Killian Petitions Supreme Court to End Alice/Mayo (ipwatchdog.com)

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"The drafters of the 1952 Patent Act knew what they were doing, and it is not within the authority of Article III courts to rewrite the Patent Law in a way that bypasses the safeguards placed into the law by Congress." – Killian petition

Jeffrey Killian yesterday submitted a petition for writ of certiorari to the United States Supreme Court asking the Court to provide clear

guidance on or else throw out the *Alice/Mayo* test for patent eligibility. Killian is involved in an ongoing patent dispute in which the Patent Trial and Appeal Board (PTAB) rejected claims of his U.S. Patent Application No. 14/450,042 under Section 101. The U.S. Court of Appeals for the Federal Circuit (CAFC) affirmed the ruling in August 2022.

In the petition, Killian claims that the U.S. Patent and Trademark Office (USPTO) violated Supreme Court precedent by ruling the patent application ineligible under the *Alice/Mayo* test.

"There can be no legitimate reliance on a test that contravenes congressional intent, a comprehensive statutory framework, and constitutional principles. *Alice/Mayo* is a failed experiment," concluded Killian in his petition.

The petition presents the Supreme Court with two questions related to the *Alice/Mayo* test. First, have departures from Supreme Court precedent on *Alice/Mayo* by the CAFC allowed the USPTO to violate Title 5 of the United States Code and the Due Process Clause of the Fifth Amendment of the Constitution? Secondly, Killian asked, do exceptions made by Article III courts of Title 35 U.S.C. § 101 exceed the court's constitutional authority?

Killian's attorney, Burman Y. Mathis, has previously published his analysis of the case on *IPWatchdog*.

CAFC: Claims Fail *Alice/Mayo*; Killian's Beef is with SCOTUS

In a precedential opinion filed on August 23, 2022, the CAFC said Killian's claims failed to meet the threshold test of *Alice/Mayo*. The '042 patent application is directed to "a computerized system and

method for determining eligibility for social security disability insurance benefits (SSDI) through a computer network."

The CAFC judges ruled the claims did not meet the first step of the *Alice/Mayo* test because they cover the abstract concept of "generic recitations of generic computer functionalities." As for the second step, the court found no inventive concept and said, "the claims here do not detail how the computer should go about determining eligibility for benefits."

In his appeal, Killian argued the *Alice/Mayo* test is poorly articulated and vague, and said that PTAB decisions that find a patent ineligible should be ruled "arbitrary and capricious" under the Administrative Procedure Act (APA).

But the CAFC said that Killian's argument should be made to the Supreme Court and not the PTAB or CAFC, who are simply applying Supreme Court precedent.

Killian's Petition

Now, in the SCOTUS petition, Killian outlines his argument in three parts. Firstly, Killian claims, "the lower courts have rendered step one of *Alice/Mayo* capricious" and that step one of the *Alice/Mayo* test can be satisfied via "nothing more than a bald assertion that defies evidence, common-sense analysis, and scientific principles."

Secondly, Killian says the term "inventive concept" in step two of *Alice/Mayo* "is capricious and this capriciousness cannot be remedied." In Killian's view, the term is a rebranding of "invention," which he argues the Court has acknowledged to be meaningless on three separate occasions.

The final argument is that the *Alice/Mayo* test should be set aside based on the Supreme Court's analysis in *Dobbs v. Jackson Women's Health Organization*, which Killian argues "demands that each judicially-created exception to patent eligibility be set aside."

Due Process

Returning to the questions Killian posed at the beginning of the petition, he argues that the manner in which the USPTO applies the *Alice/Mayo* test violates statutory due process and the Fifth Amendment due process law. According to Killian, the test violates due process "by depriving patent applicants of a property right using nonexistent definitions and factual finding without evidence."

While the CAFC wrote that Killian did not argue and could not show that the *Alice/Mayo* standard was "void-for vagueness", the petition explains that is not the case he is making; rather, he is arguing that the term "inventive concept" at *Alice* step two is meaningless.

"Respectfully, it is not necessary to argue void-for-vagueness to recognize that a decision violates due process of law," the petition asserts. "The void-for-vagueness doctrine was derived from the Fifth and Fourteenth Amendments, not the other way around." Killian adds that certiorari is necessary because the CAFC decision has given the USPTO license to violate due process under the guise of *Alice/Mayo*.

Exceeding the Court's Constitutional Authority

As to the second question presented, the petition argues "nowhere under the Constitution or under § 101 or any section of Title 35 are the courts granted authority to create exceptions to patent eligibility."

It adds that, despite the lack of empowering language in these documents, the courts have created numerous exceptions to patent eligibility.

“However, such exceptions violate congressional prerogative and ignore the express limits Congress actually created under, *inter alia*, Title 35 U.S.C. § 102 of the Patent Act of 1952,” wrote Killian.

While abstract ideas should not be able to be patented, it isn’t the *Alice/Mayo* test that should govern this analysis Rather, abstract ideas “fail the written description and enablement clauses of 35 U.S.C. § 112(b),” the petition explains. “That is, the drafters of the 1952 Patent Act knew what they were doing, and it is not within the authority of Article III courts to rewrite the Patent Law in a way that bypasses the safeguards placed into the law by Congress,” it adds.

Killian advocates for this standard to be applied so that the patent law can work as Congress originally designed it. He continues, “unfortunately, rather than adhering to congressional intent, Article III courts have destroyed Congress’s intended scope of patent eligibility by importing the exact same ‘invention’ requirement that Congress excluded.”