

The Absurdity of the §101-Discussion in MPEP-2018_Sect2106.

Sigram Schindler
TU Berlin & TELES Patent Rights International GmbH
www.fstp-expert-system.com

At the MPEP-2018 conference^{1.a)} a remarkable event occurred when questions were invited after the explanation of MPEP-Section_2106 on §101: Not a single attendee raised a hand! Not a single question was asked!

This has never happened before! Everybody has had, as to both kinds of ETCIs^{a)}, dozens of questions – for years!^{b)}

Not asking any such question unmistakably expressed the attendees' firm and common doubt about the MPEP's §101-answers (just pushed by the USPTO): That they are far too vague to be legally or factually helpful^{d)} – also as their exorbitant volume (unnecessary for the correct and scientifically confirmed framework-interpretation) doesn't comprise a rational PE/ⁿPE-criterion^[415].

Finally, this unacceptable volume & vagueness (as usual caused by a lack of rationality) invites the totally superfluous construction of two different semiotics^[440/1.c)] for both kinds^{a)} of ETCIs and the 'significantly more ...' requirement – stated by Alice's PE-analysis and to be met by an inventive concept of an ETCI-application for its PE.

Terminating this short appendix to^[456] leaves two questions open, asked there already: ● "Does the USPTO's 2-step PE-test at all – in spite of its sweeping vagueness leading to the equally sweeping vagueness of Section2106 – adjust the SPL-precedents about ETCIs to their needs for improving their patent protection, as the Supreme Court by Mayo required?, and ● "Does Section2106 rightfully ignore the clean cut, simple, and rational PE-criterion, here repeated by *fn*^{1e,9)}, although it meets all Supreme Court requirements, avoids any vagueness – and evidently is the fundamental axiom of any ET independent 'Deterministic Mathematical Innovation Theory'^{[182]?}". Both answers will broadly arise at the latest at^[182], supported by the IES^[443,444].

-
- ^{1. a} at the USPTO on 02.03.2018^[456], primarily about the PE/ⁿPE of ITtech/DNAtch 'Emerging Technology Claimed Inventions, ETCIs'.
- ^b The Supreme Court repeatedly required ex- and implicitly a reinterpretation^{c)} of §101 for improving ETCIs' patent protection – delivered in 2014 by the USPTO (and CAFC), but unfortunately incomplete from the outset and hence vague & legally erroneous^[440,415].
- ^c 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..." [...]
- ^d – which some attendees perhaps already knew^{e)} from FSTP-Technology reports explaining its rational^[415/3.1d)] PE/ⁿPE-criterion meeting all these framework requirements (that the 2 boxes below show, scientifically proven correct by 'Deterministic Mathematical AI'^[4]). Anyway it is clear that the USPTO 2-step PE test does not rationally meet them – which the US patent community broadly knows^[459].
- ^e For those not yet familiar with the incomplete-/faultiness of the interpretation of the Alice's PE-analysis – on which the USPTO/CAFC 2-step PE test is based – this footnote^{e)} repeats from^[e.g.415,440] the 2 below boxes mathematically describing the complete and correct PE-Theorem/-Axiom/-Specification/-Analysis and FSTP-Test (satisfying it^[453]) in their "ETCI Knowledge Representation, ETCI-KR"^[4] (see^[453], or text-book-style^[182]). It trivializes showing (primarily^[453]) that both are functionally much more sophisticated & fligree than this USPTO/CAFC 2-step PE test: For any ETCI, Alice's PE analysis⁹⁾ AS A WHOLE shows more (independent^[453]) requirements – in the first box quoted left side in "...", verbally represented by semiotic SPL notions referring to this ETCI, and E-crCs mathematically represented and quoted right side in the corresponding places in this box – than the USPTO/CAFC mentions resp. defines in its 2-step PE test. Its lack of ● mentioning holds as to the 'nature'-requirement (in line **a**)), and ● preciseness holds e.g. as to the 'significantly more'-requirement definition (in line **y**)).
- I.e.: USPTO & CAFC took interpreting Alice's PE analysis⁹⁾ far too easy – to a degree absolutely inadmissible in for cognitions striving thinking. This here namely requires, for any ETCI, the notional preciseness enabling to show, first of all for the 'PE-box', by rational reasoning on any of its lines **a**)-**y**), the equality ● of the on its rational left-side verbally represented compound notion in "... (from the Alice decision's PE analysis) ● to the ETCI specific (by the ETCI's specification prescribed) rational compound notion represented by (potentially mathematically defined) E-crCs. The reason being that this rationally excludes (by definition then mathematically provable) at 'minimal' SPL restriction^[453] that an ETCI is totally preemptive, i.e. may potentially threaten putting the US NPS into jeopardy.
- ^f NOTE: An 'analysis' denotes^[440/1.c)] – in plain English and in the MBA-framework context – the clarification of an item's meaning prior to reading and/or writing an ETCI specification comprising this item. This ETCI specification then knows this item's meaning. In the Alice decision's PE-analysis of an ETCI, any item's meaning serves the purpose of 'assessing this ETCI's PE/ⁿPE'.
- Applying this to Mayo, these meanings comprise knowledge embodied by the meaning A) firstly by the meaning of its Mayo-decision's semiotic +)"exceptional inventive concept" notion (here being the precise impact on a human's metabolism of the active pharmaceutical ingredient 'Thiopurine', as such barring this invention's PE) and +)other necessary ingredients' and administrations' impacts on this ⁿPE invention, just as – if available (which is not the case in Mayo and in Alice) – B) secondly of this ETCI's application of this ⁿPE invention structured as in A) but a "nonexceptional inventive concept" meeting **a**) and **(β)** or **y**)).
- Hence, the result of interpreting the just explained Alice-analysis/-specification as the USPTO/CAFC erroneously does is not the total set of meanings of requirements that the Alice's PE test of an ETCI must meet, i.e. **is not yet its complete Alice PE/ⁿPE-test alias -criterion**: It is just a part of Alice's complete PE analysis specification! The latter as a whole is met by its FSTP-Test.

PE-Theorem alias **PE-Axiom** alias **PE-Analysis** ETCI is PE \equiv [ETCI is a pair of an $n^{PE}TTO \wedge$ an application of $n^{PE}TTO, T^{T0}A$]
 a) $T^{T0}A$ "transforms the nature of T^{T0} " into ETCI \equiv $[(\Pi^{T0}scope(E-crCS) \subseteq scope(E-crCS^{T0})) \wedge$
 b) (having an "inventive *Alice* concept" or $\wedge (\exists E-crC \in \{E-crCSIE-crCS^{T0}\} \vee$
 c) or being "significantly more than T^{T0} ") $\vee |E-crCSIE-crCS^{T0}| \geq 1)]$
 \equiv ETCI is \lim PRE.

FSTP-Test <A.d. $\text{IDL} \text{FSTP-Test in: mathematical KR} = \text{mathematical KR}$ > input 'COM(ETCI)^{mat} \equiv O-/A-/E-inC0S' \wedge begin:
 1) if $[\forall (E-crC0nk \vee E-ncrC0nk), \forall 1 \leq n \leq N \wedge \forall 1 \leq k \leq K^n, \text{are lawfully_disclosed}]$ then go on;
 2) If $[(A-crC0n = \wedge^{1 \leq k \leq K^n} (E-inC0nk \vee E-ninC0nk), \forall 1 \leq n \leq N)$ is enablingly disclosed] then go on;
 3) If [COM(ETCI) is (E-definite \wedge E-complete \wedge uniquely_defined \wedge useful)] then go on;
 4) if $[scope(E-crCS^{T0}) \neq \Phi]$ then go on;
 7) if $[(\Pi^{T0}scope(E-crCS^{ETCI}) \subseteq scope(E-crCS^{T0})) \wedge (\forall x \in E-crCS^{ETCI} \setminus E-crCS^{T0} : x \perp E-crCS^{T0}) \neq \Phi]$ then go on;
 8) if $[\forall \epsilon \in \{E-crC0nk \mid 1 \leq n \leq N \wedge 1 \leq k \leq K^n\}$ are independent of each other] then go on;
 9) if $[\forall i, n, k \exists \Delta i, n, k ::= \text{if } (E-crCink = E-crC0nk) \text{ 'A' else 'N'}]$ then go on;
 10) if $[\sum_{1 \leq n \leq N} (\min_{1 \leq i \leq K^n} \{|\Delta i, n, 1| = "N", \dots, \Delta i, n, K^n = "N">\}) \geq 2]$ then go on; output 'COM(ETCI)^{mat} satisfies SPL' \wedge stop.

At a closer look at the PE-Analysis/Axiom and the FSTP-Test one sees that the above identified unquestionable legal errors have encouraged the USPTO's & CAFC's incomplete and hence legally totally erroneous – somewhat 'absurd' – interpretation of the Supreme Court's PE-analysis in *Alice* and hence of ETCIs criticized by FSTP-publications in [e.g.415,...].

The FSTP-Project's Reference List

FSTP = Facts Screening/Transforming/Presenting (Version of 15.03.2018')

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] AIT: "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 AIT 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, 2012'

[9] a. S. Schindler, "Patent Business – Before Shake-up", 2013';
 b. S. Schindler, "Patent Business – Before Shake-up", 2015';
 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, CIMC-2014'.

[69] USSC, Transcript of the oral argument in *Alice Corp. v. CLS Bank*, 31.03.2014'.

[81] S. Schindler: "To Whom is Interested in the Supreme Court's Biosig Decision?"

[113] S. Schindler: "The CAFC's Reactions Over – The USSC, by *Mayo Biosig Alice*...", publ. 07/08/2014.

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

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

[160] S. Schindler: "The USSC *Mayo/Myriad/Alice* Decisions, The PTO's Implementation by Its IEG, The CAFC's *DDR* & *Myriad* Recent Decisions", publ. 14.01.2015', its short version¹, and its PP presentation at USPTO, 21.01.2015'.

[182] S. Schindler: "A Mathematical Theory of Deterministic Innovations 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: "A Com. on the 2016 IEG Update – Suggesting More Scrutiny", publ. on 09/06/2016'

[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 2016'.

[332] S. Schindler: "MEMO The Notion of Claiming in SPL – pre & post the Aufklärung", pub. 10.10.2016'

[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, 22.11.2016'

[349] B. Wegner: Invited of a Robust Claim Interpretation and Claim Construction for an ETCI, - Adv. Steps of a "Mathematical Theory of Innovation"², Bangkok, ICMA-MU, 17.-19.12.2016'

[350] S. Schindler: "The IES Qual. Machine: Prototype Demo", GIPC, New Delh. 11-13.01.2017.
 B. Wegner: "FSTP – Math. Assess. of ETCIs' Quality", GIPC, New Delh. 11-13.01.2017'.
 D. Schoenberg: "The IES Prototype Qualif. Machine", GIPC, New Delh. 11-13.01.2017'.
 S. Schindler: "The Lesson to be Learned from the US PE Hype", publ. 11.12.2016'.
 S. Schindler: "An Amazing SPL Cogn.: Any Pat. Appl. is Draft. Tot. Rob.", publ. 31.01.2017'.
 S. Schindler: "An Ama. SPL Cogn.: Any Pat. Appl. is Draft. Tot. Rob.", publ. 07.03.2017'.

[361] J. Straus: "Int. Prop. Rights & Bioeconomy", Journal of IP Law & Practice, 14.07.2017

[364] S. Schindler: "The PTAB's Schulhauser Dec. is Untenable", publ. 08.03.2017'

[366] CAFC, Decision in *TVI v. Ebit*, 08.03.2017'.

[367] P. Michel, et al. "The Current Patent Landscape in the US&Abroad", 12th APLI, USPTO, 09.-10.03.2017'.

[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 & KR's, and Easily Drafting & Testing Patents for Their Total Robustness", publ., 16.05.2017'

[374] Justice Thomas: Friendly Comment, 04.12.2015'

[383] B. Stoll: "101 in the Future", AIPLA, 17.05.2017'

[384] G. Wisdom: "Bus. Anal. Based on *Alice* (Conceded to be Totally Abstract)", Microsoft, 17.05.2017'

[390] S. Schindler: "The Rec. AIPLA Meeting's ... §101-Guidelines ...", publ., 14.06.2017'

[391] S. Schindler: "ANNEX^[391] to^[391] – 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, Ontario, 08.-11.07.2017.

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

[396] S. Schindler: "IDL & KR's, GCKE-2017, Qingdao, 19.-21.09.2017.

[397] CAFC, Decision in *ARIOVA v. SEQUENOM*, 12.06.2015'.

[400] S. Schindler: "MEMO: Sequenom – An Incomplete Interpretation of §101/*Alice* by the CAFC, Sequenom's PIC Misses the Point, USSC's Denial Consequ.", 17.07.2017'

[404] J. Duffy: "The USSC and Biosimilar Litigation: Amgen v. Sandoz", CASRIP, 10.07.17'

[406] S. Schindler: "The PE-Theo., FSTP-Test, US Innovation Econo...", publ. 01.08.2017'

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

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

[411] D. Kolker: "USPTO Guidel. on SM PE", BCBCP Partnership Meet., 02.08.2017'

[412] J. Chambers: "Stakeholders' Persp.-on SM PE", BCBCP Partner. Meet., 02.08.2017'

[413] J. Cohan: "S.M Eligibility", BCBCP Partnership Meeting, 02.08.2017'

[414] L. Fischer: "S.M Eligibility", BCBCP Partnership Meeting, 02.08.2017'

[415] S. Schindler: "The USPTO's §101/Botch IWS, its PE-Test is Too Vague...", 12.09.2017'

[416] G. Nickol: "Update on Cancer Immunotherapy Program", BCBCP Partner Meet., 30.08.2017'

[417] D. Nguyen: "WIPO Standard ST.26 (Nucleotide and Amino Acid Sequences)", BCBCP, 02.08.2017'

[418] USSC PIC: Synopsis

[419] USSC PIC: Amdocs

[420] CAFC-pending: *Burgos*

[421] CAFC, Decision in *Visual Memory*, 15.08.2017'

[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.15.10.2017'

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

[425] N. Kelly, USPTO, 25.09.2015'

[426] L. Fischer: "IP & Diagnostic Symposium", Alexandria, 29.09.2017'

[427] H. Sauer: "IP & Diagnostic Symposium", Alexandria, 29.09.2017'

[428] W. Woessner: "IP & Diagnostic Symposium", Alexandria, 29.09.2017'

[429] J. Cohan: "IP & Diagnostic Symposium", Alexandria, 29.09.2017'

[430] E. Haug: "FCBA Global Series – Euro. 2017 Session", London, 25.-26.09.2017

[431] L. Coury, M. H. Furman, L. Jakob: "Biologic and Biosimilar Litigation – Recent Developments", FCBA Bench & Bar in Dialogue, New York, 4.10.2017

[432] Judges R. Taranto, A. Lourie, Chief S. Prost, J. Reyna: "Discussion with the Judiciary", FCBA Bench & Bar in Dialogue, New York, 4.10.2017'

[433] S. Schindler: "An SPL's ETCI's Dig. fits its Totally-Rob. – Espec. PE. Of States", publ. 05.10.2017'.

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

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

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

[440] S. Schindler: "The Supreme Court's Outer Shell-Specification of an ETCI ...", publ. 20.01.2018'

[441] S. Schindler: "OWEN – 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. Negritiu, B. Wegner, R. Wetzler, S. Schindler, "The IES'es User Interface Design for Testing an ETCI's Satisfying SPL", 23.01.2018'

[444] D. Schoenberg, J. Schulze, J. Wang, C. Negritiu, B. Wegner, R. Wetzler, S. Schindler, "The IES GUI – A Primer: Using the FSTP-Test, Inhouse Mode", 23.01.2018'

[445] B. Wegner, "A Mathematical KR Model for Claim Interpretation and Construction", 23.01.2018'

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

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

[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*, 10.01.2018'

[453] S. Schindler: "Equivalence of US and German Highest Courts' SPL", ttp still in March. 484 tbd

[454] MPEP-2018, 25.01.2018

[455] S. Schindler: "Short Artificial Intelligence Comment on MPEP2018_SECT2106 – NO IMPROVEMENT", published on 28.02.2018'

[457] B. Wegner, S. Schindler, et al.: "Mathematizing Any Rationalized Elementary Inventive Concept of an ETCI", in prep.

[458] S. Schindler: "Comment on the Absurdity of §101 in MPEP-2018_Sect2106.", this paper'.

[459] Kevin E. Noonan: *Exergen Corp. v. Kaz USA, Inc.* (Fed. Cir. 2018), March 11, 2018.')