

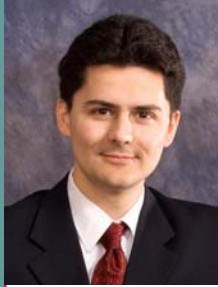


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WCBA Newsletter

Washington County Bar Association
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President's Note

Lawyers associated for justice, service, professionalism, education, mentoring, social interaction and leadership for our members and our community

Happy New Year!

By Nick Heydenrych
WCBA President

On behalf of the WCBA - Happy New Year! We wish you all a prosperous and happy 2016.

I want to thank our members and our board of directors for all their help in making 2015 one of our best years ever. In particular I want to thank Amy Velázquez for all her hard work in organizing our 2015 Winter Social and sending the year out on a great note.

To those of you who attended the Winter Social - thank you for a fun-filled and memorable evening.

For those of you who missed out - don't worry, we still have the young lawyer's coffee group, the summer social, and possibly a spring event this year.

We have a lot to look forward to in 2016. Our January CLE will be OHS and PSRB Present: The Oregon Forensic System, presented by Micky Logan of the Oregon State Hospital and Juliet Britton of the State Psychiatric Review Board. Topics will include the aid and assist process and an examination of the state of the guilty but for insanity defense in Oregon. Fun times!

Presiding Judge Charles Bailey will also deliver his second annual State of the Court address. With all the recent and upcoming changes to our court system I strongly encourage all Washington County practitioners to attend.

In the coming months we will be visited by the Oregon State Supreme Court and Court of Appeals as well as many interesting CLE presenters, and speakers. Again - thank you to all our members - Here's to a great 2016!



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Washington County Circuit Court Update

By Amy N. Velázquez
WCBA Secretary

Below are recent changes/moves of note at the courthouse.

Judge Letourneau has a new clerk: Debbie Marvin. It is best to contact her via email at Debbie.K.Marvin@ojd.state.or.us. You may contact her via phone at [503.846.8340](tel:503.846.8340), exclusively for wedding scheduling purposes.

Judge Garcia remains at the Law Enforcement Center (LEC). All early case resolution (ECR) set over matters are now being heard by Judge Garcia over at LEC, rather than at the main courthouse by Judge Knapp. ECR set-overs are being scheduled at 8:15am, rather than at 10am.

Judge Roberts has relocated to Courtroom 304C, Judge Kohl's former courtroom. She will now be presiding over Drug Court on Mondays. Judge Roberts also has new full time staff: Marcela Moenne-Loccoz is her judicial assistant and may be reached at Marcela.L.Moenne-Loccoz@ojd.state.or.us or [503.846.8642](tel:503.846.8642). Jessica Intriери is her Clerk and may be reached at Jessica.L.Intriери@ojd.state.or.us or [503.846.8643](tel:503.846.8643).

Judge Erwin is now handling the post-conviction relief motion docket which will continue to be handled on Mondays with his regular civil motion docket. Judge Thompson will be presiding over the Violation of Restraining Order docket and will continue her hybrid criminal/domestic relations docket. However, she will be hearing domestic relations matters every Monday afternoon, regardless of monthly rotation. Judge Fun will be hearing domestic relations matters every Friday morning, also regardless of the monthly rotation. Our visiting senior judges will be sitting in Courtroom 426J.

Criminal Caseflow Changes: Felony cases that enter a waiver at preliminary hearing will be set for arraignment on the District Attorney's information on the same date as is scheduled for the case management conferences. Preliminary hearings that are waived by phone will continue to have an 8:15am arraignment appearance at LEC the week following the scheduled preliminary hearing.

Odyssey Update: Court staff will be in a month long training starting the end of January 2016 and most offices will be at half-staff due to training schedule. All court offices and counters will close from 12 noon to 1pm for lunch. Staff has been directed to keep the dockets light during both the training and go-live time period but no specific planning is available to share presently. We will make an effort to share information via Newsletter and our Facebook page as it becomes available.

Note - Please feel free to contact me or any member of the board with additional information or changes you believe are important to our members.

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\$1,500 & \$1,300/Monthly: Class A office space, 18th floor of Umpqua Bank Building, at One SW Columbia. Both exterior office's with panoramic view of mountains, riverfront and downtown. AV family law practice will share two conference rooms, receptionist services, and kitchen. Copier, fax, telephones and email provided at cost. Building amenities include conference rooms, private gym and bank in building. Approximate room sizes 17 x 14 and 10 x 15. Call Cecelia Connolly 503.224.7077.



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TOM COLLINS IS RETIRING!!

Please join us in wishing Tom well. We will provide appetizers and there will be a no-host bar.

When: Thursday, January 14 from 4-7pm

Where: The Venetian Theatre and Bistro

253 East Main Street

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Hosts: Kirsten Thompson,
David Audet, Michelle Calcaterra

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Oregon Law Students Public Interest Fund Dinner & Auction

Please join us Friday, February 19, 5-9pm, at the Eugene Hilton for this great annual event that raises support for student stipends for summer legal service.

For more information and registration contact Jennifer Geller, jgeller@uoregon.edu, or visit <https://law.uoregon.edu/explore/OLSPIF>.



Recommended for You: Netflix Guide is Brilliant but Still an Unpatentable Idea

By Susan Bristow-Ford

Everyone wonders how Netflix decides what to include in its recommended categories. Although its algorithms for picking flicks certainly seem unique, did you ever consider whether the *concept* of suggesting films in creative categories could be protectable intellectual property?

A court in the Northern District of California recently said it wasn't, invalidating five patents held by Rovi Corporation related to Netflix's media streaming service.

Netflix's categories are creatively, sometimes amusingly, specific. Based on a viewer's viewing history and/or rankings of movies and TV programs, it combines genres into personally-tailored categories like "sports-related romantic animated zombie movies." Four of the patents at issue were granted to Rovi for this innovative way to organize a program guide based on a viewer's previously-watched programs (what the Court called "Viewing History" and "Category" patents). One additional patent related to creating "bookmarks," which allow a viewer to continue watching programs-in-progress on a different device (the "Bookmarking" patent). These are all great ideas - but are they *patentable*?

The court said no, [granting Netflix's motion for summary judgment](#) against Rovi.

Can ideas be patented?

The U.S. Patent Act allows an individual who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" to obtain a patent for that intellectual property. [1] The U.S. Supreme Court clarified, however, that "laws of nature, natural phenomena, and abstract ideas are not patentable." [2] But what constitutes an unpatentable "abstract idea" rather than a patentable "useful process" (also known as a "method patent")?

The Northern District opinion notes that this is a difficult distinction that courts have grappled with for many years.

In 1998, the Federal Circuit explained that a process could be patentable as long as it produced a "useful, concrete, and tangible result." [3] But in 2008, an en banc panel of the Federal Circuit rejected this test, holding that "the sole test governing § 101 analyses" should be whether a process "is tied to a particular machine or apparatus" or "transforms a particular article into a different state or thing." [4] What this decision left unclear, however, was whether describing an abstract "computer" which would execute this process was sufficient to elevate it above a mere idea.

Called upon to resolve this dispute, the U.S. Supreme Court attempted to rein in process patents, taking a more holistic approach whether a patent attempts to "grant a monopoly over an abstract idea" when determining its viability. [5] Since then, the controlling case law, *Alice Corp. Pty. Ltd. v. CLS Bank International* [6], states that if a patent relates to one of these unpatentable concepts, the court looks for an "'inventive concept' - i.e., an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself." [7]

The *Alice* Court made clear that neither adding the magic words "apply it" to a statement of an abstract idea or limiting use of that idea to a "particular technological environment" (i.e., describing that it would be implemented by an abstract "computer") would be enough, and "stating an abstract idea while adding the words 'apply it with a computer' simply combines those two steps, with the same deficient result." [8] As the Netflix court explains, "simply adding a 'wholly generic computer implementation' did not meaningfully limit the scope of a patent, and in practice, would lead to the same result as patenting an abstract idea itself." [9]

Software patentability in practice

But doesn't that mean that every software patent would be inherently invalid, since every program intends to use an abstract computer to execute an abstract idea? What makes the difference between a patentable and unpatentable software patent claim?

The Netflix decision notes that in light of subsequent Federal Circuit decisions interpreting

and distinguishing *Alice*, “the hallmark of the ‘inventive concept’ test is whether the patentee has added something to the claims to limit their scope, so that they do not monopolize the entire abstract idea to which the claims are direct.” [10] Rovi’s “Viewing History” and “Category” patents fail because they seek to assert ownership over any systems that use a viewer’s pattern of previous media consumption to create any format of customized categories of media recommendations.

Novelty doesn’t mean patentability

Most importantly, the Netflix court notes that just because a concept hasn’t been previously thought of doesn’t mean that it is eligible for a patent. This is contrary to the somewhat prevalent pop-culture understanding of patenting a “million-dollar idea.” No matter how novel or useful an idea is, it cannot be properly patented without additional, specific, unique process components or limitations on the scope of its application. (The court cites Einstein’s $E=mc^2$ theory to illustrate its point: despite being an amazing discovery, relativity remains a “natural law” rather than a process over which an individual can rightly claim ownership.)

Although the Netflix court concedes that Rovi may have been the first company to combine viewers’ histories of interest in “sports” and “drama” into recommendations for a new category of “sports dramas,” it finds that Rovi’s patents improperly attempted to claim ownership of that abstract idea rather than any specific method of implementing that idea.

A drop in the patent bucket

Rovi’s US patent portfolio includes more than 1,500 issued patents and pending applications, many for similar digital entertainment and media guides and processes. It has litigation pending against streaming video providers such as Netflix and Amazon.com, which it accuses of infringing its patents.

Once a patent has been issued, it is statutorily presumed to be valid, so a patent challenger bears the burden of proving invalidity by clear and convincing evidence. [11] Defending against patent infringement claims by challenging a patent can be extraordinarily time-consuming and expensive. Other TV providers (including Comcast Corp, Time Warner Cable Inc, DISH Network Corp and DirecTV) pay Rovi license fees for the use of similar patents to avoid litigation.

Rovi has announced it intends to appeal the Northern District’s decision. [12] The one thing

that *does* seem clear is that the question of what makes an idea patentable in today’s virtual world will remain the topic of litigation for the indefinite future.

Written with the much-appreciated assistance of Portland attorney Jamie Pfeiffer.

About the author:

Susan Bristow-Ford is an experienced business and intellectual property litigator, with over 18 years of experience working with businesses of all sizes to resolve legal disputes and avoid future litigation. As a former shareholder at one of Portland’s largest law firms, Susan has been exposed to a broad range of industries and clients. When she’s not working, Susan likes to spend quality time with her two middle school-aged kids and her Trek road bike.

1. 35 U.S.C. § 101.
2. *Diamond v. Diehr*, 450 U.S. 175, 185 (1981).
3. *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368, 1373 (Fed. Cir. 1998).
4. *In re Bilski*, 545 F.3d 943, 954-955 (Fed. Cir. 2008).
5. *Bilski v. Kappos*, 561 U.S. 593, 603, 612 (2010).
6. *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S.Ct. 2347 (2014).
7. *Alice*, *supra*, at 2355 (internal citations omitted)(emphasis added).
8. *Alice*, *supra*, at 2358.
9. *Netflix, Inc. v. Rovi Corporation, et al.*, Order Granting Motion for Summary Judgment, p. 7, 15 Jul 2015, Case No. 11-cv-6591 PJH, Northern District of California.
10. *Netflix*, *supra*, at 11.
11. *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1359 (Fed. Cir. 2007).
12. “Rovi Loses Patent Fight v. Netflix in Court.” *Light Reading*. Light Reading, 21 Jul 2015.

THE WCBA JANUARY CLE & DINNER MEETING
WEDNESDAY January 13, 2016
***“OSH and PSRB Present:
The Oregon Forensic System”***

PRESENTED BY:
Micky Logan, Oregon State Hospital
&
Juliet Britton, J.D., State Psychiatric Review Board

Date: Wednesday January 13, 2016

Time: CLE - 5:15pm Cocktails & Dinner - 6:30pm

Place: The Old Spaghetti Factory, 18925 NW Tanasbourne Drive, Hillsboro

CLE Credit (Pending approval): 1 General Credit

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- Dinner + CLE = \$40 (non-member)
- Dinner only = \$15 (member and non-member)
- CLE only = \$15 (member)
- CLE only = \$25 (non-member)

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