DISCLAIMERs

1) This paper is written in preparation of a text book about Innovation Science and Patent Law (see the FSTP-Projects Ref. List at its end) – i.e. it is just as all other papers from this series, not self-explanatory independent of its companion papers and is potentially subject to change.

2) As it often refers to e.g. a footnote u) in[xyz], such references have the form ".... [xyz/u)]" – and some of the thus referred to items are repeated here for clarification as learned from feedback.

3) This MEMO is an urgent clarification of •what actually is evidently happening in the CAFC as to "claiming an ETCI" by US SPL and •what this issue's broader context is – both clarifications being derived from observations in a series of events organized by the CAFC.

MEMO: *The Two BIG § 101 Flaws in the CAFC's Intellectual Venture (IV) Decision*
or
The Phenomenon of "US Paradigm Shift Paralysis" in SPL Precedents about ETCIs

Sigram Schindler
TU Berlin & TELES Patent Rights International GmbH

I. *The Two BIG § 101 Flaws in the CAFC's IV Decision*[1.a)]

Before going into the 2 legal errors in the CAFC's *IV* decision of 30.09.2016, this MEMO repeats 2 frequently asked § 101 questions as to "Emerging Technology Claimed Inventions, ETCIs":

1.) "Does the Supreme Court's *Alice* decision clearly define its patent-eligibility ('PE') analysis?" [b)], and
2.) "Does this 'two-step' analysis of the *Alice* decision enable dependably determining an ETCI's PE/nPE?"

The CAFC's *IV* decision implicitly answered both questions by NO – thus causing its two clear legal errors.

Both questions were discussed by panels and the audience in all recent FCBA meetings – in Nashville, DC, Paris, and Stanford – and by opinion leaders of the "old school in patent law" always fueled by ironic skepticism[c)]. Not so R&D managers[c)]: They fueled this discussion by their clear endorsement that both questions already contribute to increase the robustness of patents about ETCIs currently in their pipelines, due to the guidance provided by the CAFC's recent series of decisions in line with the Supreme Court's *Alice* decision.[332,331]

The problem hence tackled by this MEMO is: "Can the CAFC by *IV*-like decisions still void this hope?"[d)].

The answer is NO, there is no such risk! The CAFC's *IV* decision is namely wrong in its interpretation of the Supreme Court's *Alice* decision, and it is wrong also in its interpretations of *IV*'s ETCI specifications[e)].

Both BIG legal failures of the CAFC's *IV* decision are due to its lack of scrutiny – in interpreting both the Supreme Court's *Alice* decision just as the *IV* patents at issue – by simply totally ignoring[f)] explicit wordings in both such documents describing their notionally more subtle but all decisive parts of them. In all such CAFC's board decisions[a)] hence the majority often refuses the refined thinking about ETCIs, which the Supreme Court by its *MBA* framework requires to be practiced. I.e. here: The CAFC here totally ignores such explicit wordings in the

- *Alice* decision, which absolutely precisely specify the meanings of the all decisive key terms "**inventive** [*Alice*] **concept**", "**application of the nature of the** [PE] **claim**", and "**significantly more**" (and using them in the *IV* decision in a totally diffuse layman sense, compared to their clearly different, non-layman and very specific, meanings defined by the ignored wordings in the *Alice* decision), thus inventing a new non-*Alice* analysis, and
- resp. *IV* patent(s) that unmistakably disclose these key terms' – only rationally therein thinkable, though non-trivial – meanings, i.e. of "**inventive** [*Alice*] **concept**", "**application** ... **nature** ...", and "**significantly more**".

These two bullet points thus quite clearly show what the first part of this MEMO's title promised: The two BIG § 101 flaws in the CAFC's recent *IV* decision.

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[1].a This MEMO does not comment on several CAFC Substantive Patent Law ("SPL") decisions also written by Circuit Judge T. Dyk quoted in the *IV* decision, and only briefly on the dissenting opinion by Circuit Judge K. Stoll. Yet it refers to this author's comments on CAFC decisions published recently in[291,332,331], discussing the principally positive development of the relation between the CAFC's PE decisions to the Supreme Court's *Alice* decision.

.b Note that the *Alice* decision nowhere calls its two-step analysis a test: A test must be executable, an analysis may be solely declarative – as it is here.

.c While for example the R&D minded life science panel at the Paris meeting took on a very strong and well-founded "pro-*Alice*" position, in particular as to the above first question, its audience was not convinced of it – a split that similarly had occurred previously in Nashville as to the related § 112.f question[271], whether the Supreme Court implied by its *MBA* framework based claiming the existence of layers of abstraction. This split was evidenced even sharper at the (small) DC and (large) Stanford meetings, where most of the pertinent panelists a priori seemed to agree with their audiences in their deep dislike of the PE analysis of the Supreme Court's *Alice* decision and accordingly of the increasingly concurring[331,332] CAFC decisions.

These observations lead to a clear conclusion: The carriers of these retrospective concerns are the former opinion leaders in developing patent law as just another public administration law – increasingly disregarding that it is primarily supposed to unfold society's potential of innovation, as John Duffy showed in his "essay" about the claiming issue in 35 USC SPL.[314, 330,331,334]

.d D. Kappos[341] even suggests that patents need not be precise and that the ups and downs as to the PE question are of marginal significance. But both suggestions diametrically contradict any investor's view for several reasons: First of all, as thus the robustness of their patents – hedging their enormous investments – cannot be warranted. Also other commentators vastly overestimate[342,343] the negative impact of this *IV* decision by the CACF. Evidently none of these comments has recognized that the Supreme Court has performed with its *MBA* framework a clear paradigm refinement[335]: From highly metaphysical to highly rational/scientific SPL precedents as to ETCIs – and mankind has never reversed these kinds of paradigm shifts.

.e This MEMO comments only on the decision about the •'142 patent, as the •'610 patent has already been commented on correctly by Circuit Judge K. Stoll – though unnecessarily laboriously, instead as in[300] on 27.07.2016 directly leveraging *Alice,* why/that the '610 patent also meets the *Alice* decision's "significantly more" requirement the "*Alice* way" (indeed being indispensable for guaranteeing that the '610 patent is not unlimited preemptive[e.g.332] and hence threatening the US NPS as a whole) – and as commenting on the •'050 patent is superfluous after these '142/'610 comments.

.f There are further deviations from the Supreme Court's SPL interpretation by *Alice* and consequentially also its *IV* ETCIs' interpretations than these total omissions, which need not be considered here, because of the two serious legal errors caused by them. These further deficiencies – sooner or later by the CAFC also considered as legal errors – e.g. not starting the analysis of an ETCI by its complete claim interpretation based on its inventive concepts – are caused by not determining these up front, as explained in[e.g.244,300,301,332,332].

II. *The "US Paradigm Shift Paralysis" in SPL Precedents about ETCIs*

But this MEMO's headline also promised to sketch the in psychology well-known phenomenon called "paradigm shift paralysis", broadly discussed in the mid-60s.[335] It seems to be the true reason, why so many highly qualified US experts in patent business, also of the USPTO, show that much aversion against the Supreme Court's *MBA* framework[1.c)/1.d)] – and consequently can't see how to draft legally absolute robust ETCI patents, although this is already since months unquestionably clarified.[2.a)]

The Supreme Court's *Mayo* decision described the reason for the need for this paradigm shift: After the advent of emerging technologies and hence ETCIs, and since US society became aware that its wealth depends on the innovativity provided by them – the socioeconomically beneficial ones are long-time cutting-edge R&D based and of enormously high financial risks, both of clearly increasing trends – it is evident that Substantive Patent Law ("SPL") must be capable of very robustly protecting such ETCIs, in spite of their being model-based[b)]. The Supreme Court hence with its *MBA* framework paved the way for achieving this crucial patent protection objective for ETCIs, not achievable by classical claiming.[244]

This in turn requires, in reading/writing in natural language (e.g. English) and dealing with ETCIs a conciseness and completeness, warranting this invulnerability of patent protection[1.d)]. Assertions of this type have been investigated since the emergence of Analytic Philosophy. It teaches that of a compound statement about an ontology – e.g. veri-/falsifying an assertion defined over it – must be know where/when it uses this assertion's meta alternatively its object language, otherwise a correctness statement about this assertion is impossible[c)].

As to answering the above two questions this means: Their ontology is defined by "SPL testing of ETCIs"[c)], the first one's answer is based on this ontology's/assertion's meta language (describing primarily the Supreme Court's refined SPL interpretation as to testing ETCIs, i.e. dealing with them accordingly), and the second one's answer is based on this ontology's/assertion's object language (dealing with ETCIs' specification primarily, here how it is made up of its inventive concepts), both languages vastly plain English.

While this also applies to the Supreme Court's *Mayo/Alice* decisions, recognizing their uses of the meta resp. of the object language is trivial in them. By contrast, the CAFC's *IV* decision is not aware of these two language categories of this ontology at issue and hence its statements seemingly pull together in a blurring way, i.e. mix up, the meta and object languages of both, of •the *Alice*'s two-step analysis and •the resp. *IV* ETCIs.

The only notionally clean way of resolving the problem of testing these ETCIs under the refined SPL – i.e. of avoiding this confusing logical spaghetti – would have been to start the SPL tests of the *IV* ETCIs by meticulously specifying *Alice*'s two-step analysis[1.b)] for all ETCIs' PE tests, and specifying separately thereof equally meticulously the individual *IV*'s ETCIs, as outlined in Section I – which the CAFC's *IV* decision both doesn't do, as Section I explained. Then the incompleteness of the CAFCs (and USPTO's) understanding of the *Alice* two-step analysis, just as that of *IV*'s ETCIs (resp. ETCIs of USPTO's customers) would have become immediately evident, which would have made (would make) superfluous the above scientific search by the object-/meta-language approach for where/when which language is being used, for avoiding misunderstandings/ confusions in the resp. decisions at issue.

Here, any other scientific approach would have delivered the same result, yet the object-/meta-language analysis seems to show best the ease of fleeing into the comfortable paradigm shift paralysis. In spite of its temptations, this kind of paradigm shift paralysis – trying to escape the inconveniences (of exact-/precise-/completeness) coming with a knowledge area's scientification, here SPL – has never prevailed, as history teaches.

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[2] .a And worse: For that long time district courts and the USPTO didn't and don't pick up the refined SPL understanding that the Supreme Court by its *MBA* framework has put forward and that meanwhile is broadly supported also by CAFC decisions – except those addressed in[1.a)] – and instead keep producing untenable PE decisions about ETCIs by using the for ETCIs notionally far too coarse and incomplete classical SPL understanding. This enforced/persuaded the distorted misrepresentation of the extremely smart *Alice* two-step analysis as the disastrously misleading IEG's two-step test.

Here also this author is to blame: He, too, initially did not become aware of his sloppiness to ignore decisive parts of the wording of the *Alice* decision, as early USPTO communications insinuated. He offers his apologies. Yet, immediately after noticing this error, he tried to communicate it broadly as paradigm refinement that has implicitly been launched already by the Supreme Court's preceding pertinent decisions (i.e. in *KSR/Bilski/Mayo*) – without any success, as this "paradigm shift paralysis" outlined here has predicted, which he refused to acknowledge as being of pre-Aufklärung[332,331] quality.

Thereby the USPTO is occasionally not alone: In the CAFC in the last years fallbacks to it occurred with its faulty *Myriad* decision[251] – even after the paradigm shift had basically been picked up by it by its *DDR* decision, which basically met the *MBA* framework requirements. On 30.10.2016 this reoccurred, with the legally seriously faulty *IV* decision, after the series of Supreme Court consistent CAFC decisions in e.g. *Enfish/…../BASCOM*.

.b – implying that an ETCI is vastly fictional, insofar invisible and intangible, which means that performing its specification just as its claim interpretation and construction requires a much higher degree of scrutiny, i.e. of exactness & preciseness & completeness, than then known, i.e. prior to the Supreme Court's *MBA* framework.

.c This MEMO now subsumes the notional discrepancies – between the Supreme Court and the CAFC in its *IV* decision and its other analogous decisions addressed above, and basically identified by the two above questions – in colloquial language under the two generic notions used for about 100 years to this end, namely an ontology's "meta language" and "object language".

Taking as the ontology exemplarily Geometry (being sub-ontology of Mathematics), its object languages would deal with objects/notions such as spaces/dimensions/circles/connections/projections/… interspersed with natural language terms gluing them geometrically together to compound objects, while their meta language would deal with describing in natural language (and interspersed object names) managing these objects by identifying their elementary properties and/or definitions/axioms/… and such management tools.

While in this example it is trivial to recognize, in an assertion, when/where object language resp. meta language is used, the situation is much more complicated if an ontology is used, in which both languages of the assertions defined over it vastly use the same natural language – as it is here.

.d – as compared to everyday ontologies being tiny and enabling defining over it only the assertion defining it.

The FSTP-Project's Reference List

FSTP = Facts Screening/Transforming/Presenting (Version of 26.10.2016*))
Most of the FSTP-Project papers below are written in preparation of the textbook [182] – i.e. are not intended to be fully self-explaining independently of their predecessors.
Many of the MEMOs quoted below will be elaborated on only for this textbook.

[2] AIT: "Advanced Information Technology" alias "Artificial Intelligence Technology" denotes cutting edge IT areas, e.g. KnowledgeeRepresentation/Description Logic/Natural Language (NL)/Semantics/Semiotics/System Design, just as MAI: "Mathematical Artificial Intelligence", the resilient fundament of AIT.

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