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**In the  
Supreme Court of the United States**

**SIGRAM SCHINDLER  
BETEILIGUNGSGESELLSCHAFT MBH,**  
*Petitioner,*

v.

**CISCO SYSTEMS, INC.,**  
*Respondent.*

**TERESA STANEK REA, ACTING DIRECTOR,  
UNITED STATES PATENT AND TRADEMARK  
OFFICE,** *Respondent.*

**Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

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July **xx**, 2014

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**QUESTION PRESENTED**

“Does the US Constitution, for a legal decision based on 35 USC §§ 101/102/103/112,

- require using the uniform refined claim construction set forth by the *KSR*, *Bilski*, *Mayo*, *Myriad*, *Biosig* and *CLS* decisions of this Court, which overcomes the shortcomings of the classical claim construction as to emerging technology inventions, or
- entitle the PTO, a district court, and the CAFC to continue using the classical claim construction and its deficient “broadest reasonable interpretation, BRI” of a claim, or refining the BRI on its own ‘in the light of the above decisions of this Court’, as to needs of emerging technology inventions.

**PARTIES AND RULE 29.6 STATEMENT**

Pursuant to this Court's Rule 29.6, counsel for petitioner certifies that:

The Sigram Schindler Beteiligungsgesellschaft mbH ("SSBG") has no direct parent companies. No publicly held company owns 10 percent or more of SSBG.

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### **OPINIONS AND ORDERS BELOW**

The opinion of the court of appeals is provided in the attached appendix (App. A., *infra*, 1a-27a), just as the opinion of the PTO's Board of Patent Appeals (App., *infra*, 28a-77a).

### **JURISDICTION**

The judgment of the court of appeals was entered on February 21, 2014. SSBG's timely petition for rehearing en banc was filed on April 18, 2014. The CAFC rejected it on 27.05.2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

Sections 101, 102, 103, and 112 of the Patent Act, 35 U.S.C. §§ 101, 102, 103, 112 are provided in the attached appendix. (App., *infra*, 78a-84a).

## I. THE KEY ISSUES OF THIS PETITION

This petition presents to this Court the need to clarify that its *Mayo/Biosig/CLS* decisions terminated a disastrous anomaly, outlined by the above question. It arose in the National Patent System (NPS) over the years and is outlined as follows.

Normally, district courts, ITC, CAFC, and the PTO are supposed to apply this Court's interpretation of 35 USC §§ 101/102/103/112, i.e. of Substantive Patent Law (SPL). Yet, uncertainty exists among the community of patent practitioners – also of these authorities – as to this Court's above 3 decisions: ●) Are these part of the just outlined scheme “this Court interprets the U.S.C., the other authorities consistently practice such interpretations”, or ●) are they views of ‘generalists’ on SPL [85], from which the other authorities should derive claim constructions as needed by their specific businesses – thus encouraging these other authorities to strive on their own<sup>13)14)</sup> for SPL precedents.

The result: an NPS anomaly<sup>a)</sup> – simplified, a “Broadest Reasonable Interpretation, BRI” Schism, in truth a grave “ClaimConstruction” Schism, too<sup>8.a)</sup>.

I.e., there are two key issues: The BRI Schism between CAFC and PTO, and the ClaimConstruction Schism between this Court and the CAFC (and PTO) – both determinative especially for “emerging technology cases”, e.g. this Petition’s ‘902 case.

Crucial in the CAFC’s ‘902 decision is that it, strangely, is based on the PTO’s broadest (allegedly) reasonable interpretation, BRI<sup>pto</sup>, of the ‘902 claims. Namely, by *Biosig*, this Court clearly qualified the BRI<sup>pto</sup> as contradicting 35 USC (see Section IV). Thus, this Petition shows the BRI Schism is obsolete – and hence the CAFC’s ‘902 decision untenable.

Yet, this Petition shows this untenability also by the ClaimConstruction Schism<sup>o</sup> between this Court and the CAFC – about getting the patent-eligibility exceptions under control as required by *Mayo*, now by *Biosig* and *CLS*, too (see Section V). The CAFC refused to see a ClaimConstruction Schism. In this ‘902 case, too. But, it is determinative also in the ‘453 case [82]. Both cases are namely based on the “*Mayo* claim construction”. Thus, by explaining the fate of the ClaimConstruction Schism in this ‘902 Petition, SSBG prepares already its ‘453 Petition to this Court, too<sup>15</sup> – due to [83].



This '902 Petition mirrors that structure:

- I. identifies the two key issues of this Petition.
- II. provides a survey about the BRI Schism, this Court's stepping in by its *Mayo* decision, and the resulting ClaimConstruction Schism.
- III. shows that a claim(ed invention)'s, CI's, scope depends on taking its BRI<sup>pto</sup>, BRI<sup>phi</sup>, or BRI<sup>mayo</sup>.
- IV. explains the Blow of *Biosig* on BRI<sup>pto</sup> based CIs, thus ending the BRI Schism.
- V. explains the Blow of *CLS* on BRI<sup>phi</sup> based CIs, thus ending the ClaimConstruction Schism.
- VI. presents the '902 invention, its proceedings up to the CAFC's '902 decision, and the Blows the latter encounters by *CLS/Biosig*.
- VII. clarifies aftermath of *Biosig/CLS*.
- VIII. draws conclusions from the before said.

By this Petition SSBG asks this Court for confirming the framework for SPL precedents, it set forth by its *KSR/Bilski/Mayo/Myriad/Biosig/CLS* decisions – and SSBG scientifically researched since *KSR*, as implicitly invited it by these decisions<sup>7.a)</sup>.

<sup>a)</sup> In the CAFC and the PTO finally a process has begun of reconciling their decision making with this framework. SSBG hopes the scientific insights this Petition presents – achieved by AIT [2] research on these decisions' "SPL precedents reasoning" problems – would help overcoming them and bringing the PTO and the CAFC onto the top of state of sciences supporting by AIT [2] knowledge driven processes, here: of mathematical KR [3] modeling SPL precedents.

All relevant information not presented here, but only referred to<sup>6)</sup>, is available on [www.fstp-expert-system.com](http://www.fstp-expert-system.com). A reference to it may identify a sect./fig./ftn. therein<sup>6)</sup>. [91] will provided a more complete presentation, due to [83].

## II. THE BRI & ClaimConstruction SCHISMS

“Claim interpretation”<sup>8.a)</sup> is an important SPL term/notion. This term’s precise meaning [78<sup>13.a)</sup>] is subject to the below outlined two schisms.

Precisely/Scientifically: This term’s meaning is depending on the properties of two tools indispensable for interpreting a claim, independent of each other. Namely, on the extent of its invention depending “technical semantics association basis” for this claim’s terms (this extent being subject to the “BRI Schism” between the CAFC and the PTO), and on the specifics of its invention independent “legal semantics association basis” for this claim as a whole, always being 35 USC SPL (its specifics, determined by this Court’s interpretation of its §§ 101/102/103/112, subject to the “ClaimConstruction Schism” between this Court and the CAFC). For the first/second Schism, see Sections V resp. VI.

In the second half of the 20<sup>st</sup> century, the BRI anomaly arose incidentally, stimulated by the PTO and tolerated by the CAFC as a minor issue. In the first decade of the 21<sup>th</sup> century, due to emerging technology (“**ET**”) inventions, it led to controversies

in the CAFC – e.g. *Bilski/Mayo/Myriad/CLS* – (mis)taken as being caused solely by their new kinds of patent-eligibility or definiteness issues, ignoring that for clarifying and avoiding such controversies a refined claim interpretation resp. claim construction is indispensable. This Court noticed this need and refined by *Mayo* its earlier interpretation of 35 USC §§ 101/ 102/103/112 for determining what these 4 §§ comprise as to meeting ET claim(ed invention)s (“CIs”), ET CIs ET, needs – being challenges unknown from classical technology CIs<sup>8.a)</sup>.

The uncertainty in the CAFC about how to decide on such issues – caused by ET CIs – increased, when this Court asked the CAFC to reconsider some of its ET CI decisions “*in the light of Mayo*”. *Mayo* had provided guidance for how to refine the classical<sup>8.a)</sup> claim construction of an ET CI for identifying its patent-eligible inventive concepts, for

<sup>8)</sup> For preserving the integrity of the presentation of the legal argument chains, the “judicial technique” explanations of this brief are put into footnotes. A reference to a footnote in square brackets goes to this footnote in the paper, to which the reference is attached. Footnotes repeated here, either have here an improved wording or are necessary here for understanding this brief. I.e. None of the following footnotes provides just background or knowledge belonging to academic general education – i.e. were dispensable, here.

recognizing, what of this CI is patent-eligible (and potentially patentable)<sup>1.a)</sup>.

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<sup>1</sup> **.a)** *Mayo* – in *CLS* reading – proceeds in its refined claim construction<sup>8.a)</sup> for a given ET CI, the other way around as the FSTP-Test<sup>28.b)</sup> – being the concise and complete test of a CI for satisfying SPL, as Section V will show. I.e., *CLS* first determines the CI’s “patent-ineligible building block of human ingenuity”, before asking for the CI’s “patent-eligible inventive concept”; if there is one, the latter legally transforms CI into a patent-eligible – and potentially patentable – application of the patent-ineligible building block therein.

**.b)** There a logical/notional implication by *Mayo/CLS*, the FSTP-Test realizes: The need to disaggregate the CI’s “compound” building block and inventive concept, each into a conjunction of “elementary” ones [5,6,7,10,188,19,58]. I.e.: *Mayo/CLS* created both these notions as compounds, but the analysis of their intricacies as to the SPL requirements stated by *Mayo/CLS* is logically impossible without this disaggregation, as explained by the early FSTP-publications – and checked by the FSTP-Test.

*CLS* indicates this need of testing the CI on the elementary level of notional resolution by talking about “elements” of claims, whereby the grouping of elements into compounds must be preserved over the disaggregation, in *CLS* achieved by “ordered combinations” of elements. The “Mathematical SPL Precedents Model” provides the precise meanings of all these new terms and explains them in detail<sup>9)</sup> [5,6,7,25,63,73,58,78,90].

**.c)** This *Mayo/CLS* terminology for a CI’s refined claim construction<sup>8.a)</sup> is suitable “a priori” to construing it, i.e. as needed by patent practitioners when starting analyzing a CI. On the final stage of this analysis this terminology would be inappropriate. I.e.: When getting precise about a CI’s claim construction, this presentation is terminologically/notionally far too relaxed [58,73,90]. Hence at least the resequencing<sup>1.a)</sup>/disaggregation<sup>1.b)</sup>/renaming<sup>2.a)</sup> – semantically changing nothing but improving, eventually by the FSTP-Test<sup>8.b)</sup>, the “a posteriori” notional clarity of the CI’s claim construction<sup>2.a)/b)8.a)</sup>.

The CAFC and the PTO totally ignored *Mayo's* such guidance to a refinement of the classical claim interpretation for deciding on a **CI's** patent-eligibility. Insisting that *Mayo* deals solely with patent-eligibility and nothing else, both authorities refused to notice that *Mayo* unmistakably states: "A CI is patent-eligible if and only if it embodies a nontrivial patent-eligible inventive concept" (now confirmed by *CLS*) – telling them, this Court required their classical claim construction<sup>8.a)</sup> to be adjusted accordingly.

The CAFC obstinately preserved its claim interpretation doctrine as it was: In spite of repeated advice [85-88,10,34,40-42,44] stating that AIT [2] sees this Court on the track of leveraging on the amenability of SPL precedents to scientification and hence that its *Mayo's* thinking would prevail<sup>ω)</sup> – while the CAFC's classical claim construction (and alike international thinking) are too deficient to survive<sup>8.a)</sup>.

Not only that the CAFC's classical claim interpretation doctrine differed from that of the PTO (preserving its own such doctrine, too): much worse, it differed from that of this Court. Ignoring all respective information, the CAFC undertook absolutely no

effort – although being prompted by this Court to proceed this way – to refine its claim interpretation<sup>8.a)</sup> accordingly. It thus caused the “**Claim Construction Schism**” between this Court and the CAFC in 2012.

Note: Both authorities, occasionally mentioning *Mayo*, totally avoided the use of *Mayo*'s decisive term/notion “inventive concept” – being totally illogical, as a forerunner of it, the term/notion “claim term” has been created by the CAFC's *Phillips* decision<sup>10.c)</sup> and thereafter mentioned in the PTO's BRI guideline [14], whereby the PTO totally ignored this forerunner term/notion, in substance, and thus had caused the “**BRI Schism**” between CAFC and PTO (as explained in detail in [78p.5-6]) earlier already in 2005.

Today, this Court's *Biosig* decision has brought the BRI Schism to an end, just as its *CLS* decision does with the Claim Construction Schism (and also the BRI Schism, independently of *Biosig*). Both terminations are explained in detail in what follows.

In total: By *Mayo/Biosig/CLS* this Court refined its earlier interpretation of §§ 101/102/103/112 such that it now enables a uniform/precise/complete test

of both kinds of CIs<sup>2.d)</sup> for their satisfying these 4 §§<sup>2)3)</sup>.

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<sup>2</sup> .a) The FSTP-Test also systemizes the terminology, as stereotypically done in Mathematics for any new theory, by denoting the patent-ineligible building blocks as “patent-ineligible (inventive) concepts”, as *CLS*. CLS decision, p.10. Any *Mayo/Biosig/CLS*-Test then must start, just as the FSTP-Test, with identifying of a CI all its elementary inventive concepts, patent-eligible just as -ineligible ones. This disaggregation/refinement cannot be driven ad infinitum as it ends in *posc* and non-disaggregatable non-eligible concepts. But disaggregation stops already above *posc*<sup>8.a)</sup> before generating depending of each other refined inventive concepts, just as the FSTP-Test filtering out only independent ones.

.b) In its *CLS* decision this Court turned explicit – by its elaborations on the requirements stated by *Mayo* to be met by a CI – its in *Mayo* still implicit §§ 101/102/103/112 requirements to be met by a CI in the claim construction for it.

Thus, by *CLS* this Court confirmed, what it had already recognized by *Mayo*: That the classical §§ 101/102/103/112 interpretation is too coarse for basing on it a broad consent how to test precisely/concisely/completely ET CIs under these 4 §§ – although this classical interpretation today underlies all such decisions of district courts, yet without enabling them to proceed, therein, in a commonly accepted way, about which they clearly repeatedly complained [84] – and that this Court hence refined already by *Mayo* its classical interpretation of these 4 §§ such that it provides to district courts this missing way for SPL testing of ET CIs.

.d) The FSTP-Test separates both kinds of CIs<sup>2.a)</sup>.

.e) For avoiding an important potential misunderstanding: This Petition doesn't consider claim interpretation “while its examination during patent application is still in progress”. Applying, within the initial phases of examining a patent application the “heretic” *BRI<sup>pto</sup>* – as deviating from the by the CAFC ordered *BRI<sup>phi</sup>* – is reasonable, as during this phase not a clear understanding of the scope of the CI but an improvement by the applicant of a claim wording is at issue, for thus excluding its false interpretation by the *posc*.

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**3 .a)** The mathematical definition of the notion “inventive concept”, discussed in detail in [5-11,36,63], is a dramatic simplification of the powerful notion of "concept" in DL/KR [2-4]. This *Mayo* notion here is customized for modeling Highest Courts' SPL precedents, nothing else, while the DL/KR notion of “concept” serves for general purpose modeling recursively compound concepts by simpler ones.

By contrast, SPL precedents proceed the opposite way: Precisely modeling the properties of the elements of a CI requires disaggregating its initially compound inventive concepts (modeling compound such properties) into elementary inventive concepts (modeling elementary such properties) [5-11], as §§ 112/101/102/103 require any such property to be clearly defined, e.g. to be definite, useful, independent (see the FSTP-Test). This is logically impossible with compound properties – by SPL precedents today not yet noticed.

**.b)** Three preconditions are recognized and assumed as fulfilled by the CI to be tested, the first one also by the NPS. It got to be **●** of FFOL type (“finite first order logic”), **●** non-pathological (disaggregating its compound inventive concepts into independent elementary inventive concepts is always possible and always delivers isomorphic generative {inC}) [58], **●** specified consistent to its application<sup>1.a)</sup> [5,63,73,90]

For the first two of them a counter example CI has not been encountered, hitherto, and it is extremely unlikely that it practically exists, at all – though theoretically it seems difficult to exclude this. The third precondition comprises the insight that – even if a CI's specification explicitly discloses the problem to be solved by it (see the NAIIO test<sup>8.b)</sup>) – the CI may be “preemptive” in a more sophisticated way than today understood [5]. This question is currently investigated [90].

**.c)** Finally, the only way of guaranteeing that the *Mayo* thinking is not logically flawed (as is the classical claim construction thinking by its incompleteness) and that no assumption is made therein without being aware of it, is to mathematically model this thinking and its application<sup>9)</sup> [63,73,90] – as all experience shows that such deficiencies, if they exist, also strike practically (“Murphy’s law”).



### III. A CI's SCOPE DEPENDS ON ITS BRI

The notion of the term “scope(CI)” is crucial for 35 USC: For determining whether another invention, CI\*, violates CI’s patent right by belonging to scope(CI), which requires determining first this CI’s meaning precisely – by construing its refined claim construction based on Mayo’s inventive concepts<sup>4</sup>), as described by the FSTP-Test<sup>8.b</sup>).

With its *Biosig* decision this Court defined, for a CI and both its pre- and post *Mayo* presentations, what constitutionally the relation is between the meanings of the terms “scope(CI)” and this CI being “definite” – fortunately, as hitherto both fundamental terms/notions often are expected to enable, for a CI, the simplification of its interpretation<sup>5.a</sup>), as shown by Amicus Briefs this Court received as to the term/notion “definiteness” of a CI.

By contrast to them, SSBG’s Amicus Brief [58] analyzed both notions, if described by *Mayo*’s inven-

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<sup>4</sup> For the ‘902 patent, [41] describes the main inventive concepts of its CI for didactic purposes in a metaphoric language, as the CAFC’s earlier decisions clearly indicated that it had difficulties to grasp the meaning of *Mayo*’s new term “inventive concept”<sup>1)2)</sup>, explained in [18,19] – publicly hinting at the philosophical explanation of this notion in [74.a)].

tive concepts<sup>5.b)</sup> – which led to defining the *Mayo* based notion of scope (determined by the FSTP-Test), identical to what is implied by *Biosig*.

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- <sup>5</sup> .a) – which by constitution does not exist [58] –  
 .b) in a way enabling defining the notion of “preemption”  
 .c) The wordings of all post-*Phillips*<sup>10.c)</sup> versions of the PTO’s BRI guideline [14] misrepresent *Phillips* as totally ignoring its key limitation over the BRI<sup>pto</sup> – being the “claim term interpretation limitation”<sup>8.a)</sup> of *Phillips* [78] – and pretending the BRI<sup>pto</sup> were precedential.  
 .d) While any claim interpretation trivially is a broadest one, the BRI of a CI yields several different inventions, if used with different reasonablenesses. A CI’s BRI with a sole reasonableness also may yield different inventions and/or interpretations [58,63,73] – for simplicity skipped here.  
 .e) The precedential *Phillips* decision is omitted here. As it explains best the emerging of this BRI Schism, it is elaborated on in detail in [78.p.5-6].  
 .f) For very dogmatic thinking, by the *Phillips* decision the CAFC deviates from the case law doctrine – and the more the Supreme Court by *KSR/Bilski/Mayo/Myriad/Biosig/CLS* – as all these decisions reduce, for a CI, the interpretation of its claim terms to the meanings disclosed for the posc<sup>8.a)</sup> by this CI’s specification (as of CI’s interpretation in its prosecution history). But, 35 USC and early Supreme Court decisions don’t mention such reductions in claim interpretations. Hence this thinking allegedly requires these meanings to be those the posc knows, often broader than those the CI uses.

This thinking is irrational, as clinging to the originally ill-defined notion of posc<sup>8.a)</sup>. In the above decisions this “undecidability deficiency” that the original posc definition imports is reduced to a commonly/practically accepted degree by limiting posc’s knowledge to what is disclosed for it by the CI’s specification (read in the light of its prosecution history at its priority date), i.e. a finite set. CI’s specification thus limits the “elements’ semantics allocation basis” to the CI’s inventive concepts (usually derived from the CI’s claim terms as of *Phillips*) to a finite and hence clearly definable

To begin with: The usually assumed notion of the term “scope(CI)” is very intuitive but fuzzy, as defining: “For a CI, its scope(CI) is the set of all CI\* it comprises.” – whereby the meaning of the term “comprise” remains vague, if it is left unclear how to figure out, whether CI\* is comprised or not<sup>6.a)</sup>.

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set used in<sup>8.b)</sup> (as AIT always proceeds in such situations).

In sum: The original notion of “posc” is ill-defined, as its knowledge is defined by an “all quantor” on an indefinite set, here meaning its undecidable – researched by Turing et al. This undecidability is removed here by limiting posc’s knowledge to the finite, i.e. verifiable, set of CI’s disclosures.

**.g)** Just for clarity: Thus the risk of “over-claiming” the CI is excluded by the FSTP-Test, too, namely by its NAIO test.

- <sup>6</sup> **.a)** fuzzy, as the term “comprise” has different meanings, depending on the different meanings of the term “BRI”. Often this meaning is not operational, but just declarative.
- .b)** The extent of this difference – between the meanings or the scopes of a CI caused by such limitations, and hence the “impact” alias “blow” on a court’s decision – is depending on whether this CI deals with a classical or emerging technology invention. In the former case, notional ambiguities of a CI don’t exist as most of its elements’ properties are physical/visualizeable (implying that these differences between both interpretation doctrines often are small or not existing at all), while in the latter case many of its elements’ properties are invisible/intangible/non-physical, hence their description and/or understanding often imprecise and/or incomplete, implying that said differences often are tremendous. Classical claim interpretation, totally based on the tangibility/visibility of their inventions, evidently did not really have this problem.

Ftn<sup>9)</sup> briefly discusses the fundamental question, what the challenges are coming along with emerging technologies.

**.c)** not yet as fine that<sup>8.a)</sup>  $BRI_{Mayo} = BRI_{fstp} = BRI_{Biosig/CLS}$ .

### III.A The Pre-Mayo Two Fuzzy Notions of “scope(CI)”

Here, the fuzzy classical notions of scope(CI) are shown, first, resulting from its above fuzzy definition and that of a classical claim construction. This enables understanding that this Court’s *Mayo/Biosig/CLS* decisions are really groundbreaking.

Since *Phillips*<sup>5.e)</sup>, the above BRI Schism allocates to a CI two different meanings (and hence different scope(CI)s), depending on the authority – the PTO or the CAFC – interpreting the CI by means of its authority specific BRI. I.e.:

- The PTO – broadly trusted by the public, in particular by the crowd of patent lawyers – determines by [14] a scope<sup>BRIpto</sup>(CI) by its PTO specific BRI of a CI, called “**BRIpto**”.
- The CAFC defines in *Phillips* – by very good reasons [78??] – a refined meaning of the BRI<sup>pto</sup>, called “**BRIphi**”, thus determining a tighter scope<sup>BRIphi</sup>(CI)  $\subseteq$  scope<sup>BRIpto</sup>(CI)  $\forall$  CI.

In other words: The term “reasonable” in both BRI is given a different meaning by both parties:

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**.d)** – though the CAFC is much less influential on this specific public, first of all striving for getting its patent applications granted by the PTO, whatsoever it defines its BRI<sup>pto</sup>.

- One reasonableness is ‘since ever’ defined by the PTO BRI guideline [14], App. F., 178a. But, this alleged reasonableness encourages oversimplifying claim interpretation of ET CIs, potentially rendering them totally unreasonable, thus contradicting the socio/economic concerns of the NPS this Court reminded of by *Mayo*.

Nevertheless, the PTO clings to the BRI guideline [14] and takes it as the basis of any other §§ 101/102/103/112 PTO guideline.

- The CAFC had recognized pretty early this intolerable deficiency of the BRI<sup>pto</sup>, e.g. if the CI’s specification or even the wording of its claim uses a term, which outside of the CI has also a meaning different from the one used by this CI, e.g. a broader one – what often occurs with ET CIs. Then the BRI<sup>pto</sup> guideline encourages/insinuates (why explains [78.p.5-6]) to take into account this ‘extrinsic’ claim term’s meaning, too, even if – as the *posc* recognizes – the CI doesn’t work at all with the extrinsic meaning<sup>12</sup>).

The CAFC thus increased by its *Phillips* decision the reasonableness of a CI’s BRI<sup>pto</sup> by requiring its claim terms’ interpretations to be limited to

meanings used by the CI<sup>6.b)</sup>.

But, due to the mentioned very high reputation of the PTO and<sup>5.b)</sup> it succeeded to establish, in the US NPS, this anomaly alias “**BRI Schism**” as to the competence of legally determining the meanings of 35 USC SPL terms, especially of the term “claim interpretation”. The huge seize of its negative socio/economical impacts is known [20,67,76].

Circuit Judge K. O’Malley commented on this BRI Schism by asking the PTO directly/publicly [21]:

*“[D]oes it really make sense to have different tribunals considering patent litigation yet not have them all operating under the same standards for claim construction? Would it not make sense to have the PTO use the actual construction of the claims of an issued patent during re-exam – as do the courts and ITC – rather than a hypothetical “broadest reasonable” construction? It certainly would make it easier for us as a reviewing court to be able to apply one set of standards to all these IP tribunals.”<sup>12)</sup>*

Yet, applying the BRI<sup>phi</sup> to an ET CI still leaves serious questions unanswered. In particular, the BRI<sup>phi</sup> does not – and by its *Phillips* definition, the BRI<sup>phi</sup> logically cannot – provide a rationale for deciding whether this CI is patent-eligible or not.

The constitutionally foreseen reaction of this Court by its unanimous *Mayo* decision – on this intolerable anomaly in SPL precedents – requires to take the only thinkable [74.a)] way alias rationale for overcoming, for a given CI, this specific claim interpretation deficiency of the **BRIPhi**: Namely, to define for this CI a further refined claim construction, excluding this deficiency, the way hinted at by *Mayo*<sup>7)</sup>. For the resulting “**BRImayo**” holds, by definition of the notion “inventive concept” (implying it necessarily is a refinement of *Phillips*’ “claim term”),

$$\text{scope}^{\text{BRImayo}}(\text{CI}) \subseteq \text{scope}^{\text{BRIPhi}}(\text{CI}) \vee \text{CI}^{4.a)4.b)}.$$

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<sup>7</sup> .a) see [68], e.g. p. 28, JUSTICE BREYER:  
*„.... But I think it’s pretty easy to say that Archimedes can’t just go to a boat builder and say, apply my idea. ... Now we take that word ‘apply’ and give content to it.  
 And what I suspect, in my opinion, Mayo did and Bilski and the other cases is sketch an outer shell of the content, hoping that the experts, you and the other lawyers, and the -- circuit court, could fill in a little better than we done the content of that shell. ...  
 Now, will you at some point in the next few minutes give me your impression of, if it were necessary to go further, what could the right words or example be?”*

.b) [78<sup>3)</sup>] explains, why this hope<sup>7.a)</sup> – which manifesting itself in all decisions *KSR*... /*CLS* of this Court – could not be fulfilled by its “exclusively legal” environment, yet can be fulfilled by AIT [2], e.g. by SSBG with its strong AIT background [78<sup>3.b)</sup>, 74.a), 2], evidently worldwide the only such party, strangely.

Yet: *Mayo* didn't explicitly define an operational "*Mayo-Test*", as indispensable for determining for a given CI its refined claim construction<sup>8.a)</sup>.

With the classical claim construction – based on the BRI<sup>pt</sup> or the BRI<sup>ph</sup> of this CI – intuition insinuates, i.e. without letting us know, that such a test algorithm is negligible/immaterial, as the classical claim construction based on it may be construed in freestyle anyway (using the well-known table on the lines of which the CI's 'claim limitations' are noted and commented as to their SPL relevance, i.e. practicing a pre-rational procedure, which *Mayo* requires to replace by construing the rationality based, precise/concise/complete refined claim construction).

For construing this refined claim construction – based on the CI's inventive concepts<sup>1)2)</sup> [18,19] – patent practitioners didn't know how to proceed<sup>7.b)</sup>.

This alleged problem hence encouraged the broad majority of the community of patent practitioners to jump to the conclusions that the *Mayo* requirements are incomprehensible and hence impracticable. A similar excitement might arise about the *Biosig/CLS* decisions, as also progress demanding as to the rational thinking of the *Mayo* framework.



### III.B The Post-Mayo Precise Notion of “scope(CI)”

But all such postulations are wrong: The FSTP-Test is the *Mayo*-Test – now clearly backed-up by *Biosig* implicitly and by *CLS* explicitly<sup>8</sup>.

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- <sup>8</sup> .a) Construing, for a CI described by its compound inventive concepts<sup>1)2)</sup> [58], identified in CI’s specification by the “**posc**” alias (person of) pertinent ordinary skill and creativity, by
- the refined claim construction (i.e. testing it under §§ 112/101/102/103 as interpreted by *Mayo*) is performed by executing on CI the below FSTP-Test – yielding a statement why CI meets **exactly all** requirements stated by these 4 §§ or why not – while construing for this CI
  - the classical claim construction by testing it only under a small part of § 112 yields a statement why CI meets some of all the requirements stated by these 4 §§ or not. Then remains to be shown that CI passes also the remaining requirements stated by these 4 §§ [19,25,36,58] – hitherto never done completely. I.e.: The classical claim construction suffers from a series of logical “blind points”!

This Court never explicitly addressed this deficiency of the classical claim construction. But, it is not its business to identify/fix in detail a problem, but just to indicate it and how to remove it, both principally only! That is what this Court clearly did by *Mayo*<sup>7)</sup>. I.e.: In *Mayo* it clearly indicated the legal incompleteness of the classical claim construction and how to remove it – i.e.: Finer refining the classical claim construction than *Phillips* already required.

.b) The below “**FSTP-Test**” of a CI has the minimal, yet all by SPL needed, “reasonableness limitations” for CI’s inventive concepts, “**inCs**”, defining this CI [58]. It decides<sup>3.b)</sup>, for any given definite CI [7], whether any given definite CI\* belongs to  $\text{scope}^{\text{BRIfstp}}(\text{CI})$  or not, as required by *Biosig*. I.e.:

$$\text{scope}^{\text{BRIfstp}}(\text{CI}) ::= \{\forall \text{CI}^* \mid \{\text{inC}^*\} \leq_{\text{RT}} \{\text{inC}\}\},$$

meaning that any “realization tuple  $\text{inC}^*$ ” of  $\text{CI}^*$  also is one of CI, as explained in [90] and is operationally checkable<sup>3.b)</sup>.

Hence: “FSTP-Test=*Mayo*-Test=*CLS*-Test=*Biosig*-Test”).

While understanding in detail the FSTP-Test requires getting familiar with the above references, it yet shows that a refined claim construction is much more complete than a

classical one. Yet, it may be automatically guided, is stereotypical, and partly based on “formalizable semantics” – overcompensating this increased complexity. Also, the FSTP-Test comprises all algorithms (modulo “redundancy”) deciding whether a CI meets all *Mayo/Biosig/CLS* requirements and only them – simplification impossible<sup>3.b</sup>). But: Having this whole set is important for practical optimizations [7,43].

- 1) **FSTP-Test** – executed for the set  $\forall$  claim interpretations,  $\text{SoI}$ , selected in (b)/(c), comprising 10 steps (this being #1):
  - (a) It prompts  $\forall \text{SoI}, 0 \leq i \leq I, 1 \leq n \leq N \wedge \forall \text{SoI} \text{BAD}^{\text{SoI}} \underline{\text{X}}_{\text{in}} ::= \wedge_{1 \leq \text{SoI.in} \leq \text{SoI.IN}} \text{BAD-crCin}^{\text{SoI.in}}$  in doci-MUI’s;
  - (b) It prompts for justifying the **compound inCs definiteness  $\forall$  inC in SoI**, i.e. of  $\forall \text{BAD-crCin}^{\text{SoI.in}}$ ;
  - (c) It prompts to disaggregate  $\forall \text{AD-crCin}^{\text{SoI.in}} \forall 0 \leq i \leq I \wedge 0 \leq n \leq N$  into  $\{\text{BED-crCink}^{\text{SoI.in}} \mid 1 \leq k^{\text{SoI.in}} \leq K^{\text{SoI.IN}}\}$ :  
 $\text{BAD-crCin}^{\text{SoI.in}} = \wedge_{1 \leq k^{\text{SoI.in}} \leq K^{\text{SoI.IN}}} \text{BED-crCink}^{\text{SoI.in}} \wedge \text{BED-crCink}^{\text{SoI.in}} \neq \text{BED-crCink}^{\text{SoI.in}'} \forall k^{\text{SoI.in}} \neq k^{\text{SoI.in}'}$ ;
  - (d) It prompts for justifying this **disaggregation definiteness in (d)**;
  - (e) It automatically sets  $K^{\text{SoI}} ::= \sum_{1 \leq 0n \leq 0N} K^{0N}$ ,  
 $S^{\text{SoI}} ::= \{\text{BED-crC}^{0n} \mid 1 \leq k^{0n} \leq K^{0N}\}$ , with  
 $K^{\text{SoI}} = \{\text{BED-crC}^{0n} \mid 1 \leq k^{0n} \leq K^{0N}\}$ ;
- 2) It prompts for justifying  $\forall$  BED-crCs in  $S^{\text{SoI}}$ :  
Their **lawful disclosures**;
- 3) It prompts for justifying  $\forall$  BED-inCs in  $S^{\text{SoI}}$ :  
Their **definiteness** under § 112.6;
- 4) It prompts for justifying  $\forall$  BED-inCs in  $S^{\text{SoI}}$ :  
Their **enablement**;
- 5) It prompts for justifying  $\forall$  BED-inCs in  $S^{\text{SoI}}$ :  
Their **independence**;
- 6) It prompts for justifying  $\forall$  BED-inCs in  $S^{\text{SoI}}$ :  
Their **posc-nonequivalence**:
  - (a) It automatically sets if  $|\text{RS}|=0$  then  $\text{BED}^* \text{-inC}^{0k} ::=$  “dummy” else performing **b-d**  $\forall 1 \leq i \leq |\text{RS}|$ ;
  - (b) It prompts to disaggregate  $\forall \text{BAD-X}_{\text{in}}$  into  $\wedge_{1 \leq k^n \leq K^n} \text{BED-inCik}^n$ ;
  - (c) It automatically sets  $\text{BED}^* \text{-inCik}^n ::=$  either  $\text{BED-i-C}^{0k^n}$  iff  $\text{BED-inCik}^n = \text{BED-inC}^{0k^n} \wedge$  disclosed  $\wedge$  definite  $\wedge$  enabled, else “dummy(ik<sup>n</sup>)”;
  - (d) It prompts for  $\text{JUS}^{\text{posc}}(\text{BED}^* \text{-inCik}^n)$ .

- 
- 7) It prompts for justifying by NAI0 test<sup>\*)</sup> on (S<sup>Sol</sup>:P.0<sup>Sol</sup>): TT.0 is **not an abstract idea only**;
- 8) It prompts for justifying on  $\forall$  BED-inCs in S<sup>Sol</sup>: TT.0 is **not natural phenomena solely**;
- 9) It prompts for justifying  $\forall$  BED-inCs on (S<sup>Sol</sup>:P.0<sup>Sol</sup>): TT.0 is **novel and nonobvious** by NANO test<sup>\*\*)</sup> on the pair (S, if  $|RS| = 0$  then  $\{BED^* \text{-in} C0k \mid 1 \leq k \leq K\}$  else  $\{BED^* \text{-in} C_{ik} \mid 1 \leq k \leq K, 1 \leq i \leq |RS|\}$ );
- 10) It prompts for justifying  $\forall$  BED-inCs in S<sup>Sol</sup>: TT.0 is **not idempotent** by NANO test<sup>\*\*)</sup> on the pair  $S' \subseteq S$ .
- <sup>\*)</sup> The "**Not an Abstract Idea Only, NAI0**" test basically comprises 4 steps, ignoring any prior art's inventions:
- 1) It prompts to justify the specification discloses a problem, P.0<sup>Sol</sup>, to be solved by the claim(ed invention) as of S<sup>Sol</sup>;
  - 2) It prompts to justify, using the inventive concepts of S<sup>Sol</sup>, that the claimed invention solves P.0<sup>Sol</sup>;
  - 3) It prompts to justify that P.0<sup>Sol</sup> is not solved by the CI, if a BED-inC of S<sup>Sol</sup> is removed or relaxed;
  - 4) if all verifications 1)-3) apply, then this pair <claim(ed invention), Sol> is "not an abstract idea only".
- <sup>\*\*)</sup> The "**Novel And Not Obvious, NANO**" test basically comprises 3 steps, checking of prior art all its "anticipation combinations, AC<sup>Sols</sup>" as to S<sup>Sol</sup>:
- 1) It automatically generates the ANCS<sup>Sol</sup> matrix, its lines representing for any prior art document,  $i, i=1,2,\dots,I$ , the relations between its invention<sup>i-Sol</sup>'s BED-inCs to their peers of TT.0, represented by its columns, whereby S<sup>Sol</sup> is derivable for any prior art document's invention in Sol;
  - 2) It automatically derives from the ANCS<sup>Sol</sup> matrix the set of  $\{AC^{Sols}\}$  with the minim. number  $Q_{plcs/Sol}$ ;
  - 3) It automatically determines  $\wedge$  delivers  $\langle Q_{plcs/Sol}, \{AC^{Sols}\} \rangle$ , being the creativity of the pair <claim(ed invention), Sol>.
- Thereby in FSTP-Test.1-10 many of the justifications input by the user (here assumed having pose) must hold for the whole set of realization tuples  $\{\text{inC}\}$  of the generative set  $\{\text{inC}\}$  of an interpretation of CI – all sets being final<sup>3.b)</sup>.
- Finally: While *KSR/Bilski*, especially *Mayo*, induced the FSTP-Test, and Biosig/CLS clearly confirmed it – getting closer to it on their own – the CAFC still seems to question this Court's indispensable thinking of SPL precedents<sup>15)</sup> [83].

#### IV. *Biosig* BLOWS ANY BRI<sup>pto</sup> BASED LEGAL DECISION, HENCE ENDS THE BRI SCHISM<sup>y)</sup>

*Biosig* shows: PTO's claim interpretation by BRI<sup>pto</sup> contradicts 35 USC<sup>2.f)</sup> (see the below paragraphs). Hence, the BRI Schism is ended – but, not the ClaimConstruction Schism (see Sect. V).

Speaking generally, by its *Biosig* decision this Court explicitly confirms its “pro inventor” position

- <sup>y)</sup> Sections IV and V unfortunately must report: The PTO and many US patent holders are heading towards a big problem. It is comparable to the known financial crisis, into which all of us got, managed by those of all of us interested in the financial world and acted therein without common sense. Hence, also this problem will force the Congress, sooner or later, to intervene for providing some relief from encountering this disaster without any legal protection.

SSBG regrets not to be able to identify a smoother way, free of socio/economic disavowals – but just the truth. This truth here is another clear writing on the wall, cautioning against too much credulity for the looming irreconcilabilities of the accelerating global non-sustainable developments.

This truth is provoked by the two schisms that arose in Substantive Patent Law precedents – slowly over the last ten years, making almost nobody aware of that threat, except the Supreme Court. These schisms must urgently be terminated, as having the potential to put the US NPS into jeopardy – thus massively reducing the meanwhile primary source of the US society's wealth, fed by the US economies.

While this Court's *Mayo/Biosig/CLS* decisions end this threat, they logically have no option – and there is none, whatsoever – but to launch a big blow to hundred thousands of granted and/or reexamined patents, on which economically depend primarily the long-term profit makers of, i.e. sustainability-seeking investors into, today's economies.

Put simpler: No patents, no broadly distributed wealth.

as to claim interpretation, as evident from *Mayo*. Thus, *Biosig* bans the PTO's permanent – and the CAFC's occasional<sup>11)</sup> – legal “incapacitation of the inventor” of a CI by the BRI<sup>pto</sup>. This ban holds for a CI in pre-*Mayo* presentation, and results from *Biosig*'s:

- Emphasizing – referring to §112 – that a patent specification's claims are “...*the subject matter which **the applicant** regards as [the] invention*”. *Biosig* at 3818. It thus quite directly reminds the CAFC and District Courts that they are not entitled to change a claim interpretation clearly disclosed by the specification, as it is “*the written specification that represent[ed] the key to the patent*”. *Markman 517 U.S.at 379*” and “*Markman, 517 U.S., at 389 (claim construction calls for ‘the necessarily sophisticated analysis of the whole document,’ and may turn on evaluations of expert testimony)*”. *Biosig* at 3818 and 3818.
- Even drastically stating: “*It cannot be sufficient that a court can ascribe some meaning to a patent's claims; the definiteness inquiry trains on the understanding of a skilled artisan at the time of the patent application, not that of a court viewing matters post hoc*.” *Biosig* at 3823. It thus

also here clearly states that a District and the CAFC constitutionally must not apply the BRI<sup>pto</sup>, as the latter may determine – what the BRI<sup>pto</sup> guideline [14] frankly concedes to be its objective – “*some meaning*” of a claim<sup>10</sup>, i.e. a meaning the inventor has not thought of at the priority date as the specification provides no hint at it, especially if it does not make the CI providing the usefulness the specification requires by § 101<sup>9</sup>.

A post-*Mayo* presentation of a CI satisfying SPL is a pre-*Mayo* CI one, too. Hence, the preceding argument holds  $\forall$  CIs satisfying SPL.

As to the '902 decision [62.a)]: It does exactly what *Biosig* forbids to do. It simply “...*ascribe[s] some meaning to [the '902] patent's claim[s] ...*” – as it<sup>9</sup>, by applying the BRI<sup>pto</sup>, creates a CI\* contradicting the inventor's '902 specification, clearly describing the CI's (elementary) inventive concepts<sup>1</sup>[64].

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<sup>9</sup> indeed totally incapacitating the '902 inventor as to its '902 claims' interpretations, by bluntly declaring the '902 inventor(s) and the examiner of the '902 patent didn't understand the unmistakable disclosures of the '902 invention.

*Markman* rightly requires the uniform “appellative claim interpretation” by the CAFC. But the latter thereby here commits legal errors: It entitles the PTO to ignore *Phillips* legally<sup>2,6</sup>, as it itself does in the '902 case [62.a)].

V. **CLS BLOWS ANY BRI<sup>phi</sup> BASED LEGAL  
DECISION, HENCE ENDS THE  
ClaimConstruction SCHISM**

The Sections II/III/IV told about a CI:

- It comprises two tools indispensable for interpreting this CI, being independent of each other.

The “elements’ semantics association basis” for interpreting this CI’s individual terms (here: CI’s inventive concepts), subject to the “BRI Schism”.

The “claim’s semantics association basis” for interpreting this CI’s claim as a whole<sup>10.a)</sup>, subject to the “ClaimConstruction Schism”.

- pre-**Mayo**, a CI’s elements’ semantics association basis was fuzzy, due to the schisms about it between the CAFC and the PTO (BRI Schism), and its claim’s semantics association basis was defined by the classical claim interpretation, i.e. was very incomplete (of which no awareness existed then, as today recognized in hindsight), but no schism existed as to it, yet, just broad frustration among all patent practitioners about

the lack of predictability of the outcome of patent applications/reexaminations/litigations<sup>10</sup>.

- post-*Mayo* and due also to *KSR/Bilski*, the currently most urging class of problems in SPL – created by the deficiencies of the classical claim construction as to ET CIs – in principle vastly disappeared<sup>11.e)</sup> for those who recognized the far reaching implications of the claim construction requirements stated by *Mayo*<sup>11.d)</sup> [1]. I.e.: A CI’s elements’ semantics association basis is now precisely and complete defined, just as its claim’s semantics association basis.

In particular as to the latter: While the semantics association rules of both association bases of a CI are independent of each other, they yet must guarantee that both bases permanently use – during all the time of executing one SPL test of a CI – only one complete set of inventive concepts generating this CI, more precisely: generating

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<sup>10</sup> .a) by associating the “SPL quality assessing symbols” given by 35 USC (e.g. its usefulness<sup>11.d)</sup>, patent-eligibility<sup>11.d)</sup>, non-preemptivity<sup>11.d)</sup>, enablement/non-idempotency<sup>11.d)</sup>, novelty<sup>11.b)</sup>, nonobviousness<sup>11.b)</sup>) with the value T or F, derived from CI by association basis specific rules, this SPL quality post-*Mayo* felt to be understood (at least by AIT) .b) sufficiently, .c) poorly, .d) not at all.



the same interpretation of this CI, as this “generative set” need not be unique, especially not with an ET CI [58]. In classical claim construction, this indispensable logical need of a “cross over check” (in any SPL compliance test of a CI between testing all individual inventive concepts and testing the claim as a whole) never was recognized, although this evidently is a serious sloppiness – even if only a single such set exists (what only seldom occurs with ET CIs).

Yet, about *Mayo’s* both key terms/notions<sup>11.θ</sup> – being the fundament of this reconciliation of SPL precedents<sup>ω</sup> by inducing this refined claim construction such that the frequent crucial properties typical for ET CIs (now reconfirmed by *Biosig/CLS*) could be clearly identified – the Claim-Construction Schism arose, above mentioned already, between this Court and the CAFC especially (only in 2012, until today not yet fixed<sup>ω</sup>).

## VI. *Biosig/CLS* AND THE '902 DECISION

### VI.A The '902 Invention

The CI at issue – dealing with Internet telephony – is comprised by U.S. Patent No. 7,145,902 (“the ‘902 Patent”), App. D, 85a. issued on December 5, 2006 to Sigram Schindler et al., owned then by TELES AG, and now owned by SSBG.

Internet telephony, when first introduced on the market in the early 1990s, was not accepted by it despite its cost advantages, as then suffering from “lack of quality” problems. This lack of quality manifested itself in primarily two ways: i) establishing calls often totally failed and/or ii) established calls often encountered an unacceptably high rate of delays and jitters in the voice data transfer.

The ‘902 patent provides a then very inventive remedy against this lack of quality problem: The ‘902 CI requires to permanently monitor – in some way, then known by the *posc* – the data transfer of an Internet telephone call’s communications connection (stretching between caller and callee, as known by the *posc*) and to instantly change-over with exactly this communications connection to a line-switched

network – either a Public Switched Telephone Network “PSTN” or an Integrated Services Digital Network “ISDN” – as soon as this monitoring detects the bandwidth of its data transfer is understepping or exceeding a certain threshold and/or encounters a time delay when forwarding IP data packets. ‘902 patent at col.9, l.41-58.

The ‘902 invention thus substantially improved, by a compound<sup>x,y</sup> inventive concept – as of *Mayo* – the then already known technique of change-over with a data transfer between networks. E.g., none of these known change-over techniques would ●) monitor this communications connection, or ●) derive the change-over signal from monitoring this specific connection, or ●) change over with only this specific connection. The ‘902 invention hence provides in a then totally unknown way a substantial improvement of the prior art technique, thus eliminating the above quality problems i) / ii).

Initially the ‘902 invention was not accepted by the market, because it was considered to be too complex, both technically and administratively. I.e., these quality problems remained – and by the end of the 1990s Internet telephony was a dead issue.

In 2000, Cisco re-launched Internet telephony by new products, comprising the technology claimed in the '902 patent in order to eliminate call establishment failures (i.e., problem i)). Later Cisco also used this technology for eliminating unacceptable delays and jitters in the voice data transfer (i.e., problem ii)). Thus, the '902 invention – together with developments in IT – made IP telephony a success in the market, which renamed it as VoIP (“voice over IP”) to disassociate itself from the initial deficiencies.

Today, the '902 technology is used by virtually all Internet telephony equipment, in particular for business use. The '902 invention hence was, at its priority date, a very innovative ET CI par excellence – being THE concern of this Court's *Mayo* decision.

#### **VI.B The '902 Proceedings**

Cisco, when told in 2007 its new telephony products infringe TELES's '902 patent, requested its *inter partes* reexamination under 35 U.S.C. §§ 311-318 and 37 C.F.R. § 1.913. No amendments were made to the claims during the reexamination. The PTO's Central Examination Unit (“CRU”) nullified all but two of the challenged claims. SSBG appealed all CRU's invalidations to the PTO's Board (“BPAI”),

and Cisco cross-appealed because of the two preserved claims. The BPAI's decision on March 23, 2012 affirmed the decision of the CRU as to all claims.

SSBG filed an appeal against the BPAI's decision invalidating '902 claims. Cisco appealed the decision of the BPAI as to the two claims it determined to be patentable, and SSBG cross-appealed as to Cisco's attack on these two preserved claims.

The CAFC had jurisdiction over the appeals pursuant to U.S.C. § 141 and 144 and 28 U.S.C. § 1295(a)(4)(A). The CAFC's decision [62.a)] found all '902 claims at issue invalid, also the 2 preserved ones – as not novel<sup>11</sup>).

SSBG asked for Rehearing en Banc [64], refused by the CAFC on 27.05.2014 [74].

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<sup>11</sup> An amusing final mark as to this non-novelty finding of the CAFC: The PTO granted SSBG 3 new patents, leveraging on the '902 invention in various mobile (i.e. non-PSTN/ISDN) environments, all these patents having the same specification – although their Examiners knew about the '902 patent's reexamination and litigation, as evidenced by their complete quotations on these new patents' cover pages. Thus, the CAFC pretends to know better than the PTO's BPAI/CRU/Examiners that the 2 "multiplexer '902 claims", which they preserved as patentable, were non-novel in '95! By granting said 3 new SSBG patents, their Examiners clearly expressed their view of this judicial '902 hoax.

### VI.C Biosig Blows the ‘902 Decision (by Sect. IV)

This CAFC’s ‘902 decision uses the BRI<sup>pto</sup>:

- Opinion, App. A at p. 8: Here the CAFC approves the BPAI’s use of the BRI<sup>pto</sup> in a reexamination<sup>2.f</sup>.
- Opinion, App. A at p. 10: Here the CAFC states its use of the BRI<sup>pto</sup> – thus contradicting *Phillips* 2005 by applying a 2004 decision: “*During reexaminations, claims ... are to be given their broadest reasonable interpretation ...*” – while *Phillips* does not exempt the time after examination<sup>2.f5.g</sup> from its rule, to determine the meanings of a CI’s “claim terms” as exactly those used by this CI<sup>12</sup>.

### VI.D CLS Blows the ‘902 Decision (by Sect. V)

The reason: It ignores the ‘902 inventive concepts the ‘902 specification clearly identifies.

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<sup>12</sup> The ‘902 decision, in addition to this fundamental legal error – contradicting its own *Phillips* precedents (just as Circuit Judge K. O’Malley, see III.A) – the CAFC commits further legal errors by ignoring e.g. that ●) the by it invented CI\* .) neither eliminates the problems i)/ii) described/disclosed (see VI.A/B) to be the decisive property of the ‘902 CI, .) nor works, at all, with the CAFC’s off-the-shelf multiplexers [64xx] ●) using the BRI<sup>pto</sup> made the CAFC understanding the ‘902 claim 68 to be so broad that it anticipates a data transfer technique explicitly excluded by the ‘902 specification as being prior art [64??]; but, a claim interpretation evidently contradicting the claim’s specification is excluded by the BRI<sup>pto</sup> (see [14], first sentence), and ●) packet-switching transmissions/”channels” through a network don’t make it a packet-switching network, otherwise most line-switching PSTNs were packet-switching networks.

The CAFC would instantly have recognized all these legal errors if it had not applied the BRI<sup>pto</sup> but its own BRI<sup>phi</sup>.

## VII. AFTERMATH OF *Biosig/CLS*

Sections IV/V and<sup>7)</sup> addressed these decisions' key aspects. Below follow two clarifications to them.

- Both decisions will need, by this Court or the CAFC, further refinements – indicated by<sup>8)</sup>, [5,58], elaborated on in [90] – of the notion “refined claim interpretation” meeting just today’s needs as stated by *Mayo/Biosig/CLS*.

E.g., this applies to the “category of abstract idea classes, AICs”<sup>2.a)</sup> in *CLS*. Such abstract idea classes may refer e.g. to the CI as a whole (AIC<sup>CI</sup>), or to a single inventive concept (AIC<sup>SIC</sup>), or to a combination of elements (AIC<sup>COE</sup>), .... Of a CI’s interpretation, determined by its “generative set of inventive concepts” [58], being in *CLS* the “contour of the AIC<sup>CI</sup>”, the FSTP-Test’s NAIO-test would check them all for determining that this CI(’s interpretation) as a whole is not an abstract idea only, i.e. is not a patent-ineligible compound inventive concept, i.e. not preemptive. This shows – especially for “multi interpretation/RTs<sup>8)</sup> – why the elementary concepts of a CI must be determined, as the FSTP-Test does,

otherwise rationally applying the thinking of *Mayo/CLS* – and also *Biosig* – is impossible.

- If these decisions impact on the patent-eligibility of a CI this would be due to lack or vagueness of identifying its inventivity in its specification – as both happened in *CLS*. This Court here raised the bar, as SSBG had not dared to expect (in its earlier comments) but wholeheartedly welcomes. Taking the specification of the *CLS* CIs: This Court rightfully criticizes (opinion on p.15) that no creativity is disclosed for the therefore patent-ineligible claim terms (1)-(4) (opinion on p.14). Inventive concepts got to come along with them for transforming some of them separately or as a whole, into a patent-eligible compound inventive concept. SSBG knows the very difficult concurrency and/or confidentiality and/or reporting problems involved by them, providing many opportunities to resolve them in a patent-eligible and patentable way – on what this specification unfortunately did not leveraged.

I.e., these decisions don't threaten a software system or any other ET CI – they just want them to clearly identify their patent-eligibility/-ability.



## VIII. CONCLUSIONS

This Petition should have shown that a Writ of Certiorari by this Court is urgently needed for avoiding that – based on the wording of the PTO’s BRI guideline [14], generating many controversies – this Court’s groundbreaking decisions in *KSR/Bilski/Mayo/Myriad/Biosig/CLS* are ‘neutralized’<sup>13</sup> by the

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<sup>13</sup> As long as such an “exception from patent-eligibility” guideline of the PTO is based on the on the current wording [14] of its BRI<sup>ptb</sup> guideline, i.e. in its claim interpretation for a CI, which indispensably must be performed first – as commented on in detail in [78p.5-6] – the outcome of the application of this exception guideline evidently enables the PTO to deliberately finding any such CI as non-patentable by associating some term of this CI with a meaning of this term that the pose would know from somewhere outsides of this CI but different from that it has in this CI – thus rendering this CI as lacking novelty or nonobviousness.

[78p.5-6] showed in detail, how the PTO by its BRI guideline’s tricky wording [14] per lip service recognizes the CAFC’s precedential *Phillips* decision – which this Court by *Mayo/Biosig/CLS* implicitly confirmed as necessity but not sufficiency indicator for CI’s patent-eligibility (the latter achieved only by the more limiting *Mayo/Biosig/CLS* requirements, explained in Sections IV/V) – yet makes its examiners, the public, and even the CAFC<sup>5.c)5.a)</sup> often ignore *Phillips*. I.e.: By basing the upcoming “exception from patent-eligibility” guidelines on a BRI [14] recognizing *Mayo* not at all (as currently) or again only by lip service (in the future) would not terminate this BRI Schism.

This “double talking” – alias BRI Schism – by the PTO for many years (and sometimes even by the CAFC<sup>12)</sup> is ended only by making the wording of this BRI guideline [14] consistent to this Court’s *Mayo/Biosig/CLS* decisions<sup>a)</sup>.

PTO's respective guidelines, e.g. [72], for several more years. This would not only further going increase the lack of trust into US SPL precedents and create additional confusion among patent practitioners already existing – caused by this BRI Schism also as to CIs from the grey area of CIs between classical and emerging technology – but also hamper the innovativeness of the US society in all areas of emerging technologies, medium term putting its wealth into jeopardy.

There are, as to overcoming the unfortunate current situation of SPL precedents for ET CIs, three crucial aspects in *Mayo/Biosig/CLS*, i.e. not trying to find a way circumventing its scientification **5.a)**, namely:

- Most urgently is to stop the hearsay broadly accepted – as insinuating simplicity, hence felt most convenient, although causing nothing else but chaos – about the BRI<sup>pto</sup> being approved by the CAFC for post-examination/reexamination. All invited and excellent panelists at a recent hearing of the PTO [76] *uni sono* stated that the PTO's suggested implementation [72.a] of the

*Mayo/Myriad* decisions<sup>14</sup> – though clearly “*Mayo* aware” nevertheless, still based on the BRI

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<sup>14</sup> [72.a)/.b)], just<sup>13</sup>) as [14], avoid using the decisive *Mayo* term “inventive concept”, in spite of this notion in this Court’s *CLS* decision being the sole carrier of the CI’s patentable inventivity, just as in *Mayo*. Both decisions clearly indicate: only this term’s meaning represents “patent-eligible creativity” of this CI. Avoiding this so rigorously limited term “inventive concept”<sup>8.a)</sup> from the alleged explanation [72.b)] of the *CLS* opinion achieves the opposite, as it obscures the latter. [72.b)] thus insinuates, this term is superfluous or extremely error prone if not misleading, while *Mayo/CLS* require the opposite, namely exposing by it CI’s “increments of inventivity/usefulness” [18,19] (That in FSTP terminology these increments may be patent-eligible or not, is explained in<sup>12.a)</sup>). I.e., this “inventive concept” abstinence of [72.b)] insinuates, the simpler classical claim construction were still sufficient – as to ET CIs, too – while it is not.

Thus, avoiding in [72.b)] the use of the term/notion “inventive concept” just as in [14]<sup>13</sup>) – strictly refusing to meet this Courts requirements stated by its *Mayo/CLS* decisions – leaves the door open for any examiner and the board of the PTO to deliberately qualify, by using the BRI<sup>pto</sup>, practically any such CI in its patent application/reexamination as not novel or obvious over prior art<sup>13</sup>), i.e. grants to the PTO a power evidently so big and intransparent that it puts the whole 35 USC politically into jeopardy.

What, in [72.b)], is equally unacceptable as the omission of the key notion “inventive concept” is the misuse of the notion “element”: While this Court’s *CLS* opinion strictly limits this notion to represent an elementary feature of the CI<sup>12</sup>), [14] insinuates there is no such restriction.

Just to be sure: This Court’s *CLS* syllabus/opinion used the term “inventive concept” 5 times for identifying patent-eligible “elements”<sup>12</sup>) representing, for a CI, the crucial items created by the inventor of this CI for it, thus legally transforming this CI into an application of its building blocks, which the *CLS* opinion denoted as non-patent-eligible “concepts” – while [72] used this key term 0 times.

guideline [14] in its current wording, diametrically contradicting *Mayo/Biosig/CLS* – would introduce that much unpredictability into patent business that it were an enormous innovation killer. All high-tech SMEs – that is what today’s flagships of the US economy all were a few years ago – don’t have the financial power for successfully competing or only surviving in a legally that risky environment.

Consequently, this Court is asked by the petitioner to directly decide the SSBG’s ‘902 case. This would reemphasize this Court’s determination to take the US SPL precedents to a level of development urgently needed by ET CIs<sup>15</sup>).

- This would in particular provide to the PTO the firm ground it needs for designing its guidelines as to the natural phenomena and abstract idea exemptions consistent with this Court’s pertinent precedents – requiring that it accordingly adapts

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<sup>15</sup> Unlike expressed in<sup>o</sup>, [83] seems to indicate that the CAFC does not want to end its ClaimConstruction Schism with this Court as by *Mayo/CLS*. The question initially asked by this Petition hence is up-to-date.

the wording of its BRI guideline [14], i.e. its thinking it conveys to its public and examiners.

- The question then potentially remaining is, whether there is enough safety in legally enforcing this acceleration of the development of SPL precedents for supporting innovation as *KSR/Bilski/Mayo/Myriad/Biosig/CLS* require, i.e. the accordingly refined claim construction.

Indeed, this safety does exist. The principles underlying this refined system of legal criteria consistent over all technologies are: Separation of legal concerns of 35 USC §§ 101/102/103/112, and disaggregation of compound inventive concepts, of an invention supposed to meet these concerns, into appropriate elementary ones, first of all. These principles are exactly those that underlie since the 70s any system design/specification technique of complex IT systems. Hence, no reasonable risk exists that this Court's such interpretation of these 4 §§ could fail: Namely, to apply these very IT system design principles – just shown to also underlie these 4 §§ outlined legal requirement statements – in testing claimed inventions, in particular of emerging technologies,

for their satisfying SPL, i.e. for their meeting the requirements 35 USC §§ 101/102/103/112 state.

Rationality here speaks quite clearly: Sooner or later, this coherent thinking in SPL precedents – by and by extended to further §§ of 35 USC – will become an indispensable part of any textbook on patent law. The SPL precedents namely are, quite unusual for a law's precedents, extremely amenable to scientification. For 35 USC, this will substantially improve the efficiency of case law.

In total: By the reasons provided herewith, this Petition for a Writ of Certiorari should be granted.

July xx, 2014

Respectfully submitted.

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