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Libertarian Think Tanks Oppose Patents On Abstract Ideas

In 2002, the United States Patent and Trademark Office awarded a patent on a diagnostic method related to inflammatory bowel disease. The method consisted of administering a particular drug, measuring the concentration of a particular substance in the blood, and then recognizing that particular concentrations of that substance "indicates a need" to increase or decrease the drug dose. The patent did not claim a new drug or a new technology for measuring blood levels. No, it merely covered a *correlation* between blood concentrations and the optimal drug dosage, and the use of that correlation to adjust the drug dosage.

Are you really allowed to get a patent on what amounts to a fact about the human body? Traditionally, the answer would have been a clear no. For most of our nation's history, patents have been limited to physical machines and processes for manipulating matter—engines, chemicals, electronic devices, and so forth. The Supreme Court has repeatedly said that "laws of nature, physical phenomena, and abstract ideas" are not eligible for patent protection.

But then the United States Court of Appeals for the Federal Circuit, which has jurisdiction over patent appeals, heard a series of cases on the patentability of software that called this principle into question. In 1998, the Federal Circuit handed down the watershed case of *State Street v. Signature*, which upheld a patent on a strategy for managing a mutual fund using a computer. The broad language of the opinion suggested that lots of other categories of non-physical innovation could suddenly be eligible for patent protection. Suddenly, bankers, accountants, IT workers, and many other white-

collar professions had to worry about accidentally infringing someone's patent in the course of their daily work.

This was an unilateral innovation of the Federal Circuit, and in the 13 years since *State Street*, the Supreme Court hasn't weighed in on it. Last year, it rejected a particularly egregious "business method" patent but declined to articulate a clear principle to define when information-processing innovations were eligible for patent protection.

That diagnostic patent was licensed to a company called Prometheus Laboratories, which began demanding royalties from health care providers. When one of those providers, the Mayo Clinic, refused to pay up, Prometheus sued for patent infringement in 2004. The case has been working its way through the courts ever since, and in June the Supreme Court announced it would hear the case. The case gives the Supreme Court an opportunity to squarely consider—and, I hope, reject—the Federal Circuit's activism on the subject of patentable subject matter.

So I'm extremely excited that three of the nation's leading libertarian think tanks—Cato, the Competitive Enterprise Institute, and the Reason Foundation—have submitted an amicus brief in the case of *Mayo v. Prometheus*. As far as I know, this is the first time any of these think tanks has filed an patent-related amicus brief with the Supreme Court, and it couldn't have come at a better time. I'm listed as a co-author on the Cato site, but the brief was actually written for us by the brilliant Christina Mulligan at Yale's Information Society Project. We benefitted from the able leadership of Ilya Shapiro, who supervises Cato's *amicus* program.

Christina did a superb job of explaining how the Federal Circuit's decisions from the 1990s contradict earlier decisions from the Supreme Court itself. And she also marshals the growing body of empirical evidence that the Federal Court's experiment with allowing patents on abstract ideas has done serious economic damage. Because the Federal Circuit's experiment with expanding patentable subject matter started with software and business method patents, the brief focuses pretty heavily on those two categories of patents. And the data are shocking:

In 2008, software patents were more than twice as likely to be litigated as other patents. During the late 1990s, software patents alone accounted for 38 percent of the total cost of patent litigation to public firms. Bessen and Meurer concluded that patents on business methods were nearly seven times more likely to be litigated than other patents. Patents related to financial products and services generally are litigated at a rate 27 to 39 times larger than patents in general.

It's not much of an exaggeration to say that the crisis in our patent system is mostly a crisis in the new categories of patents that the Federal Circuit unilaterally legalized during the 1990s. On Friday, three leading libertarian think tanks added their voices to the growing chorus of parties calling on the Supreme Court to reverse the Federal Circuit's mistake and restore the traditional rules excluding abstract ideas from the reach of patent law.