

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: BERNARD L. BILSKI AND RAND A. WARSAW,
 Petitioners, v. DAVID J. KAPPOS, UNDER SECRETARY
 OF COMMERCE FOR INTELLECTUAL PROPERTY
 AND DIRECTOR, PATENT AND TRADEMARK
 OFFICE

CASE NO: No. 08-964

PLACE: Washington, D.C.

DATE: Monday, November 9, 2009

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BERNARD L. BILSKI AND RAND A. :

4 WARSAW, :

5 Petitioners :

6 v. : No. 08-964

7 DAVID J. KAPPOS, UNDER :

8 SECRETARY OF COMMERCE FOR :

9 INTELLECTUAL PROPERTY AND :

10 DIRECTOR, PATENT AND :

11 TRADEMARK OFFICE. :

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13 Washington, D.C.

14 Monday, November 9, 2009

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16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States
18 at 1:00 p.m.

19 APPEARANCES:

20 J. MICHAEL JAKES, ESQ., Washington, D.C.; on behalf of
21 the Petitioners.

22 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; on behalf of
24 the Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this afternoon in Case 08-964,
5 Bilski v. Kappos.

6 Mr. Jakes.

7 ORAL ARGUMENT OF J. MICHAEL JAKES

8 ON BEHALF OF THE PETITIONERS

9 MR. JAKES: Mr. Chief Justice, and may it
10 please the Court:

11 The Federal Circuit's rigid and narrow
12 machine-or-transformation test for all patent-eligible
13 methods should be reversed. The requirement that any
14 and all methods must be either tied to a particular
15 machine or transform specific subject matter doesn't
16 find any basis in either the language of section 101 or
17 anywhere in the patent statute.

18 It's not required by this Court's
19 precedence, and it's contrary to the established
20 principle that section 101 should be read broadly to
21 accommodate unforeseen advances in the useful arts.
22 There are recognized exclusions from section 101, from
23 that broad language, such as laws of nature, natural
24 phenomenon, and abstract ideas. Those may not be
25 patented.

1 But these exceptions, which are drawn from
2 the Court's precedent, including this Court's Diehr
3 case, also find support in the statutory language,
4 which says that any process must be new and useful.

5 So the prohibition against patenting laws of
6 nature or abstract principles -- it applies equally to
7 all four categories of subject matter under 101, but,
8 here, the Federal circuit has created a new test just
9 for processes that are not found in the statute or
10 required by this Court's decisions.

11 JUSTICE SCALIA: Of course, the government
12 says that the -- that the term on which it hangs its hat
13 is the term "useful arts" and that that meant,
14 originally, and still means manufacturing arts, arts
15 dealing with workmen, with -- you know, inventors, like
16 Lorenzo Jones, not -- not somebody who writes a book on
17 how to win friends and influence people.

18 What's wrong with that analysis, that
19 that's what "useful arts" meant, that it always --
20 always was thought to deal with machines and inventions?

21 MR. JAKES: Certainly, "useful arts"
22 encompasses industrial processes, manufacturing
23 processes, but it has never been limited just to those
24 types of processes. I'll admit that during the
25 Industrial Revolution most of the inventions concerned

1 machines and manufacturing processes. But we have cited
2 counter-examples that show that business was also within
3 the useful arts.

4 It's also up to Congress to decide how to
5 implement the patent system and the statutory scheme --

6 JUSTICE BREYER: Well, if you leave
7 something out, Congress can put it back in, tailoring
8 the protection to what they feel is necessary. But if
9 it covers everything under the sun, I've never seen a
10 case where Congress would take something out.

11 Now, if we are relying on Congress, I guess
12 the circuit would say, let's go narrow, and we
13 won't have -- you know -- since you referred to
14 Congress, I thought I would bring that up and see what
15 you think.

16 MR. JAKES: Congress has acted in certain
17 circumstances. One of them is in section 273, to
18 provide prior user rights for business methods. Another
19 area is 287(c), where medical activities are also
20 exempted from remedies under the statute.

21 There has been a bill introduced to exempt
22 tax avoidance methods, but that has not yet been passed.

23 JUSTICE GINSBURG: But just so you would say
24 tax avoidance methods are covered, just as the process
25 here is covered. So an estate plan, tax avoidance, how

1 to resist a corporate takeover, how to choose a jury,
2 all of those are patentable?

3 MR. JAKES: They are eligible for patenting
4 as processes, assuming they meet the other statutory
5 requirements.

6 JUSTICE BREYER: So that would mean that
7 every -- every businessman -- perhaps not every, but
8 every successful businessman typically has something.
9 His firm wouldn't be successful if he didn't have
10 anything that others didn't have. He thinks of a new
11 way to organize. He thinks of a new thing to say on the
12 telephone. He thinks of something. That's how he made
13 his money.

14 And your view would be -- and it's new, too,
15 and it's useful, made him a fortune -- anything that
16 helps any businessman succeed is patentable because we
17 reduce it to a number of steps, explain it in general
18 terms, file our application, granted?

19 MR. JAKES: It is potentially patentable,
20 yes.

21 JUSTICE BREYER: Okay. Well then, if that
22 were so, we go back to the original purpose of the
23 Constitution. Do you think that the Framers would have
24 wanted to require anyone successful in this great, vast,
25 new continent because he thinks of something new to have

1 had to run to Washington and to force any possible
2 competitor to do a search and then stop the wheels of
3 progress unless they get permission?

4 Is that a plausible view of the patent
5 clause?

6 MR. JAKES: No, Your Honor. I wouldn't
7 characterize it that way, but I do believe that --

8 JUSTICE SOTOMAYOR: So how do we limit it to
9 something that's reasonable? Meaning, if we don't
10 limit it to inventions or to technology, as some amici
11 have, or to some tie or tether, borrowing the Solicitor
12 General's phraseology, to the sciences, to the useful
13 arts, then why not patent the method of speed dating?

14 MR. JAKES: Well, first of all, I think,
15 looking at what are useful arts, it does exclude some
16 things. It does exclude the fine arts. Speaking,
17 literature, poems -- I think we all agree that those are
18 not included, and there are other things as well. For
19 example, a corporation, a human being -- these are
20 things that are not covered by the statutory categories.

21 JUSTICE SOTOMAYOR: So why are human
22 activities covered by useful arts?

23 MR. JAKES: Human activities are covered.

24 JUSTICE SOTOMAYOR: Well, you are saying
25 they are covered, but why should they be?

1 MR. JAKES: I believe the statute provides
2 for them to be covered by defining them as a process. I
3 can give you a -- one good example, which would be a
4 surgical method performed by a doctor. Those are
5 patentable. They are patent eligible. In section
6 287(c), Congress has carved out and said, you can't go
7 after the doctor for infringement, but that is an
8 entirely human activity, and it has long been
9 patentable.

10 JUSTICE SOTOMAYOR: Do you think that there
11 is some benefit to society from patenting a method to
12 cure someone that involves just human activity, as
13 opposed to some machine, substance, or other apparatus
14 to help that process?

15 MR. JAKES: Yes.

16 JUSTICE SOTOMAYOR: Do you believe that that
17 was the intent of the patent law?

18 MR. JAKES: I believe that falls within the
19 useful arts, and I believe that there is an advantage to
20 that. There are really two advantages to the patent
21 system. One is encouraging people to come up with new
22 things, such as a surgical method or a method of hedging
23 consumption risk.

24 The other is the disclosure aspect. A
25 doctor might choose to keep it secret.

1 JUSTICE BREYER: So you are going to answer
2 this question yes. You know, I have a great, wonderful,
3 really original method of teaching antitrust law, and it
4 kept 80 percent of the students awake. They learned
5 things --

6 (Laughter.)

7 JUSTICE BREYER: It was fabulous. And I
8 could probably have reduced it to a set of steps, and
9 other teachers could have followed it. That you are
10 going to say is patentable, too?

11 MR. JAKES: Potentially.

12 JUSTICE BREYER: Okay. Fine. Now, suppose
13 I reject that view, hypothetically, and suppose I were
14 to take the view that this is way too far, that that's
15 not the purpose of the statute. Suppose for
16 hypothetical's sake I'm still a little nervous about
17 that -- that circuit's decision there. Have you any
18 suggestion for me?

19 MR. JAKES: I think that we should go back
20 to the first principles that were enunciated in Diehr
21 and other cases, that abstract ideas per se are not
22 patentable. That's my position, and what I would
23 advocate in this case and in any case, as long as you're
24 --

25 CHIEF JUSTICE ROBERTS: What -- I'm looking

1 at your claim 1, in Joint Appendix page 19 to 20. How
2 is that not an abstract idea? You initiate a series of
3 transactions between commodity providers and commodity
4 consumers. You set a fixed price at the consumer end,
5 you set a fixed price at the other end, and that's it.

6 I mean, I could patent a process where I do
7 the same thing. I initiate a series of transactions
8 with sellers. I initiate a series of transactions with
9 buyers. I buy low and sell high. That's my patent for
10 maximizing wealth.

11 I don't see how that's different than your
12 claim number 1.

13 MR. JAKES: If that was a novel and
14 unobvious method, then it should be patentable, but it's
15 eligible as subject matter --

16 CHIEF JUSTICE ROBERTS: Well, but your claim
17 1 it seems to me is classic commodity hedging that has
18 been going on for centuries.

19 MR. JAKES: Your Honor, if that were true,
20 then we should run afoul of the obviousness provision
21 under section 103. Now, the Patent Office did initially
22 allow some of our claims over the prior art.

23 JUSTICE KENNEDY: But you know that the
24 insurance industry -- the insurance business, as we know
25 it, really began in England in 1680, when they

1 discovered differential calculus, and they had
2 expectancy and actuarial tables, actuarial for life,
3 expectancy for shipping, and this really created a whole
4 new industry.

5 In your view, I think, clearly those would
6 be patentable, the -- the explanation of how to compile
7 an actuarial table and -- and apply it to risk. That
8 certainly would be patentable under your view, and
9 it's -- it's difficult for me to think that Congress
10 would want to -- would have wanted to give only one
11 person the capacity to issue insurance.

12 MR. JAKES: I think that method would be
13 patent eligible. But, as you said, it would have to be
14 reduced to a concrete set of steps, like our claim 1.
15 Now, claim 1 may be written in broad terms, and it may
16 some day run into the prior art, but it does require
17 people to do actual things.

18 I think even the Patent Office agreed that
19 there are physical steps in our method here. And in the
20 insurance method --

21 CHIEF JUSTICE ROBERTS: What -- I'm sorry.
22 Just -- what are the physical steps? Initiating a
23 series of transactions between commodity provider and
24 market participants?

25 MR. JAKES: That would be one.

1 CHIEF JUSTICE ROBERTS: You get on the phone
2 and you call the baker, and you get on the phone and you
3 call the grocer and say: I can set up a deal for both
4 of you.

5 MR. JAKES: It could be. It could be done
6 that way because it does take a person acting to do
7 that. It's not purely --

8 JUSTICE KENNEDY: And so in the insurance
9 case, it takes a person to go over to the Bureau of
10 Statistics and compile statistics on -- on life -- on
11 life expectancy.

12 MR. JAKES: That could be. Now, a patent
13 on the data -- that's another category that's not
14 included in the subject matter of those four categories.
15 The data itself is not patentable, but if it is a series
16 of steps, it should be eligible as long as it meets the
17 other statutory requirements as a process.

18 There's nothing in the useful arts -- now,
19 we have heard the word "technology." That can be a
20 difficult term, because "technology" in its broadest
21 sense means the application of knowledge as opposed to
22 general knowledge.

23 JUSTICE GINSBURG: Isn't that the basis on
24 which the patent law rests in Europe, in other
25 countries? They do not permit business method patents.

1 It has to be tied to technology, to science or
2 technology. So if other systems are able to work with
3 the notion of technology-based, why not ours?

4 MR. JAKES: I would agree, Your Honor.
5 There are those systems that do have a requirement like
6 that. Ours does not. Ours speaks in very broad
7 terms about any --

8 JUSTICE GINSBURG: But I was talking about
9 -- you said that technology-based, that wouldn't work
10 because there are so many definitions. I'm simply
11 asking you the question: Does it work in these other
12 systems? That they -- they exclude business methods,
13 they include technology-based innovations.

14 MR. JAKES: That's right. But they have
15 also defined "technology" in such a way as to exclude
16 business methods. And I don't think we can do that.

17 The fields of operations research,
18 industrial engineering, even financial engineering --
19 there has been an explosion in these particular fields,
20 and to now call them non-technological because they
21 didn't exist over 100 years ago wouldn't make --

22 JUSTICE SOTOMAYOR: Are you suggesting they
23 didn't exist because we didn't give them patents
24 100 years ago?

25 MR. JAKES: No.

1 JUSTICE SOTOMAYOR: Or they exist because
2 computers have increased --

3 MR. JAKES: It's very much related to our
4 current economy and state of technology, with computers
5 and the Internet and the free flow of information. But
6 that's what --

7 JUSTICE SOTOMAYOR: No, but a patent limits
8 the free flow of information. It requires licensing
9 fees and other steps, legal steps. So you can't argue
10 that your definition is improving the free flow of
11 information.

12 MR. JAKES: Your Honor, I would, because of
13 the disclosure requirement of the patent laws. It
14 requires people to disclose their inventions rather than
15 keeping them secret, so there is a second benefit to the
16 patent system just other than encouraging people to
17 invent, and that is to have that information get to the
18 public generally. And in exchange for that --

19 JUSTICE SCALIA: Even though the public
20 can't use it, right, until the patent expires?

21 MR. JAKES: Until the patent expires, if a
22 valid patent issues on that, yes.

23 But that's our system. We do give exclusive
24 rights in exchange for that information being provided
25 to the public.

1 JUSTICE STEVENS: May I ask this question?
2 What do you think the strongest case from our
3 jurisprudence is that supports your position?

4 MR. JAKES: I would say it's the Diehr case.

5 JUSTICE STEVENS: Which one?

6 MR. JAKES: Diehr. Diamond v. Diehr.

7 JUSTICE STEVENS: Diehr?

8 MR. JAKES: Yes.

9 JUSTICE STEVENS: That's, of course, nothing
10 like this patent.

11 MR. JAKES: No, it's not, but I think it --

12 JUSTICE STEVENS: There's language in the
13 opinion.

14 MR. JAKES: It outlines the general
15 principles --

16 JUSTICE STEVENS: Yes.

17 MR. JAKES: -- and also tells us that there
18 are only these specific things that are not included
19 within the subject matter.

20 JUSTICE STEVENS: But is it correct that
21 there's none -- none of our cases has ever approved a
22 rule such as you advocate?

23 MR. JAKES: I don't think this particular
24 subject matter has been ruled on by the Court.

25 Now, in Dann v. Johnston in the seventies,

1 there was a case that could have been decided on the
2 grounds that it was a method of doing business, and
3 instead the Court chose to decide that case based on
4 obviousness. And really --

5 JUSTICE SCALIA: You know, you mention that
6 there are all these -- these new areas that didn't exist
7 in the past because of modern business and whatnot, but
8 there are also areas that existed in the past that don't
9 exist today. Let's take training horses. Don't you
10 think that -- that some people, horse whisperers or
11 others, had some, you know, some insights into the best
12 way to train horses? And that should have been
13 patentable on your theory.

14 MR. JAKES: They might have, yes.

15 JUSTICE SCALIA: Well, why didn't anybody
16 patent those things?

17 MR. JAKES: I think our economy was based on
18 industrial process.

19 JUSTICE SCALIA: It was based on horses, for
20 Pete's sake. You --

21 (Laughter.)

22 JUSTICE SCALIA: You would really have
23 thought somebody would have patented that.

24 MR. JAKES: There are also issues with
25 enforcement. I can't really answer why somebody

1 wouldn't have.

2 There are teaching methods that were
3 patented. There are a number of them that we've
4 included in our brief where there were patents issued
5 for teaching methods, and I don't think that we've had a
6 serious enforcement problem with people being sued for
7 using teaching methods. But there have been those
8 people who have sought to patent them rather than keep
9 them as secrets or just use them.

10 JUSTICE SCALIA: How old -- how old were
11 those -- those cases?

12 MR. JAKES: They range. Some of them go
13 back quite a ways, to the last century.

14 JUSTICE STEVENS: May I ask this general
15 question, too? I have always admired Judge Rich, who
16 was very active in drafting the '52 amendment.

17 MR. JAKES: Yes.

18 JUSTICE STEVENS: Has he written anything on
19 this particular issue?

20 MR. JAKES: He has written a number of
21 things. And I think one of the things that the
22 Solicitor General quotes in their brief is from an
23 article that he wrote.

24 But he also wrote the Alappat decision and
25 the State Street Bank case as well and those that I

1 think stand as his views, his latest views on what was
2 patent-eligible subject matter, looking at the State
3 Street Bank case.

4 JUSTICE KENNEDY: In the Diehr case, the
5 Court said that in the end, the abstract idea must be in
6 a process that, oh, implements a proposal that the
7 patent laws were designed to protect, which brings you
8 almost back to the beginning. You don't --

9 MR. JAKES: It does.

10 JUSTICE KENNEDY: You don't know much from
11 that language. But that was something that you could
12 touch, that you could see, that looked like a machine;
13 the substance was different before the process and after
14 the process. And -- and none of that's applicable here.
15 It's --

16 MR. JAKES: The Diehr invention was an
17 industrial process of the conventional type, because it
18 was a method of curing rubber. But today the raw
19 materials are just as likely to be information or
20 electronic signals, and to simply root us in the
21 industrial era because that's what we knew I think would
22 be wrong and contrary to the forward-looking aspect of
23 the patent laws.

24 JUSTICE SOTOMAYOR: Well, isn't the
25 manipulation of electronic signals a substance that's

1 different in kind from just a method of how to go about
2 doing business or a method of how to approach a
3 particular problem?

4 Isn't there -- isn't that what the Federal
5 Circuit was trying to explain, which is that there has
6 to be something more substantive than the mere exchange
7 of information; that it has to involve -- it used the
8 word "transformation." It hasn't defined the outer
9 limits of what it means by that.

10 MR. JAKES: I think there is a difference.
11 But by rigidly looking at that transformation test, what
12 you do is you exclude lots of other things where the
13 transformation is not required --

14 JUSTICE BREYER: That's exactly what I --
15 maybe I can get you to inadvertently help by -- a
16 hypothesis you don't like. That's why I say it's
17 inadvertent.

18 You said there are two things. There are
19 actually four things in the patent law which everyone
20 accepts. There are two that are plus and two that are
21 minus. And the two that are plus is by giving people a
22 monopoly, you get them to produce more. As you said,
23 you get them to disclose.

24 The two minuses are they charge a higher
25 price, so people use the product less; and moreover, the

1 act of getting permissions and having to get permission
2 can really slow things down and destroy advance. So
3 there's a balance.

4 In the 19th century, they made it one
5 way in respect to machines. Now you're telling us:
6 Make it today in respect to information. And if you ask
7 me as a person how to make that balance in respect to
8 information, if I am honest, I have to tell you: I
9 don't know. And I don't know whether across the board
10 or in this area or that area patent protection will do
11 no harm or more harm than good.

12 So that's the true situation in which I find
13 myself in respect to your argument. And it's in respect
14 to that, I'd say: All right, so what do I do?

15 MR. JAKES: I think the answer is to follow
16 the statute.

17 JUSTICE BREYER: Well, thank you. I thought
18 that was the issue, not the answer.

19 (Laughter.)

20 MR. JAKES: Congress has spoken in broad
21 terms and given us those four categories, and by looking
22 at those, I think that answers the question.

23 JUSTICE SOTOMAYOR: But it doesn't, because
24 we don't work in a vacuum. We work in a context.

25 MR. JAKES: Yes.

1 JUSTICE SOTOMAYOR: And so it begs the
2 question, because we go around in a circle: What does
3 "process" mean in a patent law that was passed in 1952
4 that had one set of manufacturing and other items that
5 are technologically tied and this is not? So how do we
6 discern Congress's intent, other than by the use of the
7 word "process" in context?

8 MR. JAKES: I think that "process" is not by
9 itself. It says "any new and useful process." And so
10 we have -- we can look at those words and understand
11 that natural phenomena, laws of nature, which are not
12 really new because they are part of the storehouse of
13 knowledge available to everyone, and "useful," meaning
14 there has to be a practical application.

15 JUSTICE SOTOMAYOR: But the word "knowledge"
16 is not used in the act. So it's not just useful
17 knowledge.

18 MR. JAKES: No.

19 JUSTICE SOTOMAYOR: It's useful knowledge in
20 relationship to something.

21 MR. JAKES: Practically applied, yes, in the
22 real world, whether that's the exchange of information
23 or electronic data transformation. One of the problems
24 with the transformation test is that it would exclude
25 some valuable inventions that I think everyone would

1 agree are technological under any test such as data
2 compression, such as FM radio. Even Bell's claim, the
3 claim to transmitting sound using undulating current,
4 wouldn't necessarily pass the transformation test. So I
5 think we need to look at --

6 JUSTICE SOTOMAYOR: Well, if that's --

7 JUSTICE KENNEDY: But it would be different,
8 it seems to me, than what you are -- let's assume you
9 can't patent an alphabet. I assume that's true. And
10 you can take an alphabet to make beautiful words, and --
11 and so forth. You -- you want to say that these --
12 these electronic signals can be used in a way just like
13 the alphabet can be used.

14 And many of the scientific briefs say that
15 their process is different, that they are taking
16 electronic signals and turning them into some other sort
17 of signal. But that's not what you are doing.

18 MR. JAKES: That may be, but those signals
19 could also be transmitted. On -- on your question about
20 the alphabet, you said look at the Morse claim 5, which
21 was an alphabet to Morse Code. That's exactly what it
22 was. It was --

23 CHIEF JUSTICE ROBERTS: So you reject -- you
24 reject the substitute. You think you can patent an
25 alphabet because it is a process of forming words.

1 MR. JAKES: It could be, yes. Now, I think
2 you run into all kinds of other problems. And that's
3 really where the focus of the patent statute should be,
4 so that we have the fair give-and-take, the bargain that
5 is necessary, that we -- too much overpatenting as
6 opposed to too little. The test there is obviousness.
7 That's where it takes place, not at this threshold.

8 JUSTICE SOTOMAYOR: Morse's code was not
9 obvious.

10 MR. JAKES: What is that?

11 JUSTICE SOTOMAYOR: Morse's code was not
12 obvious, and yet --

13 MR. JAKES: No, it wasn't.

14 JUSTICE SOTOMAYOR: As I understand that
15 case, the only thing patented was the use of his code
16 with respect to the telegraph machine that he proposed.
17 The Patent Office rejected -- maybe I am reading the
18 case wrong, but it rejected all of the claims except
19 those that related to the use of the code with a
20 particular machine.

21 MR. JAKES: It -- it does say used in
22 connection with telegraphy.

23 JUSTICE SOTOMAYOR: Of his claims --

24 MR. JAKES: Yes.

25 JUSTICE SOTOMAYOR: -- that was the only one

1 that was accepted, correct?

2 MR. JAKES: Well --

3 JUSTICE SOTOMAYOR: The same thing with --
4 well, Bell's patent was --

5 MR. JAKES: In Morse's claims, I believe it
6 was claim 8 was the one that was rejected, and the rest
7 of them were accepted. Claim 8 was the very broad claim
8 to transmitting information over a distance, however
9 accomplished.

10 JUSTICE SOTOMAYOR: Let's not skip over
11 that, because the rest of the claim in Bell related to
12 how to transmit over the wire, correct?

13 MR. JAKES: His disclosure did, but his
14 actual claim was interpreted as being using undulating
15 current to transmit sound, however that was
16 accomplished. It was very broad, and that's why --

17 JUSTICE SOTOMAYOR: And that was what was
18 rejected.

19 MR. JAKES: No. Bell's claim was not
20 rejected. That one was approved, yes. The Morse claim,
21 claim 8, was the broad claim that really we would
22 probably look at today as being -- as having inadequate
23 disclosure because --

24 JUSTICE SCALIA: Well, it was -- it was
25 transforming sound into electrical current and then at

1 the other end electrical current back into sound. I
2 mean it met the transformation test, didn't it?

3 MR. JAKES: It might have. It might have.

4 JUSTICE SCALIA: It clearly did.

5 MR. JAKES: Well, it's not that clear from
6 the Federal Circuit's transformation test whether that
7 would apply or not, because although the Federal Circuit
8 has said transformation of data might qualify, it said
9 it has to represent something physical, something -- a
10 real object. And sound doesn't necessarily have to be
11 that. Sound can be generated artificially. So --

12 JUSTICE SCALIA: Sound -- sound is not
13 physical, and electric current is not physical?

14 MR. JAKES: I think electric current is
15 physical.

16 JUSTICE SCALIA: Yes, I think so.

17 MR. JAKES: Yes.

18 JUSTICE SCALIA: Sound is, too.

19 MR. JAKES: It can be, but when it's
20 transmitted over a wire, it's not. It's something else.
21 It's an electrical current then.

22 JUSTICE SCALIA: Sound is not transmitted
23 over the wires. Sound has been transformed into
24 current, and current is transmitted over the wire and
25 then transformed back at the other end into sound.

1 MR. JAKES: Yes, and I would agree --

2 JUSTICE SCALIA: I think it clearly --
3 clearly would have been covered by -- by the test the
4 government --

5 MR. JAKES: I think that's more in the
6 nature of transmission, much like our data transmission.
7 You might transmit data in a packet without actually
8 changing the underlying data, and that should be allowed
9 as well.

10 If there are no questions, I'll reserve
11 the rest of my time. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Jakes.

14 Mr. Stewart.

15 ORAL ARGUMENT OF MALCOLM L. STEWART

16 ON BEHALF OF THE RESPONDENT

17 MR. STEWART: Mr. Chief Justice, and may it
18 please the Court:

19 Let me start by following up on the
20 discussion of the Morse and the telephone cases, because
21 it's certainly our view that those would come out the
22 same way under our test as -- as they actually did in
23 practice.

24 JUSTICE SCALIA: I certainly hope so.

25 MR. STEWART: Yes.

1 (Laughter.)

2 MR. STEWART: And, you know, Justice Scalia,
3 you mentioned how to win friends and influence people.
4 I think at a certain level of generality you could
5 describe both Dale Carnegie and Alexander Graham Bell as
6 people who devised methods of communicating more
7 effectively.

8 The reason that Bell's method was patentable
9 was that it operated in the realm of the physical. Bell
10 had devised a process implemented through machines by
11 which sound was transformed into electronic current.
12 Current was then transmitted over a distance and
13 transformed back into sound.

14 Innovations as to new techniques of public
15 speaking, new techniques of negotiations, techniques
16 that go to the substance of what is said may be
17 innovative. They may be valuable. They are not patent
18 eligible because they don't deal in the realm of the
19 physical.

20 So while the industrial processes that we
21 discussed at some length in our brief were at the time
22 of the framing the paradigmatic patent eligible
23 processes, they were -- they are not the only processes
24 that can be patented. In a --

25 JUSTICE ALITO: Near -- near the end of your

1 Brief, you argue that -- that the patent here is -- is
2 not -- is unpatentable on the independent ground that it
3 would pre-empt the abstract idea of hedging consumption
4 risk. If you -- if you are right about that, is this a
5 good case for us to get into these -- into the very
6 broad issue that Petitioner has raised?

7 MR. STEWART: I -- I think we would
8 certainly prefer to win on our primary ground, and let
9 me say a couple of things about that. First, we would
10 fairly vigorously resist the notion that the rule that
11 was announced by the Federal Circuit is rigid or
12 inflexible. That is, all that the Federal Circuit has
13 really said is that to have a patent-eligible process
14 you have to identify some link to a machine or a
15 transformation of matter. And the Federal Circuit has
16 said with respect to some processes the link to the
17 machine may be so attenuated, the machine part of the
18 process may be such a small segment of the process as a
19 whole, that this wouldn't be enough. But the Federal
20 Circuit said: We leave for another day the hard
21 questions that will arise when part of the process is
22 machine-implemented and another part is not.

23 And in order for the PTO and the Federal
24 Circuit to go about the business of devising more
25 precise rules as to when particular links to machines

1 are sufficient to create patent eligibility, we first
2 need to establish the -- the basic principle that some
3 link to a machine or transformation is necessary. So I
4 think we -- we have made the alternative argument in our
5 brief, and I think it is a basis for affirmance.

6 But if the Court decided the case on that
7 basis, we would lose at least the -- the limited clarity
8 that the Federal Circuit's opinion has provided; that
9 is, it would still be open to people in the future to
10 devise new contractual arrangements designed to allocate
11 risks, new methods of teaching antitrust, and --

12 JUSTICE SOTOMAYOR: How about if we say
13 something as simple as patent law doesn't cover business
14 methods, instead of what the Federal Circuit has begun
15 to say, which is technology is tied to a machine or a
16 transformation of the substance? But I have no idea
17 what the limits of that ruling will impose in the
18 computer world or the biomedical world. All of the
19 amici were talking about how it will destroy industries.
20 If we're unsure about that, wouldn't the safer practice
21 be simply to say it doesn't involve business methods?

22 MR. STEWART: I think that would be
23 incorrect, and it would create problems of its own.
24 That is, the -- the innovation that was held to be
25 patent eligible in State Street Bank was not a process.

1 The Federal Circuit was not construing the statutory
2 term "process." It was construing the statutory term
3 "machine." And it said, in essence, a computer that has
4 been programmed to perform various calculations in
5 connection with the operation of this business is a
6 machine.

7 It went on to say the opposing party in that
8 case had not raised any objection under section 102 or
9 103, and, therefore, the Federal Circuit --

10 JUSTICE SOTOMAYOR: No ruling in this case
11 is going to change State Street --

12 MR. STEWART: Well --

13 JUSTICE SOTOMAYOR: -- because it wasn't
14 looking at process or the meaning of "process." It was
15 looking at something else.

16 MR. STEWART: Well, again, I think that the
17 invention that was held to be patent eligible in State
18 Street is commonly described as a business method, even
19 though it was held to be patent eligible as a machine
20 rather than as a process.

21 So, to say that business methods are
22 categorically ineligible for patent protection would
23 eliminate new machines, including programmed computers,
24 that are useful because of their contributions to the
25 operation of businesses. And similarly, the court --

1 the Federal Circuit in other cases has held that a claim
2 to new and innovative computer software may be held
3 patentable as a process, as a method of accomplishing
4 particular tasks through the use of a computer, and
5 those might be business-related tasks. So, to say that
6 business methods were ruled out would itself be a fairly
7 sweeping holding.

8 JUSTICE SCALIA: Also you could say business
9 methods apart from machines are not patentable. How
10 about that?

11 MR. STEWART: If the Court said that in the
12 limited area of business methods, if there is no machine
13 or transformation, there is no patent eligibility --

14 JUSTICE BREYER: Suppose you say this. I'm
15 just testing things out. Start with Diehr. I
16 mean -- and Diehr has these words in it, similar words;
17 it just says "e.g." -- are you following me?

18 MR. STEWART: Yes.

19 JUSTICE BREYER: Okay. Now, you say what is
20 it they have done in this case in the Federal Circuit?
21 They have pulled back. That's a mood. That's a mood.
22 They've pulled back insofar as they are pulling back
23 from business methods, not machines, dah, dah, dah, dah,
24 dah. Okay? You say we see no problem with that.

25 Now, they have left much unresolved. One,

1 transformation; how broad or narrow is that? We don't
2 know. Many people's problems will be solved if it's
3 either broad on the one hand or narrow in the other.

4 Two, are you automatically patented -- in
5 the patent statute, if you just sort of reduce this to a
6 machine by adding a computer on at the end? They've
7 flagged that as a problem. They haven't answered it.
8 Could there ever be a situation where it doesn't meet
9 this test but still is patentable? We're not sure.

10 MR. STEWART: Let me take those points --

11 JUSTICE BREYER: Yes.

12 MR. STEWART: -- in the order that you made
13 them.

14 JUSTICE BREYER: Do you see what I'm trying
15 to do? I'm trying to note the things that have been
16 raised in these 80 briefs insofar as possible, say
17 there's a lot there for the future that we can't really
18 decide, but say as a pull back, okay.

19 MR. STEWART: Let me address those points in
20 order. The first thing is that in Diehr when you had
21 the "e.g." cite, it was "e.g., transforming an article
22 into a different" state of -- state or thing. And I
23 think the obvious inference is "e.g." was used because
24 the other prong of the machine-or-transformation test is
25 use as a machine. That is, in the context of Mr.

1 Morse's invention or Mr. Bell's invention, there is
2 transformation of a sort, but it wouldn't naturally be
3 characterized as transformation of matter.

4 Those things were held to be patent eligible
5 not because they transformed matter, but because they
6 involved the use of a machine. And so, what the Court
7 in Diehr said transformation of a matter or an article
8 into a different state or thing is the clue to the
9 patentability of a process that doesn't involve a
10 particular machine.

11 And the -- the type of process it had in
12 mind was the process that was described in Corning v.
13 Burden or the process in Cochrane v. Deener, situations
14 in which an individual had devised a method of, in one
15 sense -- one case, it was manufacturing flour, and in
16 another case it was rolling puddle balls, of
17 manufacturing items. And that person said, here is the
18 series of steps that you have to go through, but it's
19 not essential that you use any particular tool or
20 machine for each of these steps. That was why the
21 word --

22 CHIEF JUSTICE ROBERTS: Mr. Stewart, I
23 thought I understood your argument up until the very
24 last footnote in your brief. And you say this is not --
25 simply the method isn't patentable because it doesn't

1 involve a machine. But then you say but it might be if
2 you use a computer to identify the parties that you are
3 setting a price between and if you used a microprocessor
4 to calculate the price. That's like saying if you use a
5 typewriter to type out the -- the process, then it is
6 patentable. I -- I -- that takes away everything
7 that you spent 53 pages establishing.

8 MR. STEWART: Well, I guess there -- there
9 were two different places, I believe, at which we
10 identified ways in which this sort of hedging scheme
11 might be made patent eligible. The first is we
12 described a hypothetical interactive Website in which
13 people -- parties and counterparties could essentially
14 find each other by the computer and could agree to terms
15 on that basis. And in that situation, the -- the
16 computer would be at the heart of the innovation. It
17 would be --

18 CHIEF JUSTICE ROBERTS: No, no. That's just
19 saying instead of looking at the -- in the Yellow Pages,
20 you look on the computer. And that makes all the
21 difference to you?

22 MR. STEWART: I think an -- an interactive
23 computer technique, one in which you sign on and can
24 find people without tracking them down specifically, can
25 simply identify yourself on the Website as somebody

1 who is interested in engaging in a particular
2 transaction and a potential counterparty can find you,
3 is different from the Yellow Pages.

4 But I guess the fundamental point I would
5 make is -- and this is really responsive to the second
6 part of Justice Breyer's question -- I think it is both
7 a virtue and a vice of the test that the Federal Circuit
8 has announced and that we are advocating that it doesn't
9 solve all the hard questions. That is, the Federal
10 Circuit has said since this particular patent applicant
11 didn't identify any machine or any transformation that
12 would be necessary to the accomplishment of its method,
13 that person is out of luck, and, therefore, it's
14 inappropriate for us to go on to decide kind of the
15 precise level of substantiality that a machine or
16 transformation must play --

17 CHIEF JUSTICE ROBERTS: But if you look at
18 your footnote, that involves the most tangential and
19 insignificant use of a machine. And yet you say that
20 might be enough to take something from patentability to
21 not patentable?

22 MR. STEWART: And all we've said is that it
23 might be enough; that is, hard questions will arise down
24 the road as to where do you draw the line, to what
25 extent must the machine or the transformation be

1 central --

2 CHIEF JUSTICE ROBERTS: So you think it's a
3 hard question. If you develop a process that says look
4 to the historical averages of oil consumption over a
5 certain period and divide it by 2, that process would
6 not be patentable. But if you say use a calculator,
7 then it -- then it is?

8 MR. STEWART: I think if it's simply using a
9 calculator for its pre-existing functionality to crunch
10 numbers, very likely that would not be enough. What
11 we see in some analogous areas is that the computer will
12 be programmed with new software. It will be given
13 functionality it didn't have before in order to allow it
14 to perform a series of calculations, and that gets
15 closer to the line. And, again --

16 CHIEF JUSTICE ROBERTS: But your
17 footnote -- I don't mean to dwell on it -- it says to
18 identify counterparties to the transactions. So that if
19 what you're trying to get is the -- the baker who sells
20 bread, because you are going to hook him up with the
21 grocer who sells, you know, in the grocery store, if you
22 punched in, in your search station -- you know, give me
23 all the bakers in Washington -- that would make it
24 patentable?

25 MR. STEWART: Again, we are -- we are not

1 saying it would be patent eligible. We would have to
2 review those facts, and the PTO would have to review
3 those facts in the context of an actual application.

4 I guess the point I'm trying to make is
5 simply that we don't want the court, for instance, in
6 the area of software innovations or medical diagnostic
7 techniques to be trying to use this case as the vehicle
8 for identifying the circumstances in which innovations
9 of that sort would and would not be patent eligible,
10 because the case really doesn't present any -- any
11 question regarding those technologies. And, therefore,
12 we --

13 JUSTICE SOTOMAYOR: Now, if it veers the
14 other way, which is by saying that we exclusively rely
15 on the machine-or-transformation test, that we're
16 precluding applications of the patent law in those
17 fields, the things we can't imagine. Once you announce
18 an exclusive test, you're shoe-horning technologies that
19 might be different.

20 MR. STEWART: I guess I would say a couple
21 of different things. The first is that it seems
22 unlikely, even with new and rapidly emerging
23 technologies, that somebody would come up with a system
24 that seems for patent purposes analogous to the
25 inventions that have been patent eligible in the past

1 that didn't involve any machine and that didn't involve
2 any transformation.

3 Having said that, I would note that in both
4 Benson and in Flook, the Court held open the possibility
5 that some unforeseen event could take place that
6 would -- as to which the application would be patent
7 eligible, even though the machine-or-transformation
8 test --

9 JUSTICE SOTOMAYOR: All right. So help us
10 with a test that doesn't go to the extreme the Federal
11 Circuit did, which is to preclude any other items,
12 something we held open explicitly in two other cases, so
13 we would have to backtrack and say now we are ruling
14 that we were wrong, and still get at something like
15 this?

16 MR. STEWART: Well, I think the Court could
17 say -- could do essentially what was done in Benson and
18 Flook, namely acknowledge that there had never been a
19 case up to this point in which a process had been held
20 patent eligible that didn't involve a machine or a
21 transformation. It could leave open the possibility
22 that some new and as yet unforeseen technology could
23 necessitate the creation of an exception.

24 But -- and the point we would also make is
25 this seems to be a very unlikely candidate for such an

1 exception, because the hedging method that Petitioners
2 have -- for which they have sought a patent is in no
3 sense different in kind from risk management techniques
4 that have been undertaken for centuries.

5 JUSTICE SOTOMAYOR: Well, but that -- that
6 goes back to, not 101, but 102 and 103. That goes back
7 to obviousness or the standard weeding mechanisms for
8 patents.

9 MR. STEWART: Well, this may or may not be a
10 novel or nonobvious method. But even if we assume that
11 this is nonobvious for purposes of section 103, in that
12 it represents a sufficient advance over the prior art,
13 that people skilled in the art would not necessarily
14 have come up with it, it still is a different in kind
15 from risk management techniques that have taken place in
16 this country for -- for 200 years. It is -- it is --

17 JUSTICE GINSBURG: Mr. Stewart, did you --
18 did the government put forward this
19 machine-or-transformation test? Was that your test, or
20 was it the Federal Circuit's on its own?

21 MR. STEWART: The Federal Circuit, sua
22 sponte, set the case for hearing en banc. I believe the
23 case had been argued to a panel, but had not been
24 decided, and the Federal Circuit set the case for
25 reargument en banc, posed a number of questions to

1 the -- the parties and the government did advocate the
2 machine-or-transformation test.

3 JUSTICE GINSBURG: Tell me what your --

4 CHIEF JUSTICE ROBERTS: I'm sorry. Did or
5 did not?

6 MR. STEWART: It did. It did advocate the
7 machine-or-transformation.

8 JUSTICE GINSBURG: You did -- and if you
9 read Judge Mayer's opinion, it has a simplicity to it.
10 It says, if it's technology, then its within the realm
11 of patent, and if it's not technology, it isn't. If
12 it's based on science or technology -- and that seems to
13 be what is used in other places.

14 MR. STEWART: I don't know that our test --
15 I think our test, in a sense, has a shorthand version of
16 that. I don't know that focusing the inquiry directly
17 on whether technology is involved would make the inquiry
18 easier, and that is so for two reasons.

19 First, people could dispute whether
20 particular advances are properly regarded as
21 technological advances, and, second, we would still have
22 the difficult problems that the Chief Justice has
23 referred to, where you have a process that is described
24 as involving technology at some step along the way, and
25 courts will still have to make the determination, is

1 that a sufficiently substantial step to make the
2 process, as a whole, a technological one.

3 So I don't think that, by adopting a
4 technological arts test, the Court would avoid the
5 difficulties that it has appropriately identified with
6 the machine-or-transformation test.

7 The other thing I would say about the
8 machine-or-transformation test is this is not a
9 government position of recent vintage; that is, the
10 government's brief to this Court in *Gottschalk v. Benson*
11 -- or its reply brief, which was filed around 1971 --
12 basically said, although this Court has never announced
13 machine or transformation of the test, that is the
14 principle that can be abstracted from the totality of
15 the Court's decisions.

16 JUSTICE KENNEDY: Was the *State Street* case
17 a machine-or-transformation test?

18 MR. STEWART: It would --

19 JUSTICE KENNEDY: You talk about the *State*
20 *Street* case in your brief, and it's complicated because
21 of the Federal statute that followed it. If you had
22 just the facts of *State Street* before us, and forgetting
23 the Federal statute was enacted after it, how would you
24 decide this case?

25 MR. STEWART: Oh, it would come out the same

1 way. I mean, State Street Bank --

2 JUSTICE KENNEDY: That's what I thought.

3 And is it -- is it machine or transformation, in your
4 view?

5 MR. STEWART: Well, it was machine -- that
6 is, in State Street Bank, the claim was not to a process
7 within the meaning of section 101. The claim was not to
8 a method of accomplishing things by means of a computer,
9 which would be, potentially, a process. It was to the
10 computer itself, the programmed computer, that the
11 innovation in State Street Bank was that the devising of
12 new computer programs that allowed the computer to
13 perform various tasks in association with the carrying
14 out of the hub-and-spokes investment -- investment
15 method. And, certainly --

16 CHIEF JUSTICE ROBERTS: So what did that --
17 what did that transform?

18 MR. STEWART: It didn't transform anything,
19 but it would fit -- the transformation part would be
20 irrelevant because the machine-or-transformation test
21 is, in our view, the appropriate rubric to apply in
22 construing the statutory term process, that is, when the
23 person doesn't say, I have invented a new machine, but,
24 rather, says, I've identified a new process for
25 accomplishing things.

1 If a person claims to be -- to have invented
2 a new machine, then that -- it is either a machine or it
3 isn't. A computer is certainly a machine. Really, the
4 only -- I think the only --

5 JUSTICE STEVENS: I don't understand how
6 that can be a patent on a machine if the only thing
7 novel is the process that the machine is using.
8 Isn't -- isn't the question -- really, the question
9 there was whether the new process was patentable.

10 MR. STEWART: Well, I think what -- the
11 argument that the other side, the person challenging the
12 patent in State Street could have made, but apparently
13 didn't, was the person could have said, of course, the
14 computer is a machine, but a computer programmed with
15 new software to perform different functions is not a new
16 machine. It's not a different machine from the one
17 that has always -- not always, but that has already
18 existed, and therefore, it doesn't satisfy section 1 or
19 section -- 102 or section 103, but that --

20 JUSTICE KENNEDY: Well, that was one of the
21 reasons I asked you about it, I suppose. Just looking
22 at the whole case, do you think the State Street
23 holding -- the State Street invention was patentable?

24 MR. STEWART: It was -- the way I would put
25 it is: The State Street Bank analysis of the question

1 that was actually presented to it was correct; that is,
2 the argued was made the programmed computer is
3 patentable as a machine --

4 JUSTICE KENNEDY: How would you come out in
5 the State Street case today, if all of the arguments
6 were made under your test?

7 MR. STEWART: Well, under our test, we would
8 come out the same way because the computer would be a
9 machine. The only question would be whether the
10 programming of the computer with new software caused it
11 to be a patentable different machine from the one that
12 existed previously.

13 Now -- now, we do think that software
14 innovations can have the effect of causing the computer
15 to be a different, special purpose computer, as the
16 phrase --

17 JUSTICE STEVENS: I'm sorry. I must be
18 awfully stupid. You say it would come out the same way.
19 In the same way the court did or this way you argued?

20 MR. STEWART: I think the same -- the
21 Federal Circuit's decision in State Street would come
22 out the same way under our test.

23 JUSTICE STEVENS: And you think it should?
24 You think it should?

25 MR. STEWART: Yes, but, again, the point I

1 would emphasize --

2 JUSTICE STEVENS: I don't understand why
3 that isn't just the application of a process, which --
4 which is not itself patentable subject matter, to a
5 particular machine that can use the process --

6 JUSTICE KENNEDY: That's -- that's a problem
7 I have.

8 MR. STEWART: Well, I guess -- let me
9 backtrack. If you look at the text of the statute --
10 it's reproduced at page 2 of the Blue Brief -- and it
11 says -- it's right in the middle of the page. "Whoever
12 invents or discovers any new and useful process,
13 machine, manufacture, or composition of matter is
14 potentially entitled to" --

15 JUSTICE BREYER: So I thought you were
16 saying that the correct argument for the people
17 attacking the patent in that case was to say, this is
18 not a machine. The machine there is a computer. This
19 is a program that changes switches, and that is a
20 different process for the use of the machine.

21 Now, whether that process is or is not
22 patentable depends upon a lot of things that we don't
23 have to go into in this case. Is that right?

24 MR. STEWART: I don't -- no. I don't think
25 that is what I was saying.

1 JUSTICE BREYER: Okay. Well, then what is
2 right?

3 MR. STEWART: What I was saying is that --
4 and I guess the -- the first point I would make is, when
5 somebody claims to have invented a new machine, the
6 transformation test really has nothing to do with the
7 inquiry because a -- a better television or a better DVD
8 player can be patented as a machine, even though
9 transformation of matter is no --

10 JUSTICE STEVENS: It's not on a computer,
11 which the only difference from the old computer is it's
12 using a new program. You can't say that's a new
13 machine.

14 MR. STEWART: Well, but my -- I think --
15 first, I think you can because I think if you -- if you
16 improved the hardware of the computer in order to enable
17 it to perform --

18 JUSTICE STEVENS: But that patent didn't
19 require any change in the hardware, if I remember it
20 correctly.

21 MR. STEWART: But I -- but I think the
22 argument that has been made with success -- and PTO
23 agrees with this -- is that programming a computer by
24 means of software to produce -- to perform new functions
25 can create a novel --

1 JUSTICE BREYER: But then all we do is every
2 example that I just gave, that I thought were examples
3 that certainly wouldn't be patented, you simply patent
4 them. All you do is just have a set of instructions for
5 saying how to set a computer to do it. Anyone can do
6 that. Now, it's a machine.

7 So all the business patents are all right
8 back in. Now, that -- what I think we were looking
9 for was -- or at least I was -- was why that isn't so,
10 and how you are going to later, down the road, deal with
11 this situation of all you do is you get somebody who
12 knows computers, and you turn every business patent into
13 a setting of switches on a machine because there are
14 no businesses that don't use those machines.

15 MR. STEWART: Well, first of all the only
16 ruling that we're -- I backtrack a bit, to say, we
17 opposed cert in this case because we recognized that
18 there are difficult problems out there in terms of
19 patentability of software innovations and medical
20 diagnostic --

21 JUSTICE KENNEDY: You thought we -- you
22 thought we'd mess it up.

23 MR. STEWART: I didn't think you would --
24 (Laughter.)

25 MR. STEWART: We didn't think the Court

1 would mess it up. We thought that this case would
2 provide an unsuitable vehicle for resolving the hard
3 questions because the case doesn't involve computer
4 software or medical diagnostic techniques, and
5 therefore, we thought the Court would arrive at the
6 position that I think at least some members are feeling
7 that you have arrived at, that you will decide this
8 case, and most of the hard questions remain unresolved.

9 And, frankly, we think that's true.

10 JUSTICE GINSBURG: But this case could be
11 decided without making any bold step --

12 MR. STEWART: Again, I don't -- I don't
13 think it would be a bold step to say that
14 machine or transformation is the test. That is, we have
15 gone for more --

16 JUSTICE GINSBURG: But even the Federal
17 Circuit didn't say it was the test. It said it is for
18 now. We know that things that we haven't yet
19 contemplated may be around the corner, and when they
20 happen, we will deal with them.

21 MR. STEWART: And we would -- we would be
22 entirely content with a ruling like that. And we would
23 say that the claimed hedging method here is not the sort
24 of Space Age innovation that might cause Justices to
25 say: This is just different in kind from anything that

1 the drafters of the patent statute could have imagined.

2 The other point I would make about the
3 programmed computer is, to follow up on my television
4 and DVD example, that when you claim a machine or a
5 manufacture, as the committee reports to the 1952 Act
6 said, those words are broad. They encompass everything
7 under the sun that is made by man. And so a television
8 is indisputably a machine, even though its function is
9 not to transform matter. It's only when you get to the
10 term "process" that you are left with -- that the
11 machine-or-transformation test kicks in.

12 And really, the argument on the other side
13 is: The term "process" in ordinary speech is extremely
14 broad. It can literally be read to encompass any series
15 of steps, whether or not linked to technology, whether
16 or not linked to a machine or transformation. And the
17 other side argues you should construe it that way in the
18 patent statute.

19 I guess the -- the three reasons we would
20 say that's not so are, first, under the canon of
21 noscitur a sociis, it's appropriate to construe the
22 term "process" in conjunction with the other terms.
23 Those other terms are broad, but they all refer to
24 physical objects that don't exist in nature and are
25 created by man. And a huge array of very productive,

1 innovative activity doesn't culminate in the creation of
2 any new physical substance, and the word "process"
3 surely was intended to add something, but it would be
4 quite strange to construe the word "process" to
5 encompass the whole range of human endeavor when the
6 other words are limited to the creation of new things in
7 the physical.

8 The second thing is that when this Court in
9 the past has explained the term "process," it's always
10 linked it to the operation of machines, as in the
11 telephone cases and in Morse, or to the transformation
12 of matter in ways that may not be dependent on a
13 particular machine.

14 And the third thing I would say is that in a
15 sense, there's a strong "dog that didn't bark in the
16 night" quality to our argument; that is, even though the
17 Court has never said in so many words that a method of
18 allocating risk by contract is a patent-eligible
19 process, the economic history of this country really
20 would have been fundamentally different if it had been
21 believed from the outset that innovations of this
22 character could be patented and potential competitors
23 could be foreclosed from engaging in the same method.

24 If the Court has nothing further?

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Jakes, you have 4 minutes remaining.

2 REBUTTAL ARGUMENT OF J. MICHAEL JAKES

3 ON BEHALF OF THE PETITIONER

4 MR. JAKES: Thank you, Mr. Chief Justice.

5 The Federal Circuit did announce this test
6 as the sole test for all processes. It said it applied
7 no matter what the process was. So we do have to face
8 these difficult questions.

9 I think the question can be avoided, because
10 we don't need a rigid test of this type based on
11 machine or transformation. The question we're looking
12 at and should be looking at is: Are we trying to patent
13 an abstract idea?

14 Now, the government has gone farther than
15 that and really wants to exclude methods of organizing
16 human behavior. I think that's the way they describe
17 it. That's really the business method rejection in
18 other words. And I think that runs contrary to section
19 273 of the statute, which recognized that there were
20 business methods that could fall within the patent
21 statute, and as a result, prior user rights should be
22 granted.

23 To speak briefly about the State Street Bank
24 case, that was a type of business method that was
25 implemented on a machine. The Federal Circuit said it

1 didn't matter. They weren't looking at whether it was
2 in machine form or method form. Their reasoning would
3 have applied the same either way, and to do otherwise
4 would be to place form over substance. And in a sense,
5 that's what some of the transformation debate is about.
6 It's form over substance. Why should transformation be
7 the key? The key should be: Is it a practical
8 application of a useful result?

9 Our method, we believe, is a practical
10 application. As the Patent Office has said, it does
11 involve physical steps. I think that was one of the
12 clues that the patent office has relied on in saying
13 whether or not something is abstract. Since it is not
14 an abstract method, it's rooted in the real world, we
15 think it should be eligible to have its examination at
16 the Patent Office and it shouldn't be thrown out on an
17 arbitrary test.

18 CHIEF JUSTICE ROBERTS: The -- the physical
19 step that your process involves is picking -- picking up
20 the phone and calling people on both sides of the
21 transaction.

22 MR. JAKES: It could be. It also requires
23 the sale of a commodity at a fixed price. That is
24 something that actually takes place in the real world,
25 as opposed to a mental process within somebody's head.

1 Purely mental processes that are done just solely in
2 someone's mind, I think we all agree, those are not
3 patent-eligible. That's not our method.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

6 (Whereupon, at 1:55 p.m., the case in the
7 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: BERNARD L. BILSKI AND RAND A. WARSAW, Petitioners, v. DAVID J. KAPPOS, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Raymond R. Heer *JS*

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