transactions are defined as fixed rate transactions and criteria are defined for fixing the rates. These details move the claimed subject matter away from a principle in the abstract to subject matter that is covered by Section 101. Thus, the subject matter of Claim 1 does not fall under any of the *Diamond v. Diehr* exclusions from patent-eligibility.

Further, Claim 1 satisfies the requirements of Section 101 under the general rule for process claims, which requires transformation and reduction of an article to a different state or thing, *see* section (2) of this brief, because the state of

commodity consumption risks are changed and because the state of ownership of the commodity is changed.

For these reasons, Claim 1 recites patentable subject matter under Section 101. HIPLA takes no position as to whether the claims are patentable under 35 U.S.C. §§ 102, 103, and 112 and recommends that this matter should be remanded to the Examiner to make those inquiries.

(2) What standard should govern in determining whether a process is patent-eligible subject matter under Section 101?

The question of whether a process is patent-eligible subject matter under Section 101 should be addressed by: (a) determining whether the process falls under one of the exclusions from patent coverage (laws of nature, natural phenomena, and abstract ideas), and, if not, (b) applying the general rule for process claims set out by the *Diehr* Court: “The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence.” *Diehr*, 450 U.S. at 183-184 (quoting *Cochrane v. Deener*, 94 U.S. 780, 787-788 (1877)); and that “Transformation and reduction of an article ‘to a different state or thing’ is the clue to the patentability of a process claim that does not include particular machines.” *Diehr*, 450 U.S. at 184 (quoting *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972)).

The long period of time and the tremendous technological advances that have occurred since the *Cochrane* opinion issued in 1877 justify updating the portion of the formulation concerning “certain substances” to include intangible articles, such as commodity consumption risk and ownership interests, as in this case.

Any additional limitations, such as those in *State Street*, are not justified and should be eliminated. *See* section (5) of this brief.

(3) Whether the claimed subject matter is not patent-eligible because it constitutes an abstract idea or mental process; when does a claim that contains both mental and physical steps create patent-eligible subject matter?

The claimed subject matter in this case is not an abstract idea as discussed above in section (1) of this brief. Further, the claimed subject matter is patent-eligible whether or not it is a mental process because neither 35 U.S.C. § 101 nor applicable Supreme Court precedent exclude from patentable subject matter mental processes or claims that contain both mental and physical steps.

When interpreting a statute, this Court begins with the words of the statute. *Diamond v. Diehr*, 450 U.S. 175, 182 (1981). 35 U.S.C. § 101 (2000) governs whether subject matter is patent-eligible:

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 therefor, subject to the conditions and requirements of this title.

Nothing in the words of the statute excludes from patentable subject matter mental processes or claims that contain both mental and physical steps and no such exclusion should be read into the statute. *Diehr*, 450 U.S. at 182 (when Congress has not expressed the intention to include limitations and conditions, the Court should not read such limitations and conditions into the statute).

Further, there is nothing in the legislative history that would tend to limit Section 101 to exclude mental steps. Indeed, as has been often observed, “. . . Congress intended statutory subject matter to ‘include anything under the sun that is made by man.’” *Id.* at 182 (discussing the legislative history of the 1952 Patent Act).

Thus, there is no basis in the language of the statute or in its legislative history to exclude mental steps from statutory subject matter.

Similarly, the Supreme Court has not made any such exclusion. The Supreme Court in *Diehr* held that the breadth of patent protection is not without bounds:

This Court has undoubtedly recognized limits to § 101 and every discovery is not embraced within the statutory terms. Excluded from such patent protection are laws of nature, natural phenomena, and abstract ideas. See *Parker v. Flook*, 437 U.S. 584 (1978); *Gottschalk v. Benson*, *supra* at 67; *Funk Bros. Seed Co. v. Kalo Inoculant Co.* (1948). ‘An idea of itself is not patentable,’ *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 507 (1874). ‘A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right.’ *Le Roy v. Tatham*, 14 How. 156, 175 (1853). Only last Term, we

explained: “[A] new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E = mc^2$; nor could Newton have patented the law of gravity. Such discoveries are “manifestations of ... nature, free to all men and reserved exclusively to none.” *Diamond v. Chakrabarty*, 447 U.S., at 309, quoting *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, *supra*, at 130. *Diehr*, 450 U.S. at 185.

In this passage, the *Diehr* Court identified the three exclusions from patent protection (laws of nature, natural phenomena, and abstract ideas) and provided examples of each. The Court’s illustrations of laws of nature and natural phenomena were a new mineral, Einstein’s law relating matter and energy, and Newton’s law of gravity. The Court’s example of an abstract idea was a principle, in the abstract, which is a fundamental truth, an original cause, or a motive.

In that same opinion, the *Diehr* Court held that an “algorithm,” which the Court defined as “a procedure for solving a given type of mathematical problem” was an abstract idea not within the boundaries of patentable subject matter. *Id.* at 186. This Court observed that the *Diehr* Court “never intended to create an overly broad, fourth category of subject matter excluded from § 101.” *In re Alappat*, 33 F.3d 1526, 1543 (Fed. Cir. 1994). Instead, the Court intended to explain that “certain types of mathematical subject matter, standing alone, represent nothing more than *abstract ideas* until reduced to some type of practical application.” *Id.* (emphasis in original).

None of the examples recited above exclude mental processes *per se* from being patentable subject matter under Section 101. Certainly, a claim to a mental process that merely reflects an abstract idea, *i.e.* a principle in the abstract, is not patentable subject matter. But a claim to more than a principle in the abstract is patent-eligible.

A claim that is a mixture of mental and physical processes should be held to the same standard. Such a claim is patent-eligible if it is to more than a principle in the abstract.

Further, a claim that is a mixture of mental and physical processes has a stronger entitlement to patentability because the claim must be considered as a whole. *See Diehr*, 450 U.S. at 192 (“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 . . . then the claim satisfies the requirements of § 101”). Holding that a claim is not patent-eligible because some of its elements are mental processes is improperly treating the claim in parts rather than as a whole. *See id.* at 193. (“In order for the dissent to reach its conclusion it is necessary for it to read out of respondents’ patent application all the steps in the claimed process which it determined were not novel or ‘inventive.’ That is not the purpose of the § 101 inquiry and conflicts with the proposition recited above that a claimed invention

may be entitled to patent protection even though some or all of its elements are not ‘novel’”).

Claims that contain both mental and physical processes are patent-eligible if they do not fall under one of the exclusions set out by the *Diehr* Court and if they satisfy the general rule for process claims set out by the *Diehr* Court, as discussed in section (2) of this brief. The *Bilski* claims satisfy those requirements. See discussion of Claim 1 in section (1) of this brief.

(4) 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 Section 101?

No.

The *Diehr* Court’s general rule for process claims requires “[t]ransformation and reduction of an article ‘to a different state or thing.’” *Diehr*, 450 U.S. at 184. The *Diehr* Court did not require that the transformation or reduction be physical or that it be tied to a machine. It could be, as in this case, an intangible transformation, such as a shift in risk or a change in ownership of an intangible article.

(5) Whether it is appropriate to reconsider *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), and *AT&T Corp. v. Excel Commc’ns, Inc.*, 172 F.3d 1352 (Fed. Cir. 1999) in this case and, if so, whether those cases should be overruled in any respect?

Yes.

This Court in *State Street* held that the subject matter claimed in that case, “the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price, constitutes a practical application of or a mathematical algorithm, formula, or calculation, [an abstract idea] because it produces ‘a useful, concrete and tangible result.’” *State Street*, 149 F.3d at 1373 (emphasis added). The *AT&T* court used the same “useful, concrete and tangible result” test in finding the subject matter in that case within the scope of Section 101. *AT&T*, 172 F.3d at 1358.

The “useful, concrete and tangible result” phrase does not appear in Section 101, the legislative history of Section 101, or in any Supreme Court cases that interpret Section 101. Nevertheless, perhaps because it appears more specific, and therefore, easier to apply, than the analysis adopted by the Supreme Court in *Diehr*, it has been adopted by the USPTO as the “general test for patentable subject matter.” BPAI Opinion at 38.

However, the very specificity that may have led the USPTO to adopt the *State Street* test transforms the *Diehr* Court’s analysis of patentability into a difficult formalistic inquiry. The analysis is so difficult that the BPAI wondered aloud in its opinion whether the USPTO should not be relieved of the responsibility of examining claims for statutory matter under Section 101. BPAI Opinion at 8.

The USPTO in its Interim Guidelines¹ has applied its own misdirection and gloss to the “useful, concrete and tangible result” test:

It seems that the ‘useful result’ part of the *State Street* test refers to the ‘utility’ requirement of § 101, which is a separate requirement from patent eligible subject matter, yet this is not questioned by the *Interim Guidelines*. The *Interim Guidelines* define ‘tangible’ as the opposite of ‘abstract.’ 1300 O.G. at 146, which adds nothing of substance or guidance to the abstract idea exception, and no case is cited for the definition. The *Interim Guidelines* define ‘concrete’ as the opposite of ‘unrepeatable’ or ‘unpredictable,’ *id.*, yet we find no dictionary that supports this definition. . . . In our opinion, the terms ‘concrete and tangible’ essentially say the same thing, that the result is not just an ‘abstract idea,’ but is ‘actual and real.’ BPAI Opinion at 40.

This confusion arises directly from the *State Street* test. For that reason, it should be discarded. Analysis under Section 101 should return to the formulation stated by the Supreme Court in the *Diehr* case and described above in section (2).

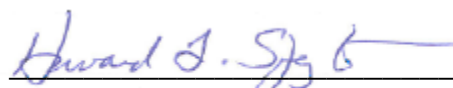
The business method exception to patent-eligibility, which was dismissed by this Court in *State Street*, should not be revived. The rationale expressed in *State Street*, 149 F.3d at 1375-76, continues to apply.

¹ *Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility*, 1300 Off. Gaz. Patent and Trademark Office 142 (November 22, 2005).

Conclusion

For the reasons set forth above, HIPLA respectfully suggests that this Court reverse the BPAI's rejection of the claims and remand this matter to the Examiner for further proceedings.

Respectfully submitted,



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**United States Court of Appeals
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2007-1130 (Serial No. 08/833,892)**

-----)
IN RE RENARD L. BILSKI
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-----)

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April 4, 2008



John C. Kruesi, Jr.

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**United States Court of Appeals
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2007-1130 (Serial No. 08/833,892)**

-----)
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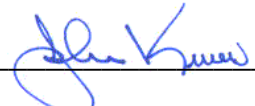
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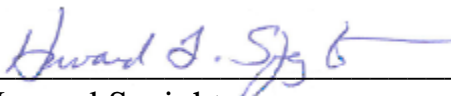
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