
Alice Analysis: Practical Guidance From a Decade of Eligibility Cases – Part I

By Reilley P. Keane

It has been about ten years since the landmark Supreme Court decision in *Alice Corp. v. CLS Bank International* (published in 2014), laying out a two-step analysis for determining whether a patent claim recites eligible subject matter.¹

Step one involves examining whether the claim is directed to an abstract idea, defined by the U.S. Patent & Trademark Office (USPTO) by the enumerated groupings of mathematical concepts (i.e., mathematical relationships, formulas, equations, calculations, or the like), certain methods of organizing human activity (i.e., economic practices, commercial/legal interactions, managing personal behavior, or the like), or mental processes (i.e., observations, evaluations, judgements, or the like that may be performed in the human mind).² If the claim is not directed to an abstract idea, the claim recites patent eligible subject matter (though eligibility does not necessarily equate to allowability, and the claim may be rejected by the USPTO nonetheless based on a variety of other qualifications including novelty or non-obviousness).

In the alternative, the step two analysis is performed, which includes determining whether the claim includes elements that amount to significantly more than the abstract idea itself.³ If the claim prevails in reciting significantly more than the abstract idea, it is found eligible; otherwise it is ineligible.

While the *Alice* test (also frequently referred to as the *Alice/Mayo* test, as a nod to the Supreme Court's opinion in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, from which the judges in *Alice* heavily pulled), provided a basic framework for determining patent eligibility, it remained vague and open to numerous interpretations at each step (i.e., what do we really mean by “directed to,” or “significantly more?”).⁴ Over the past decade, the U.S. Court of Appeals for the Federal Circuit has issued a myriad of opinions providing context for this test,

which have clarified the *Alice* test over time. It is vital that practitioners understand these decisions/developments, and how they may be used to inform strategy for drafting and prosecuting patent applications. Techniques that may have been successful at the dawn of the decade might no longer be successful; likewise, Federal Circuit precedent sheds light on new techniques that may be advantageous.

This article takes a deep dive into eligibility-related caselaw of the last decade, and discusses my personal “Top 10” decisions from the Federal Circuit. More specifically, the list includes, in my opinion, the ten cases that are most useful for practitioners in prosecution strategy, including corresponding details and takeaways from each decision. In particular, practitioners may use these takeaways as a blueprint for structuring specifications and claims during the initial drafting process, and for handling subject matter eligibility rejections during prosecution.

The first five cases are discussed in this part of this article; the remainder will be discussed in the conclusion, to be published in the next issue of the *Intellectual Property & Technology Law Journal*.

***Digitech Image Techs v. Electronics for Imaging* (Federal Circuit – July 2014)**

Several weeks after the decision in *Alice*, the Federal Circuit addressed whether or not claims directed to “a device profile and a method for creating a device profile within a digital image processing system,” passed muster under the *Alice* test, providing one of the first patent eligibility analyses in the post-*Alice* world.⁵ More specifically, this digital image processing system was configured to capture images, alter them, and transfer the altered images (i.e., as a digital camera would capture and transfer images for output at a printer).⁶

Digitech requested reversal of the district court's decision, asserting that the court erred on the following two findings:

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- (1) That the device profile claims are “directed to a collection of data that lacks tangible or physical properties,” and
 - (2) The method claims “encompass an abstract idea and are not tied to a specific machine or apparatus.”⁷

With regard to the first contention, the independent device profile claims are reflected below:

1. A device profile for describing properties of a device in a digital image reproduction system to capture, transform or render an image, said device profile comprising:

first data for describing a device dependent transformation of color information content of the image to a device independent color space; and

second data for describing a device dependent transformation of spatial information content of the image in said device independent color space.

26. A device profile for describing properties of a device in a digital image reproduction system to capture, transform or render an image, said device profile comprising data for describing a device dependent transformation of spatial information content of the image to a device independent color space, wherein through use of spatial stimuli and device response for said device, said data is represented by spatial characteristic functions.⁸

Although these claims describe a device profile that includes two sets of data – one for color information and the other for spatial information – the Federal Circuit found that the claims lacked discussion of “any tangible embodiment of this information” or “any tangible part of the digital processing system.”⁹ Thus, because the claims were instead directed to information in a non-tangible form, the device profile claims were affirmed as ineligible. Notably, Digitech’s argument that the profile was eligible because it comprised either “hardware or software within a digital image processing system,”

also failed, as the position was not found to be supported in the claim language.

With regard to the second contention, the representative independent method claim is shown below:

10. A method of generating a device profile that describes properties of a device in a digital image reproduction system for capturing, transforming or rendering an image, said method comprising:

generating first data for describing a device dependent transformation of color information content of the image to a device independent color space through use of measured chromatic stimuli and device response characteristic functions;

generating second data for describing a device dependent transformation of spatial information content of the image in said device independent color space through use of spatial stimuli and device response characteristic functions; and

combining said first and second data into the device profile.¹⁰

In essence, this claim recites combining two data sets into a device profile. The Federal Circuit thus found that the method claims merely recited an “abstract process of gathering and combining data that does not require input from a physical device.”¹¹ The court further found that use of a “digital image reproduction system” in the claim’s preamble was insufficient to limit claim scope as it merely stated the intended use of the invention, and thus punted on the decision of whether tying the claimed method to an image processor would suffice as patent eligible subject matter.¹² The Federal Circuit thus held that the asserted claims were directed to an abstract idea and were not patent eligible.¹³

Despite the holding that these claims were ineligible, Digitech teaches us important lessons in what to do:

- (1) Ensure that your claimed features are explicitly tied into tangible hardware/software steps;

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- (2) In doing so, do not rely solely on the preamble (particularly where that preamble may simply recite an intended use of the claimed method); and
 - (3) Avoid claim language that is “so abstract and sweeping” as to cover any use of a particular claim element (yes, broad can be bad!).¹⁴

Most (if not all) seasoned practitioners today would take one look at the *Digitech* claims and know the eligibility outcome from the get-go. Hindsight is always 20/20, and each year following the *Alice* decision, we’ve gained a broader understanding of what is sufficient to satisfy the eligibility test. With this case being decided merely weeks after the decision in *Alice*, the decision had no impact on the claim drafting process. Unlike the drafters in *Digitech*, however, practitioners today have the opportunity to understand how the *Alice* test has been interpreted over the last decade, and should inevitably do so to most strategically draft claims that pass muster against eligibility challenges.

***DDR Holdings, LLC v. Hotels.com*
(Federal Circuit - December 2014)**

Several months after the decision in *Digitech*, the Federal Circuit revisited the issue of subject matter eligibility – particularly in the context of software-related inventions.¹⁵ *DDR*’s patent at issue was directed towards a web page that combined third party content (i.e., a merchant’s product information) with visual content (i.e., logos, background colors, fonts, or the like) of a host website. National Leisure Group, Inc. (NLG) – one of the defendants/appellants in this case – asserted that the district court erred in finding that the claims recited patent eligible subject matter.

Representative claim 19 recites:

A system useful in an outsource provider serving web pages offering commercial opportunities, the system comprising:

- (a) a computer store containing data, for each of a plurality of first web pages, defining a plurality of visually perceptible elements, which visually perceptible elements correspond to the plurality of first web pages;

- (i) wherein each of the first web pages belongs to one of a plurality of web page owners;
- (ii) wherein each of the first web pages displays at least one active link associated with a commerce object associated with a buying opportunity of a selected one of a plurality of merchants; and
- (iii) wherein the selected merchant, the out-source provider, and the owner of the first web page displaying the associated link are each third parties with respect to one other;
- (b) a computer server at the outsource provider, which computer server is coupled to the computer store and programmed to:
 - (i) receive from the web browser of a computer user a signal indicating activation of one of the links displayed by one of the first web pages;
 - (ii) automatically identify as the source page the one of the first web pages on which the link has been activated;
 - (iii) in response to identification of the source page, automatically retrieve the stored data corresponding to the source page; and
 - (iv) using the data retrieved, automatically generate and transmit to the web browser a second web page that displays: (A) information associated with the commerce object associated with the link that has been activated, and (B) the plurality of visually perceptible elements visually corresponding to the source page.¹⁶

The Federal Circuit emphasized that the eligibility waters remained murky, noting that the line separating patent eligible inventions and patent ineligible abstract concepts is not always clear, and that in *Alice*, the Supreme Court did not “delimit the precise contours

of the ‘abstract ideas’ category.”¹⁷ Nonetheless, the Federal Circuit waded into these waters and began its analysis. The Federal Circuit asserted that the claims did not merely recite the performance of known business practices using the internet, as NLG alleged. Rather, “the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks,” – specifically the problem of retaining website visitors who, upon clicking an advertisement on a host website, would otherwise be transported away from the original website.¹⁸ As provided in claim 19, the claimed features provide a solution to this problem, whereby upon clicking an advertisement on a host website, users are directed to an automatically generated hybrid web page that provides information related to the advertisement along with “look and feel” elements of the host website.¹⁹

The Federal Circuit also emphasized that the claims did not “broadly and generically claim ‘use of the Internet’ to perform an abstract business practice (with insignificant added activity),” and instead the claims “specify how interactions with the Internet are manipulated to yield a desired result – a result that overrides the routine and conventional sequence of events ordinarily triggered by the click of a hyperlink.”²⁰ Of particular note in this analysis is that the limitations of the claims were taken together as an ordered combination.²¹

Furthermore, the claims were found to recite a specific way to automate composite web page creation that did not attempt to preempt every application of the idea of making two web pages appear visually similar.²² As such, the Federal Circuit found that the claimed features constituted more than a drafting effort to monopolize the alleged abstract idea.²³ In view of the above, the Federal Circuit found the claims to recite patent eligible subject matter and affirmed the district court’s ruling.²⁴

Despite a handful of other patent eligibility challenges at the Federal Circuit, since the *Alice* decision, none had been decided in favor of patent eligibility – rather, the claims at issue in each case were found to include patent ineligible subject matter. DDR reversed this trend, and provided an initial example of patent eligible subject matter in the post-*Alice* world, thus providing an initial roadmap for obtaining patent eligible subject matter (particularly in the software space). Much of this roadmap remains relevant today – of paramount importance is the idea of rooting a

claimed solution in computer technology to overcome a technical problem specific to the claimed technology. Additionally, this case illustrates the importance of carefully crafting claims to recite specific features that, when considered in combination, go beyond a routine sequence of events and yield a desired result.

BASCOM Global Internet Services, Inc. v. AT&T Mobility LLC (Federal Circuit – July 2016)

In 2016, BASCOM appealed the grant of a motion to dismiss by the District Court for the Northern District of Texas, alleging that the ordered combination of limitations was sufficient to satisfy the second step of the *Alice* test, thus establishing eligibility of their claims.²⁵ BASCOM’s patent described a software tool that inspected URL access requests, and applied filtering mechanisms accordingly (i.e., blacklisting, whitelisting, word screening or the like) at a remote ISP server.²⁶ In particular, the patent noted that by doing so, it combined advantages of known filtering tools, while avoiding certain drawbacks such as being installed on “individual end-user hardware and operating systems” or “tied to a single local area network or a local server platform.”²⁷ For example, representative claim 1 recites:

A content filtering system for filtering content retrieved from an Internet computer network by individual controlled access network accounts, said filtering system comprising:

a local client computer generating network access requests for said individual controlled access network accounts;

at least one filtering scheme;

a plurality of sets of logical filtering elements; and

a remote ISP server coupled to said client computer and said Internet computer network, said ISP server associating each said network account to at least one filtering scheme and at least one set of filtering elements, said ISP server further receiving said network access requests from said client computer and executing said associated filtering scheme utilizing said associated set of logical filtering elements.²⁸

BASCOM primarily relied on three arguments in favor of eligibility at the district court.

First, like the claims in *DDR Holdings*, BASCOM argued that the claims addressed a computer network problem with a solution entirely rooted in computer technology.

Second, BASCOM argued that “filtering internet content,” the alleged abstract idea, was not longstanding or fundamental at the time of the invention.

Finally, BASCOM argued that even if the claims were found to be directed to an abstract idea (i.e., using the first step of the *Alice* test), the ordered combination of claim limitations recites a patent eligible inventive concept – particularly a “special ISP server that receives requests for Internet content, which the ISP server then associates with a particular user and a particular filtering scheme and elements.”²⁹ The district court disagreed on each point, and found the claims ineligible.

On appeal, the Federal Circuit agreed that the claims were directed to “filtering content,” and that this constitutes “an abstract idea because it is a longstanding, well-known method of organizing human behavior.”³⁰ The Federal Circuit acknowledged that the claims presented a close call in characterizing what they are “directed to,” in the *Alice* step one analysis, and thus further consideration is needed in step two.³¹

Specifically, the Federal Circuit agreed that the claimed limitations, when examined individually, are not themselves inventive.³² However, it disagreed with the district court’s analysis on the ordered combination of limitations, asserting that “[a]s is the case here, an inventive concept can be found in the non-conventional and non-generic arrangement of known, conventional pieces.”³³ Rather than merely reciting the abstract idea of filtering content along with a requirement to perform it on the internet or on a set of generic components, or preempting all ways of filtering content on the internet, the Federal Circuit found that the claims “recite a specific discrete implementation of the abstract idea of filtering content” that provides a technical improvement over prior art ways of filtering such content. Particularly, the Federal Circuit recognized that unlike prior art solutions, the claimed solution provided a “filter implementation versatile enough that it could be adapted to many different users’

preferences while also installed remotely in a single location.”³⁴

Like the claims in *DDR*, which did not claim a business method per se despite claiming a technical solution to retain customers, the claims at issue in *Bascom* did not simply claim the idea of filtering content as applied to the internet.³⁵ Rather, the Federal Circuit found that the claims recited “a technology-based solution (not an abstract-idea-based solution implemented with generic technical components in a conventional way) to filter content on the Internet that overcomes existing problems with other Internet filtering systems,” and in doing so, improved performance of these computer systems themselves.³⁶ The Federal Circuit thus found that although the claims at issue were directed to the abstract idea of filtering content, they pass muster under step two of the *Alice* test, and reversed the district court’s decision.³⁷

BASCOM offers particular insight into the step two analysis of the *Alice* test – emphasizing that an inventive concept may be found where an ordered combination of claim limitations transform an alleged abstract idea into a particular practical application of that alleged abstract idea. From a practical perspective, BASCOM provides ammunition for applicants to argue against subject matter eligibility rejections that merely address each claim limitation in isolation. Furthermore, arguments may be made based on BASCOM that despite the recitation of conventional components in the claims, such claims may nevertheless recite eligible subject matter based on their non-conventional/non-generic arrangement.

Electric Power Group, LLC v. Alstom S.A. (Federal Circuit – August 2016)

In *Electric Power*, the Federal Circuit shed further light on application/interpretation of the *Alice* test (at both steps), ultimately agreeing that the claims failed to recite patent eligible subject matter. Specifically, they found that despite the length of the claims, they “do not go beyond requiring the collection, analysis, and display of available information in a particular field, stating those functions in general terms, without limiting them to technical means for performing the functions that are arguably an advance over conventional computer and network technology.”³⁸ For example, representative claim 12 of the asserted patent recites:

A method of detecting events on an interconnected electric power grid in real time over a wide area and automatically analyzing the events on the interconnected electric power grid, the method comprising:

receiving a plurality of data streams, each of the data streams comprising sub-second, time stamped synchronized phasor measurements wherein the measurements in each stream are collected in real time at geographically distinct points over the wide area of the interconnected electric power grid, the wide area comprising at least two elements from among control areas, transmission companies, utilities, regional reliability coordinators, and reliability jurisdictions;

receiving data from other power system data sources, the other power system data sources comprising at least one of transmission maps, power plant locations, EMS/SCADA systems;

receiving data from a plurality of non-grid data sources;

detecting and analyzing events in realtime from the plurality of data streams from the wide area based on at least one of limits, sensitivities and rates of change for one or more measurements from the data streams and dynamic stability metrics derived from analysis of the measurements from the data streams including at least one of frequency instability, voltages, power flows, phase angles, damping, and oscillation modes, derived from the phasor measurements and the other power system data sources in which the metrics are indicative of events, grid stress, and/or grid instability, over the wide area;

displaying the event analysis results and diagnoses of events and associated ones of the metrics from different categories of data and the derived metrics in visuals, tables, charts, or combinations thereof, the data comprising at least one of monitoring data, tracking data, historical data, prediction data, and summary data;

displaying concurrent visualization of measurements from the data streams and the dynamic stability metrics directed to the wide area of the interconnected electric power grid;

accumulating and updating the measurements from the data streams and the dynamic stability metrics, grid data, and non-grid data in real time as to wide area and local area portions of the interconnected electric power grid; and

deriving a composite indicator of reliability that is an indicator of power grid vulnerability and is derived from a combination of one or more real time measurements or computations of measurements from the data streams and the dynamic stability metrics covering the wide area as well as non-power grid data received from the non-grid data source.³⁹

The U.S. District Court for the Central District of California found that the claims were directed to an abstract idea – specifically “monitoring and analyzing data from disparate sources,” and further that the claims lack any inventive concept that would transform the claimed features into patent eligible subject matter.⁴⁰

In its analysis at step one of the *Alice* test, the Federal Circuit agreed that the claims were directed to an abstract idea.⁴¹ Specifically, they found that the claims did not recite an improvement in computers as tools, but rather recited abstract ideas that merely use computers as tools.⁴² For example, rather than claiming a particular inventive technology, they recited a process for gathering and analyzing information and displaying the results.⁴³ Accordingly, the Federal Circuit proceeded to an analysis at step two of the *Alice* test.⁴⁴

Turning to step two, the Federal Circuit found that although the claims were lengthy in nature, much of this length was simply due to description of enumerated information types and sources within a power grid environment.⁴⁵ These remaining steps, however, which merely relate to the selection of information for collection, analysis, and display, fail to differentiate from ordinary mental processes.⁴⁶ As the claims failed to require any new information sources, types, and/or analysis techniques, they failed to require any inventive components or

methods that would generate new data or invoke inventive programs.⁴⁷ Merely requiring the selection and manipulation of information, however, “by itself does not transform the otherwise abstract processes of information collection and analysis.”⁴⁸

In light of this analysis, the Federal Circuit turned to how the desired result is achieved in the claims.⁴⁹ However, because the claims merely recite information collection, analysis, and display functions on generic computer components, they failed to recite a non-conventional arrangement of known conventional pieces.⁵⁰ Accordingly, the Federal Circuit found that the claims failed to recite a patent eligible inventive concept.⁵¹

From a practical standpoint, it is important to understand the distinction between “patenting a particular concrete solution to a problem and attempting to patent the abstract idea of a solution to the problem in general.”⁵² For example, in the context of this case, the Federal Circuit noted that the claims “purport to monopolize every potential solution to the problem” rather than incentivizing “further innovation in the form of alternative methods for achieving the same result,” and that in doing so, other inventors would be prohibited from developing solutions to this problem without first licensing the abstract idea.⁵³ Accordingly, in drafting claims, practitioners must be careful, especially in the context of data analysis claims, to recite specific steps of a particular technical solution. Particularly, because such claims may often be found directed to an abstract idea at step one, practitioners should bolster their case for eligibility by drafting their specification and claims to satisfy the inventive step analysis at step two.

McRO, Inc. v. Bandai Namco Games America (Federal Circuit – September 2016)

Several months after the decision in *BASCOM*, McRO appealed a decision from the District Court for the Central District of California finding the asserted claims invalid as being directed to patent-ineligible subject matter. The claims at issue were directed to a method for “automatically . . . producing accurate and realistic lip synchronization and facial expressions in animated characters.”⁵⁴ More specifically, a plurality of rulesets are used to determine specifically when keyframes should be set, and

setting the keyframes accordingly. For example, representative claim 1 recites:

A method for automatically animating lip synchronization and facial expression of three-dimensional characters comprising:

obtaining a first set of rules that define output morph weight set stream as a function of phoneme sequence and time of said phoneme sequence;

obtaining a timed data file of phonemes having a plurality of sub-sequences;

generating an intermediate stream of output morph weight sets and a plurality of transition parameters between two adjacent morph weight sets by evaluating said plurality of sub-sequences against said first set of rules;

generating a final stream of output morph weight sets at a desired frame rate from said intermediate stream of output morph weight sets and said plurality of transition parameters; and

applying said final stream of output morph weight sets to a sequence of animated characters to produce lip synchronization and facial expression control of said animated characters.⁵⁵

McRO offered two primary arguments in favor of eligibility.

First, McRO argued that the claims were not directed to an abstract idea because they describe generation of a tangible product – specifically “a video of a 3-D character speaking the recorded audio.”⁵⁶

Second, McRO argued that even if the claims were directed to an abstract idea, they recite a technological improvement (particularly, employing specific rules that are used in a specific way to improve the process of 3D computer generated lip-synchronization), thus making the claims patent eligible.⁵⁷

The Federal Circuit began with an analysis at step one of the *Alice* test, looking to whether or not

the claims are “directed to” a judicial exception.⁵⁸ As an initial matter, it noted that the claims recite a specific improvement in computer animation – namely “the automatic use of rules of a particular type.”⁵⁹ In doing so, the Federal Circuit found that automation of further tasks was facilitated.

Furthermore, this automation was found to go beyond the implementation of a fundamental economic practice by using a “combined order of specific rules that renders information into a specific format that is then used and applied to create desired results: a sequence of synchronized, animated characters.”⁶⁰ Conceding that this might not produce a tangible result, the Federal Circuit indicated that there is no requirement to do so, and that the primary hurdle to eligibility of the claims may be preemption.⁶¹

On the issue of preemption, the Federal Circuit found that the “specific structure of the claimed rules would prevent broad preemption of all rules-based means of automating lip synchronization.”⁶² Accordingly, because the specific rules are incorporated into the claims as limitations, the claims were found to be limited in their nature, thus not preempting alternative approaches to automatically animate characters.⁶³ The Federal Circuit thus found that the asserted claims were not directed to an abstract idea.⁶⁴ In view of this finding in the *Alice* step one analysis, the claims were found to recite patent eligible subject matter without any analysis at step two of the *Alice* test, and the district court’s decision was reversed.⁶⁵

This case emphasizes the importance of including sufficient specifics in your claims to steer clear of challenges on the basis of preemption. It is paramount, at the drafting stage, to include enough detail in your specification to support the inclusion of such specifics (whether initially included in your filed claims, or to support amendments down the road in prosecution). In particular, these details should emphasize technical improvements over the known prior art.

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Editor’s note: This article will conclude in the next issue of the *Intellectual Property & Technology Law Journal*.

Notes

1. See *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. CT. 2347 (2014); see also *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. CT. 1289 (2012).
2. See *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. CT. 2347 (2014); see also MPEP 2106.04(a).
3. See *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. CT. 2347 (2014); see also *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. CT. 1289 (2012).
4. See *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. CT. 2347 (2014); see also *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. CT. 1289 (2012).
5. See *Digitech Image Tech’s v. Electronics For Imaging*, 758 F.3d 1344 (Fed. Cir. 2014).
6. See *Digitech Image Tech’s v. Electronics For Imaging*, 758 F.3d 1344, 1347-1348 (Fed. Cir. 2014).
7. See id.
8. See id.
9. See id. at 1348-1351.
10. See id.
11. See id. at 1350-1351.
12. See id.
13. See id.
14. See id. at 1346-1351.
15. See id.; see also *DDR Holdings, LLC v. Hotels.com*, 773 F.3d 1245 (Fed. Cir. 2014).
16. See *DDR Holdings, LLC v. Hotels.com*, 773 F.3d 1245, 1255-1259 (Fed. Cir. 2014).
17. See id.
18. See id.
19. See id.
20. See id.
21. See id.
22. See id.
23. See id.
24. See id.
25. See *Bascom Global Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016).
26. See id. at 1343-1347.
27. See id.
28. See id.
29. See id.
30. See id. at 1347-1352.
31. See id.
32. See id.
33. See id.
34. See id.
35. See id.

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36. See id.
37. See id. at 1352.
38. See *Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016).
39. See id. at 1351-1352.
40. See id.
41. See id. at 1353-1354.
42. See id.
43. See id.
44. See id.
45. See id.
46. See id.
47. See id.
48. See id.
49. See id.
50. See id.
51. See id.
52. See id.
53. See id.
54. See *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299, 1306-1308 (Fed. Cir. 2016).
55. See id.
56. See id. at 1309-1310.
57. See id.
58. See id. at 1311-1313.
59. See id. at 1314-1316.
60. See id.
61. See id.
62. See id.
63. See id. at 1316.
64. See id.
65. See id.

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