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A NEW THEORY FOR PATENT SUBJECT MATTER ELIGIBILITY: A VEBLENIAN PERSPECTIVE

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I. INTRODUCTION

What inventions are eligible for utility patent protection in the United States? The question, as simple as it appears, has been a topic of much heated debate. Courts have wrestled with the issue and have struggled to offer a cohesive and definitive standard.[1] As a result, judicial decisions in this area have varied wildly, particularly with respect to determining what constitutes an unpatentable "abstract idea."[2] Fundamental disagreements remain. Even when ostensibly applying the same standards, judicial opinions reveal a deep, underlying ideological divide about fundamental purposes of patents, the ends they advance, and who should benefit from them. In a practical sense, the most problematic claims for subject matter eligibility analysis are those that raise the perennial question of overbreadth,[3] in which a relatively insignificant (or nonexistent) "inventive" contribution is recited (and therefore a monopoly secured) in relatively broad claims that greatly surpass the scope of the inventive contribution—or simply recite a result rather than the actual solution to the underlying technical problem.[4]

[1] *E.g.*, CLS Bank Int'l v. Alice Corp. Pty. Ltd., 717 F.3d 1269 (Fed. Cir. 2013) (en banc) (per curiam), *cert. granted*, 82 U.S.L.W. 3131 (U.S. Dec. 6, 2013) (No. 13–298).

[2] *E.g.*, *compare* Ultramercial, Inc. v. Hulu, LLC, 722 F.3d 1335 (Fed. Cir. 2013), *with* CyberSource Corp. v. Retail Decisions, Inc., 654 F.3d 1366 (Fed. Cir. 2011).

[3] Bernard Chao, *Moderating Mayo*, 107 NW. U. L. REV. COLLOQUY 82, 89–90 (2012).

[4] Results- or effect-based claiming frequently arises through the use of functional (rather than structural) language, or through the recitation of method steps that relate to the physical world in only a vague, abstract way. It is, nonetheless, a problem that has existed for well over a hundred years, beginning with the introduction of claims in patent applications along with pre-grant examination in 1836. *See, e.g.*, Le Roy v. Tatham, 55 U.S. (14 How.) 156, 173 (1852) ("A patent is not good for an effect, or the result of a certain process, as that would prohibit all other persons from making the same thing by any means

Some key questions repeatedly arise when the patentability of business methods and other nontechnological activities are considered. Will protections of business methods displace technological endeavors, as historically understood? Should the grant of business method patents accommodate economic transitions that are alleged to flow from the so-called "post-industrial" economy, or does the Constitution, statutory language, or judicial gloss preclude patents from extending outside of the realm of "technology," more narrowly defined? Can patents on business methods ever be clearly distinguished from practical technology? These sorts of questions are central to an understanding of the deep ideological divide in the judiciary as evidenced by what are clearly conflicting patentable subject matter decisions. These inquiries illuminate the subtext of many disputes about the proper bounds of patent-eligible subject matter.

The Supreme Court has analyzed exceptions from patent eligibility under the doctrine of "preemption."[5] Yet determining what does and does not constitute "preemption" remains a contentious issue.[6] The lower courts and the U.S. Patent and Trademark Office ("USPTO") still struggle when patents and patent applications recite methods having tenuous links to tangible yet commonplace things like general purpose computers. In this legal quagmire, some degree of clarity might be found through reference to efforts in one of the last places patent attorneys look: the social sciences.

The present paper presents a possible extension of standards for patent eligibility based upon theories developed by economist Thorstein Veblen, who elaborated a dichotomy between

whatsoever. This, by creating monopolies, would discourage arts and manufactures, against the avowed policy of the patent laws.").

[5] *E.g.*, Mayo Collab. Servs. v. Prometheus Labs, Inc., 132 S. Ct. 1289, 1294 (2012); Parker v. Flook, 437 U.S. 584, 595 (1978).

[6] Indeed, it is not clear that judges in lower courts are actually applying the preemption standard at all. *See, e.g.*, Ultramercial, Inc. v. Hulu, LLC, 722 F.3d 1335, 1354 (Fed. Cir. 2013) (Lourie, J., concurring).

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