Abstracting About “Abstract Idea”

Jasper L. Tran

ABSTRACT: An abstract about the abstractness of “abstract idea” is unavoidably too abstract.

“The problem is the solution . . . .”

How to precisely define “abstract idea” in patent law has long puzzled judges, scholars, and practitioners. Frankly, “no one understands what
makes an idea ‘abstract.’”

Efforts hitherto have failed because, in short, they have inevitably used either “equally abstract” or “overly narrow” terms. Defining “abstract idea” with equally difficult-to-define terms “only perpetuates the problem.” Ergo, the U.S. Supreme Court has repeatedly declined “to delimit the precise contours of the ‘abstract ideas’ category.”

Yet “abstract idea” is, by definition, too abstract for a concrete definition. As the Federal Circuit succinctly put: “The problem with articulating a single, universal definition of ‘abstract idea’ is that it is difficult to fashion a workable definition to be applied to as-yet-unknown cases with as-yet-unknown inventions.”

Perhaps one could, should, and ought to think more abstractly about

---

(2014); Maria R. Sinatra, Note, Do Abstract Ideas Have the Need, the Need for Speed?: An Examination of Abstract Ideas After Alice, 84 FORDHAM L. REV. 821, 829–30 (2015) (discussing the ambiguity in defining “abstract idea”); cases cited supra note 2; sources cited infra note 4; see also discussion infra note 11. For empirical analysis on Alice’s application by lower courts, see Jasper L. Tran, Two Years After Alice v. CLS Bank, 98 J. PAT. & TRADEMARK OFF. SOC’Y 354, 355–56 (2016); and Jasper L. Tran, Software Patents: A One-Year Review of Alice v. CLS Bank, 97 J. PAT. & TRADEMARK OFF. SOC’Y 532, 534–35 (2015).


7. Alice, 134 S. Ct. at 2357; see The Supreme Court, 2015 Term—Leading Cases, 124 HARV. L. REV. 320, 376 (2010); see also Bilski, 561 U.S. at 621 (Stevens, J., concurring) (“The Court . . . never provides a satisfying account of what constitutes an unpatentable abstract idea.”); cases cited supra note 2.

8. See BLACK’S LAW DICTIONARY, supra note 2; MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, supra note 2.

9. See, e.g., Alice, 134 S. Ct. at 2357; Amdocs, 841 F.3d at 1294; Versata, 793 F.3d at 1331 (“The third exception—abstract ideas—is more of a problem, a problem inherent in the search for a definition of an ‘abstract idea’ that is not itself abstract.”); cf. YUKIO MISHIMA, SUN AND STEEL 9 (John Bester trans., 1970) (“Words are a medium that reduces reality to abstraction for transmission to our reason . . . .”). Indeed, “meaning lies with the reader rather than the writer.” Frank H. Easterbrook, Legal Interpretation and the Power of the Judiciary, 7 HARV. J.L. & PUB. POL’Y 87, 95 (1984).

10. Amdocs, 841 F.3d at 1294; see also JEROME FRANK, LAW AND THE MODERN MIND 129, 141 (Transaction Publishers 2009) (1930) (“To do justice, to make any legal system acceptable to society, the abstract preestablished rules have to be adapted and adjusted, the static formulas made alive. . . . The judge who does not learn how to manipulate these abstractions will become like that physician, described by [John Stuart] Mill, ‘who preferred that patients should die by rule rather than live contrary to it.’”).
"abstract idea" to conceptualize, understand, and appreciate what "abstract idea" means.\textsuperscript{11} Put simply, concretizing "abstract idea" necessarily requires \textit{abstracting} about "abstract idea."\textsuperscript{12} Indeed, "the idea which we abstract [about] . . . will always be \textit{abstracted.}"\textsuperscript{13}

Or am I being too \textit{abstract} about "abstract idea"?\textsuperscript{14}

\textbf{Table 1}

<table>
<thead>
<tr>
<th>Abstract</th>
<th>Idea</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\textbf{Figure 1}

<table>
<thead>
<tr>
<th>A</th>
</tr>
</thead>
<tbody>
<tr>
<td>b</td>
</tr>
<tr>
<td>s</td>
</tr>
<tr>
<td>t</td>
</tr>
<tr>
<td>r</td>
</tr>
<tr>
<td>a</td>
</tr>
<tr>
<td>c</td>
</tr>
</tbody>
</table>

\textsuperscript{11} Yet "American legal thinkers and actors often display a characteristic disdain for abstraction . . . ." Pierre Schlag, \textit{The Enchantment of Reason} 124 (1998); see also Bruce Ackerman, \textit{Liberating Abstraction}, 59 U. Chi. L. Rev. 317, 318–19 (1992) (discussing Justice Scalia’s "disdain for abstraction" and Judge Easterbrook’s "aversion to abstraction" in constitutional law); Frank H. Easterbrook, \textit{Abstraction and Authority}, 50 U. Chi. L. Rev. 349, 359–92 (1992) ("Most judges and justices, most of the time, act as if every text contains its own rule for the level of abstraction. . . . Ronald Dworkin, Owen Fiss, and Harry Wellington, among others, propose putting the abstraction question to the contemporary legal community."). This Catch-22 has unfortunately shackled (most) judges, scholars, and practitioners from understanding "abstract idea."

\textsuperscript{12} \textit{But see} Easterbrook, supra note 11, at 380 (positing that, in the constitutional law context, "you can’t view abstraction in the abstract"). Put differently, abstracting about "abstract idea" is essentially second-order abstraction, or meta-abstraction.


Perhaps some visuals about "abstract idea" might help. \textit{See, e.g., tbl. 1; fig. 1} (possibly displaying a graph of table 1); \textit{infra} p. 63. This is as (un)abstract as it gets—because less is more when it comes to abstraction. \textit{See also Sec. & Exch. Comm’n v. Chenery Corp.}, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting) ("The more you explain it, the more I don’t understand it.") (sarcastically quoting Mark Twain)); Martha M. Ertman, \textit{For Both Love and Money: Viviana Zelizer’s The Purchase of Intimacy}, 34 Law & Soc. Inquiry 1017, 1017 (2009) (book review) ("The best academic projects make readers think . . . ."). Hence, abstract on!
2016] ABSTRACTING ABOUT “ABSTRACT IDEA” 63

[This page is intentionally left blank for abstracting about “abstract ideas.”]