A PS to an Appraisal of the Supreme Court's *Teva* Decision: CAFC Teaming-up with USPTO for Barring *Teva* – and this entire "ET Spirit" Framework?

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The Unnoticed Message at the CASRIP Conference

This message came up by side-remarks and went unnoticed at this conference: The USPTO rigorously counters the Supreme Court's *MBA* initiative (adapting SPL precedents to the needs of ET CIs), and the CAFC now fully supports this counter – by its most recent *Cuozzo* [221], *Versata* [222], and *Intellectual Ventures* [223] decisions.

Originally this little paper was announced as a post scriptum[1)] to the appraisal of the Supreme Court's *Teva* decision in [217] (published on 22.07.2015) and its far reaching impact on future CAFC decisions, explained by means of its recent ones – by time-out not including the above 3 ones. But the last week's CASRIP conference has put all recent CAFC decisions into a much brighter light, especially 2 of these 3 ones.

The next paragraph hence first reports about its two decisive panels, commenting on the recent *MBA* based CAFC decisions: These vastly concur with the comments on them in [217,…]. Yet: The CAFC's reaction by its decisions in *Cuozzo* and *Versata* on the resp. PTO decisions seem to clearly indicate their determined consent about their game changing intent as to all this "ET spirit" these inventions embody – i.e., as to the Supreme Court's *MBA*-framework and its application to ET CIs, and as to *Teva*.

A remark as to coarse reasoning is important: ●)The harsh critics of the Supreme Court's *MBA* decisions by the first panel's [226] speakers had correctly to be addressed to the CAFC and its coarse "*MBA* overinterpretation & ET CIs oversimplification" (stated and clarified by [163, 217,…]). ●)Also the second panel's speakers [227] maintained the CAFC's coarseness of reasoning, which it practiced in its decisions. Due to this coarseness they, too, could not really show where are in these decisions their legal errors – unlike the critics as to these 10+ CAFC decisions presented by [217,208,…,below], which precisely identify them therein. I.e., also these speakers felt that these decisions are fundamental legal errors – though likely on different grounds.

Such coarse reasoning especially disabled a discussion of the new and really big problem ahead, caused by these CAFC decisions – of which some conference attendees evidently were well aware of, as their questions indicated: The strange interpretation by some CAFC boards and the PTAB of the AIA's PGR/IPR/CBM provisions – totally inconsistent to the Supreme Court's *Teva* decision and to the CAFC's own precedents!

This sweeping interpretation is by both of them, CAFC and PTAB, melted with their above already mentioned, now permanently and rigorously applied "*MBA* overinterpretation & ET CIs oversimplification" strategy [163]. Their pro domo interpretations – now of the AIA, whereas above of the Supreme Court – thus imply that they don't need to refine their application of 35 USC §§ 101/102/103/112 as urgently needed by ET CIs. And be it by discouraging developing ET CIs by barring them from protection by patent law – if only the simplicity of their hitherto practiced SPL precedents is preserved (while just some lip service pretends, SPL precedents were indeed refined by its *MBA* interpretation of 35 USC SPL, as by the Supreme Court required).

The CAFC's and PTAB's Joint Effort to Bar Most ET CIs from the US NPS

Next[1)2)], these 3 CAFC decisions are briefly discussed in the just explained light, but maintaining the point of view of AIT in the *MBA*-evaluation of their ET CIs – i.e. ignore all procedural aspects, just as the parties' presentations as to these ET CIs (but putting much more emphasis on the patentees' ones in their specifications – otherwise at least the Supreme Court's *Biosig* decision is violated, if not also its *Teva* one[3)]).

***Cuozzo* [221]**: Its most striking feature is its BRI paean of praise, elaborating on its reasonableness as to legal details – assuming/pretending it were ●logically meaningful[3)], ●legally reasonable as to the consistency objective of SPL precedents, ●legally

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[1] Up-front, a number justifying this PS'es headlines – as felt by an inventor, anyway[2)]: The PTO has found, since the Supreme Court's *Alice* decision, 88 ET CIs as patent-eligibility exemptions prone and hence rejected 86 of them as allegedly not meeting § 101 [228] – allegedly indefinite ET CIs coming on top – among them (some or all of) the 10+ CAFC decisions here found legally erroneous, by AIT anyway[2)].

[2] Another 5 patent applications for ET CIs have been submitted by the author [6,7,11,43,59], which procedurally could not yet reach the CAFC but by their examination unit are already finally or repeatedly rejected as being "abstract ideas". Thereby another problem arose:

The inevitably limited qualifications of examiners as to cutting edge knowledge of ET areas, here of AIT [2], and of such knowledge inevitably being vastly unusual – in particular often rooted in non-technical usefulness, e.g. in emotionally or socially or esthetically or economically or .... motivated usefulness, in these 5 cases rooted in cutting edge AIT in IPR business totally unknown, hence being extremely innovative to examiners – makes them believe this knowledge is not needed, at all, as ET CIs applying for patent protection must present themselves such that they may be grasped by an examiner without having the knowledge they are based on, as no "person of ordinary skill and creativity ("posc", see *KSR*)" exists yet. This sometimes is possible to achieve, sometimes not – in these 5 cases it is a problem, as the examiner and its manager refused to therefore accept the explanations their inventor, i.e. this author, provided them with.

This problem may bear strange consequences. A senior examiner with a PhD in an AIT science, who was allocated by the resp. examination unit to the first one of these 5 ET CIs, hence with an excellent understanding in examining this ET CI – as fully grasping what this ET CI's inventivity and usefulness is, though possibly not being able to represent both in own words, when being questioned by its examiner colleagues of lower qualification – after its telephonic announcement of issuing an allowance of this patent application, nevertheless got by its manager withdrawn from this application and replaced by a seemingly totally novice in this specific AIT area. He then consequently had no alternative but to confessing that for him this ET CI is an abstract idea – as he understands this term. For the author's lawyer from the broadly recognized Shugrue law firm, who also has a decent background in AIT and hence helped the author to streamline the patent application, this was an absolute novum in his 19 years of working with the PTO – in line with the above said[1)]. No need to mention that the examiner also came to the same conclusion in the other 4 cases and found all 5 ET CIs to be anticipated&obvious over the same set of prior art documents, whereby none of these deals with 1 of their 4 totally different AIT areas, i.e. of the 5 ET CIs.

All resp. documents will shortly be put into the FSTP blog – under another numbering scheme than the one below, i.e. of its own.

[3] This PS also provides, additional to [217], some notional clarifications as to the BRI of which especially the CAFC's *Cuozzo* panel – to a lesser degree also the CAFC's *Versata* panel – by their decisions sweepingly and quite demonstratively try to re-establish its trustworthiness. While this continues the longtime ongoing insisting in the lawfulness of its use again and again, it is possible only by refusing to become aware and to acknowledge the huge logic flaw the BRI represents, depriving it from any legal credibility: It namely prescribes using a vast and hence logically indefinable oversimplification of the claim interpretation for ET CIs – in terms of SPL precedents, the BRI is an irreconcilably "indefinite" invention by the USPTO.

This oversimplification is very convenient as indeed very much "thinking saving" and hence very useful for the USPTO's internal use for checking patent applications in their early stages. But, in final legal decisions by the PTO it is totally untenable: As seen by AIT, the dissenting opinion in *Cuozzo*[4)] correctly addresses most of the legal gaps and/or misrepresentations in the majority opinion allegedly justifying the BRI – doubts in AIT's such view are ok. But this footnote adds one more and unquestionable AIT deficit of the BRI, ftn[4)] is based on.

Namely: The BRI shall determine the unique meaning of a claimed invention ("CI", if from an emerging technology called "ET CI") from the specification of the patent (application) claiming this ET CI. But from Logics and Linguistics it is known, since the early 19th century, that it often is impossible to determine the meaning of sentences from their wordings. The Linguists' standard example for showing this often unavoidable ambiguity is "I see Jim with field glasses far ahead" – which evidently has two quite different meanings. I.e., its unique meaning can be derived from this sentence iff this meaning is known a priori, what this sentence shall tell. This absolutely unavoidable uncertainty about sentences' meanings gets much worse, if the sentences comprise words the meanings of which are not unique – as commonly known. The peers to such ambiguities in SPL precedents are inconsistencies (not needing ambiguous words for arising).

The whole irrationality of the belief in any reasonability of the BRI is shown by a single flashlight: In all 3 decisions by the CAFC (2 of them also by the USPTO) the use of the BRI is proclaimed, just as evidently in the 5 above applications provided by the author – but bizarrely, none of the involved 10+ interpretations of the 10 ET CIs (3 belonging to the evident to or at least clearly induced on the posc by the resp. specifications) are legally evaluated as non-substantial, even if contested by experts. By AIT this is logically clearly erroneous as trivially contradicting the BRI.

These are the eventual grounds, why the Supreme Court by the *MBA*-framework (i.e. by *Biosig*) and now also by its *Teva* decision has im- and explicitly multiply excluded the use of the BRI in the legal decisions of claim interpretation&construction.

Therefore, worldwide in no other NPS the BRI is used in legal decisions. In Germany the BGH's claim interpretation since long time is based on its "*Spannschrauben*" decision, which explicitly requires to determine from the invention's specification first the inventions principal meaning, before defining it precisely – correctly, as of AIT, and hence likely becoming the claim interpretation standard in a future unitary EU patent system, too.

not diametrically contradicting the Supreme Court's *Biosig* decision and ●the CAFC's own *Phillips* decision, and ●legally not contradicting several further AIA provisions, whereby none of these 5 assumptions/pretentions applies[4]. Its easy taking of "posc evident" disclosures[2] is common to all 3 decisions – see [223] below. Its "obviousness" verdict hence seems to be – seen from the AIT point of view – a clear legal error.

***Versata* [222]**: Its "abstract idea" verdict hence also seems to be a clear legal error – seen from the AIT point of view – due to the rationale given above for its *Cuozzo* case.

Intellectual Ventures [223]: While the PTAB is not involved in this CAFC decision and its 3 ETCIs, all considerations just provided as to its *Cuozzo* & *Versata* decisions hold also here.

In total this shows, why the Supreme Court's *Teva* initiative is here urgently needed, once more, for avoiding the totally undesirable development identified above and for supporting the US creative potentials in full breadth to unfold and to accelerate developing SPL precedents for ET CIs, such that these creative HR potentials and financial investments in the US are definitively encouraged and protected by SPL.

Otherwise, the Supreme Court's *Teva* decision is evidently totally neutralized twice: ●)By the CAFC due to its strange interpretation of the Supreme Court's *Biosig* decision [217], and ●)by the PTAB due to its strange interpretation of the Congress's AIA, especially its PGR/IPR/CBM provisions (see first page) – all these strange interpretations derived by allegedly applying the irrational BRI (see pages 2/3), not only to ET CIs' claim interpretations&constructions, but evidently also to determining the meanings of the AIA's PGR/IPR/CBM provisions.

[4] see the dissenting opinion to this *Cuozzo* panel's majority decision.

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FSTP = Facts Screening/Transforming/Presenting (Version_of_27.07.2015[7])
Most of the author's below paper's are written in preparation of [182].

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