



# INTELLECTUAL PROPERTY

Law 388

Professor Eric Goldman

## COURSE SUPPLEMENT

Spring 2015

## IP Overview

IP	Registration	Duration	Excludability	Other Pros	Other Cons
Trade Secret	None	Indefinite	None	<ul style="list-style-type: none"> <li>•Can protect any info</li> </ul>	<ul style="list-style-type: none"> <li>•Easy to lose</li> <li>•Messy enforcement</li> </ul>
Patents (utility)	Required	<20 years	Typically absolute	<ul style="list-style-type: none"> <li>•Strict liability</li> <li>•No exploitation requirement</li> </ul>	<ul style="list-style-type: none"> <li>•Disclosure requirements</li> <li>•Upfront costs</li> <li>•Expensive enforcement</li> </ul>
Copyright	“Optional”	>70 years	None in theory; significant in practice	<ul style="list-style-type: none"> <li>•Protects every work</li> </ul>	<ul style="list-style-type: none"> <li>•Only protects expression</li> </ul>
Trademark	Optional	Indefinite	Typically by class	<ul style="list-style-type: none"> <li>•Originality not required</li> </ul>	<ul style="list-style-type: none"> <li>•Limited exclusive rights</li> <li>•Influenced by external factors</li> </ul>

## Let's Stop Using the Term "Soft IP"

By Eric Goldman

Technology & Marketing Law Blog, January 8, 2013

[http://blog.ericgoldman.org/archives/2013/01/a\\_phrase\\_to\\_ret.htm](http://blog.ericgoldman.org/archives/2013/01/a_phrase_to_ret.htm)

You may have heard—or even used—the phrase “soft IP.” I’m not a fan of it, and I think we should retire the term.

The term “soft IP” is inherently ambiguous. Sometimes, people use “soft IP” to refer to “copyrights and trademarks;” other times, the term is intended to cover all IP other than patents—presumably publicity rights, trade secrets, etc. I especially cringe when I hear students tell me they are looking for a “soft IP” job. Typically, that’s a reliable tipoff that the students don’t know what kind of IP job they want; they just know they don’t want to be (or aren’t eligible to become) a patent prosecutor. That lack of clarity in the student’s mind is rarely an asset to their job search.

I’ve had difficulty tracing the term’s etymology. I searched several online databases looking for early uses and I found published references as far back as 1998, but my vague recollection (corroborated by others) is that the term goes back well before then.

As a term establishing a classification of IP, “soft IP” implies an antonym—presumably, “hard IP.” I don’t hear people use the term “hard IP,” but given that soft IP always excludes patents, presumably patents are part of the antonym.

I can think of a few explanations for a hard/soft distinction among intellectual properties. First, patents often cover physical devices, so they often have a physical tangibility, while copyrights, trademarks and other IPs may be more intangible by comparison (even though patents protect “ideas,” which is as intangible as they come).

Second, the hard/soft distinction might imply some difference in the degree of the practice’s difficulty, i.e., the perception that patent law, and any associated technology, are complicated and “hard,” while other IPs are relatively easy and “soft” by comparison. People rarely articulate this relative value judgment explicitly, but I’m sure some patent practitioners believe that what they do is more challenging than the work of other IP practitioners; and I’m even more confident (because I’ve seen it repeatedly) that some patent practitioners feel comfortable “dabbling” in other IPs on the grounds that if they can do patents, they are well-qualified to handle other IPs.

It’s true that patent prosecution requires passage of a separate bar exam, which in turn requires a technical background, so in that sense becoming a patent practitioner is “harder” than becoming an IP practitioner generally. Still, there is a certain implicit arrogance in this line of thinking.

Although I concede that patent law has plenty of arcane and baffling rules, I think patent practice is demonstrably not “harder” than other IP practices. I invite any patent practitioner—or, for that matter, any lawyer—who thinks that non-patent IP is “easy” to: walk me through 17 USC 114 (the music streaming provisions); calculate a pre-1976 copyright term duration; tell me what the term “use in commerce” means in trademark law; or walk me through the multitudinous ICANN procedures for objecting to or challenging gTLDs. And while historically the biggest bucks were in patent

litigation, we're seeing big bucks across the IP spectrum, such as Oracle's \$1.3B copyright damages award in the SAP case and Google's \$100M+ defense costs in *Viacom v. YouTube*. (As I explain to my Internet Law class, \$100M of legal fees is like the cost of \*twenty\* typical patent lawsuits!) And patent cases don't have a monopoly on hard technological questions; think about the technological sophistication to resolve *Oracle v. Google*, the *Cablevision* case or the *Goforit* case (just to pick three examples off the top of my head). Not only would it be condescending to say or imply that non-patent IP is "easy" or fluffy, I don't think it's remotely supportable factually.

A third hard/soft distinction is in the phrase "hard sciences," although we rarely hear the antonym "soft sciences" (presumably social sciences). Because a technical background is required for patent prosecution, perhaps "hard IP" implicitly cross-references "hard sciences." The thing is, there are several paths to qualify for the patent bar that don't require a "hard" science background, so that linkage would be odd.

In conclusion, I see at least three problems with the term "soft IP":

- 1) It has at least two different definitions, making the term ambiguous.
- 2) It establishes an implicit hierarchy between different IP practices, which is potentially condescending and factually unsupportable.
- 3) It might imply an linkage with "hard sciences" that isn't necessarily true.

OK, so what should we use instead of the term "soft IP"? I don't have a great answer. The reality is that the IPs being lumped together under the "soft IP" appellation don't have enough commonalities to support the linkages—other than that they aren't patents. So we could use the term "non-patent IP" as the antonym to a patent practice. You probably like the term "non-patent IP" as much as I do (i.e., not much). My only other suggestion is to skip any effort to combine IPs in a single term and instead specify which IPs you are referring to. For example, if you're using "soft IP" to refer to copyrights and trademarks, just say "copyrights and trademarks."

Precise nomenclature is especially crucial for students in their job searches. If you aren't interested in a patent career, that's fine; but it's not a strong sales pitch to tell employers what you're \*not\* interested in, and the requirements and expectations of a trademark practice are quite different than a copyright practice (and different still from other IP niche practices). In reality, the best thing students can do is to match their search criteria with the way employers structure the jobs. Few entry-level employers recruit for a "copyright" lawyer; typically, they are looking for a software licensing attorney or an entertainment attorney or an IP litigator knowledgeable in copyright law. My recommendation to students: figure out what employers are looking for, assess how the requirements of the job match against your skills and interests, and proceed accordingly. If you haven't gotten to the point where you can avoid the term "soft IP," your job search process probably still needs more cultivation, no matter how much effort you've invested in it to date.

**From “A Discourse on Gaming,” April 30, 2013**

<http://adiscourseongaming.tumblr.com/post/49319892728/let-me-tell-you-a-little-story-about-innovation>

Let me tell you a little story about innovation and creativity. Years ago, I worked on a wiki-based project to find the first instance of ideas/techniques in video games (like the first game to use cameras as weapons, or the first game to have stealth as a play element). It excited me to dig to give credit to those who laid the foundations of ideas that we now take for granted. I couldn't wait to show the world how creative and innovative these unknown game designers/developers were.

I went into it with much passion and excitement, but unexpectedly, it turned out that there were almost no “firsts”. Every time someone put up a game that was the first to do/contain something, there was another earlier game put up to replace it with a SLIGHTLY less sophisticated, or SLIGHTLY different version of the same thing. The gradient was so smooth and constant that eventually, the element we were focusing on lost meaning. It became an unremarkable point to address at all. We ended up constantly overwriting people's work with smaller, less passionate articles, containing a bunch of crappy games that only technically were the first to do something in the crudest manner. Sometimes only aesthetically.

After a lot of time sunk into this project, I came to the conclusion that I was mistaken about innovation/creativity. It would have been a better project to track the path of ideas/techniques than to try to find the first instance of an idea/technique. I held innovation so highly for years before that, but after this project, I saw just how small it was. How it was but a tiny extension of the thoughts of millions before it. A tiny mutation of a microscopic speck that laid on top of a mountain. It was a valuable experience that helped me very much creatively.

— Dave Freeman, a game designer, friend, and former coworker of mine

## When Asked, Vast Majority of Businesses Say IP Is Not Important

Gabriel J. Michael

To Promote the Progress? Blog

December 20, 2013

<http://topromotetheprogress.wordpress.com/2013/12/20/when-asked-vast-majority-of-businesses-say-ip-is-not-important/>

Last year, the U.S. Patent and Trademark Office released a widely cited report entitled “Intellectual Property and the U.S. Economy: Industries in Focus.” This report played up the importance of IP, claiming “the entire U.S. economy relies on some form of IP,” and estimated that “IP-intensive industries” accounted for 40 million American jobs and 35% of the U.S. GDP in 2010.

While many pro-IP groups hailed the report as demonstrating the importance of IP to the American economy, the report was panned by critics who pointed out that the definition of “IP-intensive industries” was so broad as to be meaningless. Indeed, according to the report, the number one IP-intensive industry by employment in the United States was...grocery stores. Furthermore, although supporters of stricter IP regulation and enforcement continue to rely on the report to justify policies relating to copyrights and patents, the vast majority of the report’s purported economic benefits were attributed to trademarks.

USPTO’s report was released in March 2012, and received a lot of attention. Yet just one month prior, the National Science Foundation (NSF) released the findings of a survey on business use of intellectual property. While a few sites picked up on the NSF report last year, it received far less media attention than it deserved. Why? Perhaps because **it turns out that if you actually ask, the vast majority of businesses report that intellectual property is not important to them....**

But wait – surely I’m making all this up. If “IP-intensive” industries account for 40 million jobs and 35% of GDP, intellectual property must be very important to businesses. What’s this “vast majority,” then?

- \* **In 2010, 87.2% of businesses reported that trademarks were “not important” to them.**
- \* **90.1% of businesses reported that copyrights were “not important” to them.**
- \* **96.2% of businesses reported that patents were “not important” to them....**

If you examine the details, the survey results begin to make more sense. Larger companies tend to report intellectual property as being more important; businesses designated as especially “R&D active” also place more importance on various kinds of intellectual property.

Nevertheless, the results of this survey (now in its third year) are striking. **Even when looking at a sector where one would expect heavy reliance on intellectual property, the results do not match expectations.** For example, take one of the most copyright-dependent sectors we can imagine: “R&D active” software publishing. In 2010, 51.4% of respondents in this sector said copyright was “very important”; 34.6% said it was “somewhat important”; and 13.9% said it was

“not important.” That is, only about half of respondents in a purportedly heavily copyright-dependent sector describe copyright as “very important” to their business.

In my mind, there are two ways of interpreting these data: either all the survey respondents are totally uninformed about what is going on in their businesses, or **formal intellectual property protection is far less important to the vast majority of U.S. businesses than some would like us to believe.**

Some additional highlights:

- \* 61.7% of businesses manufacturing computer and electronic products report that patents are “not important” to them.
- \* 96.3% of businesses with less than 500 employees report that patents are “not important” to them.
- \* 45.6% of businesses with 25,000 or more employees report that patents are “not important” to them.
- \* 53.6% of businesses classified in the information sector (NAICS code 51 – i.e., a sector we’d expect to rely heavily on copyright) report that copyrights are “not important” to them.
- \* Overall, businesses report that trade secrets are the most important form of intellectual property protection, with 13.2% of businesses calling trade secrets “very important” or “somewhat important.” Trademarks are a close second, with copyrights and patents significantly farther behind. Trailing in last place is *sui generis* protection for semiconductor mask works, although that is no surprise.

# Business Use of Intellectual Property Protection Documented in NSF Survey

by John E. Jankowski

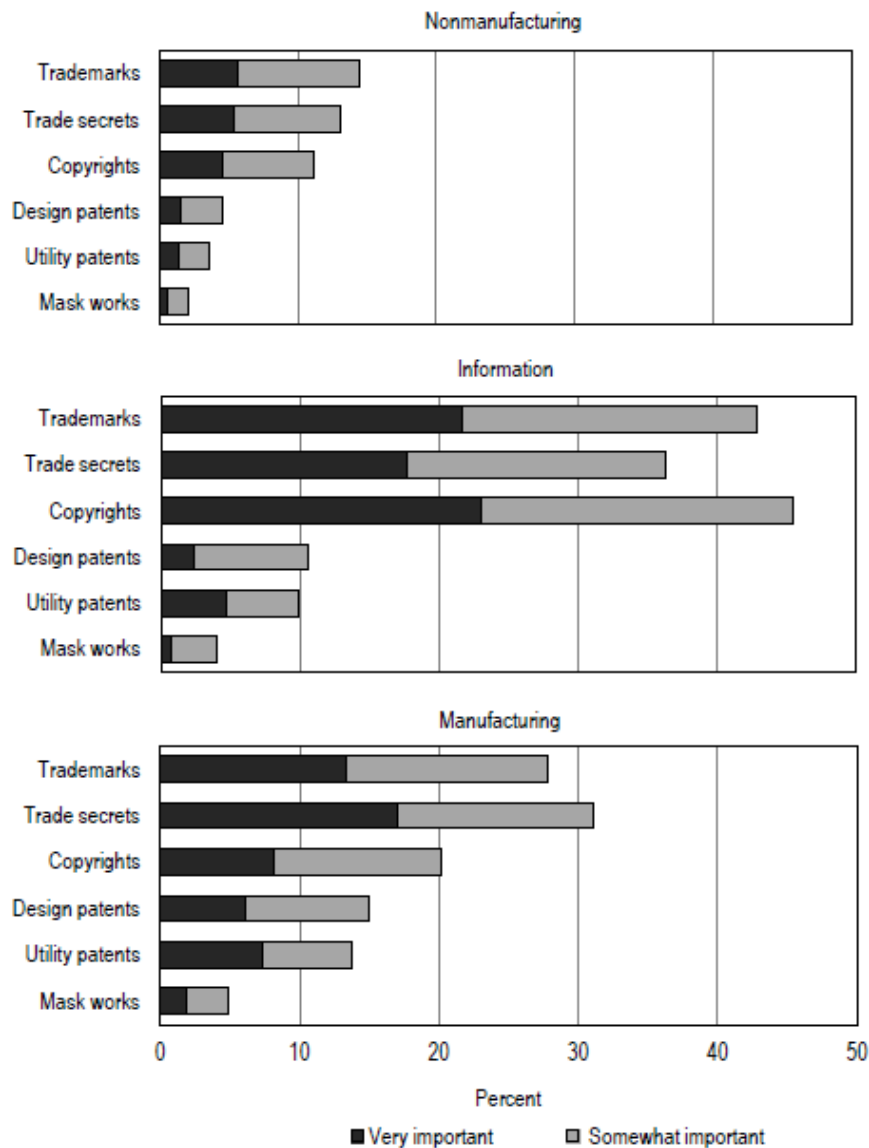
NSF 12-307 | February 2012

[Selected excerpts; citations omitted]

## Manufacturing Sector

A higher share of businesses in the manufacturing sector (NAICS 31–33) than in the nonmanufacturing sector (NAICS 21–23, 42–81) reported each of the individual types of IPR as important. Manufacturers were three times as likely as nonmanufacturers to rate patents (both design and utility) as important to their business during 2008 (14%–15% versus 4%–5%) (figure 1).

FIGURE 1. Businesses reporting IPR as very or somewhat important, by type of industry sector and type of IPR: 2008

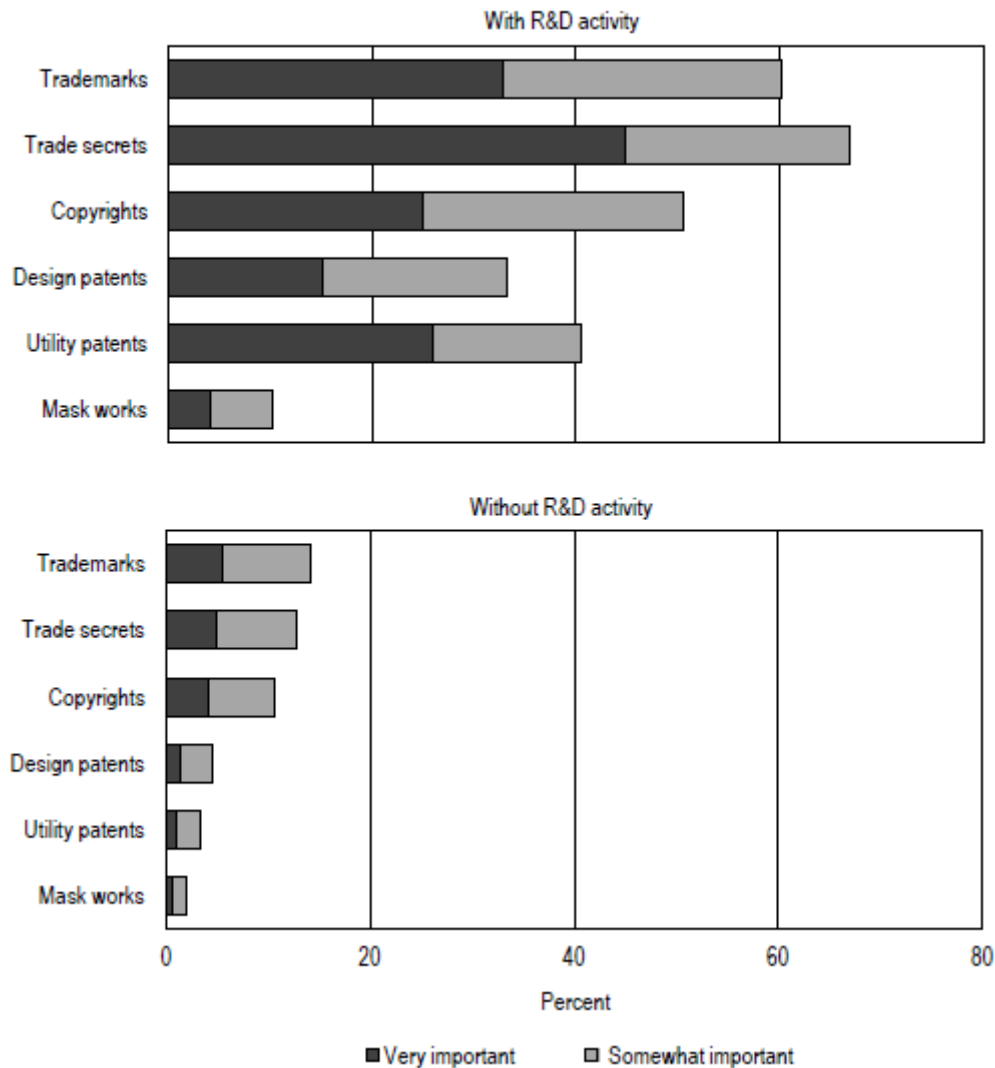




## Companies with R&D Activity

Finally, one of the clearest findings in the BRDIS data is the large difference in the importance of IPR when companies with R&D activity are compared with those without any R&D activity. A much larger share of companies with R&D (either performing R&D or funding others to perform R&D) than of those without R&D reported each of the individual IPR forms as important (figure 2)....

FIGURE 2. Businesses reporting IPR as very or somewhat important, by presence of R&D activity and type of IPR: 2008



Only about 3% of the estimated 1.9 million for-profit companies represented in the survey performed and/or funded R&D in 2008. According to the survey data more than 50% of all these R&D-active companies reported trade secrets, trademarks, and copyrights as important to their business in 2008; 40% reported utility patents as important; and 33% reported design patents as important. By comparison, less than 15% of the non-R&D active companies reported any one of the possible forms of IP protection as important....

### **Median Litigation Costs in 2013**

From the AIPLA Report of the Economic Survey 2013

Patent Infringement Suit, less than \$1 million at risk, inclusive of all costs: \$700k

Patent Infringement Suit, more than \$25 million at risk, inclusive of all costs: \$5.5M

Trademark Infringement Suit, less than \$1 million at risk, inclusive of all costs: \$300k

Trademark Infringement Suit, more than \$25 million at risk, inclusive of all costs: \$1.5M

Copyright Infringement Suit, less than \$1 million at risk, inclusive of all costs: \$300k

Copyright Infringement Suit, more than \$25 million at risk, inclusive of all costs: \$788k

Trade Secret Misappropriation Suit, less than \$1 million at risk, inclusive of all costs: \$425k

Trade Secret Misappropriation Suit, more than \$25 million at risk, inclusive of all costs: \$2.95M

## **Speaking Truth to Patents: The Case for a Better Patent System**

Deputy Under Secretary of Commerce for IP and USPTO Deputy Director Michelle K. Lee  
June 26, 2014

...I wouldn't call myself "anti-patent," nor would I call myself "pro-patent," whatever those labels mean. But let me be clear: I am, without reservation, "pro-patent system."

What do I mean by "pro-patent system"? It means that I believe that a strong patent system is essential to fostering the innovation that drives our economy. I recognize that our patent system is not something that exists in the state of nature, but is the result of policy decisions made by Congress and the Courts that weigh the costs of patent exclusivity against its benefits. We are constantly reexamining those policy decisions, to make sure the benefits continue to outweigh the costs.

I believe that, for the most part, the benefits do outweigh the costs, but we need to be clear about what those benefits and costs are, and about the realities underlying innovation today. Patents are not the only drivers of innovation. The first entity to bring a product to market has a first-mover advantage that provides an incentive to innovate on its own, even if no patents are ever sought or granted. Some firms opt for an open source model, where they benefit from the network effects of the widespread adoption of a technology they developed. We also know that reputation and branding—with or without trademark protections—play a large role in facilitating innovation. And, of course, there are a large number of innovations protected by trade secrets or by copyrights, not by patents.

And yet, patents still play a critical role in promoting innovation. Patent exclusivity—that is, the right of a patent owner to exclude others from using the patented invention—provides a unique route for inventions to find their way to the marketplace. Even with a patent, an inventor requires access to capital, developing a prototype, finding channels of distribution, and more before he—or increasingly, she—can get it to the market. Exclusivity protects the competitive position of a new entrant to the marketplace, which in turn attracts investment. And that plays an essential role in giving inventors and investors the confidence to take the necessary risks to launch products and start businesses.

Now, critics of our patent system point to the patent's grant of exclusivity as a monopoly. And they are right to a point. That grant of exclusivity inhibits competitors and allows the patent owner to charge supra-competitive prices, but only for a limited time. But we accept the monopoly because of our strong conviction that the long-term benefits to society outweigh the costs. Innovation today means that we will have even more innovation tomorrow. And the higher prices we pay for patented goods and services today are an investment for the future.

The history of federal technology transfer provides a useful example. Before 1980—with a few exceptions—the federal government did not grant exclusive licenses to its patents. That led to fewer than five percent of those patents being licensed. So the vast majority of federally-funded research was not finding its way to the market, where it would support our economic growth. After President Carter signed the Bayh-Dole Act into law in 1980, patents that were the result of federally-funded research could be exclusively licensed. As a result, we saw an explosion in the

commercialization of federally-funded research, enabling—for example—so many of the breakthroughs in pharmaceuticals and information technology that we take for granted today. By one study's count, approximately 154 new FDA drugs were approved since 1980 that resulted from federally-funded research. And, on the IT side, federally-funded research resulted in the PageRank method of ranking search results that Google exclusively licensed from Stanford University.

So we have seen the difference that exclusivity makes. We have seen that the commercialization enabled by that exclusivity sustains jobs, drives our economy, and raises our standard of living. We may have borne the costs, in the form of higher prices, but we also received something in return, because those exclusive rights enabled the private sector to take risks and bring products to the market. And there, I think, most of us would say that the benefits of a patent system outweigh its costs.

These benefits are supported by a robust system of licensing and technology transfer that gets patent rights into the hands of those who are able to commercialize inventions. We all recognize that universities and the federal government play an enormous role in supporting research and development, and that their ability to license their intellectual property often enables them to fund the development of future breakthroughs. Litigation is an inefficient way of conducting licensing negotiations. But the ability to defend and maintain the exclusivity granted by a patent is, at the end of the day, an essential element of the system. Litigation is not only the final refuge for legitimate patent holders; it also provides an essential background against which licensing negotiations take place.

I am, as I said, “pro-patent system.” That, to me, means putting the well-being of the patent system first. And if there is a bug in our system, I think it ought to be fixed. So when patent rights are used not to help bring new products to the market, but rather to extract “cost of litigation” settlements from companies and end users inexperienced in the ways of our patent system, the careful balance of costs and benefits underlying our patent system is threatened. In these circumstances, patents are not being used to “promote the progress of Science and useful Arts,” as intended by our Constitution and founding fathers, and it imposes the costs of a monopoly on society, without any greater benefits.

And these costs are real—not just for the parties they accuse of infringement, but for the economy as a whole. Economists have studied this issue and found that this is a multi-billion dollar problem for our economy as a whole. That's a significant cost for American businesses to bear, without the public benefits that arise when an invention is commercialized.

Unfortunately, this shapes how people think about the patent system today. They don't see a driver of innovation or a force for economic growth—they see a sideshow to innovation instead.

And, for those of us who care about the patent system, this is a concern. Litigation costs are normal frictions that occur in any marketplace, but abusive litigation is a flaw in an otherwise great system. It takes a system that we built, together, and makes it an instrument of abuse and injustice. If we care about the system, we have to bring our expertise and experiences to bear on

how we can address this problem before it threatens to undo so much of what we've all worked so hard to build together.

Working towards that solution will require thinking about the patent system as a whole, with input from all stakeholders—including patent applicants and owners, patent defendants and plaintiffs, judges, businesses (small and large) from all industries, universities, and the general public. Not everyone may own patents, but we all are the intended beneficiaries of the system.....

**MUTUAL NONDISCLOSURE AGREEMENT**

This **MUTUAL NONDISCLOSURE AGREEMENT** (the "Agreement") is made effective as of \_\_\_\_\_, 201\_\_ between X and Y.

**1. DEFINITIONS.** "Confidential Information" is all (a) written information disclosed by one party (the "Disclosing Party") to the other (the "Receiving Party") marked "confidential" or with a similar legend, or (b) oral information identified as confidential when disclosed to the Receiving Party and thereafter summarized in a writing marked "confidential" sent to the Receiving Party within 10 days of disclosure. The disclosure "Purpose" is \_\_\_\_\_. If the foregoing is blank, the disclosure "Purpose" is to evaluate the desirability of a business development relationship between the parties.

**2. RESTRICTIONS/OBLIGATIONS.** For 3 years from the applicable date of disclosure, the Receiving Party shall: (a) disclose the other party's Confidential Information only to employees who need to know; (b) not disclose the other party's Confidential Information to any third party, except that the Receiving Party may disclose Confidential Information as compelled by law if the Disclosing Party is given written notice prior to such disclosure; (c) use the other party's Confidential Information only for the Purpose; (d) not reproduce the other party's Confidential Information; (e) not reverse engineer, decompile, or disassemble any software included in the other party's Confidential Information; and (f) not directly or indirectly export the other party's Confidential Information in violation of the law.

**3. EXCLUSIONS.** Sections 2(a)-(d) do not apply to Confidential Information which: (a) is or becomes generally known through no action or failure to act by the Receiving Party; (b) the Receiving Party knows at the time of disclosure; (c) a third party legitimately discloses to the Receiving Party; or (d) the Receiving Party independently develops without using the other party's Confidential Information.

**4. OWNERSHIP.** All Confidential Information shall remain the Disclosing Party's property and shall be returned (or, at the Disclosing Party's option, destroyed) upon the Disclosing Party's written request. A Disclosing Party does not grant any license (expressly, by implication, by estoppel or otherwise) to its trademarks, copyrights or patents pursuant to this Agreement.

**5. EQUITABLE REMEDIES.** The parties acknowledge that monetary damages may not adequately remedy an unauthorized use or disclosure of Confidential Information, and each party may, without waiving any other rights or remedies, seek injunctive or equitable relief to remedy such a breach.

**6. GENERAL.** This Agreement is governed by California law excluding its conflicts of laws principles. This Agreement is the entire agreement, and supersedes all prior or contemporaneous oral or written agreements and understandings, between the parties regarding the subject matter hereof. The Agreement may be changed only by a writing signed by both parties. If any provision of this Agreement is held unenforceable, that provision shall be severed and the remainder of this Agreement will continue in full force and effect.

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By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_



US005966743A

# United States Patent [19]

[11] Patent Number: **5,966,743**

Flann

[45] Date of Patent: **Oct. 19, 1999**

[54] **SUBSTANCE DISPENSING HEADGEAR**

[76] Inventor: **Randall D. Flann**, 413 W. Mineral St., Room 7, Milwaukee, Wis. 53204-1741

[21] Appl. No.: **09/020,605**

[22] Filed: **Feb. 9, 1998**

[51] Int. Cl.<sup>6</sup> ..... **A42B 1/02**

[52] U.S. Cl. .... **2/209.13; 2/209.11**

[58] Field of Search ..... 2/209.13, 171, 2/209.11, 209.12; 222/175, 78; 224/148.2, 148.7, 181; 446/26, 27

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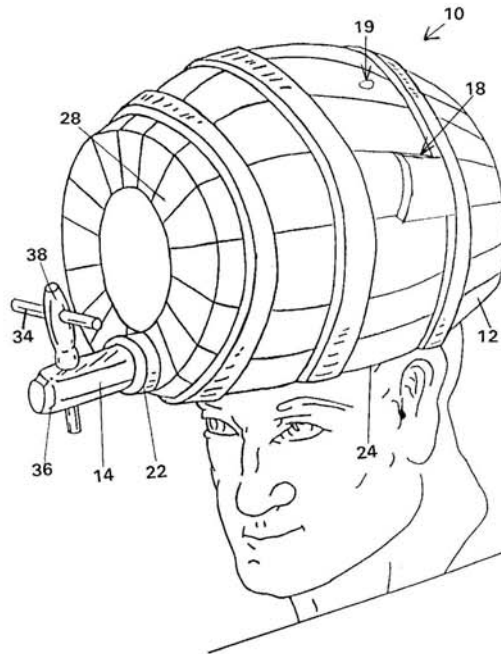
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*Primary Examiner*—Diana L. Biefeld  
*Attorney, Agent, or Firm*—Ryan Kromholz & Manion

[57] **ABSTRACT**

A headgear for dispensing a substance has a container to carry the substance. A spigot is secured to the container. The spigot can be opened to dispense the substance by gravity, suction, pressure or levity flow when the container. The spigot can be closed to retain the substance in the chamber. A hat-like recess is formed within the bottom wall of the container sized for wearing on an individual's head, and for maintaining the container in a freestanding condition during hands-free ambulation of the individual.

**12 Claims, 6 Drawing Sheets**



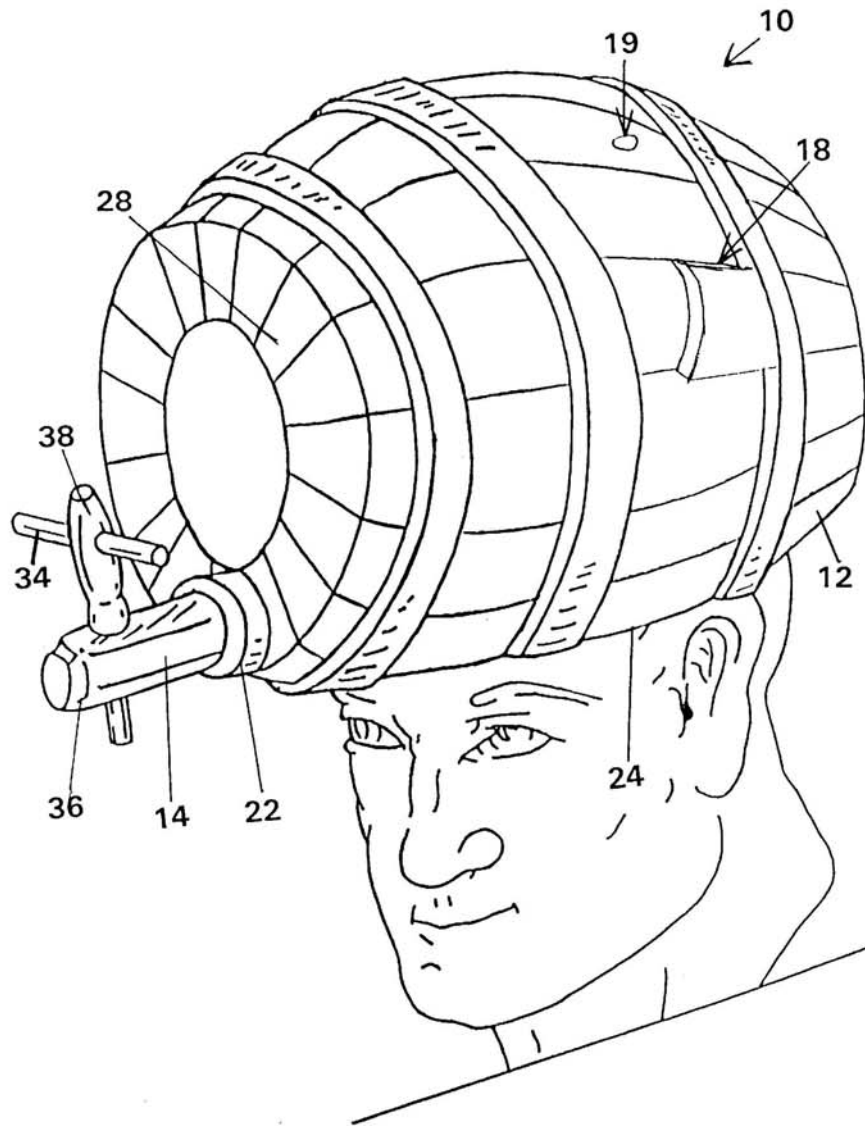


FIG. 1



FIG. 2

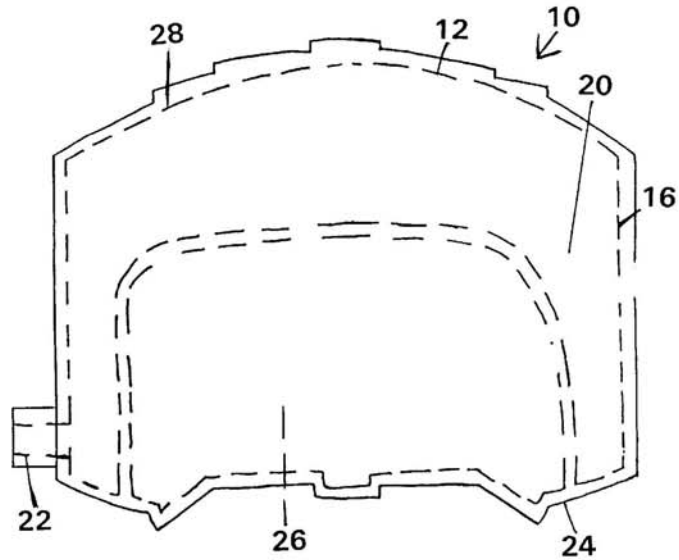


FIG. 3

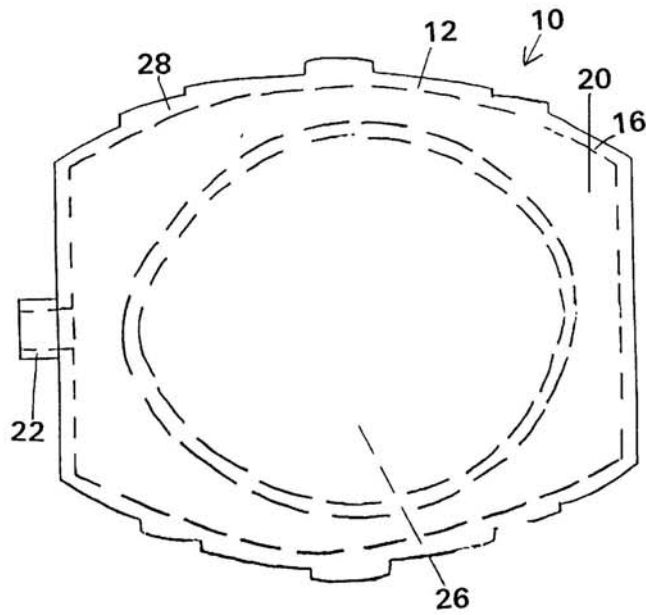


FIG. 4

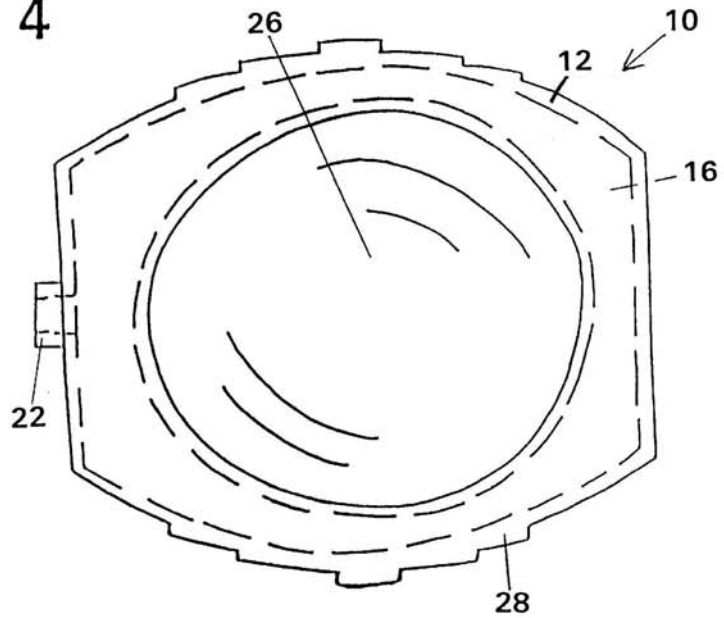


FIG. 5

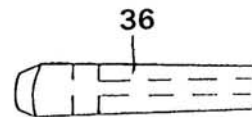
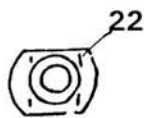


FIG. 6

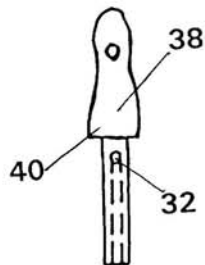


FIG. 7

FIG. 8

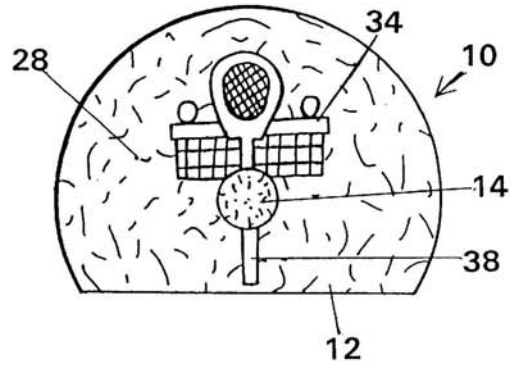


FIG. 9

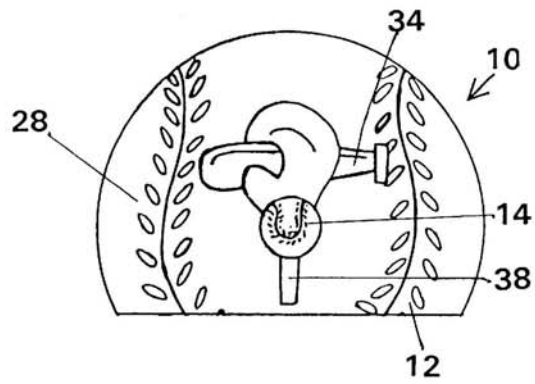


FIG. 10

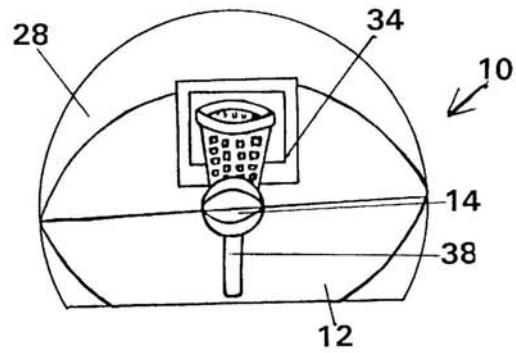


FIG. 11

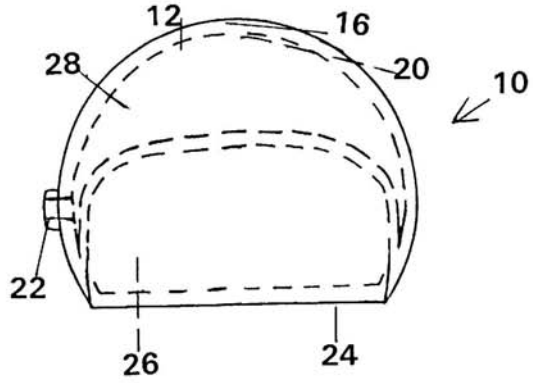


FIG. 12

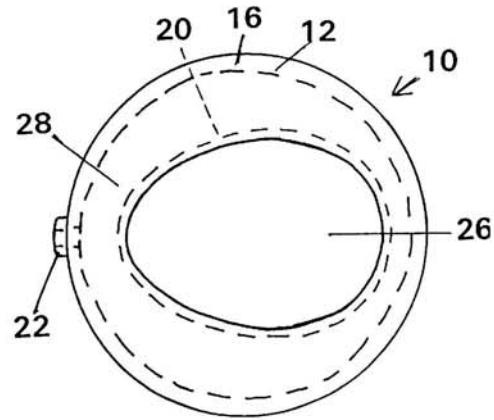
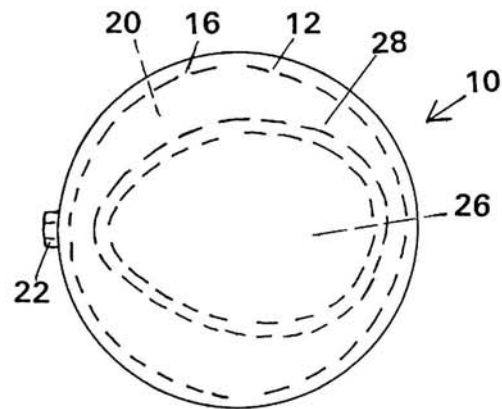


FIG. 13



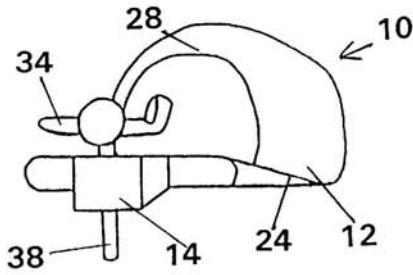


FIG. 14

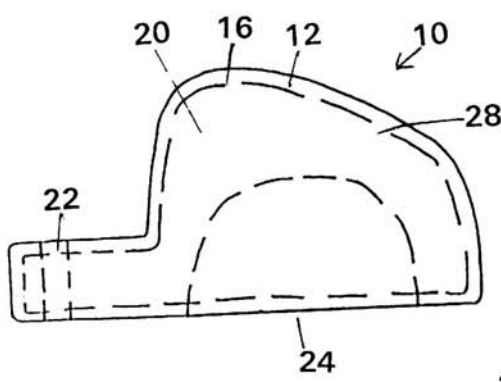


FIG. 15

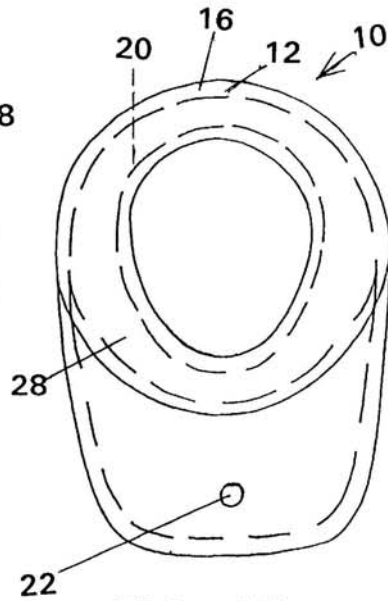


FIG. 16

**SUBSTANCE DISPENSING HEADGEAR****BACKGROUND OF THE INVENTION**

Based upon a need for containing a substance centuries ago, a vessel was invented. Later, to dispense the substance, a spigot was invented. Both are stationary devices. Transporting the substance was either by animals, or mechanical means, with limited, restrictive, and or regulated distances, and locations.

**SUMMARY OF THE INVENTION**

To resolve this, the inventor has invented a means for transporting a substance, by way of the contained substance being equally distributed upon a person's head resulting in the holding, dispensing, and transportability of the substance, to, from, and at a location, during any time.

The invention comprises wearable headgear for holding, and dispensing a substance, to, from, and at a location. It is worn upon a person's head for access at a location, during any time without hindering, or obstructing the wearer's use of other appendages.

The headgear has advantages, which solves previously existing problems of a contemporary container, which was heavy, unmanageable, and remained stationary. The headgear is made of molded Food Grade plastic, resulting in being lightweight, and transportable.

Its wearability upon a person's head allows the substance to be held, transported, and dispensed to, from, and at a location for instantaneous usability, and frees the wearer's hands, for other purposes.

One aspect of the invention provides a transportable dispensing receptacle for a substance. The receptacle comprises a container enclosing a chamber to carry the substance. The container includes a bottom wall defining a generally flat surface to maintain the container in a freestanding condition when placed on a horizontal surface. The receptacle also provides a spigot spaced above the bottom wall and secured to the container in communication with the chamber. The spigot carries a valve including an external handle to manually move the valve between an opened and a closed position. In the opened position, the valve opens communication with the chamber to dispense the substance by gravity, suction, pressure or levity flow when the container is in the freestanding condition. In the closed position, the valve closes communication with the chamber to retain the substance in the chamber. The receptacle further includes a hat-like recess formed within the bottom wall sized for wearing on an individual's head and for maintaining the container in the freestanding condition during hands-free ambulation of the individual.

In one embodiment, the container includes a mount for the spigot including means for removing the spigot from the mount for repair or replacement with another spigot.

In one embodiment, the container includes an identifiable spatial form.

In one embodiment, the spigot includes an identifiable spatial form.

In one embodiment, the container includes a fitting or recess to support an external object.

In one embodiment, the container encloses a second chamber to carry a substance and further includes a second spigot in communication with the second chamber.

In one embodiment, insulating material surrounds the chamber.

Another aspect of the invention provides a transportable receptacle for dispensing a substance comprising a container enclosing a chamber to carry the substance. The container includes a bottom wall defining a generally flat surface to maintain the container in a freestanding condition when placed on a horizontal surface. The receptacle also includes a mount in the container spaced away from the bottom wall.

According to this aspect of the invention, the receptacle includes a family of spigots presenting different identifiable spacial forms. The spigots are constructed and arranged for interchangeable placement on or in the mount in communication with the chamber. Each spigot includes a valve to regulate gravity, suction, pressure or levity flow of the substance through the spigot when the container is in the freestanding condition. The receptacle also includes a hat-like recess formed within the bottom wall. The hat-like recess is sized for wearing on an individual's head and for maintaining the container in the freestanding condition during hands-free ambulation of the individual.

In one embodiment, the valve of at least one of the spigots includes an external handle to manually move the valve between an opened position, opening communication with the chamber to dispense the substance by gravity, suction, pressure or levity flow when the container is in the freestanding condition, and a closed position, closing communication with the chamber to retain the substance in the chamber.

In one embodiment, the container includes an identifiable spatial form.

Another aspect of the invention provides a family of transportable receptacles for dispensing substances. The family of receptacles comprises a family of containers presenting different identifiable spacial forms. Each container enclosing a chamber to carry a substance and includes a bottom wall defining a generally flat surface to maintain the container in a freestanding condition when placed on a horizontal surface. Each container also includes a mount spaced from the bottom wall, and a hat-like recess formed within the bottom wall sized for wearing on an individual's head and for maintaining the container in the freestanding condition during hands-free ambulation of the individual.

The family also includes a family of spigots presenting different identifiable spacial forms. Each spigot is constructed and arranged for interchangeable placement on or in the mount in communication with the chamber. Each spigot includes a valve to regulate flow of the substance by gravity, suction, pressure or levity through the spigot when the container is in the freestanding condition.

In one embodiment, the valve of at least one of the spigots includes an external handle to manually move the valve between an opened position, opening communication with the chamber to dispense the substance by gravity, suction, pressure or levity flow when the container is in the freestanding condition, and a closed position, closing communication with the chamber to retain the substance in the chamber.

**BRIEF DESCRIPTION OF THE DRAWINGS**

FIG. 1 is a side perspective view of a substance dispensing headgear that embodies features of the invention;

FIG. 2 is a side view of the headgear shown in FIG. 1;

FIG. 3 is a top view of the headgear shown in FIG. 1;

FIG. 4 is a bottom view of the headgear shown in FIG. 1;

FIG. 5 is an end view of a spigot mount located in the headgear shown in FIG. 1;

FIG. 6 is a side view of a plug that is placeable in the mount shown in FIG. 5, as shown in FIG. 1;

FIG. 7 is a side view of a tap that the plug shown in FIG. 6 carries, as shown in FIG. 1;

FIGS. 8 to 10 show transportable, substance dispensing headgears comprising ball-shaped containers having different spatial forms and spigots having different spacial forms, shown mounted on the headgears;

FIG. 11 is a side view of a ball-shaped container of the type shown in FIGS. 8 to 10;

FIG. 12 is a bottom view of the ball-shaped container shown in FIG. 11;

FIG. 13 is a top view of the ball-shaped container shown in FIG. 11;

FIG. 14 is a side perspective view of a transportable, substance dispensing headgear comprising a hat-shaped container and spigots shown mounted on the headgear;

FIG. 15 is a side view of the hat-shaped container shown in FIG. 14; and

FIG. 16 is a side view of the hat-shaped container shown in FIG. 15.

#### DESCRIPTION OF THE PREFERRED EMBODIMENT

The transportable receptacle 10 shown in FIGS. 1 to 4 comprises a molded headgear/hat 12, and a spigot 14. The headgear/hat 12, and the spigot 14 are made from one and, or more, types of food grade plastics, such as low density polyethylene LDPE), high density polyethylene (HDPE), polyethylene terephthalate (PET) or polyvinyl chloride (PVC).

The size and shape of the headgear/hat 12 or spigot 14 may be varied to unlimited range (made smaller or larger, and appearance unlimited), as FIGS. 8 to 10 and FIG. 14 show by way of example. The color may be varied to unlimited range. The unlimited range, means that the color may be altered, in tint, and or, tone.

The spigot 14 for one headgear/hat 12 is interchangeable, interconnecting, and functional with any another headgear/hat 12.

Interior, or exterior insulation 16 may be incorporated into headgear/hat. Eye ring, or eye rings; slot, or slots; compartment, or compartments, concave or convex form, or forms (see, e.g., reference numeral 18 in FIG. 1), may be utilized on any headgear/hat 12.

The headgear/hat 12 includes a chamber 20, which holds a predetermined amount of substance. Its containing capacity is not limited to liquid alone. A gelatin, and, or solid compound, may be contained, and means for dispensing from it.

The headgear/hat 12 is molded in form. The headgear/hat 12 includes a mount 22 or orifice, having a predetermined diameter, located in front, in the middle, above the generally flat bottom 24 of the headgear/hat 12. The headgear/hat 12 comprises a covering device for a head in the form of a hat-like recess 26, with a predetermined means 20 for keeping within it, an amount of substance, and means 26 for transporting said substance on the head, and means 14 for dispensing of the substance, from said headgear, from on said head, during any time, at any location.

The spigot 14 comprises two separate parts: a plug 36 (FIG. 6) and a tap 38 (FIG. 7). The plug 36 comprises a partially hollow pipe fitting for making a connection to the headgear/hat 12 by either insertion, or screwing on, to said

headgear's/hat's mount 22. The tap 38 comprises a stout 40 and valve 32, attached to the end of the plug 36, to control the flow of a substance; a fluid, a gelatin, and or a solid.

FIGS. 1 to 4, 8 to 13, 14, and 15 to 16 show alternative embodiments of a wearable headgear/hat 12, comprising of a receptacle 28, including a chamber means 20 for holding a predetermined amount of a substance. The headgear/hat 12 also includes mount means 22 for attaching an appendage part (e.g. spigot 14) that allows for drawing, and regulating availability, or flow of the substance, from said receptacle. The headgear/hat 12 also includes a hat-like recess 26 for covering a person's head as a way for transporting the receptacle 28, and the connected appendage part 14, to, from, and at a location for dispensing of the substance. Whereby, while wearing the headgear/hat 12, a person can work, eat, and play, with means for holding, and dispensing a substance, to, from, and at a location, during any time.

As the Figures demonstrate, the exterior, or interior shape, structure of the headgear/hat 12, may be varied to provide a plurality of alternative shape embodiments of unlimited range. The unlimited range of shapes includes a predetermined spacial form of a particular item, or kind of item, comprising a standard, or universally recognized spatial form.

The headgear/hat 12 can include an interior, or exterior adjunct/fastener 18 for attaching, hanging, swinging, and or, suspending an object, upon its surface.

The headgear/hat 12 can include a slot/recess/pocket 19 for placing an object in, inside, on, or around it.

The headgear/hat 12 can include a predetermined substance, or material that allows for changing the exterior or interior temperature of the headgear/hat.

The headgear/hat 12 can include a bi-container version for holding and dispensing two separate substances. The bi-container may be disconnected and reconnected, by way of a predetermined method.

The color of the headgear/hat 12 may be varied to an unlimited range. The unlimited range of the color may be altered in tint or tone.

The headgear/hat 12 can include a predetermined material for making the headgear/hat 12 capable of holding and dispensing a substance, either singularly, or when joined.

The headgear/hat 12 can include an attached strap/belt/harness for securing the headgear/hat, on to a person's head to prevent loss of the headgear/hat, and, direct impact to the person's head.

The headgear/hat 12 can include a conduit/hose-like predetermined spigot for dispensing a substance that is operated from a person's mouth, to his/her self. The conduit/hose-like predetermined spigot on the headgear/hat is a means for holding and self-dispensing of said substance to oneself.

The headgear/hat 12 can include from its physical structure internally or externally, means for supporting a predetermined electrical device. The predetermined electrical device can include a cooling system; a heating system; an audio system, and or, a visual system.

The size of the headgear/hat 12 may be varied to a plurality of alternative embodiments, of unlimited range of predetermined physical magnitude, extent, or bulk of relative, or of proportionate dimensions.

The headgear/hat 12 can include a covering/wrap 16 constructed of a predetermined material for protecting; insulating, and for another predetermined purpose.

The spigot can include a predetermined male, and or female connector contact in any of its alternative embodi-

## 5

ments to allow for interchangeability with a compatible male, and or female connector contact, on the headgear/hat, and any of its alternative embodiments.

The spigot 14 (see FIGS. 6 and 7) carries a valve 32 including an external handle 34 (see FIG. 1) to manually move the valve 32 between an opened and a closed position. In the opened position, the valve 32 opens communication with the chamber 20 to dispense the substance by gravity, suction, pressure or levity flow when the container 20 is in the freestanding condition. In the closed position, the valve 32 closes communication with the chamber 20 to retain the substance in the chamber 20.

The shape of the spigot 14 may be varied to a plurality of alternative shape embodiments of unlimited range. The unlimited range of shapes includes a predetermined spacial form of a particular item, or kind of item, comprising a standard, or universally recognized spatial form.

The spigot 14 can include a predetermined material (e.g., the valve 32) for holding and dispensing the substance.

The color of the spigot 14 may be varied to unlimited range in tint or tone.

The size of the spigot 14 may be varied to a plurality of alternative embodiments, of unlimited range of predetermined physical magnitude, extent, or bulk of relative, or of proportionate dimensions.

The spigot 14 can include a self-contained spigot comprising a tap and plug combination forming a single member (spigot).

The spigot 14 can include means for regulating availability, or flow of a substance: a liquid; a gelatin, and or, a solid by exerting a suction force produced by movements of the lips, and tongue, or to hold, or grip (especially with teeth), by which friction is created on the dispensing apparatus, or to expand, or distend with air, the internal pressure through the dispensing apparatus to urge the substance in to a person's mouth.

What is claimed is:

1. A transportable dispensing receptacle for a substance comprising

a container enclosing a chamber to carry the substance, the container including a bottom wall defining a generally flat surface to maintain the container in an upright, freestanding condition when placed on a horizontal surface,

a spigot spaced above the bottom wall and secured to the container in communication with the chamber, the spigot carrying a valve including an external handle to manually move the valve between an opened position, opening communication with the chamber to dispense the substance by gravity, suction, pressure or levity flow when the container is in the freestanding, upright condition, and a closed position, closing communication with the chamber to retain the substance in the chamber, and

a hat-like recess formed within the bottom wall sized for wearing on an individual's head and for maintaining the container in the upright, freestanding condition during hands-free ambulation of the individual.

2. A receptacle according to claim 1 wherein the container includes a mount for the spigot including means for removing the spigot from the mount for repair or replacement with another spigot.

3. A receptacle according to claim 1 wherein the container includes an identifiable spatial form.

4. A receptacle according to claim 1 wherein the spigot includes an identifiable spatial form.

## 6

5. A receptacle according to claim 1 wherein the container includes a fitting or recess to support an external object.

6. A receptacle according to claim 1 wherein the container encloses a second chamber to carry a substance, and further including a second spigot in communication with the second chamber.

7. A receptacle according to claim 1 and further including insulating material surrounding the chamber.

8. A transportable receptacle for dispensing a substance comprising

a container enclosing a chamber to carry the substance, the container including a bottom wall defining a generally flat surface to maintain the container in an upright, freestanding condition when placed on a horizontal surface,

a mount in the container spaced away from the bottom wall,

a family of spigots presenting different identifiable spacial forms, the spigots being constructed and arranged for interchangeable placement on or in the mount in communication with the chamber, each spigot including a valve to regulate gravity, suction, pressure or levity flow of the substance through the spigot when the container is in the freestanding, upright condition, and a hat-like recess formed within the bottom wall sized for wearing on an individual's head and for maintaining the container in the upright, freestanding condition during hands-free ambulation of the individual.

9. A receptacle according to claim 8

wherein the valve of at least one of the spigots includes an external handle to manually move the valve between an opened position, opening communication with the chamber to dispense the substance by gravity, suction, pressure or levity flow when the container is in the freestanding, upright condition, and a closed position, closing communication with the chamber to retain the substance in the chamber.

10. A receptacle according to claim 8

wherein the container includes an identifiable spatial form.

11. A family of transportable receptacles for dispensing substances comprising

a family of containers presenting different identifiable spacial forms, each container enclosing a chamber to carry a substance and including a bottom wall defining a generally flat surface to maintain the container in an upright, freestanding condition when placed on a horizontal surface, a mount spaced from the bottom wall, and a hat-like recess formed within the bottom wall sized for wearing on an individual's head and for maintaining the container in the upright, freestanding condition during hands-free ambulation of the individual, and

a family of spigots presenting different identifiable spacial forms, each spigot being constructed and arranged for interchangeable placement on or in the mount in communication with the chamber, each spigot including a valve to regulate flow of the substance by gravity, suction, pressure or levity through the spigot when the container is in the freestanding, upright condition.



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12. A receptacle according to claim 11  
wherein the valve of at least one of the spigots includes an  
external handle to manually move the valve between an  
opened position, opening communication with the  
chamber to dispense the substance by gravity, suction,

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pressure or levity flow when the container is in the  
freestanding, upright condition, and a closed position,  
closing communication with the chamber to retain the  
substance in the chamber.

\* \* \* \* \*

**Alice Corporation Pty. Ltd. v. CLS Bank International, 134 S.Ct. 2347 (2014)**

Justice THOMAS delivered the opinion of the Court.

The patents at issue in this case disclose a computer-implemented scheme for mitigating “settlement risk” (i.e., the risk that only one party to a financial transaction will pay what it owes) by using a third-party intermediary. The question presented is whether these claims are patent eligible under 35 U.S.C. § 101, or are instead drawn to a patent-ineligible abstract idea. We hold that the claims at issue are drawn to the abstract idea of intermediated settlement, and that merely requiring generic computer implementation fails to transform that abstract idea into a patent-eligible invention. We therefore affirm the judgment of the United States Court of Appeals for the Federal Circuit.

I

A

Petitioner Alice Corporation is the assignee of several patents that disclose schemes to manage certain forms of financial risk. According to the specification largely shared by the patents, the invention “enabl[es] the management of risk relating to specified, yet unknown, future events.” The specification further explains that the “invention relates to methods and apparatus, including electrical computers and data processing systems applied to financial matters and risk management.”

The claims at issue relate to a computerized scheme for mitigating “settlement risk” — i.e., the risk that only one party to an agreed-upon financial exchange will satisfy its obligation. In particular, the claims are designed to facilitate the exchange of financial obligations between two parties by using a computer system as a third-party intermediary. The intermediary creates “shadow” credit and debit records (i.e., account ledgers) that mirror the balances in the parties’ real-world accounts at “exchange institutions” (e.g., banks). The intermediary updates the shadow records in real time as transactions are entered, allowing “only those transactions for which the parties’ updated shadow records indicate sufficient resources to satisfy their mutual obligations.” At the end of the day, the intermediary instructs the relevant financial institutions to carry out the “permitted” transactions in accordance with the updated shadow records, thus mitigating the risk that only one party will perform the agreed-upon exchange.

In sum, the patents in suit claim (1) the foregoing method for exchanging obligations (the method claims), (2) a computer system configured to carry out the method for exchanging obligations (the system claims), and (3) a computer-readable medium containing program code for performing the method of exchanging obligations (the media claims). All of the claims are implemented using a computer; the system and media claims expressly recite a computer, and the parties have stipulated that the method claims require a computer as well.

B

Respondents CLS Bank International and CLS Services Ltd. (together, CLS Bank) operate a global network that facilitates currency transactions. In 2007, CLS Bank filed suit against petitioner, seeking a declaratory judgment that the claims at issue are invalid, unenforceable, or not infringed. Petitioner counterclaimed, alleging infringement. Following this Court’s decision in *Bilski v. Kappos*, 561 U.S. 593 (2010), the parties filed cross-motions for summary judgment on whether the asserted claims are eligible for patent protection under 35 U.S.C. § 101. The District Court held that all of the claims are patent ineligible because they are directed to the abstract idea of “employing a neutral intermediary to facilitate simultaneous exchange of obligations in order to minimize risk.”...

## II

Section 101 of the Patent Act defines the subject matter eligible for patent protection. It provides:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. 35 U.S.C. § 101.

“We have long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” We have interpreted § 101 and its predecessors in light of this exception for more than 150 years.

We have described the concern that drives this exclusionary principle as one of pre-emption. Laws of nature, natural phenomena, and abstract ideas are ““the basic tools of scientific and technological work.”” “[M]onopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it,” thereby thwarting the primary object of the patent laws. We have “repeatedly emphasized this ... concern that patent law not inhibit further discovery by improperly tying up the future use of these building blocks of human ingenuity.

At the same time, we tread carefully in construing this exclusionary principle lest it swallow all of patent law. At some level, “all inventions... embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas.” Thus, an invention is not rendered ineligible for patent simply because it involves an abstract concept. “[A]pplication[s]” of such concepts ““to a new and useful end,”” we have said, remain eligible for patent protection.

Accordingly, in applying the § 101 exception, we must distinguish between patents that claim the “buildin[g] block[s]” of human ingenuity and those that integrate the building blocks into something more, thereby “transform[ing]” them into a patent-eligible invention. The former “would risk disproportionately tying up the use of the underlying” ideas and are therefore ineligible for patent protection. The latter pose no comparable risk of pre-emption, and therefore remain eligible for the monopoly granted under our patent laws.

## III

In *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. \_\_\_, (2012), we set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts. If so, we then ask, “[w]hat else is there in the claims before us?” To answer that question, we consider the elements of each claim both individually and “as an ordered combination” to determine whether the additional elements “transform the nature of the claim” into a patent-eligible application. We have described step two of this analysis as a search 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.”<sup>3</sup>

## A

We must first determine whether the claims at issue are directed to a patent-ineligible concept. We conclude that they are: These claims are drawn to the abstract idea of intermediated settlement....

It follows from our prior cases, and *Bilski* in particular, that the claims at issue here are directed to an abstract idea. Petitioner’s claims involve a method of exchanging financial obligations between two parties using a third-party intermediary to mitigate settlement risk. The intermediary creates and updates “shadow” records to reflect the value of each party’s actual accounts held at “exchange institutions,” thereby permitting only those transactions for which the parties have sufficient resources. At the end of each day, the intermediary issues irrevocable instructions to the exchange institutions to carry out the permitted transactions.

On their face, the claims before us are drawn to the concept of intermediated settlement, i.e., the use of a third party to mitigate settlement risk. Like the risk hedging in *Bilski*, the concept of intermediated settlement is “‘a fundamental economic practice long prevalent in our system of commerce.’” The use of a third-party intermediary (or “clearing house”) is also a building block of the modern economy. Thus, intermediated settlement, like hedging, is an “abstract idea” beyond the scope of § 101.

Petitioner acknowledges that its claims describe intermediated settlement, but rejects the conclusion that its claims recite an “abstract idea.” Drawing on the presence of mathematical formulas in some of our abstract-ideas precedents, petitioner contends that the abstract-ideas category is confined to “preexisting, fundamental truth[s]” that “‘exis[t] in principle apart from any human action.’”

*Bilski* belies petitioner’s assertion. The concept of risk hedging we identified as an abstract idea in that case cannot be described as a “preexisting, fundamental truth.” The patent in *Bilski* simply involved a “series of steps instructing how to hedge risk.” Although hedging is a longstanding commercial practice, it is a method of organizing human activity, not a “truth” about the natural world “‘that has always existed.’” One of the claims in *Bilski* reduced hedging to a mathematical

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<sup>3</sup> Because the approach we made explicit in *Mayo* considers all claim elements, both individually and in combination, it is consistent with the general rule that patent claims “must be considered as a whole.”

formula, but the Court did not assign any special significance to that fact, much less the sort of talismanic significance petitioner claims. Instead, the Court grounded its conclusion that all of the claims at issue were abstract ideas in the understanding that risk hedging was a “fundamental economic practice.”

In any event, we need not labor to delimit the precise contours of the “abstract ideas” category in this case. It is enough to recognize that there is no meaningful distinction between the concept of risk hedging in *Bilski* and the concept of intermediated settlement at issue here. Both are squarely within the realm of “abstract ideas” as we have used that term.

## B

Because the claims at issue are directed to the abstract idea of intermediated settlement, we turn to the second step in *Mayo*’s framework. We conclude that the method claims, which merely require generic computer implementation, fail to transform that abstract idea into a patent-eligible invention.

## 1

At *Mayo* step two, we must examine the elements of the claim to determine whether it contains an “inventive concept” sufficient to “transform” the claimed abstract idea into a patent-eligible application. A claim that recites an abstract idea must include “additional features” to ensure “that the [claim] is more than a drafting effort designed to monopolize the [abstract idea].” *Mayo* made clear that transformation into a patent-eligible application requires “more than simply stat[ing] the [abstract idea] while adding the words ‘apply it.’”

*Mayo* itself is instructive. The patents at issue in *Mayo* claimed a method for measuring metabolites in the bloodstream in order to calibrate the appropriate dosage of thiopurine drugs in the treatment of autoimmune diseases. The respondent in that case contended that the claimed method was a patent-eligible application of natural laws that describe the relationship between the concentration of certain metabolites and the likelihood that the drug dosage will be harmful or ineffective. But methods for determining metabolite levels were already “well known in the art,” and the process at issue amounted to “nothing significantly more than an instruction to doctors to apply the applicable laws when treating their patients.” “Simply appending conventional steps, specified at a high level of generality,” was not “enough” to supply an “inventive concept.”

The introduction of a computer into the claims does not alter the analysis at *Mayo* step two. In *Benson*, for example, we considered a patent that claimed an algorithm implemented on “a general-purpose digital computer.” Because the algorithm was an abstract idea, the claim had to supply a “new and useful” application of the idea in order to be patent eligible. But the computer implementation did not supply the necessary inventive concept; the process could be “carried out in existing computers long in use.” We accordingly “held that simply implementing a mathematical principle on a physical machine, namely a computer, [i]s not a patentable application of that principle.”

*Flook* is to the same effect. There, we examined a computerized method for using a mathematical formula to adjust alarm limits for certain operating conditions (e.g., temperature and pressure) that could signal inefficiency or danger in a catalytic conversion process. Once again, the formula itself was an abstract idea, and the computer implementation was purely conventional. In holding that the process was patent ineligible, we rejected the argument that “implement[ing] a principle in some specific fashion” will “automatically fal[l] within the patentable subject matter of § 101.” Thus, “*Flook* stands for the proposition that the prohibition against patenting abstract ideas cannot be circumvented by attempting to limit the use of [the idea] to a particular technological environment.”

In *Diehr*, by contrast, we held that a computer-implemented process for curing rubber was patent eligible, but not because it involved a computer. The claim employed a “well-known” mathematical equation, but it used that equation in a process designed to solve a technological problem in “conventional industry practice.” The invention in *Diehr* used a “thermocouple” to record constant temperature measurements inside the rubber mold — something “the industry ha[d] not been able to obtain.” The temperature measurements were then fed into a computer, which repeatedly recalculated the remaining cure time by using the mathematical equation. These additional steps, we recently explained, “transformed the process into an inventive application of the formula.” In other words, the claims in *Diehr* were patent eligible because they improved an existing technological process, not because they were implemented on a computer.

These cases demonstrate that the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention. Stating an abstract idea “while adding the words ‘apply it’” is not enough for patent eligibility. Nor is limiting the use of an abstract idea “to a particular technological environment.” Stating an abstract idea while adding the words “apply it with a computer” simply combines those two steps, with the same deficient result. Thus, if a patent’s recitation of a computer amounts to a mere instruction to “implemen[t]” an abstract idea “on ... a computer,” that addition cannot impart patent eligibility. This conclusion accords with the pre-emption concern that undergirds our § 101 jurisprudence. Given the ubiquity of computers, wholly generic computer implementation is not generally the sort of “additional featur[e]” that provides any “practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself.”

The fact that a computer “necessarily exist[s] in the physical, rather than purely conceptual, realm,” is beside the point. There is no dispute that a computer is a tangible system (in § 101 terms, a “machine”), or that many computer-implemented claims are formally addressed to patent-eligible subject matter. But if that were the end of the § 101 inquiry, an applicant could claim any principle of the physical or social sciences by reciting a computer system configured to implement the relevant concept. Such a result would make the determination of patent eligibility “depend simply on the draftsman’s art,” thereby eviscerating the rule that “[l]aws of nature, natural phenomena, and abstract ideas are not patentable.”

The representative method claim in this case recites the following steps: (1) “creating” shadow records for each counterparty to a transaction; (2) “obtaining” start-of-day balances based on the

parties' real-world accounts at exchange institutions; (3) "adjusting" the shadow records as transactions are entered, allowing only those transactions for which the parties have sufficient resources; and (4) issuing irrevocable end-of-day instructions to the exchange institutions to carry out the permitted transactions. Petitioner principally contends that the claims are patent eligible because these steps "require a substantial and meaningful role for the computer." As stipulated, the claimed method requires the use of a computer to create electronic records, track multiple transactions, and issue simultaneous instructions; in other words, "[t]he computer is itself the intermediary."

In light of the foregoing, the relevant question is whether the claims here do more than simply instruct the practitioner to implement the abstract idea of intermediated settlement on a generic computer. They do not.

Taking the claim elements separately, the function performed by the computer at each step of the process is "[p]urely conventional." Using a computer to create and maintain "shadow" accounts amounts to electronic recordkeeping — one of the most basic functions of a computer. The same is true with respect to the use of a computer to obtain data, adjust account balances, and issue automated instructions; all of these computer functions are "well-understood, routine, conventional activit[ies]" previously known to the industry. In short, each step does no more than require a generic computer to perform generic computer functions.

Considered "as an ordered combination," the computer components of petitioner's method "ad[d] nothing ... that is not already present when the steps are considered separately." Viewed as a whole, petitioner's method claims simply recite the concept of intermediated settlement as performed by a generic computer. The method claims do not, for example, purport to improve the functioning of the computer itself. Nor do they effect an improvement in any other technology or technical field. Instead, the claims at issue amount to "nothing significantly more" than an instruction to apply the abstract idea of intermediated settlement using some unspecified, generic computer. Under our precedents, that is not "enough" to transform an abstract idea into a patent-eligible invention.

## C

Petitioner's claims to a computer system and a computer-readable medium fail for substantially the same reasons. Petitioner conceded below that its media claims rise or fall with its method claims. As to its system claims, petitioner emphasizes that those claims recite "specific hardware" configured to perform "specific computerized functions." But what petitioner characterizes as specific hardware — a "data processing system" with a "communications controller" and "data storage unit" — is purely functional and generic. Nearly every computer will include a "communications controller" and "data storage unit" capable of performing the basic calculation, storage, and transmission functions required by the method claims. As a result, none of the hardware recited by the system claims "offers a meaningful limitation beyond generally linking `the use of the [method] to a particular technological environment,' that is, implementation via computers."

Put another way, the system claims are no different from the method claims in substance. The method claims recite the abstract idea implemented on a generic computer; the system claims recite a handful of generic computer components configured to implement the same idea. This Court has long “warn[ed] ... against” interpreting § 101 “in ways that make patent eligibility ‘depend simply on the draftsman’s art.’” Holding that the system claims are patent eligible would have exactly that result.

Because petitioner’s system and media claims add nothing of substance to the underlying abstract idea, we hold that they too are patent ineligible under § 101.

\* \* \*

For the foregoing reasons, the judgment of the Court of Appeals for the Federal Circuit is affirmed....

[Justice Sotomayor concurrence omitted.]



## Fair Use Doctrine Cheat Sheet

### First Factor (Nature of Use)

Spectrum of commercial to educational uses, where commercial uses are less fair and educational uses are more fair. Some courts treat commercial uses as presumptively unfair (Sony), but Campbell rejected this presumption.

Courts will also consider if the use is transformative or just redistributive. Transformative uses “add something new, with a further purpose or different character, altering the first with new expression, meaning or message” (Campbell). Rarely, courts do not require adding something new if the use has a different purpose (Kelly v. Arriba, but compare Texaco). Transformative uses are more likely to be fair use, and the other three factors are less important (Campbell).

### Second Factor (Nature of Work).

Spectrum of fact to fiction, where taking factual works is more fair and taking fiction is less fair. Some courts deem taking unpublished works presumptively unfair (Harper & Row), but §107 was amended to supersede this presumption.

Some courts treat fact/fiction and published/unpublished as two separate sub-factors.

### Third Factor (Amount/Substantiality of Portion Taken).

Some courts say that taking the entire work is presumptively unfair. Taking the “heart of the work,” even if a small amount, usually isn’t fair.

### Fourth Factor (Market Effect).

The fourth factor is routinely characterized as the most important factor (Harper & Row). The factor evaluates (1) whether unrestricted and widespread conduct like the defendant’s would substantively and adversely impact the market, and (2) the harm to the market for derivative works when these derivative markets are “traditional, reasonable, or likely to be developed markets” (Texaco), but some courts give the copyright owner the option not to pursue a market (Castle Rock). Increasing demand for the underlying work doesn’t mitigate harm to a derivative market (Harper & Row; Napster).

### Some Trademarks That Need To Watch Their Backs

Derived from <http://consumerist.com/2014/07/19/15-product-trademarks-that-have-become-victims-of-genericization/>

Putative Trademark	Generic Name
Adrenalin	Epinephrine
AstroTurf	Artificial Turf
Band-Aid	Adhesive bandage
Bubble Wrap	Inflated cushioning
Bubbler	Drinking fountain
ChapStick	Lip balm
Crock-Pot	Slow cooker
Dumpster	Front loader waste container
Fiberglas, Fiberglass	Glass wool
Formica	Wood or plastic laminate
Frisbee	Flying disc
Hackey Sack	Footbag
Hula Hoop	Toy hoop
Jacuzzi	Hot tub or whirlpool
Jet Ski	Stand-up personal watercraft
Kleenex	Facial tissue
Lava lamp	Liquid motion lamp
Mace	Pepper spray
Memory Stick	Flash memory storage device
Muzak	Elevator music, background music
Onesies	Infant/adult bodysuit
Ping Pong	Table tennis
Plexiglas, Plexiglass	Acrylic glass
Popsicle	Ice Pop
Putt-Putt Golf	Miniature golf
Q-Tips	Cotton swabs
Realtor	Real estate agent
Saran Wrap	Plastic wrap, cling wrap
Scotch tape	Clear adhesive tape
Sharpie	Permanent marker
Stetson	Cowboy hat
Styrofoam	Extruded polystyrene foam
Super Glue	Cyanoacrylate adhesive
Tarmac	Asphalt road surface
Taser	Electroshock weapon, stun gun
Teflon	Polytetrafluoroethylene
Telecopier	Facsimile machine
Tupperware	Plastic storage containers
Velcro	Hook-and-loop fastener
Xerox	Photocopier to make a photocopy

**The Pillsbury Company v. Milky Way Productions, Inc.**  
215 U.S.P.Q. 124 (N.D. Ga. Dec. 24, 1981)

In its December 19, 1977 issue of *Screw* magazine, the defendant Milky Way Productions, Inc. [Milky Way] published a picture of figures resembling the plaintiff's trade characters "Poppin' Fresh" and "Poppie Fresh" engaged in sexual intercourse and fellatio. This picture also featured the plaintiff's barrelhead trademark and its jingle, the refrain of a two stanza song entitled "The Pillsbury Baking Song." The same picture was published in the February 20, 1978 issue of *Al Goldstein's Screw*.

Contending that the manner in which Milky Way presented this picture suggested that the plaintiff placed or sponsored it as an advertisement in *Screw* magazine, the Pillsbury Company [Pillsbury] instituted this action. In its original complaint, the plaintiff alleged several counts of copyright infringement, federal statutory and common law trademark infringement, violations of the Georgia Uniform Deceptive Trade Practices Act and of the Georgia "anti-dilution" statute, and several counts of tortious tarnishment of its marks, trade characters, and jingle....

The plaintiff alleges that in violation of Ga. Code Ann. §106-115, Milky Way's unauthorized use of its barrelhead trademark, the words "Poppin' Fresh," its trade characters, and its jingle creates a likelihood of injury to its commercial reputation and of dilution of the distinctive quality of its trademarks, trade symbols, or advertising. The plaintiff contends that Milky Way has tarnished the reputation, and thereby impaired the effectiveness, of its advertising agents by placing them in a "depraved context."

Milky Way rests its defense against this claim upon an erroneous conception of the anti-dilution statute, namely that the plaintiff must prove a likelihood of confusion to prevail on this count. The court previously has concluded that the plaintiff has failed to show a likelihood of confusion, but as the statute plainly states, actionable dilution occurs when by subsequent unauthorized use of the plaintiff's marks, the uniqueness of the plaintiff's marks as the designation for its products is diminished by the defendant's unauthorized use of these marks, "notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services." Ga. Code Ann. §106-115. The basis for this cause of action is the belief that the owner of these marks should not have to stand by and watch the diminution [sic] in their value as a result of unauthorized uses by others. All the plaintiff need show to prevail is that the contested use is likely to injure its commercial reputation or dilute the distinctive quality of its marks. The court concludes that, despite the lack of actual damages, there is a likelihood that the defendants' presentation could injure the business reputation of the plaintiff or dilute the distinctive quality of its trademarks. Consequently, the court concludes that the plaintiff has prevailed on this claim and is entitled to injunctive relief provided in section 106-115 of the Georgia Code....

[Eric's note: after reading this case, I encourage you to read the Salon article from 2000, *The Inner Doughboy*, <http://www.salon.com/2000/03/23/doughboy/>]