Conservatives
for
Property Rights

March 8, 2019

U.S. Patent & Trademark Office
600 Dulany Street
P.O. Box 1450
Alexandria, VA 22313

RE: 2019 Revised Patent Subject Matter Eligibility Guidance, Docket No. PTO-P-2018-0053

To whom it may concern:

Conservatives for Property Rights (CPR), a coalition of policy organizations representing thousands of Americans, strongly supports the 2019 Revised Patent Subject Matter Eligibility Guidance, Docket No. PTO-P-2018-0053.

We commend the U.S. Patent and Trademark Office (PTO), and Director Andrei Iancu for his leadership, on this initiative to ensure "clarity, consistency, and predictability" in the PTO's application of the patent laws relating to patentable subject matter. The revised guidance provides coherence and clear direction in assessing whether patent claims constitute abstract ideas under the law.

CPR agrees that "[t]he growing body of precedent has become increasingly more difficult for examiners [and practitioners, inventors, administrative judges, and indeed federal judges] to apply in a predictable manner, and concerns have been raised that different examiners within and between technology centers [along with administrative judges and federal judges] may reach inconsistent results."[1] CPR could not agree more that comparing patent claims to ones earlier deemed to "be directed" to abstract idea exceptions "has since become impractical."

In our judgment, the PTO has done a masterful job of making sense of contradictory and confused judicial determinations regarding patentable subject matter. The earlier guidance took a long step in the right direction of making sense of the judicial mishmash of 35 U.S.C. § 101. The revisions extend that progress by another step forward. The revised guidance's synthesis of relevant judicial rulings and groupings of abstract ideas — mathematical concepts, methods of organizing human activity, and mental processes — along with useful examples give meaning to the heretofore post-*Alice*, post-*Mayo* uncertainty and inconsistency.

The revised guidance should add certainty and consistency to an important aspect of the threshold question of whether something is patentable, not falling under a disqualifying "direction to" an "abstract idea." The answer carries great consequence concerning the

[1] https://www.federalregister.gov/documents/2019/01/07/2018-28282/2019-revised-patent-subject-matter-eligibility-guidance

exclusive private property rights in one's invention as well as broader real-world effects, as seen in distressing rulings such as the recent *Athena Diagnostics v. Mayo*.[2] There, Judge Pauline Newman decried the outcome, stating in dissent, "For procedures that require extensive development and federal approval, unpredictability of patent support is a disincentive to development of new diagnostic methods. The loser is the afflicted public, for diagnostic methods that are not developed benefit no one."

Conservatives for Property Rights believes the PTO has, with this guidance, done yeoman's work toward restoring certainty and predictability in patentability matters, at least as far as the PTO itself is concerned. Indeed, this guidance would have remedial effect in the judiciary, should judges (and justices) follow this practical, de facto definition of "abstract ideas."

We commend the PTO on deriving order from badly disordered jurisprudence. We urge the PTO to apply these revised guidelines post haste.

Respectfully,

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[2] *Athena Diagnostics Inc. v. Mayo Collaborative Services*, 1717-2508 (Fed. Cir. 2019)