

Patent reform update

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I'm not sure if I'd mentioned this before, but there is dwindling hope that the Congress is going to do anything about eliminating software or business methods. I am not making the following dialogue up:

Me: So what if you got 1,000 letters from programmers asking you to do something.

Congressional aide: We'd probably just think, 'oh, they're just programmers.'

So we return to the Supreme Court. As noted in this op-ed, the Court has three (3) chances to fix patents, and of the three, the one that really matters is *LabCorp v Metabolite*, a case that directly raises the question of what should or should not be patentable.

On Wednesday, the Supreme Court dismissed it.

Why? That's the part where we try to read tea leaves. Here is the full text of the statement. For those who don't know their semilatin, a *writ of certiorari* (*cert* among the cool kids) is the Supreme Court's statement that it will hear a case.

The writ of certiorari is dismissed as improvidently granted. THE CHIEF JUSTICE took no part in the consideration or decision of this case.

That's all we get. The direct cause was procedural issues: the subject matter question wasn't argued in the lower courts, because the opponents of the patent knew that it was a losing argument, so it's debatable whether the Supreme Court gets to consider that issue or not.

The Chief Justice didn't participate, by the way, because his old law firm had represented LabCorp. Readers will recall that Justice Roberts's confirmation hearings included some amount of chiding of Mr. Roberts for not taking more care to prevent conflicts of interest.

As for the opposition They were a little more chatty. Justice Breyer wrote for the minority (with Justices Stevens and Souter joining) explaining why the case should not have been dismissed.

Now, the entire concept of the software and business method patent was invented by a Federal-level court (the Court of Appeals for the Federal Circuit, CAFC), and one could even argue by a single judge (Judge Giles Rich). This was

all in the mid-90s, and since then we haven't heard a word from the Supremes about whether the CAFC rulings that created these things (*In re Alappat* and *State Street* being the key rulings) were valid or not. But here's a snippet from the dissenting argument:

Neither does the Federal Circuit's decision in *State Street Bank* help respondents. That case does say that a process is patentable if it produces a "useful, concrete, and tangible result." But this Court has never made such a statement and, if taken literally, the statement would cover instances where this Court has held the contrary. The Court, for example, has invalidated a claim to the use of electromagnetic current for transmitting messages over long distances even though it produces a result that seems "useful, concrete, and tangible." [this was over Samuel Morse's patent on all of telecommunications] . . . And the Court has invalidated a patent setting forth a process that transforms, for computer-programming purposes, decimal figures into binary figures—even though the result would seem useful, concrete, and at least arguably (within the computer's wiring system) tangible.

The first word we hear from the Court about the current breadth of allowable patents, albeit from a minority, strongly disapproves. For the computer geeks out there, notice that the idea that a computer's wiring makes a mathematical algorithm into a physical device is explicitly addressed and rejected.

So what will the Court do next? Personally, I have no clue. It seems clear that at least a few members of the Court are seeking out a new test case to take on the issue of patentable subject matter. But whether cert will be granted in the future depends on why cert was ruled to be "improvidently granted" in this case. If it was truly and honestly because of mere procedural issues, then there's no roadblock to future cases, and the lawyers presenting cases in the lower courts will be happy to present subject matter arguments in the hopes that they'll move on to the top leauge. But if *LabCorp* was killed on a technicality because a majority of the Court realized that the only sensible way to rule on it would be to seriously narrow the current scope of patent law, then we're stuck.