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Webinar: 360 Degree Perspective on Al

Tuesday, July 7th, 2020 at 4 PM (IDT)



Barry Schindler
New Jersey Shareholder and
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Global Patent ProsecutionGroup



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Patenting Challenges and Opportunities in Al

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Generation and Processing of Big Data

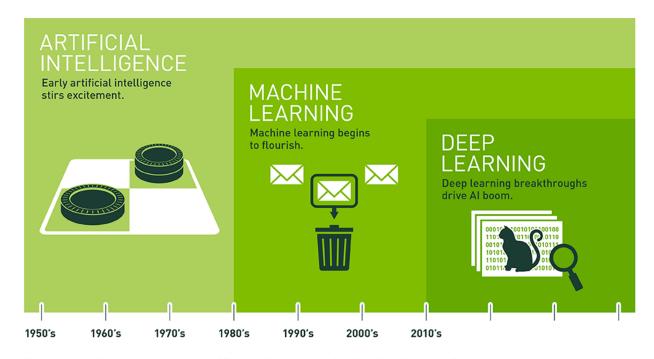
- Big Data refers a corpus (collection) of data or a database based on:
 - (1) Size
 - (2) Quality of the data sources
 - (3) The speed at which data stored the corpus or database is generated
 - (4) The variety of different data types/sources
 - (5) The value the data provides to an entity
- Large volumes of (Big) Data may be generated by automatically collecting and mining data from multiple sources to create a corpus (collection) of data or a database.
- The big data corpora may be transformed or processed using artificial intelligence (AI) or machine learning models to find correlations, predictions or other analytic results in the original data.
- The original data from the data corpora or databases is input to the AI models which modified the original data corpus or databases based on the input data

Generation and Al-based Processing of Big Data **Creates Many New Issues in IP protection**

- Protecting AI-based innovation using software-based algorithms protection by copyright or patent law. Patenting require claiming subject matter that is patent eligible.
- 2. Big Data used in AI MLM: Data ownership is a critical issue. Data privacy protection regulations play an important role in the evolution of AI-based systems. Trade secrecy laws may affect how input and output data to the AI MLM may be used and to whom has access.
- AI-generated Creativity: AI algorithms may be trained to write poems, compose novels, compose music, edit photographs and create artwork. Effectively, is the AI algorithm is the author? Who has rights to these creative products? How to manage copyright infringement?
- AI-generated Innovation: AI algorithms may be trained to develop a new method, drug, machine, or even a technical improvement to other invention or even itself. Who is the inventors and/or owners of patents based on AI-generated innovation? These are still unanswered questions!
- Digital Right Management (DRM): AI and blockchain technologies may be used to track and manage ownership/transactions, and implement payments. Issues of competition-limiting behavior may arise when ownership/management of the blockchain platforms overlap ownership of the rights being exchanged.

The Al Patent Boom

• What is AI? – AI vs machine learning vs neural networks



Since an early flush of optimism in the 1950s, smaller subsets of artificial intelligence – first machine learning, then deep learning, a subset of machine learning – have created ever larger disruptions.



 $^{*\} https://blogs.nvidia.com/blog/2016/07/29/whats-difference-artificial-intelligence-machine-learning-deep-learning-ai/artificial-intelligence-machine-learning-deep-learning-ai/artificial-intelligence-machine-learning-deep-learning-ai/artificial-intelligence-machine-learning-deep-learning-ai/artificial-intelligence-machine-learning-deep-learning-ai/artificial-intelligence-machine-learning-deep-learning-ai/artificial-intelligence-machine-learning-deep-learning-ai/artificial-intelligence-machine-learning-ai/artificial-intelligence-machine-learning-deep-learning-ai/artificial-intelligence-machine-machine-machine-machine-machine-machine-machine-machine-machine-machine-machine-machine-machine-machine-machine-machine-mac$

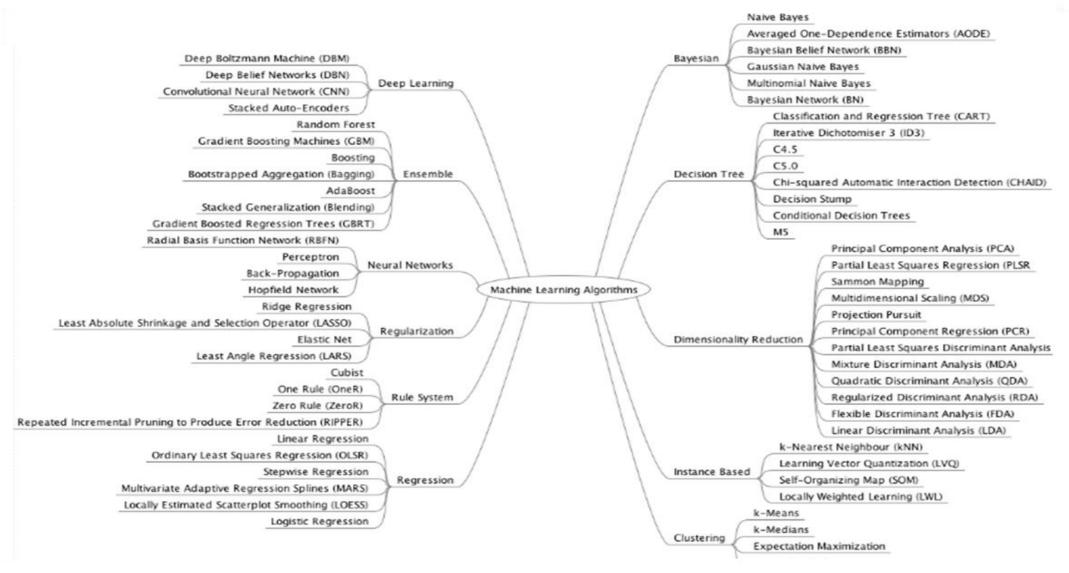
The Al Patent Boom – Industry Sectors

Patent Trends – AI Applications



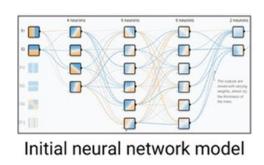


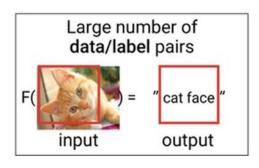
USPTO Artificial Intelligence Categories

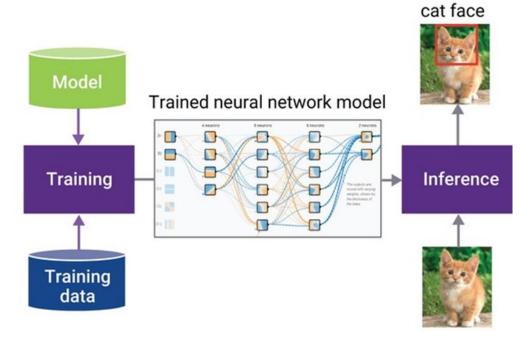


Patentability Considerations in Al-related Patents

- Patentability Consideration
 - Architecture of an AI engine
 - Model training algorithms
 - Acquisition of train data
 - Inference
 - Practical application
 - Self-executing AI







Al Invention Disclosures

- Focus on **practical applications**, for example, improvements in the functioning of a computer, or an improvement to other technology
- Highlight the <u>specific steps and data structures</u> that provide such improvements
- Define the structure and processes of the model, including:
 - Acquisition of raw data
 - Feature extraction
 - Description of machine learning model and adaptation to a specific need or implementation
 - Training method (supervised vs. unsupervised), tuning, and generation of hyperparameters
 - If more than one model is used specify how these models are coupled, how they interact with each other, and what is the contribution of each model to the overall implementation.
- Describe the **concrete outcomes** that the model produces in specific types of systems
- Highlight the **advantage of your implementation** over other obvious implementations
- Highlight the <u>technical problems</u> solved

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RADICAL CHANGES IN PATENT ELIGIBILITY IN THE INTERPRETATION OF 35 U.S.C § 101 AFTER U.S. SUPREME COURT DECISION: Alice Corp. Pty. Ltd. v. CLS Bank Int'l (2014)

Figure 3: Top Work Groups for § 101 Rejections

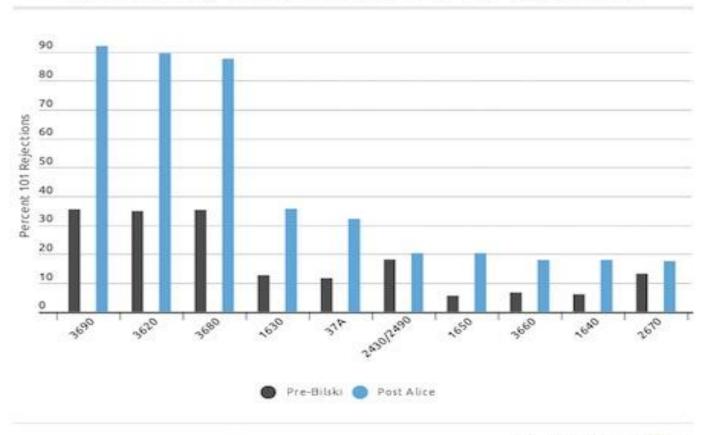


Figure 4: Top Work Group Technologies

3690, 3620, 3680
E-commerce and business methods

1630 Molecular biology

37A

Amusement/education devices

2430, 2490
Cryptography and security

1650 Microbiology

((1-1)) 3660

Wave communications

1640 Immunology

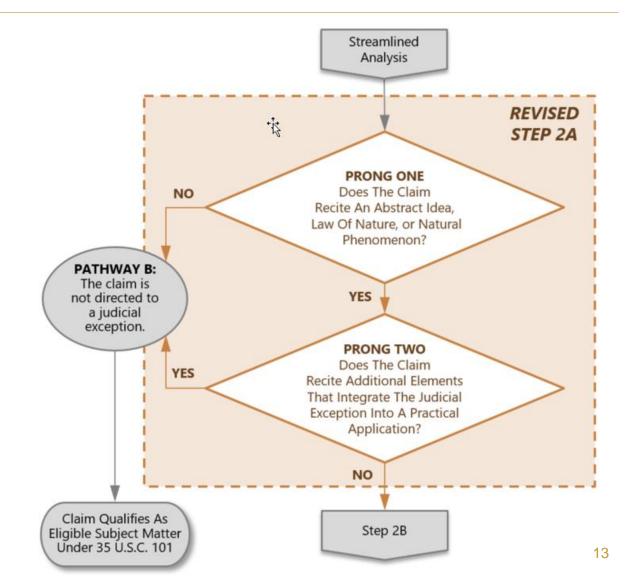
2670
Printers and scanners





2019 USPTO Revised Patent Subject Matter Eligibility Guidance

- This flowchart depicts revised Step 2A.
- Under this new two-prong inquiry, a claim is now eligible at revised Step 2A unless it:
 - Recites a judicial exception and
 - The exception is not integrated into a practical application of the exception.



THREE "BUCKETS" OF ABSTRACT IDEAS FOR STEP 2A: PRONG 1 (JUDICIAL EXCEPTIONS)

1. Mathematical concepts

- Mathematical relationships
- Mathematical formulas or equations
- Mathematical calculations

2. Mental processes

 Concepts performed in the human mind (including an observation, evaluation, judgment, opinion)

3. Certain methods of organizing human activity

- Fundamental economic principles or practices (including hedging, insurance, mitigating risk)
- Commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations)
- Managing personal behavior or relationships or interactions between people (including social activities, teaching, and following rules or instructions)

→ CLAIMS MUST RECITE LIMITATIONS FALLING INTO ONE OR MORE OF THESE BUCKETS TO FAIL STEP 2A PRONG 1

Revised Step 2A: Prong Two: Integration into a Practical Application

New procedure not found in prior guidance:

- Identifying whether there are any additional elements recited in the claim beyond the judicial exception(s), and
- Evaluating those additional elements to determine whether they integrate the exception into a practical application of the exception.

"Integration into a practical application"

- Requires an additional element or a combination of additional elements in the claim to apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the exception.
- Uses the considerations laid out by the Supreme Court and the Federal Circuit to evaluate whether the judicial exception is integrated into a practical application.

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Revised Step 2A: Prong Two: Integration into a Practical Application

- Limitations that are indicative of integration into a practical application:
 - Improvements to the functioning of a computer, or to any other technology or technical field see MPEP 2106.05(a)
 - Applying or using a judicial exception to effect a particular treatment or prophylaxis for a disease or medical condition – see Vanda Memo
 - Applying the judicial exception with, or by use of, a particular machine - see MPEP 2106.05(b)
 - Effecting a transformation or reduction of a particular article to a different state or thing - see MPEP 2106.05(c)
 - Applying or using the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular technological environment, such that the claim as a whole is more than a drafting effort designed to monopolize the exception see MPEP 2106.05(e) and *Vanda* Memo.

- Limitations that are not indicative of integration into a practical application:
 - Adding the words "apply it" (or an equivalent) with the judicial exception, or mere instructions to implement an abstract idea on a computer, or merely uses a computer as a tool to perform an abstract idea - see MPEP 2106.05(f)
 - Adding insignificant extra-solution activity to the judicial exception - see MPEP 2106.05(g)
 - Generally linking the use of the judicial exception to a particular technological environment or field of use – see MPEP 2106.05(h)

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EXAMPLE OF RESPONSE RE. "TECHNOLOGICAL ADVANCE"

When focusing on the critical inquiry of whether the claims, when fully considered, represent an advance to computer technology, the present claims must be considered subject The requirement is not just whether new hardware is added to the computer system, or just whether the computer system is made more efficient, but rather does the invention represent a technological advance. *DDR*, *Enfish*, and *McRo* where all purely software inventions that added functionality to a computer that was considered a technological advance. Likewise the present claims should similarly be considered a technological advance as they provide functionality that has not before been included in a payment service, and the functionality solves several problems with cryptocurrency transactions. In fact, the present technology is the first commercial technology to make cryptocurrency transactions actually feasible in real life.



United States Patent

Hannun et al.

US 10,540,957 B2 Patent No.: **Date of Patent:** Jan. 21, 2020

SYSTEMS AND METHODS FOR SPEECH TRANSCRIPTION

Applicant: BAIDU USA LLC, Sunnyvale, CA

(US)

Inventors: Awni Hannun, Palo Alto, CA (US);

Carl Case, San Francisco, CA (US); Jared Casper, Sunnyvale, CA (US); Bryan Catanzaro, Cupertino, CA (US); Gregory Diamos, San Jose, CA (US); Erich Elsen, Mountain View, CA (US); Rvan Prenger, Oakland, CA (US); Sanjeev Satheesh, Sunnyvale, CA (US); Shubhabrata Sengupta, Menlo

Park, CA (US); Adam Coates. Sunnyvale, CA (US); Andrew Y. Ng,

Mountain View, CA (US)

Assignee: BAIDU USA LLC, Sunnyvale, CA

(US)

Notice:

U.S.C. 154(b) by 462 days.

Appl. No.: 14/735,002

Jun. 9, 2015 Filed:

Presented herein are embodiments of state-of-the-art speech recognition systems developed using end-to-end deep learning. In embodiments, the model architecture is significantly simpler than traditional speech systems, which rely on laboriously engineered processing pipelines; these traditional systems also tend to perform poorly when used in noisy environments. In contrast, embodiments of the system do not need hand-designed components to model background noise, reverberation, or speaker variation, but instead directly learn a function that is robust to such effects. A phoneme dictionary, nor even the concept of a "phoneme," is needed. Embodiments include a welloptimized recurrent neural network (RNN) training system that can use multiple GPUs, as well as a set of novel data synthesis techniques that allows for a large amount of varied data for training to be efficiently obtained. Embodiments of the system can also handle challenging noisy environments better than widely used, state-of-the-art commercial Subject to any disclaimer, the term of this patent is extended or adjusted under 35 **speech systems.**

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Ex-Parte Hannun



UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte AWNI HANNUN, CARL CASE, JARED CASPER, BRYAN CATANZARO, GREGORY DIAMOS, ERICH ELSEN, RYAN PRENGER, SANJEEV SATHEESH, SHUBHABRATA SENGUPTA, ADAM COATES, and ANDREW Y. NG

> Appeal 2018-003323 Application 14/735,002 Technology Center 2600

Before JOHNNY A. KUMAR, JENNIFER L. McKEOWN, and CATHERINE SHIANG, Administrative Patent Judges.

McKEOWN, Administrative Patent Judge.

DECISION ON APPEAL

Appellants¹ appeal under 35 U.S.C. § 134(a) from the Examiner's decision to reject claims 11–20. We have jurisdiction under 35 U.S.C. § 6. We reverse.

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THE REJECTIONS

The Examiner rejected claims 11–20 under 35 U.S.C. § 101 as directed to patent ineligible subject matter. Final Act. 6–14.

Claim 11 is illustrative of the claimed invention and reads as follows:

11. A computer-implemented method for transcribing speech comprising: receiving an input audio from a user;

normalizing the input audio to make a total power of the input audio consistent with a set of training samples used to train a trained neural network model;

generating a jitter set of audio files from the normalized input audio by translating the normalized input audio by one or more time values;

for each audio file from the jitter set of audio files, which includes the normalized input audio:

generating a set of spectrogram frames for each audio file;

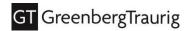
inputting the audio file along with a context of spectrogram frames into a trained

neural network;

obtaining predicted character probabilities outputs from the trained neural

network; and

decoding a transcription of the input audio using the predicted character probabilities outputs from the **trained neural network** constrained by a language model that interprets a string of characters from the predicted character probabilities outputs as a word or words.



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Appellant's Position

TAKEAWAY: HOW TO ARGUE

IN THE THREE BUCKETS

A EXAMINER CLAIM REJECTION
LEVERAGING A GENERIC COMPUTER
IN CLAIM LIMITATIONS THAT
RECITE THE ONE OR MORE
ALLEGED ABSTRACT IDEA

Appellants' Contentions

Appellants, on the other hand, maintain that the Examiner overgeneralizes and oversimplifies the claimed invention and that the claimed invention is not "directed to" an abstract idea. App. Br. 8–9. For example, **Appellants assert that the Examiner "tries to eliminate the trained neural network and related elements" by equating it to a generic computer.**

According to Appellants,

A generic computer is not a trained neural network; but even more, a generic computer is not the claimed trained neural network that has been specially designed and trained to receive sets of context of spectrogram frames from a jitter set of audio files, which includes a normalized input audio file obtained from an input audio, to predict character probabilities from the input audio, which are finally selected by being constrained by a language model that interprets a string of characters from the predicted character probabilities outputs as a word or words.

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Step 2A: Prong 1

PTAB ARGUES AGAINST
EXAMINER THAT
CLAIMED LIMITATIONS
DO NOT FALL INTO
TWO BUCKETS OF
ABSTRACT IDEAS THAT
THE EXAMINER ARGUED

Under the Memorandum, in prong one of step 2A we look to whether the claim recites a judicial exception. The Examiner identifies the abstract ideas – a mathematical relationship/formula (Final Act. 3) and certain methods of organizing human activity "since human can listen to an audio file and transcribe the audio data into text data which can all be done mentally." Ans. 4.

As an initial matter, we note that the Memorandum identifies mental processes as a separate category of abstract ideas from methods of organizing human activity. We disagree with the Examiner that the claims recite either a method of organizing human activity or a mental process. While transcription generally can be performed by a human, the claims here are directed to a specific implementation including the steps of normalizing an input file, generating a jitter set of audio files, generating a set of spectrogram frames, obtaining predicted character probabilities from a trained neural network and decoding a transcription of the input audio using the predicted character probability outputs. These are not steps that can practically be performed mentally. Nor do we see how the claimed invention recites organizing human activity. For example, the claims do not include fundamental economic principles or practices, commercial or legal interactions, managing personal behavior or relationships or interactions between people. As such, the claims do not recite a mental process or method of organizing human activity.

Step 2A: Prong 1 (CONT'D)

PTAB ARGUES AGAINST
EXAMINER THAT
CLAIMED LIMITATIONS
DO NOT RECITE A MATHEMATICAL
FORMULA OR ALGORITHM

The claims do recite using predicted character probabilities to decide a transcription of the input audio, which the Examiner, relying on the Specification, determines is using a mathematical formula. Namely, the Examiner identifies that the Specification discloses an algorithm to obtain the predicted character probabilities. Final Act. 3–4 (citing Spec. 44). The mathematical algorithm or formula, however, is not recited in the claims. As such, under the recent Memorandum, the claims do not recite a mathematical concept. See, e.g., Subject Matter Eligibility Examples: Abstract Ideas, at 7 (Jan. 7, 2019)(discussing Example 38 and noting that "The claim does not recite a mathematical relationship, formula, or calculation. While some of the limitations may be based on mathematical concepts, the mathematical concepts are not recited in the claims.").

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Step 2A: Prong 2

PTAB ARGUES AGAINST
EXAMINER THAT
ALLEGED JUDICIAL EXCEPTION
INTEGRATED IS INTO A PRACTICAL
APPLICATION

TAKEAWAY: MUST DRAFT
SPECIFICATION STATING
THE CLAIMED INVENTION
PROVIDES A TECHNICAL
SOLUTION/IMPROVEMENT
TO A TECHNICAL PROBLEM

Moreover, even if the claims were considered to recite a mathematical concept, under prong two of step 2A the claims are not directed to an abstract idea because the alleged judicial exception is integrated into a **practical application.** Namely, as Appellants explain, "the claims of the current application include specific features that were specifically designed to achieve an improved technological result" and "provide improvements to that technical field." App. Br. 16. For example, the Specification describes that using DeepSpeech learning, i.e. a trained neural network, along with language model "achieves higher performance than traditional methods on hard speech recognition tasks while also being much Spec. ¶ 29. As such, based on the record before us, we are persuaded that the Examiner erred in determining that the claims are directed to an abstract idea.

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Takeaways for Patent Practitioners in Drafting **Responses to Office Actions**

- RESPOND BY ARGUING STEP 2(A) PRONG 1 FIRST OF THE NEW ALICE/MAYO FRAMEWORK TRY TO NEUTRALIZE THE ALLEGATIONS THAT ANY CLAIM LIMITATIONS ARE DIRECTED TO ABSTRACT IDEAS IN THE THREE BUCKETS
- RESPOND BY ARGUING STEP 2(A) PRONG 2 OF THE NEW ALICE/MAYO FRAMEWORK TRY TO ARGUE THAT THE LIMITATIONS NOT DIRECTED TO ABSTRACT IDEAS IN THE THREE BUCKETS INTGRATED THE ALLEGED ABSTRACT IDEAS INTO A PRACTICAL APPLICATION
- RESPOND BY ARGUING STEP 2(B) OF THE NEW ALICE/MAYO FRAMEWORK THE ORDERED COMBINATION OF STEPS PROVIDE SIGNIFICANTLY MORE THAT THE ALLEGED ABSTRACT IDEAS [USUALLY SAME ARGUMENT AS STEP 2(A) PRONG 2]
- ANALOGIZE, IF POSSIBLE KNOW THE COURT CASES AND USPTO EXAMPLES AS TO WHAT CASES WERE ALLOWABLE RECITE THOSE ARGUMENTS.
- ALWAYS SEARCH IN THE SPEC FOR TECHNICAL PROBLEM/SOLUTION STATEMENTS, IMPROVEMENTS TO TECHNOLOGY, FUNCTIONING OF THE COMPUTER ITSELF, AND/OR MACHINE TRANSFORMATION (BILSKI/ABELE TEST) TO ARGUE STEP 2(A) PRONG 1 AND STEP 2(B) -- AT THE VERY LEAST, THE SPECIFICATION SHOULD IDENTIFY ONE OR MORE TECHNOLOGICAL IMPROVEMENTS CAPTURED BY THE INVENTION — PREFERABLY AFTER A SUMMARY OF THE CLAIMS — EVEN IF PARTICULAR CLAIM ELEMENTS ARE NOT IDENTIFIED AS BEING PARTICULARLY CRITICAL TO ACHIEVING THE PURPORTED IMPROVEMENTS.
- IN THE AREA OF FINTECH TRANSACTION PATENTS, WHEN RECITING AN ELEMENT SUCH AS "THE AUTOMATIC DECISION ENGINE" --SOLVED THE PROBLEM OF "CREATING A UNIVERSAL PROTOCOL FOR DEALING WITH MULTIPLE, DISPARATE AND NON-COMPATIBLE SOFTWARE APPLICATIONS USED IN LOAN APPLICATION PROCESS - THE SPECIFICATION NEEDS TO DETAIL HOW THE SYSTEM IMPORTS OR EXPORTS DATA, OR HOW THE COMPATIBILITY IS ACCOMPLISHED.
- USE EXAMINER ANALYTICS WHAT DID PREVIOUS PRACTITIONERS USE TO OVERCOME 101 WITH A PARTICULAR EXAMINER?

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Thank You!



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Thinking about AI on a transactional level

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AI in Transactions

- Transaction Tips
- Liability & Risk
- Data Privacy & Security
- Ethics
- Governance

Transaction Tips – SaaS Agreements & Licenses

Define the AI

- Imbedded within the core technology
- Utility of AI
- Fully operational or still under development
- Escrow
- IP Protection

Feeding the AI Engine

- Defining and qualifying the training data (provider / client tension)
- Scope of rights to use training data (the old internal usage maxim)
- Post-Termination Hangover
- Garbage in, Garbage Out



Transaction Tips – SaaS Agreements & Licenses

Confidentiality/Ownership

- Reservation of rights
- Audit rights (more than just looking under the hood)
- Ownership of AI-produced deliverables (2020 version of chicken & egg)
- Trade secret status

Reps/Warranties

- Integrity
- Non-Infringement
- No Conflict
- Customary standards
- Compliance with applicable laws & regulations

Liability & Risk – Data Quality/Integrity

• IP Infringement

- Algorithms
- Training Data

Misappropriation

- Has all training data been properly cleared
- Data scraping (at a minimum, breach of contract)

Reproduce/ Audit

- Vetting results
- Algo but no training data = nada
- Data quality ("...and the portions are so small")

Liability & Risk – Social Misuse

- Consumer Protection / Discrimination
- Violations of Labor Law / Disparate Impact
- Anti-Trust
- Securities Fraud / Quant Funds & Robo-Advisors
- Misdiagnosis / Malpractice

Data Privacy

- **Threshold Question**: Does the training data include personal data? If so, you must consider the applicable data privacy laws (e.g., GDPR, CCPA, HIPAA, etc.).
- **Threshold Classification**: AI may turn a Data Processor into a Data Controller (GDPR), and a Service Provider to a covered "business" (CCPA), all with enhanced accountability.
- Threshold Analysis: Can training data be anonymized, or must it contain PII?

Data Privacy

Other Important Privacy Considerations:

- Data security requirements (access rights, encryption, monitoring/testing, stress tests, etc.)
- Where is the data coming from? Is it being transferred overseas?
- DPA requirements
- Gap Analysis / Data Privacy Impact Assessments
- Data Minimization Rule
- Regulatory Developments (e.g., California Security of Connected Device Law)
- Automated Processing Limitations (GDPR, Art. 22)

Data Privacy

Fairness & transparency

Used for limited purpose

Legal basis for use

Individual rights

Data retention

Accountability and governance

Security and encryption

Data transfers

Data breach notifications

Automated profiling

Ethics

Golden Rule: Companies have a responsibility to integrate ethics within their AI! Consider what is ethical, not just whether it's legal.

- Ethics should cover:
 - Avoiding bias and disparate impact
 - Transparency and accountability
 - Predictability / Explainability
 - Misinformation & Overpromising
 - Diversity
 - Respect for privacy
 - Impact on jobs/workforce
 - Avoiding disrespect
 - Addressing/correcting issues

Governance

- The key to maintaining legal, ethical and effective AI practices is strong internal governance. Governance should be:
 - cross-departmental/functional (i.e., management, engineering, legal and marketing)
 - involved early in the product/solution design
 - Capable of monitoring/testing ongoing developments and deployments (e.g., algorithms, testing data, acquisitions, impact assessments, etc.)

3-Part Governance

- 1. Control -> Implement operational and design reviews -> identify divergence points
- 2. Verify -> Develop tests for divergence points -> implement process for feedback
- Records -> tracking & transparency of development process -> tracking & explainability of operation



Thank You!



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