

The Short Artificial Intelligence Comment on MPEP2018_Sect2106: NO IMPROVEMENT.

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In the FSTP-Project the above term “Artificial Intelligence, AI” does not have the usual free-style meaning, but stands for “Deterministic Mathematical Artificial Intelligence, AI”^{1.a)}. This specific rigorous scientific approach to applying Substantive Patent Law (“SPL”) is possible^[e.g.415,440] and absolutely indispensable for guaranteeing consistency to the Supreme Court’s framework over all claimed inventions (as shown by e.g.^[e.g.415,423]). The MPEP2018_Sect2106 is not of this rigor and hence can’t provide this consistency and scientificity of SPL-precedents, e.g. about all DNAtch-“ETCIs” (“Emerging Technology Claimed Inventions”).

To guarantee this consistency, i.e. for achieving this rigor, this MPEP2018_Sect2106 would have had to remove the legal errors (comprised by its preceding versions of the “USPTO’s guidance on subject matter eligibility”) – and with them the so implied disastrous vagueness^[e.g.415], especially of the ●BRI and USPTO’s ●incomplete interpretation of the Supreme Court’s PE-analysis – which it both does not do. All such legal errors are discussed in detail in several preceding FSTP-publications^[e.g.415,423] (2 of which are just quoted, below^{b)}).

It is important to note that the Supreme Court, when launching for the US-SPL by its “*MBA* framework”^{c)} a paradigm refinement^[335] for improving ETCIs’ protection by SPL, explicitly invited improvements^{d)} for it. Due to the well-known “paradigm paralysis”^[335] this paradigm refinement is (as usual) only slowly and only partially and hence faultily accepted by this community. Yet, it nevertheless will soon come to its correct end – enforced by its practical&economical&cognitional incredible advantages for any patent-/innovation-business^[9] – which most of Section2106 will not survive. History teaches this clearly: Through all paradigm refinements for achieving the scientification of the model/theory/practice/... based on this paradigm, here of the ‘classical’ SPL interpretation.

- **The ‘BRI’ legal error.** The BRI has always been a bone of contention between the patent community^[e.g.37] and the USPTO (loving its sweeping interpretability, even comprising nonsense-interpretations^[364]) – but is also supported by opinion makers therein – and contradicts the Supreme Court’s *MBA*-framework^{e)}, which precisely defined it in *Biosig*. Scientifically the BRI is an indefinite alias indefinable notion^{f)} (in spite of^[56] itself being indefinite) – legally: a ‘vague legal concept’^{f)}.
- **The ‘MBA framework interpretation’ legal error.** According to the *MBA*-framework definition this interpretation comprises several evident (and mathematically provable) independent legal errors^{g)}^[415,423], such as **transforms the nature ...* and **significantly more ...*. This interpretation fails to determine their precise meanings – as it is provided in^[e.g.415,423], but unfortunately not grasped by the authors of this

^{1.} a – focused on an invention’s “definiteness, DE”, “patent-eligibility, PE”, and “patentability, PA”, hence inevitably comprising also the “claim interpretation” for this invention’s claim construction –

^{b.} NOTE: Any legal error in an ETCI’s “Knowledge Representation, KR” is an inconsistency to the Supreme Court’s *MBA* framework. A cohesive and didactical presentation will come with^[182] before the end of the year, see also the IES prototype^[e.g. 440].

^{c.} The “*MBA*” abbreviates the “*KSR/Bilski/Myo/Myriad/Biosig/Alice*” – using the initials of their most crucial Supreme Court decisions.

^{d.} Justice Breyer^[69]: “*Different judges can have different interpretations. All you’re getting is mine, ok? I think it’s easy to say that Archimedes can’t just go to a boat builder and say, apply my idea [i.e. the natural phenomenon of a boats’ water displacement] Everybody agrees with that. But now we try to 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 to sketch an outer shell [i.e. framework] of the content, hoping that the experts, you and the other lawyers and the CAFC, could fill in a little better than we had done the content of that shell...*” [highlights added]

^{e.} Justice Ginsberg^[81,127] (as to BRI^{USPTO}’s untenability): “*It cannot be sufficient that a court can ascribe some meaning to a patent’s claims ... post hoc*”, and Constitution authorized “...to inventors the exclusive right to their discoveries, ...” [highlights added]

^{f.} Chief Justice Roberts^[279] (as to the coexistence of the BRI^{USPTO} and the BRI^{CAFC}^[56]): “...it’s a very extraordinary animal in legal culture to have two different proceedings addressing the same question that lead to different results. I’m sorry. It just seems to me that’s a bizarre way to decide a legal question.”

^{g.} – caused by ignoring its linguistic & legal implications^{g)} (as not interpreting parts of its definition, e.g. in *Alice*^[e.g.415], although this complete interpretation is evidently necessary for the meaningfulness of the Supreme Court’s ‘framework’ definition^[e.g.415]). Analytic Philosophy tells us that such absolutely indispensable cognitions are constitutive for correct thinking. Thereby this MPEP version’s additional tiny progress towards grasping the *MBA* framework – nevertheless by now still not noticing all its notions!!! – is not an improvement.

Section2106, evidently not familiar with the AI^{1.a)} applied here – without which the unacceptable vagueness of the USPTO’s preceding PE guideline^[415] documents is not really improved^{1.g)}.

This Sect2106 does not explain, why it completely ignores the simple and clean cut/defined scientific PE-criterion that the author determined/explained/published^[415]. It hence will prevail, anyway – as any mathematically proven cognition.

In total: The MPEP2018/Sect2106 does not support by^{1.d)} adjusting/refining the SPL-precedents about ETCIs to their needs for improving their patent protection – i.e. through the Supreme Court’s SPL-reinterpretation yielding its MBA-framework. Its legal errors achieve the contrary by the sweeping vagueness that they inevitably imply^[415,423].

The FSTP-Project’s Reference List

FSTP = Facts Screening/Transforming/Presenting (Version of 26.02.2018)
 Most of the FSTP-Project papers below are written in preparation of the textbook^[182] – i.e. are not fully self-explanatory independent of their predecessors.

[2] AIIT: "Advanced Information Technology" alias "Artificial Intelligence Technology" denotes cutting edge IT areas, e.g. Knowledge Representation(KR)/ Description Logic (DL)/ Natural Language (NL)/ Semantics/ Semiotics/ System Design/... just as MAI & MKR: "Mathematical Artificial Intelligence & Mathematical Knowledge Representation", the resilient fundament of AIIT and "Facts Screening/Transforming/Presenting, FSTP"-Technology, both developed here.— currently most of it still being in "status nascendi"^[182]

[5] S. Schindler: "Math. Modeling SPL Top-Down vs. Bottom-Up", Yokohama, 2012¹⁾

[9] a) S. Schindler, "Patent Business – Before Shake-up", 2013²⁾.
 b) S. Schindler, "Patent Business – Before Shake-up", 2015³⁾.
 c) S. Schindler, "Patent Business – Before Shake-up", 2018, to be publ. soon.

[56] CAFC Decision Phillips v. AWH Corp., 12.07.2005

[64] B. Wegner, S. Schindler: "A Mathe. Structure Modeling Inventions", Coimbra, CICM-2014⁷⁾.

[69] USSC, Transcript of the oral argument in *Alice Corp. v. CLS Bank*, 31.03.2014⁸⁾.

[81] S. Schindler: "To Whom is Interested in the Supreme Court’s Biosig Decision"⁹⁾

[113] S. Schindler: "The CAFC’s Rejection Over – The USSC, by *Myriad Biotech*...", publ. 07.08.2014¹⁰⁾.

[130] G. Frege: "Funktion und Begriff", 1891.

[157] USPTO: "2014 Int. Guidance on Pat. Subj. M. Eli. & Examples: Abs. Ideas"¹¹⁾.

[160] S. Schindler: "The USSC *Myriad/Alice* Decisions, The PTO’s Implementation by its IEG, The CAFC’s *DDR & Myriad* Recent Decisions", publ. 14.01.2015¹²⁾, its short version¹³⁾, and its PP presentation at USPTO, 21.01.2015¹⁴⁾.

[182] S. Schindler: "A Mathematical Theory of Innovation and Substantive Patent Law Technology", *Textbook*, in prep.

[218] B. Russel: "Principles of Mathematics", see Wikipedia.

[278] a) D. Parnas: Personal Communications, Berlin, 1975.
 b) D. Parnas: "Software Fundamentals", ADDISON-WESLEY, 2001.

[296] S. Schindler: "ACom on the 2016 IEG Update – Suggesting More Stringency", publ. on 09.06.2016¹⁵⁾.

[312] R. Bahr, USPTO: MEMO as to "Recent Subject Matter Eligibility Rulings", 14.07.2016¹⁶⁾.

[313] a.) Wikipedia: "First-order logic", b.) Wikipedia: "Prädikatenlogik", c.) Wikipedia: "Analytic Philosophy", d) Wikipedia: "D. Parnas".

[314] J. Duffy: "Counterproductive Notice in Literalistic v. Peripheral Claiming", U. of Virginia, June 2016¹⁷⁾.

[332] S. Schindler: "MEMO The Notion of Claiming in SPL – pre & post the Aufklärung", pub. 10.10.2016¹⁸⁾.

[335] T. Kuhn: "The Structure of Scientific Revolutions", UCP, 1962.

[348] B. Wegner: Invited paper, "Innovation, knowledge representation, knowledge management and paper, Math. Modelling class. math. thinking", Corfu, Ionian University, 22.11.2016¹⁹⁾.

[349] B. Wegner: Invited of a Robust Claim Interpretation and Claim Construction for an ETCI, - Adv. Steps of a "Mathematical Theory of Innovation", Bangkok, ICMA-MU, 17.-19.12.2016²⁰⁾.

[350] S. Schindler: "The IES Qual. Machine: Prototype Demo", GIPC, NewDeli, 11-13.01.2017.

[351] B. Wegner: "FSTP – Math. Assess. of ETCIs' Quality", GIPC, NewDeli, 11-13.01.2017.

[352] D. Schoenberg: "The IES Prototype Qualif. Machine", GIPC, N NewDeli, 11-13.01.2017.

[353] S. Schindler: "The Lesson to be Learned from the US PE Hype", publ. 11.12.2016²¹⁾.

[354] S. Schindler: "An Amazing SPL Cogn.: Any Pat. Appl. is Draft. Tot. Rob.", publ. 31.01.2017²²⁾.

[355] S. Schindler: "An Amazing SPL Cogn.: Any Pat. Appl. is Draft. Tot. Rob.", publ. 07.03.2017.

[360] IA (Internet Association): "Letter to the President-elect Trump", 14.12.2016²³⁾.

[361] J. Straus: Intellectual Property Rights and Bioeconomy", Journal of IP Law & Practice, 14.07.2017.

[362] USPTO/PTAB: *Ex parte* Schulhauser, 2016,²⁴⁾

[364] S. Schindler: "The PTAB’s Schulhauser Dec. is Untenable", publ. 08.03.2017²⁵⁾.

[366] CAFC, Decision in *TVI v. Elbit*, 08.03.2017²⁶⁾.

[367] P. Michel, et al.: The Current Patent Landscape in the US & Abroad", 12th APLI, USPTO, 09.-10.03.2017²⁷⁾.

[369] P. Newman, dinner speech, 12th APLI, USPTO, 09.-10.03.2017.

[371] Wikipedia: a.) "DSL", b.) "Compiler", c.) "BNF", d.) "Analytic Philosophy", e.) "Axiomatization", f.) "Memory", g.) "Prion".

[372] S. Schindler: "IDLs & KRIs, and Easily Drafting & Testing Patents for Their Total Robustness", publ., 16.05.2017²⁸⁾.

[373] S. Schindler: "Innovation Description Languages, IDLs & Brain brainKR", in prep.

[374] Justice Thomas: Friendly Comment, 04.12.2015²⁹⁾

[376] AIPLA: "Legislative Proposal and Report On Patent Eligible Subject Matter", 2.05.2017³⁰⁾.

[377] IPO: "Proposed Amendments to Patent Eligible Subject Matter", 07.02.2017³¹⁾.

[378] S. Schindler: "see the correct reference in the V.27 of the [372] at the below URL, in a few days.

[379] ABA: Letter by D. Suchy to the USPTO, 28.03.2017³²⁾.

[380] SIPO: Message by H-M Tso, J. Yi, 31.03.2017³³⁾.

[383] B. Stoll: "101 in the Future", AIPLA, 17.05.2017³⁴⁾.

[384] G. Wisdom: "Bus. Anal. Based on *Alice* (Conceded to be Totally Abstract)", Microsoft, 17.05.2017³⁵⁾.

[390] S. Schindler: "The Recent AIPLA Meeting’s ... Nationwide §101-Guidelines ...", publ., 14.06.2017³⁶⁾.

[391] S. Schindler: "ANNEX^[391] to^[390] – Trivializing and Semi-Automatizing ETCIs’ SPL-Satisf.-Tests"

[392] S. Schindler: "The FSTP-Test and the *DDR*’s ETCI Recon. – as Model Case", in prep.

[394] S. Schindler: "IDL & Knowledge Rep.s.", IRRP’17, Orlando, 08.-11.07.2017.

[395] S. Schindler: "IDL & Knowledge Rep.s.", IKE’17, Las Vegas, 17.-20.09.2017.

[396] S. Schindler: "IDL & KRIs", GCKE-2017, Gungao, 19.-21.09.2017.

[397] CAFC, Decision in *ARIOSA v. SEQUENOM*, 12.06.2015³⁷⁾.

[398] CAFC, Denial on Pet. for Hearing en Banc in *SEQUENOM vs ARIOSA*, 02.12.2015³⁸⁾.

[399] USSC, PIC in *SEQUENOM v. ARIOSA*, 21.03.2016³⁹⁾, DENIED on 27.06.2016.

[400] S. Schindler: "MEMO: Sequenom – An Incomplete Interpretation of §101/Alice by the CAFC, Sequenom’s PIC Misses the Point, USSC’s Denial Consequ.", 17.07.2017⁴⁰⁾.

[401] S. Schindler, tbd: "Axiomatization of (non)Exceptional E-crCs", in prep.,

[402] S. Narayan: "On the Micro Biome", 2017 FCBA Conference, 22.06.2017⁴¹⁾.

[403] P. Jeng, J. Jeng: "Parallel Pred. of Stock Volatility", WMSIC2017, 09.07.2017⁴²⁾.

[404] J. Duffy: "The USSC and Biosimilar Litigation: Amgen v. Sandoz", CASRP, 10.07.17⁴³⁾.

[405] P. Morris: "The Latest Developments in CRISPR-Technology", CASRP, 10.07.2017⁴⁴⁾.

[406] S. Schindler: "The PE-Theorem, FSTP-Test, and the US Innovation Econo. ...", publ. 01.08.2017⁴⁵⁾.

[407] USPTO: PATENTELIGIBLE SUBJECT MATTER: REPORT ...", 25.07.2017⁴⁶⁾.

[408] C. Coons, T. Cotton, D. Durbin, M. Hirono: "Stronger Patents Act 2017", 21.06.2017⁴⁷⁾.

[409] S. Schindler: "MEMO about the §112 Enabling Requirement with ETCIs", in prep.

[410] S. Schindler, tbd: "Automatic & Correct Transl. of (non)Exceptional E-crCs", in prep.

[411] D. Kolkner: "USPTO Guidel. on Subject Matter Eligibility", BCBCP Partnership Meet., 02.08.2017⁴⁸⁾.

[412] J. Chambers: "Stakeholders’ Perspectives on S.M Eligibility", BCBCP Partner. Meet., 02.08.2017⁴⁹⁾.

[413] J. Cohan: "S.M Eligibility", BCBCP Partnership Meeting, 02.08.2017⁵⁰⁾.

[414] L. Fischer: "S.M Eligibility", BCBCP Partnership Meeting, 02.08.2017⁵¹⁾.

[415] S. Schindler: "The USPTO’s §101/Biotech WS: Its PE-Test is Too Vague ...", 12.09.2017⁵²⁾.

[416] G. Nickel: "Update on Cancer Immunotherapy Program", BCBCP Partnership Meet., 30.08.2017⁵³⁾.

[417] D. Nguyen: "WIPO Standard ST.26(Nucleotide and Amino Acid Sequences)", BCBCP, 02.08.2017⁵⁴⁾.

[418] USSC PIC: Synopsis

[419] USSC PIC: Amdocs

[420] CAFC-meeting: *Burgos*

[421] CAFC, Decision: *Visual Memory*, 15.08.2017⁵⁵⁾.

[422] C. Shannon: "A Mathematical Theory of Communication", 1948.

[423] S. Schindler: "The CAFC’s Biotech/PE-Decisions – Reconsidered for the R&D-Investor Community", publ. 15.10.2017⁵⁶⁾.

[424] P. Michel: Comment on the BRI and Consistency, at recent Congressional hearing⁵⁷⁾.

[425] N. Kelly: USPTO, 25.08.2015⁵⁸⁾.

[426] L. Fischer: "IP & Diagnostic Symposium", Alexandria, 29.09.2017⁵⁹⁾.

[427] H. Sauer: "IP & Diagnostic Symposium", Alexandria, 29.09.2017⁶⁰⁾.

[428] W. Woessner: "IP & Diagnostic Symposium", Alexandria, 29.09.2017⁶¹⁾.

[429] J. Cohan: "IP & Diagnostic Symposium", Alexandria, 29.09.2017⁶²⁾.

[430] E. Haug: "FCBA Global Series – Euro. 2017 Session", London, 25.-26.09.2017⁶³⁾.

[431] L. Coury, M. H. Furman, L. Jakob: "Biologic and Biosimilar Litigation – Recent Developments", FCBA Bench & Bar in Dialogue, New York, 4.10.2017⁶⁴⁾.

[432] Judge R. Taranto, Judge A. Lourie, Chief Judge S. Prost, Judge J. Reyna: "Discussion with the Judiciary", FCBA Bench & Bar in Dialogue, New York, 4.10.2017⁶⁵⁾.

[433] S. Schindler: "An SPL ETCI’s Dig. # Its Totally Rob. – Espec. PE. O’States", publ. 05.10.2017⁶⁶⁾.

[434] S. Schindler: "Getting Famil. with the IES by Testing its Prototype_V.x.xz1", in prep.

[435] P. Leahy, IPAS 2017, Intellectual Property Awareness Summit, 06.11.2017, Chicago.

[436] P. Ludwig, AIPPI 2017, Sydney, World C., M. Pharma2: Injunctions: innovator vs. innovator, 16.10.2017⁶⁷⁾.

[437] J. Lefstin, P. Menell, D. Taylor: "Final Rep. of the Berkeley Center for Law & Tech. Section 101 Workshop: Addressing Patent Eligibility Challenge", Berkeley Tech. Law Journal, 2018 Forthcoming

[438] USSC, Brief of Federal Respondent (USPTO) in *Oil States Energy v. Greene’s Energy*⁶⁸⁾.

[439] R. Rader: Pers. Communication, Chicago, 06.11.2017.

[440] S. Schindler: "The Supreme Court’s 'Outer Shell'-Specification of an ETCI – Digitizing & Mathematizing It: & The Semi-Automated FSTP-Tests by the IES of ETCIs for Satisfying SPL – *DDR Myriad, Sequenom, GTG*, & The German SPL-Precedents Implies the Supreme Court’s SPL-Framework – Political Issues.", pub. 20.01.2018⁶⁹⁾.

[441] S. Schindler: "OAEAM – An ETCI’s 4 Use-Hierarchy-Levels", in prep.

[442] P. Michel: Pers. Communication, Alexandria, 30.08.2017.

[443] D. Schoenberg, J. Schulze, J. Wang, C. Negrutiu, B. Wegner, R. Wetzler, S. Schindler, "The User Interface Design of the IES for Testing an ETCI’s Satisfying SPL", 23.01.2018⁷⁰⁾.

[444] D. Schoenberg, J. Schulze, J. Wang, C. Negrutiu, B. Wegner, R. Wetzler, S. Schindler, "The IES GUI – A Primer: Using the FSTP-Test, Inhouse Mode", 23.01.2018⁷¹⁾.

[445] B. Wegner: "A Mathematical KR Model for Claim Interpretation and Construction", 23.01.2018⁷²⁾.

[446] R. Stoll (on IP Watchdog): "Director Andrei Iancus Act One", 26.11.2017

[447] R. Katznelson: "Private Patent Rights, the Patent Bargain and the Fiction of Administrative 'Error Correction' in Inter Partes Reviews", 04.12.2017⁷³⁾.

[448] H. Goddard, J. Strauss: Pers. Communication, Berlin, 20.12.2017.

[449] tbd

[450] E. Kandel: "Auf der Suche nach dem Gedächtnis.", Random House, 2006.

[451] S. El-Metwally, O. Ouda, M. Helmy: "Next Generation Sequencing Technologies and Challenges in Sequence Assembly", Springer, 2014

[452] CAFC, Decision in *Finjan v. Blue Coat Systems*, 10.01.2018⁷⁴⁾.

[453] S. Schindler: "Equivalence of US and German Highest Courts’ Substantive Patent Law (SPL)", to be published soon.

[454] CAFC: Decision in *Finjan v. Blue Coat Systems*, 10.01.2018⁷⁵⁾.

[455] MPEP-2018, 25.01.2018

[456] S. Schindler: "Short Artificial Intelligence Comment on MPEP2018, SECT2106 – NO IMPROVEMENT", this paper.

[457] B. Wegner, S. Schindler, "Mathematizing All Rationalized Elementary Creative Concepts of an ETCI", in prep.

) document and full list available at www.fstp-expert-system.com