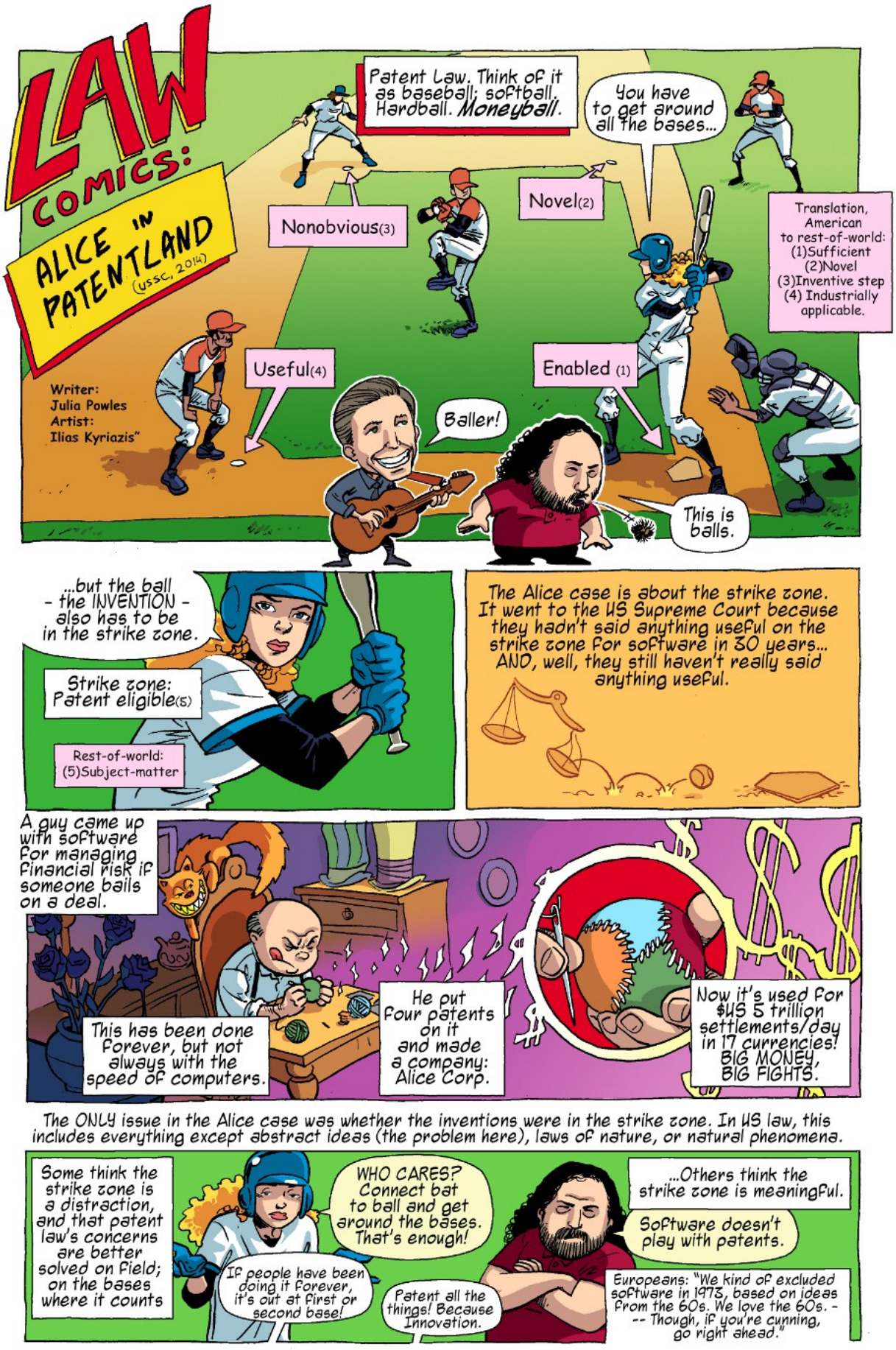
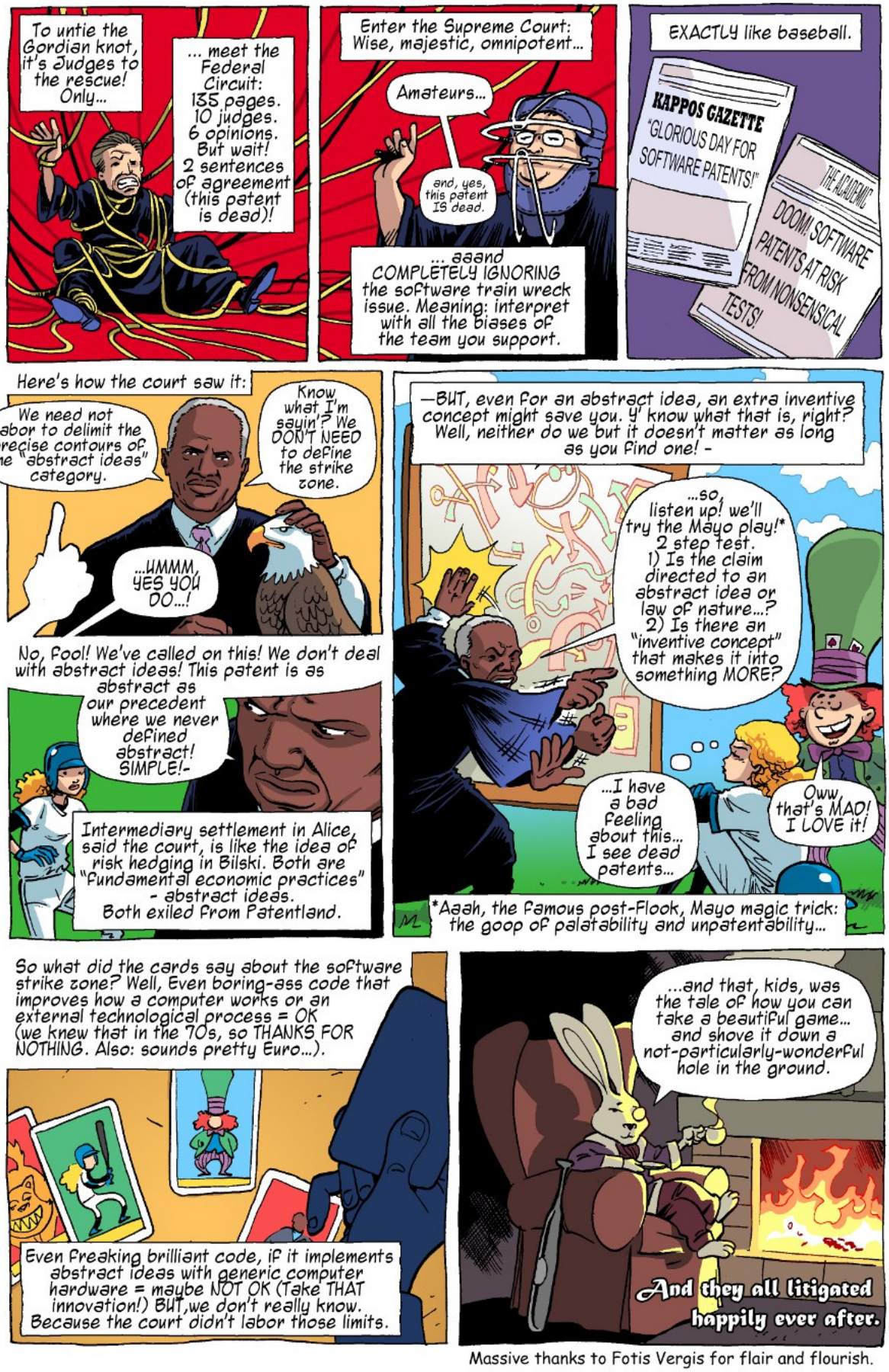

LAW COMICS:
ALICE IN PATENTLAND
(USSC, 2014)
Writer:
Julia Powles
Artist:
Ilias Kyriazis"
Patent Law. Think of it as baseball: softball. Hardball. Moneyball.
You have to get around all the bases...
Nonobvious(3)
Novel(2)
Translation, American to rest-of-world: (1)Sufficient (2)Novel (3)Inventive step (4) Industrially applicable.
Useful(4)
Enabled (1)
Baller!
This is balls.
...but the ball - the INVENTION - also has to be in the strike zone.
Strike zone: Patent eligible(5)
Rest-of-world: (5)Subject-matter
The Alice case is about the strike zone. It went to the US Supreme Court because they hadn't said anything useful on the strike zone for software in 30 years... AND, well, they still haven't really said anything useful.
A guy came up with software for managing financial risk if someone bails on a deal.
This has been done forever, but not always with the speed of computers.
He put four patents on it and made a company: Alice Corp.
Now it's used for $US 5 trillion settlements/day in 17 currencies! BIG MONEY, BIG FIGHTS.
The ONLY issue in the Alice case was whether the inventions were in the strike zone. In US law, this includes everything except abstract ideas (the problem here), laws of nature, or natural phenomena.
Some think the strike zone is a distraction, and that patent law's concerns are better solved on field; on the bases where it counts
WHO CARES? Connect bat to ball and get around the bases. That's enough!
If people have been doing it forever, it's out at first or second base!
Patent all the things! Because Innovation.
...Others think the strike zone is meaningful.
Software doesn't play with patents.
Europeans: "We kind of excluded software in 1973, based on ideas from the 60s. We love the 60s. -- Though, if you're cunning, go right ahead."



Massive thanks to Fotis Vergis for flair and flourish.

LAW & DISORDER —

Supreme Court smashes “do it on a computer” patents in 9-0 opinion

Court declines to stop software patents altogether.

JOE MULLIN - 6/19/2014, 12:08 PM

Taryn Damingos

The most-anticipated patent decision from this Supreme Court term was published today. The decision involves finance-related software patents that were being used against CLS Bank, a key part of the global financial infrastructure.

The court ruled unanimously that all of patent-holder Alice Corp.'s claims were invalid, because they simply added computer language to a basic idea: using a financial intermediary to create trust in transactions. The 9-0 opinion [PDF], written by Justice Clarence Thomas, is the clearest statement yet from the Supreme Court that adding technological-sounding language to existing ideas isn't enough to get a patent.

FURTHER READING
Supreme Court hears argument on a patent worthy of King Tut

Some advocates were hoping the case would go so far as to eliminate software patents altogether. If that were to happen, this would have likely been the case to do it. But the court didn't go that far, instead suggesting that software patents could still be allowed when they "improve the functioning of the computer itself" or "improve an existing technological process."

Today's decision clarifies a fractured decision in the US Court of Appeals for the Federal Circuit that couldn't reach a majority about whether the patents were valid. That left intact the lower court decision, which had ruled the patents invalid.

The Supreme Court addressed this area of patent law in the 2010 *Bilski* decision, which invalidated a patent on a financial hedging scheme. Today's ruling essentially found that the Alice patents were a kind of "Bilski on a computer." Thomas writes:

> 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 court rejected the argument of Alice's lawyer that the abstract-ideas exception in patent law should only apply to "preexisting, fundamental truths."

A final section of the opinion blasts the Federal Circuit's idea that the "system" and "media" claims should be treated any differently than Alice's "method" claims. A group of four judges, including recently departed Chief Judge Randall Rader, banned method and media claims but would have allowed system claims, which they said involved hardware "specifically programmed to solve a complex problem."

The high court dismisses these terms as being much gamesmanship by patent lawyers. To allow one type of claim but not another would be to interpret patent law "in ways that make patent eligibility ‘depend simply on the draftsman’s art.’”

So what's abstract?

Alice's patent claims did nothing more than "simply instruct the practitioner to implement the abstract idea of intermediated settlement on a generic computer," the court held.

That makes the patents abstract, but the justices specifically declined to lay out a definition of what "abstract" is.

"Both the Bilski invention and Alice's method are squarely within the realm of 'abstract ideas' as we have used that term," Thomas writes. And the court says, that's enough for now. "We need not labor to delimit the precise contours of the 'abstract ideas' category in this case."

FURTHER READING
How far will the Supreme Court go to stop patent trolls?

Here, as in *Bilski*, the Supreme Court is navigating between three early computer-oriented cases that arose between 1972 and 1981. *Gottschalk v. Benson* and *Parker v. Flook* both rejected algorithm-based patents, while *Diamond v. Diehr* allowed a patent on a computer program that described a method of curing rubber. These three early cases all relate to Section 101 of patent law, like today's case, and they don't exist in comfortable harmony.

Today, the Supreme Court emphasized that it was the non-computing elements of the Diehr invention that made it patentable. "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.'"

Future court battles are likely to circle around the concept of just what is abstract. In one sense, it seems that the Supreme Court is taking technology that's actually just quite old—like using hedging and intermediaries in business—and calling it "abstract."

The effect of that will be to put more patent battles in the area of Section 101, which is where frequent patent defendants want it. Getting a ruling that software or Internet patents are "abstract" means they can

be thrown out of court relatively quickly. Proving patents are invalid because they were anticipated by earlier inventions is much more likely to lead to expensive court battles that involve discovery and the hiring of expensive experts.

Patent owners who go to court will certainly always argue their inventions aren't abstract. Still, today's opinion has guideposts that will make it easier for judges to rule that they are.

"The Federal Circuit had decisions that basically said, if you had a physical thing—even a generic thing, like a 'data processing unit'—that was enough to make it patent eligible," said Matthew Levy, a lawyer who works on patent reform issues for the Computer and Communications Industry Association. "District court judges would hang their hat on that. Now, in a lot of cases, they'll say [to a patent owner], you just have generic terms here, like a CPU—that's exactly what the Supreme Court said doesn't matter."

The future of software patents

The big software companies that wrote amicus briefs that essentially were long paeans to software patents, like Microsoft and IBM, can rest assured that their nightmare scenario—the mass-invalidation of the thousands of software patents they own—will not come to fruition. The idea of throwing out software patents as a class, via the courts, looks more pie-in-the-sky than ever before.

As for the many software and Internet companies that emphasized the harm being done by software patents, they'll have a stronger basis to stand their ground. This decision seems to explicitly encourage decisions like the one written by US District Judge Denise Cote, who eviscerated a patent troll's claim on "matchmaking," then awarded attorney's fees to defendant FindTheBest. We're likely to see more of those in the future.

Still, it's hard to see this decision wiping out many lawsuits filed in a patent-friendly area like the Eastern District of Texas. It's really up to individual judges whether they see a patent as being broad or brazen enough to be claiming an "abstract idea." And even in the best case scenario, a defendant who wins a speedy decision will have to spend a few hundred thousand dollars, so "bottom feeder" patent trolls asking for $25,000 or $50,000 will still be able to score settlements. Sadly, as pro-defense decisions make it harder for trolls to compete in the "mid-market" asking for six-figure settlements, smaller companies may become more frequent targets.

That was clearly the concern for the Main Street Patent Coalition, which sent out a press release this morning lauding the decision but insisting that Congress must take action to "stop extortionist claims," even though this year's patent reform bill was killed in the Senate. "Most American businesses do not have the time or money to fight these frivolous lawsuits that can take years and millions of dollars to resolve in the courts," the group wrote.

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PARTNER CONTENT PREETAM KAUSHIK

THE FRUITS OF INNOVATION, AND THE LEGAL FOG OVER SOFTWARE PATENTS

Image: brunkfordbraun/Flickr

WHEN US SUPREME Court justices start quoting Greek mythology you know you have a remarkable case on your hands.

Judge Stephen G. Breyer's "Scylla and Charybdis" analogy to describe the legal

arguments that have stemmed from Australia-based Alice Corporation suing New York-based CLS Bank International, over allegations that the former's patents were infringed, indicate that the vexed issue of software patents is going to persist in throwing up harrowing scenarios for both businesses and courts.

A Judgment Call

It's the unenviable job of the Supreme Court now to translate abstract principles like "novelty" — the bedrock of granting patents — into a practical judgment that allows businesses to operate without a legal fog obscuring their operations. Unfortunately, the Supreme Court's track record on software patents has been rather patchy, with one of the most recent judgments, Bilski v. Kappos coming in for harsh criticism.

At heart is the argument whether a computerized version of an existing business process can be termed as "novel", and therefore be eligible for patent. In the current dispute Alice Corporation claims that its escrow software is a "novel" invention, while CLS Bank maintains that escrow accounts as a business process have been around for ages, and just by replicating their function in software, does not grant anyone the right to claim a patent.

Intellectual property lawyer Roman

Tsibulevskiy of New York-based Goldstein Patent Law adds another layer to this complex debate. “Via reading the oral argument transcript of the case, I believe many people confuse patentable subject matter and novelty. The key is to look at the claimed computer structure and see if such structure is novel over other known structures,” he says.

A Precedent of Conflicts

When the case came before a federal court, after a district court had invalidated Alice Corporation’s claims, 10 different judges broadly reaffirmed the district court’s decision but not before they had muddied the waters with seven different opinions, and a total lack of consensus on the reasoning.

Now, even though the Supreme Court is only expected to reach a verdict by June, we see similar divisions appear amongst the top judges. Justices Breyer, Kennedy, Ginsburg, and Sotomayor seemed to be leaning towards the Bilski v. Kappos decision — where a hedging software was declared ineligible for patent. However Justice Antonin Scalia, a noted dissenter and conservative champion, seemed to be taking a different tack from his colleagues likening the “invention” to that of the cotton gin. One could not validate a patent on the gin by just saying that it replicated mechanically what the human hand would do.

The justices will also be sweating over the fact that their courtroom could well become a corporate battleground as billions of dollars of software patents could be up for review as a consequence of their judgment. Besides the two parties, numerous amici briefs have been filed by interested parties. These range from IT industry veterans like Microsoft and IBM to the new kids on the block like LinkedIn, NetFlix, Twitter, and Yelp.

Tsibulevskiy underlines the economic ramifications of a judgment invalidating software patents. “There is potential for a huge economic loss. In current uncertain economic times, such loss may negatively impact US economy and cascade downstream to other industrialized nations. Also, the Supreme Court does not want to destroy the incentive to innovate.”

However, the courts have also consistently displayed a contempt for patent trolls. Alice Corporation, seems to fit the profile of such companies that have been branded as patent trolls. CLS Bank, which is an international clearinghouse for major member banks like JPMorgan Chase, Bank of America, and Citigroup, is a particularly appealing target for such predatory behavior.

Though the software industry clearly would not want patent protection for genuine innovation to be rescinded as a consequence of the

judgment, they are conflicted like many others on the issue of whether the patent system in itself is promoting innovation.

Competition Conundrum

It helps therefore to gain clarity to step back from the specifics of the case and examine why patent protection was brought into the legal statutes in the first place. Unlike criminal law patent law has has to be contextualized with commerce, and implicitly competition.

Tsibulevskiy amplifies this issue with an example, "It's a way to improve competitiveness. For example, look at Amazon one-click shopping patent enforcement against Barnes and Noble. Similarly, many patents in the financial field serve as the tip of the spear in distinguishing one company from the other."

However, as an article in *The New York Times* states, "The Constitution gives Congress the power to grant inventors a temporary monopoly over their creations to promote the progress of science and useful arts." The words temporary monopoly stick out at you as obviously the Founding Fathers abhorred a lack of competition.

If Alice Corporation was duking it out with 10-12 different players in the market for its originally developed software, there would be a great argument that its intellectual property be

protected, and it have the right to enjoy the economic fruits of this innovation. Unfortunately though that does not seem to be the case — just creating a few lines of code and then making no honest attempts to commercialize the innovation does not put you in the same league as an Apple or a Google.

Legally Lucid

The case presents an excellent opportunity for the finest legal minds in the country to streamline the legalese that has enveloped terminology like "abstract idea" — from the litigated Section 101 of USC, and "non-obvious" from Section 103.

Moreover, amending and modifying the laws to be relevant in a software-centric world is challenging not just patent law the world over but also issues around taxation and ownership. The software companies are certainly pushing for it.

The Supreme Court has had multiple cracks at it. It dropped the ball in Bilski v. Kappos and therefore finds the ball in its court once again.

Preetam Kaushik is a freelance journalist based in India. He writes for The Huffington Post, The Street *and* Business Insider India.