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**Recent Developments in Patent Law (Fall 2020)**

Updated through 10/28/2020

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<b>PATENTABLE SUBJECT MATTER.....</b>	<b>5</b>
<b>Software and Business Method Cases.....</b>	<b>5</b>
<b>Unpatentable .....</b>	<b>5</b>
<i>Electronic Communication Technologies, LLC v. ShoppersChoice.com</i> , 958 F.3d 1178 (Fed. Cir. May 14, 2020) .....	5
<i>Customedia Techs., LLC v. Dish Network Corp.</i> , 951 F.3d 1359 (Fed. Cir. March 6, 2020) .....	6
<b>Patentable .....</b>	<b>7</b>
<i>Packet Intelligence LLC v. NetScout Sys.</i> , 965 F.3d 1299 (Fed. Cir. July 14, 2020) ...	7
<i>Uniloc USA, Inc. v. LG Elecs. USA, Inc.</i> , 957 F.3d 1303 (Fed. Cir. Apr. 30, 2020) ...	7
<i>Koninklijke KPN N.V. v. Gemalto M2M GmbH</i> , 942 F.3d 1143 (Fed. Cir. Nov. 15, 2019) .....	8
<b>Life Sciences Claims .....</b>	<b>9</b>
<b>Patentable .....</b>	<b>9</b>
<i>XY, LLC v. Trans Ova Genetics, LC</i> , 968 F.3d 1323 (Fed. Cir. July 31, 2020) .....	9
<i>Illumina, Inc. v. Ariosa Diagnostics, Inc.</i> , 952 F.3d 1367 (Fed. Cir. March 17, 2020) .....	10
<i>Boehringer Ingelheim Pharm., Inc. v. Mylan Pharm., Inc.</i> , No. 2019-1172, 2020 U.S. App. LEXIS 8393 (Fed. Cir. Mar. 16, 2020).....	11
<b>Mechanical Inventions.....</b>	<b>12</b>
<i>In re Rudy</i> , 956 F.3d 1379 (Fed. Cir. April 24, 2020) .....	12
<b>DISCLOSURE.....</b>	<b>13</b>
<b>Definiteness.....</b>	<b>13</b>
<i>IBSA Institut Biochimique, S.A. v. Teva Pharm. USA, Inc.</i> , 966 F.3d 1374 (Fed. Cir. July 31, 2020).....	13
<i>Samsung Elecs. Am., Inc. v. Prisia Eng'g Corp.</i> , 948 F.3d 1342 (Fed. Cir. February 4, 2020) .....	14
<b>NOVELTY .....</b>	<b>16</b>
<i>BASF Corp. v. SNF Holding Co.</i> , 955 F.3d 958 (Fed. Cir. April 8, 2020).....	16

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<b>OBVIOUSNESS .....</b>	<b>17</b>
<i>Nike, Inc. v. Adidas AG</i> , 955 F.3d 45 (Fed. Cir. April 9, 2020) .....	17
<i>Google LLC v. Koninklijke Philips N.V.</i> , 795 F. App'x 840 (Fed. Cir. January 6, 2020) .....	17
<i>TQ Delta, LLC v. Cisco Sys.</i> , 942 F.3d 1352 (Fed. Cir. Nov. 22, 2019) .....	18
Inherency.....	19
<i>Hospira, Inc. v. Fresenius Kabi USA, LLC</i> , 946 F.3d 1322 (Fed. Cir. January 9, 2020) .....	19
<i>Persion Pharm. LLC v. Alvogen Malta Operations LTD.</i> , 945 F.3d 1184 (Fed. Cir. December 27, 2019).....	21
Secondary Considerations.....	22
<i>Fox Factory, Inc. v. SRAM, LLC</i> , 944 F.3d 1366 (Fed. Cir. December 18, 2019).....	22
 <b>CLAIM CONSTRUCTION .....</b>	 <b>23</b>
<i>Cochlear Bone Anchored Sols. AB v. Oticon Med. AB</i> , 958 F.3d 1348 (Fed. Cir. May 15, 2020) .....	23
<i>Personalized Media Communs., LLC v. Apple Inc.</i> , 952 F.3d 1336 (Fed. Cir. March 13, 2020) .....	23
<i>Techtronic Indus. Co. v. ITC</i> , 944 F.3d 901 (Fed. Cir. December, 12 2019) .....	24
<i>Kaken Pharm. Co. v. Iancu</i> , 952 F.3d 1346 (Fed. Cir. March 13, 2020) .....	25
<i>Amgen Inc. v. Amneal Pharm. LLC</i> , 945 F.3d 1368 (Fed. Cir. January 7, 2020).....	26
 <b>INFRINGEMENT .....</b>	 <b>28</b>
<b>International Trade Commission .....</b>	<b>28</b>
<i>Comcast Corp. v. ITC</i> , 951 F.3d 1301 (Fed. Cir. March 2, 2020).....	28
<b>Joint Infringement .....</b>	<b>29</b>
<i>Syngenta Crop Prot., LLC v. Willowood, LLC</i> , 944 F.3d 1344 (Fed. Cir. December 18, 2019) .....	29
<b>Indirect Infringement .....</b>	<b>30</b>
<b>Doctrine of Equivalentents .....</b>	<b>31</b>
 <b>DEFENSES .....</b>	 <b>34</b>
<b>Inequitable Conduct .....</b>	<b>34</b>
<i>GS CleanTech Corp. v. Adkins Energy LLC</i> , 951 F.3d 1310 (Fed. Cir. March 2, 2020) .....	34
<b>Assignor Estoppel.....</b>	<b>35</b>
<i>Hologic, Inc. v. Minerva Surgical, Inc.</i> , 957 F.3d 1256 (Fed. Cir., April 22 2020) ...	35

<b>REMEDIES .....</b>	<b>37</b>
<b>Attorneys’ Fees.....</b>	<b>37</b>
<i>Elec. Commun. Techs., LLC v. ShoppersChoice.com, LLC</i> , 963 F.3d 1371 (Fed. Cir. July 1, 2020).....	37
<i>Amneal Pharms. LLC v. Almirall LLC</i> , 2020-1106, 2020 WL 2961939, at *1 (Fed. Cir. June 4, 2020).....	38
<i>Intellectual Ventures I LLC v. Trend Micro Inc.</i> , 944 F.3d 1380 (Fed. Cir. December 19, 2019) .....	39
<i>Blackbird Tech LLC v. Health in Motion LLC</i> , 944 F.3d 910 (Fed. Cir. December 1, 2019) .....	40
<i>Peter v. NantKwest, Inc.</i> , No. 18-801 (Supreme Court December 11, 2019).....	41
<b>Marking .....</b>	<b>42</b>
<i>Arctic Cat Inc. v. Bombardier Rec. Prods.</i> , 950 F.3d 860 (Fed. Cir. February 19, 2020) .....	42
<b>PRACTICE AND PROCEDURE.....</b>	<b>44</b>
<b>Right to Jury Trial.....</b>	<b>44</b>
<i>TCL Commun. Tech. Holdings Ltd. v. Telefonaktiebolaget LM Ericsson</i> , 943 F.3d 1360 (Fed. Cir. December 5, 2019) .....	44
<b>Venue.....</b>	<b>45</b>
<i>In re Adobe Inc.</i> , 2020 U.S. App. LEXIS 23803 (July 28, 2020).....	45
<i>In re Google LLC</i> , 949 F.3d 1338 (Fed. Cir. February 13, 2020).....	46
<b>International Trade Commission .....</b>	<b>48</b>
<i>Mayborn Grp., Ltd. v. ITC</i> , 965 F.3d 1350 (Fed. Cir. July 16, 2020) .....	48
<b>PATENT TRIAL AND APPEAL BOARD.....</b>	<b>49</b>
<i>Apple Inc. v. Voip-Pal</i> , 2020 U.S. App. LEXIS 30820 (September 25, 2020).....	49
<b>Constitutionality and Jurisdiction.....</b>	<b>49</b>
<i>Thyrv Inc.. v. Click-to-Call Techs., LP</i> , ___ S.Ct. ___ (U.S. April 20, 2020).....	49
<i>ESIP Series 2, LLC v. Puzhen Life USA, LLC</i> , 958 F.3d 1378 (Fed. Cir. May 19, 2020) .....	50
<i>Facebook, Inc. v. Windy City Innovations, LLC</i> , 953 F.3d 1313 (Fed. Cir. March 18, 2020) .....	51
<i>Virnetx Inc. v. Cisco Sys., Inc.</i> , 958 F.3d 1333 (Fed. Cir. May 13, 2020).....	52
<i>In re Boloro Glob. Ltd.</i> , 963 F.3d 1380 (Fed. Cir. July 7, 2020).....	53
<i>Christy, Inc. v. United States</i> , 971 F.3d 1332 (Fed. Cir. August 24, 2020).....	53
<b>Inter Partes Review Procedure.....</b>	<b>54</b>

*Network-1 Techs. v. Hewlett-Packard Co.*, 2020 U.S. App. LEXIS 30747 (September 24, 2020) ..... 54  
*Uniloc 2017 LLC v. Hulu, LLC*, 966 F.3d 1295 (Fed. Cir. July 22, 2020)..... 55

**DESIGN PATENTS..... 57**

**Design Patent Exhaustion..... 57**

*Automotive Body Parts Ass’n v. Ford Global Techs., LLC*, 930 F.3d 1314 (Fed. Cir. July 23, 2019)..... 57

## PATENTABLE SUBJECT MATTER

### Software and Business Method Cases

#### Unpatentable

#### ***Electronic Communication Technologies, LLC v. ShoppersChoice.com*, 958 F.3d 1178 (Fed. Cir. May 14, 2020)**

In this appeal from the Southern District of Florida, the Federal Circuit affirmed the district court’s finding that the asserted patent claims were not subject matter eligible.<sup>3</sup>

Electronic Communication Technologies’ ‘261 patent claimed an automated notification system for securely notifying customers in advance of the pickup or delivery of a good.<sup>4</sup> The district court held the disputed claim had was patent ineligible under § 101 for being directed an abstract idea and did not contain an inventive concept.<sup>5</sup> The district court reasoned “business practices designed to advise customers of the status of delivery of their goods have existed at least for several decades, if not longer” and the claim recited merely generic computer components performing conventional computer functions.<sup>6</sup> ECT appealed.

The Federal Circuit affirmed. At step 1 of the *Alice* test, the court agreed the disputed claim was directed towards an abstract idea.<sup>7</sup> According to the court, two of the identified functions, “monitoring the location of a mobile thing and notifying a party in advance of arrival of that mobile thing” were ultimately just “the fundamental business practice of providing advance notification of the pickup or delivery of a mobile thing.”<sup>8</sup> The court also held the recited increased security measures using “authentication information” were directed towards an abstract idea.<sup>9</sup> Supplying order numbers and recording customer information is a longstanding business practice.<sup>10</sup> Furthermore, the recited authentication measures merely involved “gathering, storing, and transmitting information.”<sup>11</sup> The court rejected ECT’s arguments that the claim being “unique” and having no issues during patent prosecution made it patent eligible.<sup>12</sup>

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<sup>3</sup> *Electronic Communication Technologies, LLC v. ShoppersChoice.com*, 958 F.3d 1178 (Fed. Cir. 2020)

<sup>4</sup> *Id.* at 1180. (citing U.S. Patent No. 9,373,261).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1181 (quoting *Elec. Comm’n Techs., LLC v. ShoppersChoice.com, LLC*, No. 16-81677-CIV-KAM, 2019 WL 1173448, 2019 U.S. Dist. LEXIS 10042, slip op. at 6 (S.D. Fla. Jan. 18, 2019) (“District Court Opinion”))

<sup>7</sup> *Id.* at 1181.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1182

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (citing *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353–54 (Fed. Cir. 2016)).

<sup>12</sup> *Id.* at 1182-83.

At step two of the *Alice* test the court again agreed with the district court that the claim contained no inventive concept.<sup>13</sup> Rather, the claimed invention “only entails applying longstanding commercial practices using generic computer components and technology.”<sup>14</sup> ECT argued the claim should be valid because, in another case, the court found a shorter and less enabled claim valid.<sup>15</sup> The court rejected the argument, however, noting the length and enablement of claims and was not indicative of subject matter eligibility.<sup>16</sup>

***Customedia Techs., LLC v. Dish Network Corp.*, 951 F.3d 1359 (Fed. Cir. March 6, 2020)**

In this appeal of a Covered Business Method (“CBM”) review from the Patent Trial and Appeal Board (“PTAB”), the Federal Circuit affirmed the district court’s finding that the patents were not subject matter eligible.<sup>17</sup>

Customedia’s ‘090 and ‘494 patents disclose a data management and processing system for storing and delivering advertising data.<sup>18</sup> The system consisted of “a remote Account-Transaction Server (ATS) and a local host Data Management System and Audio/Video Processor Recorder-player (VPR/DMS), e.g., a cable set-top box.”<sup>19</sup>

Dish petitioned the PTAB for a CBM review, arguing the patents were ineligible under § 101.<sup>20</sup> CBM review is available for a business method patents claiming a method for “performing data processing or other operations used in the practice, administration, or management of a financial product or service” and is not a technological invention.<sup>21</sup> Despite the ‘090 and ‘494 patents arguably being a technological invention and not being connected to a financial product or service, the PTAB instituted CBM review.

In the CBM review, the PTAB held the patents’ disputed claims were patent ineligible under § 101.<sup>22</sup> On appeal, the Federal Circuit affirmed.<sup>23</sup> At step one of the *Alice* test, the court held “the claimed invention merely improves the abstract concept of delivering targeted advertising using a computer only as a tool.”<sup>24</sup> At step two, the court noted “the claims recite only generic computer components” and found no inventive concept.<sup>25</sup>

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<sup>13</sup> *Id.* at 1183.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Customedia Techs., LLC v. Dish Network Corp.*, 951 F.3d 1359 (Fed. Cir. 2020).

<sup>18</sup> *Id.* at 1360-61.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1362.

<sup>21</sup> 77 Fed. Reg. 48734, August 14, 2012

<sup>22</sup> *CustomediaCustomedi*, 951 F.3d 1359 at 1362.

<sup>23</sup> *Id.* at 1366.

<sup>24</sup> *Id.* at 1363.

<sup>25</sup> *Id.* at 1366

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