No. 13-298

IN THE

Supreme Court of the United States

ALICE CORPORATION PTY. LTD.,
Petitioner,
v.
CLS BANK INTERNATIONAL AND
CLS SERVICES LTD.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* DALE R. COOK, *PRO SE*, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Alice asks "whether … computer-implemented … machines, processes … are … patentable … subject matter within the meaning of 35 U.S.C. § 101 …?" The more fundamental question is: "where are industries to turn in the absence of patent protection for such technologies since patent law, not copyright law, protects the functional (valuable) machines or processes specified by computer programs?" Also, *Markman v. Westview Instruments*, 517 U.S. 370 (1996) states a "patent is a legal instrument, to be construed, like other legal instruments," yet 245 legal claims in Alice's legal instruments (39 claims in US Patent 5,970,479; 75 claims in US Patent 6,912,510; 84 claims in US Patent 7,149,720; and 47 claims in US Patent 7,725,375) stand unconstrued yet threatened for allegedly reading on a human mind thinking, yet one skilled in the art would NEVER construe the claims as human thinking because Intelligence Amplification automation, like Alice's, is sold to augment humans, not replace them. Humans are the market to whom Alice sells. A bizarre result reached because Alice's claims have never been construed in accordance with *Markman*. *Is this fair?* Further, the court below created (2008) an alleged "machine or transformation test" from a hodge-podge of this Court's Industrial Age law (CAFCIndustrialAge Test) that gives the drafting attorney the Hobson's choice of (a) drafting claims that pass the CAFCIndustrialAge Test, but are subject to strong legal arguments of invalidity and/or unenforceability as a matter of law, or (b) drafting claims that are enforceable and valid, but subject to strong legal arguments that such claims fail the CAFCIndustrialAge Test. Is this right? For these reasons, Amicus asks this Court to grant Alice's Petition.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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INTEREST OF *AMICUS CURIAE* [1]

Dale Cook, Pro Se Amicus, the real party in interest, is an attorney licensed by Texas (1992) and Washington (2001). Mr. Cook believes "V for Vendetta" frames showing non-copyrightable material is fair use, but is seeking permission.

Mr. Cook filed a Pro Se Amicus brief in the court below.

SUMMARY OF ARGUMENT

Patent, not Copyright, protects the machines and processes specified by computer programs. Court should require *Markman*-compliant claim construction in all patent litigations that involve Intelligence Amplification (IA) automation, especially where malpractice is implicated.

IA automation is a type of technology that varies machine states to produce "data" (human perceivable differences) that can be understood as "information" (human understandable "data") by/with human thinking. One skilled in the art would NEVER construe process claims to IA machine-state-produced data as human thinking.

The CAFCIndustrialAge Test applied to IA technologies creates a DILEMMA: patentable subject matter that meets the Test but easily argued

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* understands from the SCT website that all parties have consented to *Amicus* briefs.

invalid/unenforceable "as a matter of law" or vice versa.

The conclusion that Alice is patent-claiming "human thinking" can be cured by adherence to *Markman*. But, this Court must resolve the DILEMMA created by CAFCIndustrialAge Test.

ARGUMENT

I. Intelligence Amplification Technologies, Such as Described in the Question Presented, Cannot be Discussed Without the Benefit of a Precise Formal Vocabulary that Distinguishes Between (a) Processes-Emergent-From-Program-Assembled-Machines-In-Operation, and (b) Program-Assembled-Machines-Proper, and (c) Machine States, and (d) Data (human-perceivable differences), and (e) Information (human understandable Data); In the Face of this Complexity, Markman-Compliant Claim Construction Should be Required

Attorney malpractice is a State Law cause of action and State Courts must follow Federal substantive patent law. *Gunn v. Minton*, 568 U.S. __ (2013). This Court states a "patent is a legal instrument, to be construed, like other legal instruments … by the standard construction rule that a term can be defined only in a way that comports with the instrument as a whole … the decision maker vested with the task of construing the patent … to ascertain whether an expert's proposed definition fully comports with the specification and claims and so will preserve the patent's internal coherence." *Markman v. Westview Instruments*, 517 U.S. 370 (1996). Yet the 245 legal

claims (39 claims – Patent 5,970,479; 75 claims – Patent 6,912,510; 84 claims – Patent 7,149,720; and 47 claims Patent 7,725,375) in Alice's ambiguously "invalidated" legal instruments have never been construed in accordance with *Markman*. *CLS Bank v. Alice*, 717 F.3d 1269 (Fed. Cir. 2013). Is this fair?

One skilled in the art would NEVER construe the claims as human thinking because Intelligence Amplification automation, like Alice's, is sold to augment humans, not replace them. Humans are the market to whom Alice sells. Alice does not sell human thinking, but rather a change in machine states/ processes, and thus one skilled in the art could never derive human thinking from the claims. That is why this Court's *Markman* jurisprudence is so critical.

There are no words in this Court's jurisprudence that accurately address the concepts of Intelligence Amplification ("IA") automation such as Alice's. Like Heidegger's English translators, Amicus creates and uses compound words herein. The compound words are meant to assist the Court in remembering that, in IA automation, (i) one part of a computer program assembles a machine, (ii) another part of the computer program specifies how that machine will operate, (iii) when that program-assembled machine is in operation, another part of the computer program causes the states of various of the machine parts (mechanical) or voltage (electronic) to be mapped/ recorded, and (iv) those dynamically mapped/recorded states typically constitute data that IA process claims are drafted toward. So, a claimed IA process does typically emerge from the operations of a program-controlled machine, where that machine itself was previously assembled by the computer program.

Either the emergent process or the machine itself is typically claimed in IA.

To help the Court from being confused in the face of this complexity, Amicus creates and uses herein this FIRST COMPOUND WORD: "processes-emergent-from-program-assembled-machines-in-operation-OR-program-assembled-machines-proper"; this SECOND COMPOUND WORD: "processes-emergent-from-program-assembled-machines-in-operation"; and this THIRD COMPOUND WORD: "program-assembled-machines-proper."

Processes-emergent-with-program-assembled-machines-in-operation (process statutory class) claim construction can be complicated in that the machines are assembled from selected logic circuits by computer programs, and then the processes emerge from the mapped states of such computer-program-assembled machines-in operation, or at ending state. If viewed from "inside" the machine (e.g., on the inside of an LCD monitor – the part a human can't see), the changes of states of the machine are just that: changes in state (e.g., changes in voltage signals that drive associated brightnesses of pixels on a computer screen). However, when the changes in machine states create a difference a human can perceive, formally "data" (plural of datum) are produced (e.g., the different voltages are such that a human can perceive differences in brightness in at least two areas of the screen). For example, if the changing voltages drove pixel brightness differences creating a character string that an observing human could discern – such as "comprar el dólar canadiense inmediatamente por 90 centavos de dólar en la que tenemos un comprador dispuesto a pagar inmediatamente 95 centavos de dólar" – such a string would constitute data. If a

human observer only understands English and not Spanish, such a string would merely constitute data.

However, if data – human-discernible differences (e.g., text string) – are understood to have a meaning by an observing human, such data are said to formally constitute "information." For example, if the data (machines states (e.g., varying voltages/varying pixel brightnesses)) formed the character string "buy the Canadian dollar immediately for 90 cents US in that we have a buyer willing to immediately pay 95 cents US"[2] the data – character string – would constitute information for an English reader.

That character string (data) can be understood by/with human thought, but the data itself does not constitute human thought. From the machine standpoint, it is just the current state of a process that changes pixel brightnesses as dictated by the computer program.

A patent claim to that process would read like the string ("buy the Canadian dollar immediately …), but with a proper claim construction, one skilled in the art would understand that what was claimed was the machine-in-motion – process – or an end state of a process that resulted in pixel brightnesses that a viewing human could perceive as the string "buy the Canadian dollar immediately…." One skilled in the art would not construe the claim as human thinking because Intelligence Amplification automation, like Alice's, is sold to augment humans, not replace them. Humans are the market to whom Alice sells. Alice does not sell human thinking, but rather a change in machine states/processes, and thus one skilled in the art could never derive human thinking from the

[2] From "Google Translate."

claims. That is why this Court's *Markman* jurisprudence is so critical here.

The Court should require *Markman*-compliant claim construction ("*Markman*") in all patent litigations to avoid courts being misled as they have been in Alice's cause.

II. Where Are Intelligence Amplification Technologies Industries to Turn in the Absence of Patent Protection for the Machines and Processes Specified by Computer Programs (a form of hardware specifications)

Alice asks "whether … computer-implemented … machines, processes … are ... patentable … subject matter within the meaning of 35 U.S.C. § 101 …?" The more fundamental question is: "where are industries to turn in the absence of patent protection for such technologies since patent law, not copyright law, protects the functional (valuable) machines or processes specified by computer programs?" Further, the court below created an alleged "machine or transformation test" from a hodge-podge of this Court's Industrial Age law (CAFCIndustrialAge Test), *Bilski*, 545 F.3d 943 (Fed. Cir. 2008), that gives the drafting attorney the Hobson's choice of (a) drafting claims that pass the CAFCIndustrialAge Test, but subject to strong legal arguments that such claims are invalid and/or unenforceable as a matter of law, or (b) drafting claims that are enforceable and valid, but subject to strong legal arguments that such claims fail the CAFCIndustrialAge Test. Is this right?

The accused infringer (CLS Bank) is an institution of significant financial means. The owner of the patent rights (Alice, who is not the inventor) is

desirous of at least part of those means as compensation for the patent rights it believes it owns. The owner of such patent rights will be disappointed should it turn out that the legal instruments are drafted to unpatentable subject matter. The implications are staggering, and improper, the results of brilliant lawyering as befit the financial industry, but improper nevertheless.

Malpractice liability can only be established if harm is proven. Alice's harm – the loss of all patent infringement rights – is enormous and will affect all industries relying on legal protection for processes-emergent-from-program-assembled-machines-in-operation-OR-program-assembled-machines-proper.

This Court, in light of its pronouncements in *Gunn* that State Courts will follow the substantive patent law as set forth by the Federal Courts, should ensure that the substantive patent law is objective, so the State Courts can follow *Gunn*. *Markman* should be required, and the law applied here should be clear enough that a State Court could apply the same law to reach substantially the same result should a malpractice claim be made.

The judge-created exceptions to otherwise statutory subject matter are not consistent with this goal. Analytically, the judge-created exceptions to otherwise patentable statutory subject lie where an attorney, following their ethical rules, would likely not reach in view of his client duties and the law. An implication of loss of all client rights/attorney error for not knowing a shifting and uncertain "standard" – upon which no judges/Justices can agree – buried levels deep under ethically-driven attorney reliance is not in accord with an attorney's ethical duties to his client, and exposes the drafting attorney to the

liability theory used in the record setting $72.6 million Akin Gump patent attorney malpractice verdict. The Court should strike all judge-created exceptions from the law in favor of other more fair and objective criteria (such as novelty) on at least this basis, but especially in view of *Gunn*.

Alice's legal instruments reach this Court with some judges stating that the statutory class to which the claims are drafted may not matter. This is inconsistent with this Court's understanding in *Markman*: the substantive law of post-issuance patent claim infringement varies dependent upon the statutory class under consideration.

For IA technologies, a claim to a machine activates different infringement law and has different enforcement considerations than a claim to a process. Attorneys often choose the statutory class as a legal strategy in view of the expressed commercial objectives of their clients and in view of their fiduciary and ethical duties. The statutory class of the claim is crucial and cannot be ignored.

Patent claims must be sufficiently definite to provide notice to others that the patent owner is claiming a right to exclude through the vehicle of patent infringement lawsuits. Notice for IA technologies is complicated due to the ease with which the technology allows nouns (machines) to be mischaracterized as verbs (process). Failure to keep nouns and verbs straight subjects the client to strong/expensive post-issuance argument that such claims are invalid as a matter of law.

Enforcement for IA Technologies is complicated due to the ease with which such technologies can be "parted up." For example, drafting attorneys must

foresee a company placing different parts of its automation in different legal sovereigns to avoid patent infringement claims (e.g., where the United States has no legal jurisdiction (e.g., Canada)). Failure to take account of the multi-sovereign gambit subjects the client to strong/expensive post-issuance argument that such claims are unenforceable as a matter of law.

Before 2008, it was possible to draft pure system or pure method claims that would meet the definiteness requirements and tend to forestall the multi-sovereign gambit. Attorneys could draft around the noted complexities by patterning on CAFC precedent.

However, the CAFC recently replaced time-tested IA technology law with a "machine or transformation test" cobbled together from a hodge-podge of this Court's Industrial Age law ("CAFCIndustrialAge Test"). *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008). This hodge-podge creates a DILEMMA: (a) drafting claims that meet the CAFCIndustrialAge Test, but are subject to strong/expensive arguments of invalidity/unenforceability as a matter of law, or (b) drafting claims that are enforceable/valid, but subject to strong/expensive arguments that such claims are unpatentable for failing to meet the CAFCIndustrialAge Test. The Court should grant Alice's petition to address and resolve this dilemma.

In view of lack of copyright protection, *Gunn*, and the irresolvable legal dilemmas that arise from the application of the CAFCIndustrialAge Test to IA technologies, this Court should, (a) require a *Markman* where a client could reasonably conclude legal malpractice is implicated, with careful account of the statutory subject matter class to which the attorney drafted the claim, (b) eliminate all judge-

created exceptions to the patent statutes in favor of objective criteria consistent with attorney rules/duties which State Courts can apply in attorney malpractice actions, and (c) resolve the dilemma created by applying the CAFCIndustrialAge Test to Information Age technologies.

III. Copyright (95 years) Does Not Protect the Functional or Efficiency-Driven Parts of Computer Programs (Machines or Processes), Which When Properly Understood Are the Domain of Patent (20 years)

Amicus directly quotes the trial judge in the ongoing saga of Oracle versus Google:

> This action was the first of the so-called "smartphone war" cases tried to a jury. This order includes the findings of fact and conclusions of law on a central question … extent to which, if at all, certain replicated elements of the structure, sequence and organization of the Java application programming interface are protected by copyright.
>
> …
>
> 2. The Development Of Law On The Copyrightability Of Computer Programs And Their Structure, Sequence And Organization
>
> …
>
> Turning now to the more difficult question, this trial showcases a distinction between copyright protection and patent protection … question … arises whether the copyright holder is more appropriately asserting an exclusive right to a functional system, process, or method of operation

> that belongs in the realm of patents, not copyrights.
>
> …
>
> [Summary: Supreme Court, 1976 amendments to 17 U.S.C. 102(b) of the copyright statutes, the 2nd (1992), 9th (1992), 10th (1993), 1st (1995), CAFC (2007) hold that machines/processes of computer programs are patent, not copyright:]
>
> …
>
> … Oracle's evidence … show that the design of methods in an API was a creative endeavor. … such inventions – at the concept and functionality level – are protectable only under the Patent Act. The Patent and Trademark Office examines such inventions for validity and if the patent is allowed, it lasts for twenty years. Based on a single implementation, Oracle would bypass this entire patent scheme and claim ownership over any and all ways to carry out methods for 95 years – without any vetting by the Copyright Office of the type required for patents.…

Oracle Am., Inc. v. Google Inc., 872 F. Supp. 2d 974 (D. Cal. 2012).

IV. Markman Should be Required – The Courts Have Been Misled: Alice's Processes Are Not the Human Mind; the Voltage and Timing Signals of Processors – Expressed in Binary Form (e.g., 11001001) – Are Not the Human Mind Performing Binary Arithmetic With Pen and Paper

CLS Bank's presence at this Court shows the technology underlying Alice's legal instruments is

used for commerce, not philosophy. The CAFC has been misled by argument surrounding the term "computer implemented methods." Amicus seeks to undo this by demonstrating Alice's claimed computational processes emerge from/with special purpose machines that are assembled and interoperated by the complex technical specifications referred to as computer programs. Amicus seeks to do this through the use of an analogy to domino patterns that has been approved as an analogy by various technical experts. The following is an analogy, believed to be an illuminating one for the Court.

A computer program can be superficially confusing because what it actually comprises has been glossed over as the power of technology has allowed computer programmers to move further and further away from the machines that their programs actually assemble and control. When properly understood, a computer program is anything but abstract.

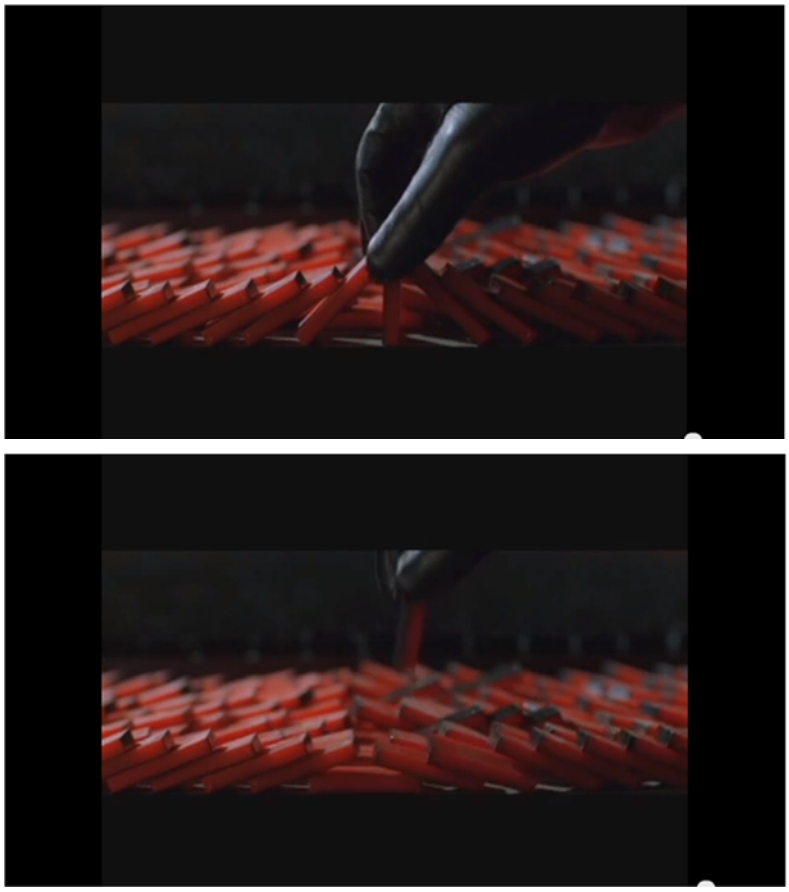
A computer program for a general purpose processor specifies:[3] (a) a selection drawn from a collection of many available computing elements in the general purpose processor, analogous to the way that a human could select dominoes from a box of red and black dominos (e.g., red like "logical 1"; black like "logical 0"); (b) a specification of how the selected computing elements are to be (i) organized (e.g., in sequence or in

[3] Human readable source code is compiled (e.g., "translated") into the machine code appropriate to the Instruction Set Architecture of the general purpose processor upon which it will run. At a gross level, the translated human readable source code assembles, operates, and tears down the machines as described. Billions of minute operations are involved in what is here described at a gross level, but that does not make what is deterministic and tightly controlled abstract.

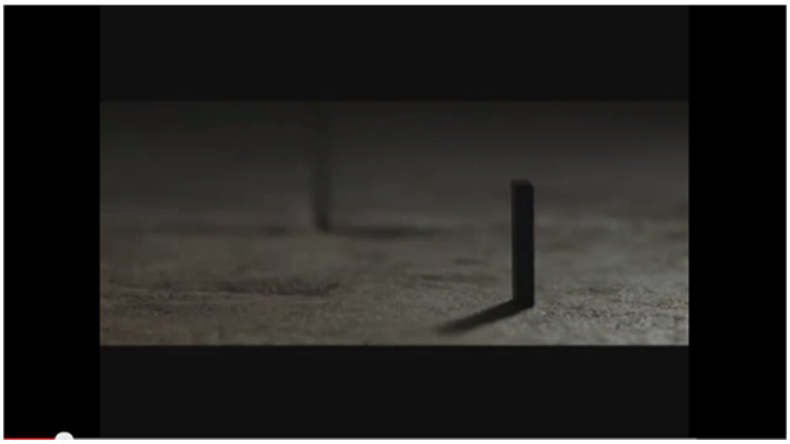
parallel) to "set up" desired combinational, sequential, and/or parallel logic circuit(s), analogous to the way the human might arrange the black-and red dominoes on a floor and (ii) such organization further including the sequences and timing of the voltage levels that will be applied to the various selected computing elements in the "set up" circuit(s), analogous to the way that a human would space and arrange the red and black dominoes such that if they fell into each other the resultant of the various domino interactions as they fell into each other would form a desired dynamic pattern in the dominoes; (c) an initiation signal that kicks the logic circuit(s) into action, analogous to the way a human kicks his domino chain into action by "flicking" the first domino; such that (d) after initiation, the states of the various program-selected, program-arranged, and program-timed computing elements as they interoperate in the manner specified by the computer program may be observed/recorded/mapped, analogous to the way that dominoes, when properly set up and sequenced, flow in/form a human-desired red-black pattern/process that can be photographed until, (e) ultimately, the flowing pattern/process generated by the interoperating computing circuits gives the result of a set of determined and discrete machine states which manifest a human-perceivable pattern that confers meaning to an observing human, which is analogous to the result of a set of determined and discrete black-and red domino states which manifest a human-perceivable pattern that confers meaning to an observing human when everything in the domino setup works properly.

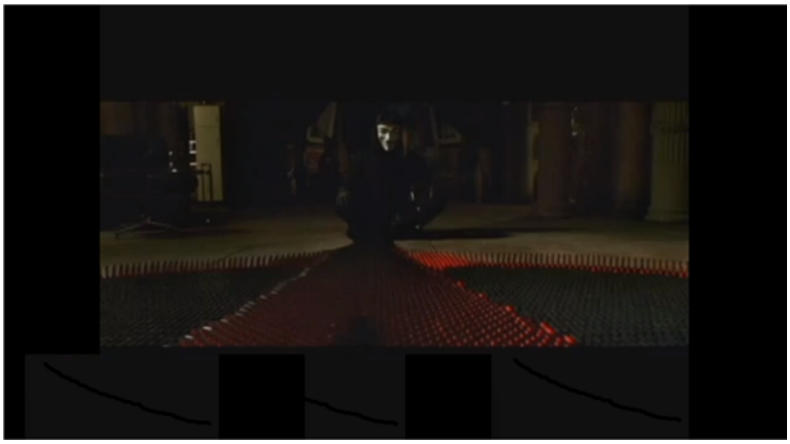
Now Amicus presents the emergent process domino analogy in pictures. A computer program for a general purpose processor specifies:

(a) a selection drawn from a collection of many available computing elements in the general purpose processor, analogous to …;

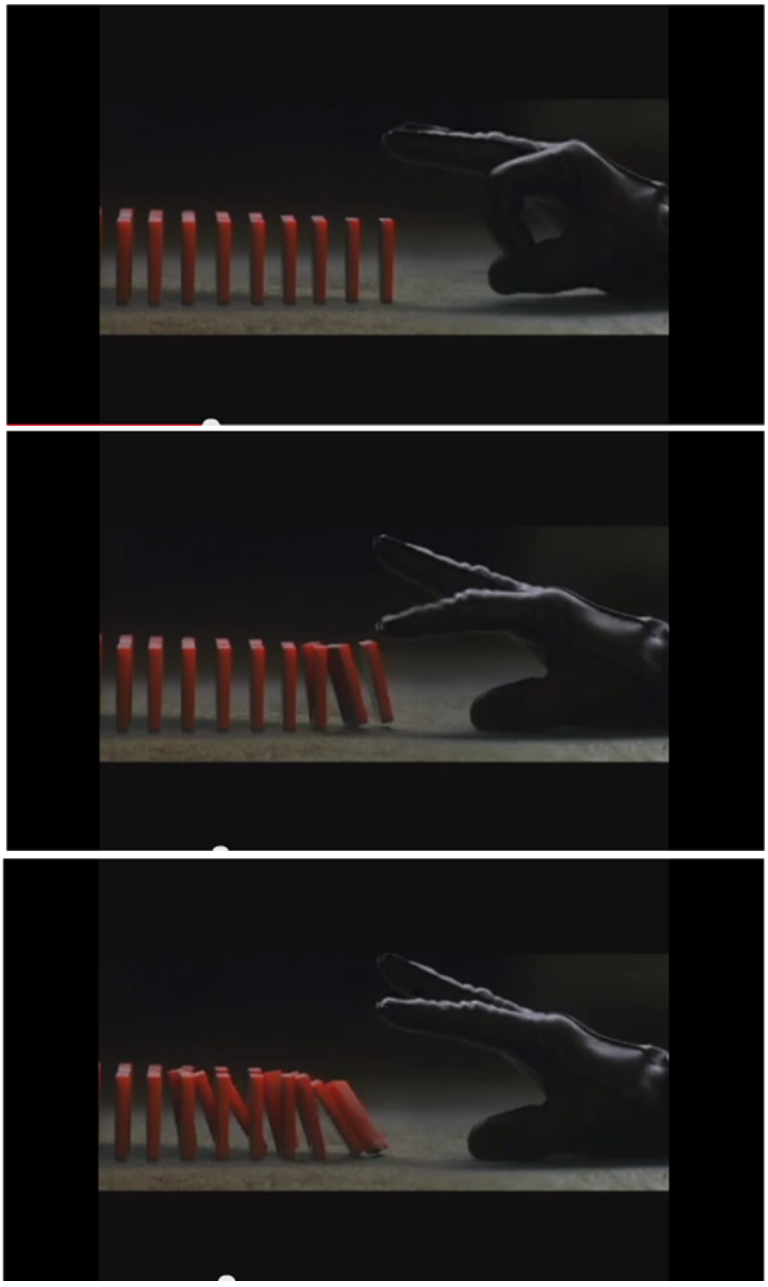


(b) a specification of how the selected computing elements are to be (i) organized (e.g., in sequence or in parallel) to "set up" desired combinational, sequential, and/or parallel logic circuit(s), analogous to … and (ii) such organization further including the sequences and timing of the voltage levels that will be applied to the various selected computing elements in the "set up" circuit(s), analogous to …;

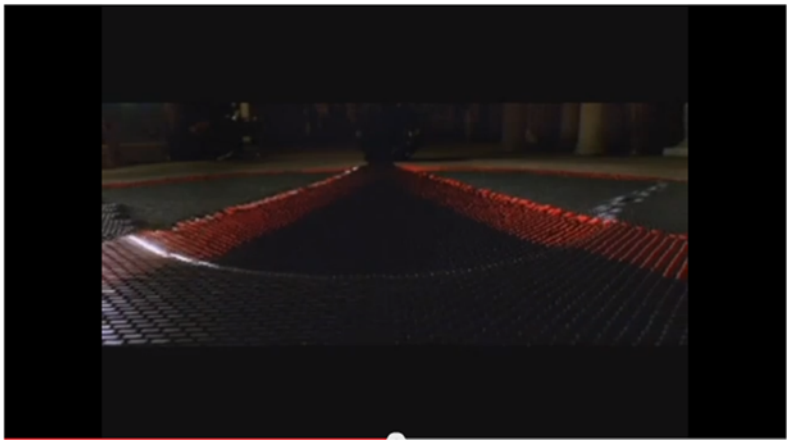


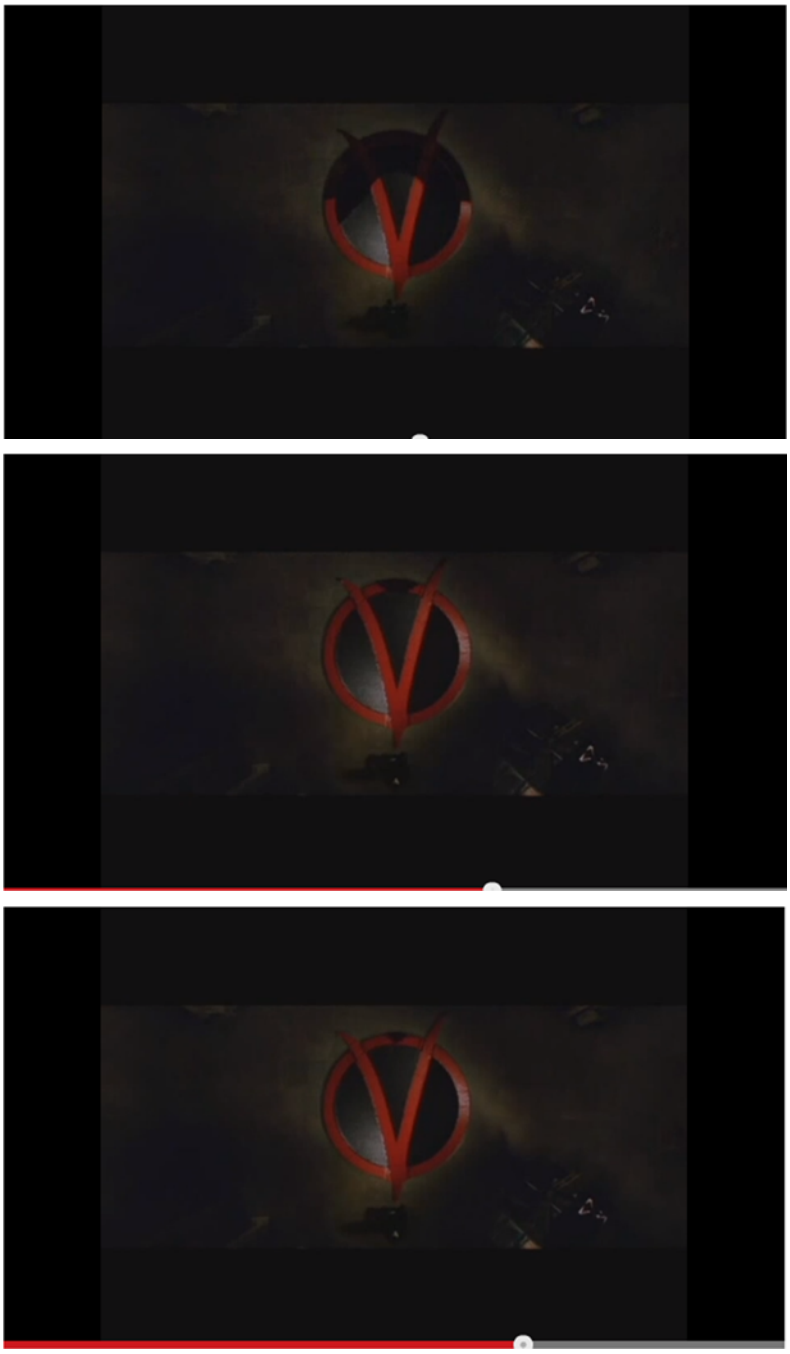


(c) an initiation signal that kicks the logic circuit(s) into action, analogous to …;

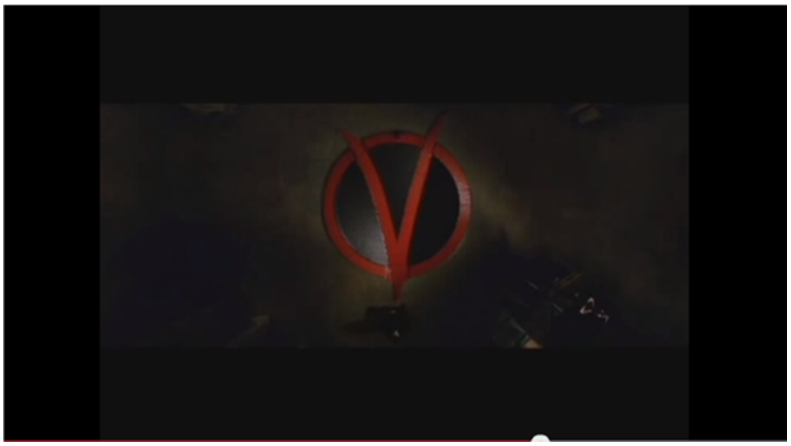


such that (d) after initiation, the states of the various program-selected, program-arranged, and program-timed computing elements as they interoperate in the manner specified by the computer program may be observed/recorded/mapped analogous to …;





until, (e) ultimately, the flowing pattern/process generated by the interoperating computing circuits gives the result of a set of determined and discrete machine states which manifest a pattern that both (i) can be perceived by and (ii) confers meaning to an observing human, which is analogous to …:



This mechanical contrivance is analogous to electronic processes-emergent-with-program-assembled-machines-in-operation, but constitutes mechanical processes-emergent-with-program-assembled-machines-in-operation in its own right. But it is not new. There is no need to augur this, as in the judge-created exceptions to otherwise patentable subject matter. Lack of novelty can be objectively demonstrated for the domino message transmission machine and process. Amici urge the Court to vitiate the inscrutable judge-created exceptions to otherwise patentable subject matter in view of criteria that can be demonstrated via objective evidence.

The precision and control of the domino process/ pattern that dynamically flowed and was called into being as the dominoes fell into each are anything but

abstract, and result in intermediate/ending states of discrete red-black (binary) dominoes.

The result is a red-black pattern recognized by the viewer as the letter "V" for Specific, an Antonym of Abstract. Amici note that the red-black dominos constitute:

> (a) Tangible Perceptions (humanly perceivable differences – formally "data"): something is tangible if it can produce data (plural of datum). Data are one or more differences that can be registered by one or more of the human physical senses (sight, hearing, touch, smell, etc.); the process/result of the process is tangible because it produces a pattern of red-black differences that are perceivable by human vision;
>
> (b) Concrete Meaning (humanly understandable data – formally "information"): information is a difference (data) that makes a difference to someone. Here, the result of the process has concrete meaning in that an English reader can discern the human-semantic letter "V" from the red-black pattern, via a priori known letters of the English alphabet; and
>
> (c) Useful Information (humanly valuable information): the result is valuable in that it allows the Court to understand that Alice's technologies are not anything like what a human does with pen and paper, and are not the human mind itself. The result allows the Court to understand just how far afield the courts have been led in that it provides an analogy demonstrating claimed computational processes are the polar opposite of abstract.

Beyond the foregoing, the courts have been misled into concluding that since digital computers do nothing more than basic arithmetic on a string of binary numbers, such at 10010100 + 00000011, computational processes are not patentable. Such arguments have been successful in that, like all good advocacy that wrongly carries the day, it is sometimes true that computers do binary arithmetic.

However, this partial truth has been used to obscure the fact that in electronic computing it is always true that the machine selection and control codes expressed as zeros and ones[4] specify voltage levels and timing signals of the microprocessor. This truth in its entirety should override the partial truth touted above.

As an aid to the Court, Appendix A contains documentation of an Atmel 8-bit microcontroller which states on page 26: "… Inputs … driven at … –0.5V for a logic 1 and 0.45V for a logic 0." Amicus reproduces here characteristics for the microcontroller, which can be found on page 22 of Atmel documentation:

22. DC Characteristics

The values shown in this table are valid for T_A = -40°C to 85°C and V_{CC} = 2.7V to 4.0V, unless otherwise noted.

Symbol	Parameter	Condition	Min	Max	Units
V_{IL}	Input Low Voltage	(Except $\overline{EA}$)	-0.5	0.7	V
V_{IL1}	Input Low Voltage ($\overline{EA}$)		-0.5	0.2 V_{CC}-0.3	V
V_{IH}	Input High Voltage	(Except XTAL1, RST)	0.2 V_{CC}+0.9	V_{CC}+0.5	V
V_{IH1}	Input High Voltage	(XTAL1, RST)	0.7 V_{CC}	V_{CC}+0.5	V
	Output Low Voltage[1] (Ports				

[4] Translation from the source code (human readable) to the object code (binary machine readable) is deterministic and is done by another program (a compiler program), the output of which has to be tightly coupled to the Instruction Set Architecture that mates with the particular hardware of the microprocessor in use. The Instruction Set Architecture is expressed as zeroes and ones but represents voltages as appropriate to the vendor of the microprocessor (e.g., Intel, Atmel, etc.)

Atmel microcontroller documentation is dense, but states that input logic zero (0 = "low"), V_{IL} (voltage-for-logic-0-low) can be as low as NEGATIVE .5 volts (- .5 volts), and input logic one (1 = "high"), V_{IH} (voltage-for-logic-1-high) can be as high as POSITIVE 4.5 volts (+ 4.5 volts). So the binary strings associated with the processor do not represent a mere "digital computer . . . [that] operates on data expressed in digits, solving a problem by doing arithmetic as a person would do it by head and hand" as the courts have been led erroneously to believe. Amicus asks that the Court take the opportunity to see through these deceptions and set things right.

Amicus hopes that this brief analogy and illustration help the Court avoid confusion. We intelligently speak of the mind apart from the brain, and Alice – in order to provide legally valid/infringeable patent claims under the law – claims computational processes apart from the machines from/with which they emerge. Alice's processes are integral and inseparable from the machines from which they emerge just as the human mind is integral and inseparable from the human brain. Yet Alice's computational processes are not the human mind, nor are the voltage and timing signals of Alice's machines the human mind doing binary arithmetic with pen and paper. The Court should put such clever deceptions to rest.

V. Judge-Created Exceptions Are Not in Accord with Attorney Client Duties, and Place Attorneys at Risk of the Same Theory That Generated Akin Gump Legal Malpractice Verdict

A patent malpractice verdict – $72.6 million dollars – was recorded against the law firm of Akin

Gump on behalf of plaintiff AMT. The damages theory, on remand from the CAFC, was simple. The licensed attorney, through the use of continuing applications before the PTO, generated a multi-year delay in obtaining the maximum legal rights to which AMT was entitled in view of the objective evidence ("prior art"). Later obtained claims read on accused infringing products; earlier claims did not. AMT was disappointed to find damages run from date of issuance of patent claims, not the priority date of claims. AMT sought lost compensation for the time window of the delay. (Appendix B). Amount of calculated damages during that time window was around $100 million; jury awarded $72.6 million. (Appendix B).

If Alice's patents are held invalid on the basis of judge-created exceptions to otherwise statutory subject matter, all client rights will be obviated on the basis a shifting and uncertain "standard" – upon which no judges/Justices can agree. It takes exactly one patent attorney who will aver that he could have drafted valid and infringed claims to map this case directly to the negligence theory of Akin Gump.

Amicus asks the Court to abolish such judge-created exceptions in favor of objective criteria on at least this basis.

VI. Claims Should Not be Invalidated Based on Personal Philosophical/Religious Convictions of Reviewing Judge

Alice's legal instruments reach this Court with complete disregard for the language of the most stringently legal parts of such instruments. Instead, invalidation appears hinged on the personal

religious/philosophical convictions of each reviewing judge:

> The abstractness and natural law preclusions not only make sense, they explain the purpose of the expansive language of section 101. Natural laws and phenomena can never qualify for patent protection because they cannot be invented at all. After all, God or Allah or Jahveh or Vishnu or the Great Spirit provided these laws and phenomena as humanity's common heritage. Furthermore, abstract ideas can never qualify for patent protection because the Act intends, as section 101 explains, to provide "useful" technology. An abstract idea must be applied to (transformed into) a practical use before it qualifies for protection. The fine print of Supreme Court opinions conveys nothing more than these basic principles. Yet this court expands (transforms?) some Supreme Court language into rules that defy the Supreme Court's own rule.

In re Bilski, 545 F.3d 943 (Fed. Cir. 2008) (Rader dissent).

Legal instruments should not be invalidated by the personal religious or philosophical beliefs of the reviewing judges; rather, they should be evaluated in view of the law that formed context for the legal strategies employed by the attorneys as they drafted the legal instruments. Statutory classes matter, especially with respect to processes-emergent-from-program-assembled-machines-in-operation-OR-program- assembled-machines-proper.

This Court should eliminate judge-created exceptions in lieu of other more fair and objective-evidence-

based considerations, such as novelty, in accord with attorney-client duties.

VII. Patent Infringement Law Varies with Statutory Class; Markman Should be Required and Take Into Account the Statutory Class of Construed Claims

After an attorney understands the technologies and the business objectives of her client, she starts to look at the applicable law implicated by the technologies and business objectives. If her client has made factual averments that certain statutory subject matters are novel,[5] in view of her ethical rules and fiduciary duties, the first place the attorney looks is at the patent statutes 35 U.S.C. § 154 (defining exclusionary rights) and 35 U.S.C. § 271 (defining the who, the what, and the how of enforcing the exclusionary rights through patent infringement suits). 35 U.S.C. § 154(a) defines the fundamental "right to exclude others from making, using, offering for sale, or selling the [claimed] invention." 35 U.S.C. § 271 defines who can be sued, for what that who can be sued, and how that who can be sued via a number of different statutorily defined infringement schemes (e.g., direct literal infringement (271(a)), inducement of infringement (271(b)), contributory infringement (271) (c)), etc.). Relevant to Alice's technologies is 35 U.S.C. §271(a) which recites: "whoever without authority makes, uses, offers to sell, or sells any … [claimed] invention, within the United States …during the term of the patent …infringes."

---

[5] "Anticipation is a question of fact.… Obviousness is a question of law based on underlying facts." *Cross v. Medtronic*, 424 F.3d 1293 (Fed. Cir. 2005).

After the attorney has consulted the exclusion/ infringement statutes, the attorney turns to the judge-made law implicated by the technologies and business objectives of his client. This is where things get complex for processes-emergent-from-program-assembled-machines-in-operation-OR-program-assembled-machines-proper. The fundamental statutory function of the claims in a patent is notice that the patent owner is claiming a right to exclude others – through the vehicle of patent infringement lawsuits – from commercial use of definitely identified technologies.

For IA technologies notice is very complicated because the technology itself is very subtle – creating information via the intersection of machine objectivity and human subjectivity. The machines are not processes; the processes emerge with the mapped states of machines-in-operation, yet are not machines. The attorney must hyper-focus on whether she is drafting a claim to post-issuance patent infringement rights founded upon the circuitry-as-set-up-and-sequenced-by-the-computer program (a MACHINE) OR founded upon mapped states dynamically emergent from such circuitry-in-operation (a PROCESS). A machine is not a process; a process is not a machine.

Enforcement of IA technology infringement rights is very complicated due to the fact that such technologies can easily be "parted up." This feature allows infringers to enjoy substantial revenues from U.S. commerce – while evading U.S. patent laws – by placing all or part of the "infringer's" processes-emergent-from-program-assembled-machines-in-operation-OR-program-assembled-machines-proper where the United States has no legal jurisdiction (e.g., Canada).

Prior to the introduction of the CAFCIndustrialAge Test, an attorney could draft claims that were legally valid and infringeable, provided that the attorney was mindful of the IA technologies law associated with each claimed statutory class. The CAFCIndustrialAge Test makes this now impossible/impracticable since it requires "hybrid claims" – claims that mix two or more statutory classes of claims (e.g., a process claim with machine limitations).

Good news? Hybrid claims likely satisfy the CAFCIndustrialAge Test. Bad news? Hybrid claims generate high post issuance enforcement risks/costs in view strong attorney arguments that such claims are invalid as a matter of law for failing statutory notice requirements.

Further bad news? Hybrid claims generate high post issuance enforcement risks/costs in view of strong attorney argument based on the multi-sovereign infringer gambit.

The Court should grant Alice's petition to address and solve this dilemma.

"Hybrid" claims – such as a primarily "machine" (statutory-class one) claim drafted to include one or more "process" (statutory-class two) limitations – to program-assembled-machines-proper are subject to strong/expensive arguments that such claims are invalid as a matter of law:

> Claim construction is a question of law. . . . Similarly, indefiniteness is a question of law.… we review … whether the prevailing party is entitled to judgment as a matter of law.... district court found that claim 25 is indefinite under 35 U.S.C. § 112, as it attempts to claim both a system and a method for using that system…." ... A claim is

> considered indefinite if it … "is not sufficiently precise to provide competitors with an accurate determination of the 'metes and bounds' of protection involved"…. Because claim 25 recites both a system and the method for using that system, it does not apprise a person of ordinary skill in the art of its scope, and it is invalid under Section 112, paragraph 2.

IPXL Holdings v. Amazon.com, 430 F.3d 1377 (Fed. Cir. 2005); *Katz Interactive v. Am. Airlines*, 639 F.3d 1303 (Fed. Cir. 2011).

IPXL's "hybrid" claims – a mix of machine and process statutory classes such as is mandated by the CAFCIndustrialAge Test – "invalid as a matter of law." Statutory class matters.

"Hybrid" claims – such as a primarily "process" (statutory-class one) claim drafted to include one or more "machine" (statutory-class two) limitations – to processes-emergent-with-program-assembled-machines-in-operation are subject to strong/expensive arguments that such "hybrid" claims are unenforceable as a matter of law based on the multi-sovereign infringer gambit:

> We therefore hold that a process cannot be used "within" the United States as required by section 271(a) unless each of the steps is performed within this country. … each of the asserted method claims … recites a step that utilizes an "interface" or "interface switch," which is only satisfied by the use of RIM's Relay located in Canada. Therefore, as a matter of law, these claimed methods could not be infringed by use of RIM's system. ….

> ... a finding of direct infringement by RIM's customers under section 271(a) of the method claims reciting an "interface switch" or an "interface" is precluded by the location of RIM's Relay in Canada….

NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005).

NTP's "hybrid" claims – a mix of process and machine statutory classes such as is mandated by the CAFCIndustrialAge Test – "unenforceable as a matter of law." Statutory class matters.

The CAFC has attempted to fashion a "safe harbor" for drafting attorneys to forestall evasion of U.S. patent rights through the multi-sovereign gambit. System claims are "safe harbor" in that "use" of such a system from within the U.S. will provide a valid patent infringement suit despite the fact that a portion of the system may lie outside of United States jurisdiction. *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005) ("…location of the Relay in Canada did not, as a matter of law, preclude infringement of the asserted system claims….").

Despite RIM's multi-sovereign gambit, machine class claims of NTP valid and infringed. Statutory class matters.

DILEMMA: For processes-emergent-from-program-assembled-machines-in-operation-OR-program-assembled-machines-proper, the CAFCIndustrialAge Test seems to require that an attorney achieve patentable subject matter at the expense of claims subject to strong (and thus expensive) attorney argument that such claims are invalid "as a matter of law" (*IPXL v. Amazon*) OR unenforceable "as a matter of law" (*NTP v. RIM*) . Or vice versa. Can this be true?

The Court should grant Alice's petition to address and resolve this dilemma.

VIII. A Markman Would Remedy Much Confusion, Except For The Dilemma Arising from Applying Industrial Age Law to Information Age Technologies, Which This Court Must Address And Resolve

This Court understands that the CAFCIndustrialAge Test is not appropriate to processes-emergent-from-program-assembled-machines-in-operation-OR-program-assembled-machines-proper: "machine-or-transformation test … Industrial Age-… grounded in a physical or other tangible form…. doubt whether test … determining the patentability of inventions in the Information Age." *Bilski v. Kappos*, 130 S. Ct. 3218 (U.S. 2010).

The CAFC Information Age Law, which to date this great Court has only seen and heard in distorted caricature, is an awe-inspiring logical cathedral that does not create Hobson's choice of the CAFCIndustrialAge Test.

The Court is urged to validate some version of the CAFC's Information Age Law.

CONCLUSION

Petition for writ of certiorari should be granted.

Respectfully submitted,

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October 4, 2013

APPENDIX

APPENDIX A

ATMEL
[LOGO]

8-bit Low-Voltage Microcontroller with
4K Bytes In-System Programmable Flash

AT89LS51

Features

- Compatible with MCS®-51 Products
- 4K Bytes of In-System Programmable (ISP) Flash Memory – Endurance: 10,000 Write/Erase Cycles
- 2.7V to 4.0V Operating Range
- Fully Static Operation: 0 Hz to 16 MHz
- Three-level Program Memory Lock
- 128 x 8-bit Internal RAM
- 32 Programmable I/O Lines
- Two 16-bit Timer/Counters
- Six Interrupt Sources
- Full Duplex DART Serial Channel
- Low-power Idle and Power-down Modes
- Interrupt Recovery from Power-down Mode
- Watchdog Timer
- Dual Data Pointer
- Power-off Flag
- Flexible ISP Programming (Byte and Page Mode)
- Green (Pb/Halide-free) Packaging Option

1. Description

The AT89LS51 is a low-voltage, high-performance CMOS 8-bit microcontroller with 4K bytes of in-system programmable Flash memory. The device is manufactured using Atmel's high-density nonvolatile memory technology and is compatible with the

industry-standard 80051 instruction set and pinout. The on-chip Flash allows the program memory to be reprogrammed in-system or by a conventional nonvolatile memory programmer. By combining a versatile 8-bit CPU with in-system programmable Flash on a monolithic chip, the Atmel AT89LS51 is a powerful microcontroller which provides a highly-flexible and cost-effective solution to many embedded control applications.

The AT89LS51 provides the following standard features: 4K bytes of Flash, 128 bytes of RAM, 32 I/O lines, Watchdog timer, two data pointers, two 16-bit timer/counters, a five-vector two-level interrupt architecture, a full duplex serial port, on-chip oscillator, and clock circuitry. In addition, the AT89LS51 is designed with static logic for operation down to zero frequency and supports two software selectable power saving modes. The Idle Mode stops the CPU while allowing the RAM, timer/counters, serial port, and interrupt system to continue functioning. The Power-down mode saves the RAM contents but freezes the oscillator, disabling all other chip functions until the next external interrupt or hardware reset.

22. DC Characteristics

The values shown in this table are valid for T_A = -40°C to 85°C and V_{CC} = 2.7V to 4.0V, unless otherwise noted.

Symbol	Parameter	Condition	Min	Max	Units
V_{IL}	Input Low Voltage	(Except $\overline{EA}$)	-0.5	0.7	V
V_{IL1}	Input Low Voltage ($\overline{EA}$)		-0.5	0.2 V_{CC}-0.3	V
V_{IH}	Input High Voltage	(Except XTAL1, RST)	0.2 V_{CC}+0.9	V_{CC}+0.5	V
V_{IH1}	Input High Voltage	(XTAL1, RST)	0.7 V_{CC}	V_{CC}+0.5	V
V_{OL}	Output Low Voltage[1] (Ports 1,2,3)	I_{OL} = 0.8 mA		0.45	V
V_{OL1}	Output Low Voltage[1] (Port 0, ALE, $\overline{PSEN}$)	I_{OL} = 1.6 mA		0.45	V
V_{OH}	Output High Voltage (Ports 1,2,3, ALE, $\overline{PSEN}$)	I_{OH} = -60 µA	2.4		V
		I_{OH} = -25 µA	0.65 V_{CC}		V
		I_{OH} = -10 µA	0.80 V_{CC}		V
V_{OH1}	Output High Voltage (Port 0 in External Bus Mode)	I_{OH} = -800 µA	2.4		V
		I_{OH} = -300 µA	0.75 V_{CC}		V
		I_{OH} = -80 µA	0.9 V_{CC}		V
I_{IL}	Logical 0 Input Current (Ports 1,2,3)	V_{IN} = 0.45V		-50	µA
I_{TL}	Logical 1 to 0 Transition Current (Ports 1,2,3)	V_{IN} = 2V		-150	µA
I_{LI}	Input Leakage Current (Port 0, $\overline{EA}$)	0.45 < V_{IN} < V_{CC}		±10	µA
RRST	Reset Pulldown Resistor		50	300	KΩ
C_{IO}	Pin Capacitance	Test Freq. = 1 MHz, T_A = 25°C		10	pF
I_{CC}	Power Supply Current	Active Mode, 12 MHz		25	mA
		Idle Mode, 12 MHz		6.5	mA
	Power-down Mode[2]	V_{CC} = 4.0V		30	µA

Notes: 1. Under steady state (non-transient) conditions, I_{OL} must be externally limited as follows:
Maximum I_{OL} per port pin: 10 mA
Maximum I_{OL} per 8-bit port:
Port 0: 26 mA Ports 1, 2, 3: 15 mA
Maximum total I_{OL} for all output pins: 71 mA
If I_{OL} exceeds the test condition, V_{OL} may exceed the related specification. Pins are not guaranteed to sink current greater than the listed test conditions.

2. Minimum V_{CC} for Power-down is 2V.

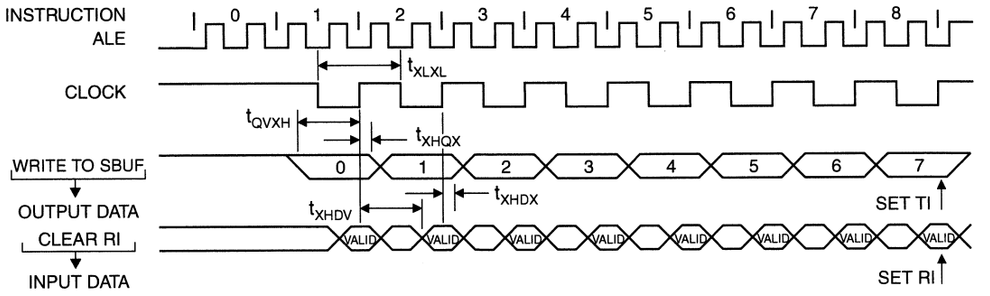
3a

29. Serial Port Timing: Shift Register Mode Test Conditions

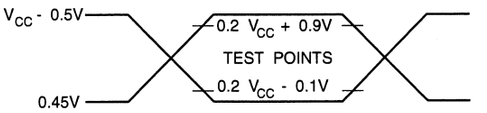
The values in this table are valid for V_{CC} = 2.7V to 4.0V and Load Capacitance = 80 pF.

Symbol	Parameter	12 MHz Osc		Variable Oscillator		Units
		Min	Max	Min	Max	
t_{XLXL}	Serial Port Clock Cycle Time	1.0		$12t_{CLCL}$		µs
t_{QVXH}	Output Data Setup to Clock Rising Edge	700		$10t_{CLCL}$-133		ns
t_{XHQX}	Output Data Hold After Clock Rising Edge	50		$2t_{CLCL}$-80		ns
t_{XHDX}	Input Data Hold After Clock Rising Edge	0		0		ns
t_{XHDV}	Clock Rising Edge to Input Data Valid		700		$10t_{CLCL}$-133	ns

30. Shift Register Mode Timing Waveforms

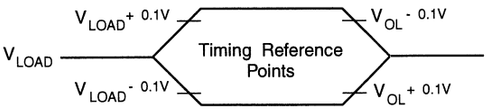


31. AC Testing Input/Output Waveforms[1]



Note: 1. AC Inputs during testing are driven at V_{CC} - 0.5V for a logic 1 and 0.45V for a logic 0. Timing measurements are made at V_{IH} min. for a logic 1 and V_{IL} max. for a logic 0.

32. Float Waveforms[1]



Note: 1. For timing purposes, a port pin is no longer floating when a 100 mV change from load voltage occurs. A port pin begins to float when a 100 mV change from the loaded V_{OH}/V_{OL} level occurs.

4a

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed June 27, 2003]

Cause No. SA03CA0541 RF

AIR MEASUREMENT TECHNOLOGIES, INC. AND
NORTH-SOUTH CORPORATION AND
LOUIS HERBERT STUMBERG, JR.

v.

GARY HAMILTON, HAMILTON &
TERRILE, L.L.P., MATTHEWS &
BRANSCOMB, P.C. AND
AKIN GUMP STRAUSS HAUER & FELD, LLP

NOTICE OF REMOVAL CIVIL ACTION

To the Honorable United States District Judge:

Pursuant to 28 U.S.C. §§ 1338, 1441 and 1446, Defendants Gary Hamilton and Hamilton & Terrile, L.L.P. (the "Hamilton Defendants") hereby remove this action from the 131st Judicial District Court of Bexar County, Texas, where it was filed as Cause No. 2003-CI-08100 (the "State Court Action"), to the United States District Court for the Western District of Texas, San Antonio Division. As the grounds for removal, the Hamilton Defendants state as follows:

1. Plaintiffs Air Measurement Technologies, Inc. and North-South Corporation and Louis Herbert

Stumberg, Jr. ("Plaintiffs") filed their Original Petition in the State Court Action on May 28, 2003, in the 131st Judicial District Court of Bexar County, which is located within the San Antonio Division of the Western District of Texas.

2. Defendant received Citation and a copy of Plaintiffs' Original Petition on May 28, 2003. Thereafter, on May 30, 2003, Plaintiffs served the Hamilton Defendants with a copy of their First Amended Petition. The Hamilton Defendants timely filed their Answer in the State Court Action on June 20, 2003.

3. Copies of all process, pleadings, and orders served upon or filed by the Hamilton Defendants in the State Court Action as well as a certified copy of the docket sheet in the State Court Action are collectively attached as Exhibit "A" and incorporated herein by reference.

4. This is a civil action over which this Court has original patent question jurisdiction under the provisions of 28 U.S.C. § 1338, and therefore is a civil action that may be removed to this Court pursuant to the provisions of 28 U.S.C. §§ 1441 and 1446. "An action arises under the patent laws if the complaint includes allegations that federal patent law creates the cause of action or federal patent law is a necessary element of the [state law] claim." *Scherbatskoy v. Haliburton Co.*, 125 F.3d 288, 291 (5th Cir. 1997) (emphasis added).

5. Plaintiffs' Original Petition and First Amended Petition assert a legal malpractice claim, which assails the Hamilton Defendants' handling of Plaintiffs' patents, and, more specifically, complains of how the Hamilton Defendants' conduct impaired certain

patent infringement lawsuits filed by Plaintiffs. In their Original and First Amended Petitions, Plaintiffs contend that the Hamilton Defendants' conduct gave rise to the "on sale bar" defense pursuant to 35 U.S.C. § 102(b) and the "inequitable conduct" defense pursuant to 35 U.S.C. § 112. *See* Pls.' Pets.' at § IV, ¶¶ 5-6. The Plaintiffs also contend that the Defendants' settlement of one patent infringement suit impaired the value of Plaintiffs' remaining patent suits. Plaintiffs' legal malpractice claim necessarily requires the resolution of at least one substantial question of federal patent law, and therefore patent question jurisdiction is proper in this Court under 28 U.S.C. § 1338.

6. Plaintiffs also assert additional state law claims in their Petition. These claims either also invoke federal patent jurisdiction, or, alternatively, are properly removed pursuant to 28 U.S.C. § 1441(c).

7. The Plaintiffs did not request a jury trial in the state court action. The Hamilton Defendants did not request a jury trial in the state court action. Defendant Akin Gump has demanded a jury and has tendered the fee.

8. This Notice of Removal is timely because it is filed within thirty (30) days from the date the Hamilton Defendants received a copy of Plaintiffs' Original Petition. *See* 28 U.S.C. § 1446 (b). More specifically, this Notice of Removal is filed within thirty (30) days of the date Plaintiffs filed their Original Petition in the State Court Action.

9. All Defendants have consented to this removal by affixing their signatures to the Notice of Consent to Removal filed herewith. The Notice Consent to Removal is timely because it was filed with this Court

within thirty (30) days from the first date that any Defendant received a copy of Plaintiffs' Original Petition.

10. As required by 28 U.S.C. § 1446(d), written notice of the filing of this Notice of Removal is being filed this day with the Clerk of the District Court of Bexar County, Texas.

WHEREFORE, PREMISES CONSIDERED, the Hamilton Defendants request that this Court assume jurisdiction over this controversy and that this matter proceed in the United States District Court for the Western District of Texas from this day forward.

Respectfully submitted,

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Attorneys For Defendants
Gary L. Hamilton AND Hamilton & Terrile, L.L.P.

IN THE DISTRICT COURT
131st JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

[Filed May 29, 2003]

No. 2003CI08100

AIR MEASUREMENT TECHNOLOGIES, INC. AND NORTH-SOUTH CORPORATION, AND LOUIS HERBERT STUMBERG, JR.,

Plaintiffs,

v.

GARY L. HAMILTON, HAMILTON & TERRILE, L.L.P., MATTHEWS & BRANSCOMB, P.C. AND AKIN GUMP STRAUSS HAUER & FELD, L.L.P.,

Defendants.

PLAINTIFF'S ORIGINAL PETITION

* * * *

§ 112. Specification

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly

claiming the subject matter which the applicant regards as his invention.

7. Patent No. 5,910,771 (the "771 Patent") was the broad form of claims covering the entire firefighting and safety industry, using Plaintiffs' Device. The 771 Patent could have been filed as early as 1990. Defendant Akin, however, acting through Defendant Hamilton, failed to timely prosecute the 771 Patent, delaying that application until 1997. In fact, upon subsequent inquiry, Mr. Hamilton assured Plaintiffs, that the broad claims of the 77 Patent "related back" to the original filing on August 6, 1991 of Patent No. 5,157,378 (the "378 Patent"). That statement was misleading and inaccurate, in that the term limitation of the Patent relates back to the August 6, 1991 filing, *but not* as to recoverable damages against an infringer. In other words, the effect of the delayed filing was to shorten the otherwise minimum 17-year period[3] during which Plaintiff had the protection of their Patent and Plaintiffs could not recover damages for infringements) prior to the date of filing. Plaintiffs did not learn of this distinction until Summer 2002, and only *after* Akin had withdrawn as Patent Litigation Counsel. As a consequence of this unwarranted and inexplicable delay, Plaintiffs lost significant past royalties under the "771" Patent. Sales of SCBA's and other infringing products covered by these Patents, have been approximately $100 million a year since 1998.

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[3] The General Agreement on Tariffs and Trade Uruguay Round Agreement Act ("GATT") (Pub. L. 103-465, § 2, Dec. 8, 1994, 108 Stat. 4813.), modifies 35 U.S.C.A. § 154 to extend the life of certain types of patents for an additional two years beyond the traditional 17-year period of protection. Under GATT for all continuation applications filed after June 8, 1995 the patent expires 20 years after the effective filing date of the application.

8. Continuing with their pattern of negligence and negligent misrepresentation, related to the term of Patents, Akin, through Mr. Hamilton assisted by Rhonda S. Jolley of M&B, inexplicably settled the *Draeger* litigation using only a 17-year term of Patent protection, related back to 1991. Consequently, all additional payments received as damages under the *Draeger* settlement were limited to sales of the Device through 2008. Under the *Gatt* Amendment, such additional payments should have been extended by an additional two years. In this settlement, Defendant Akin collected a contingency fee on the *Draeger* settlement ($1.0 million) of $263,202.52 after expenses of $122,658.26. In addition, Akin collected $119,752.00 in hourly fees and expenses from 1995 to the present date, for work on Plaintiffs' Patents. These fees were excessive and unconscionable in that Akin knew, at the time, that its own negligence was a cause of Plaintiffs' reduced recovery in the *Draeger* settlement.

9. In the course of the Patent Litigation, all but one of the several defendants alleged the "on sale" bar and "inequitable conduct" as defenses to Plaintiffs' infringement suits. Those Defendants making such defensive allegations filed counterclaims for attorney's fees based on those issues. The only Defendant which did not assert the "on sale" bar and/or inequitable conduct" as defenses was *Draeger* which settled without obtaining any written discovery.

10. The person dealing with the Defendants on behalf of the Companies was, at all times relevant here to, Louis Herbert Stumberg, Jr. The first occasion on which Mr. Stumberg was informed of the problem with the "on sale" bar rule

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TEXAS SAN ANTONIO DIVISION

[Filed May 07, 2009]

NO. SA-03-CA-0541-RF

AIR MEASUREMENT TECNOLOGIES, INC.,
NORTH-SOUTH CORPORATION,
AND LOUIS HERBERT STUMBERG, JR.

Plaintiffs,

v.

AKIN GUMP STRAUSS
HAUER & FELD, L.L.P.

Defendants.

VERDICT FORM

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless you are otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight of credible evidence admitted in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proven by a preponderance of the evidence, you must find that the fact is more likely true than not true. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless you are otherwise instructed.

QUESTION 1

(ANTICIPATION—PUBLICLY USED OR KNOWN)

Has Akin Gump proven by clear and convincing evidence that all of the claims in Plaintiffs' patents listed below are invalid because they were publicly used or known by others before March of 1990?

Answer "yes" or "no" for each patent listed below.

'378 patent No

'234 patent No

'771 patent No

QUESTION 2

(ANTICIPATION—ON SALE BAR)

Has Akin Gump proven by clear and convincing evidence that all of the claims in Plaintiffs' patents listed below are invalid because of the on-sale bar?

Answer "yes" or "no" for each patent listed below.

'378 patent No

'234 patent No

'771 patent No

QUESTION 3

(ANTICIPATION—PUBLIC USE)

Has Akin Gump proven by clear and convincing evidence that all of the claims in Plaintiffs' patents listed below are invalid because of public use?

Answer "yes" or "no" for each patent listed below.

'378 patent No

'234 patent No

'771 patent No

QUESTION 4

(ANTICIPATION—MADE OR INVENTED BY SOMEONE ELSE)

Has Akin Gump proven by clear and convincing evidence that the invention claimed in the patents below was made by someone else before March of 1990?

Answer "yes" or "no" for each patent listed below.

'378 patent No

'234 patent No

'771 patent No

QUESTION 5

(OBVIOUSNESS)

Has Akin Gump proven by clear and convincing evidence that all of the claims in Plaintiffs' patents listed below are invalid as obvious?

Answer "yes" or "no" for each patent listed below.

'378 patent No

'234 patent No

'771 patent No

QUESTION 6

(INEQUITABLE CONDUCT)

Has Akin Gump proven by clear and convincing evidence that any of those listed below failed to disclose to the PTO information that was material to the '378, '234, or '771 patents at issue, coupled with an intent to deceive or mislead?

Answer "yes" or "no" for each of those listed.

a. Branscomb No

b. Hamilton No

*(during the time between January 1, 1991 and April 30, 1995)

c. Plaintiffs No

If you have answered "No" to all of the questions above, then answer the following questions. Otherwise, do not answer the following questions.

QUESTION 7

Did the negligence, if any, of those named below proximately cause the injury in question?

"Injury in Question," means Plaintiffs' loss of reasonable royalties for the use of their patented invention.

Answer "Yes" or "No" to each of the following:

a. Akin Gump — Yes

b. Branscomb — No

c. Hamilton & Terrile — No

d. Gary Hamilton* — No

*(during the time between January 1, 1991 and April 30, 1995)

e. Plaintiffs — No

If you answered "Yes" to Question 7 for more than one of those named above, then answer the following question. Otherwise, do not answer the following question and go to Question 9.

QUESTION 8

Assign percentages of responsibility only to those you found caused or contributed to cause the injury. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found.

For each person you found caused or contributed to cause the injury, find the percentage of responsibility attributable to each:

a. Akin Gump 100 %

b. Branscomb 0 %

c. Hamilton & Terrile 0 %

d. Gary Hamilton* 0 %

*(during the time between January 1, 1991 and April 30, 1995)

e. Plaintiffs 0 %

Total 100 %

QUESTION 9

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiffs for their loss, if any, resulting from the negligence for which you have answered "Yes" in Question No. 7?

Do not increase or reduce the amount in your answer to this question because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not include interest on any amount of damages, if any. Do not reduce your award of damages for any amount of money actually paid in settlement of Plaintiffs' litigation with the SCBA manufacturers or previous Defendants in this case. This question inquires only into the amount of money in gross, exclusive of interest, that Plaintiffs would have been awarded against the SCBA manufacturers had Plaintiffs prevailed in the infringement litigation.

Answer in dollars and cents, for damages, if any.

Answer: $72,611,397.83

QUESTION 10

From a preponderance of the evidence, do you find that Plaintiffs knew or should have known of the facts that establish their claim for malpractice against Akin Gump prior to May 28, 2001?

Answer "yes" or "no": No

May 7, 2009
Date