Patenting the Social: A Non-Economic Take on Alice

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Laura R. Ford, *Patenting the Social:* Alice*, Abstraction, & Functionalism in Software Patent Claims*, 14 **Cardozo Pub. L. Pol'y & Ethics J.** 259 (2016).

"Where does technology stop and humanity begin?" This is the weighty opening question in Laura Ford's recent article *Patenting the Social*. Ford, a sociologist and lawyer, offers a novel contribution to the debates raging in the courts and law reviews after the Supreme Court opinion in *Alice v. CLS Bank* about what constitutes a patent-ineligible abstract idea and, relatedly, why abstract ideas should be patent-ineligible. She proposes that claims describing novel computer-mediated social relationships and interactions ("the social") are core examples of claims to abstract ideas, but that claims to novel means of achieving those social ends are not. Ford then draws on sociological concerns and moral theory to defend her interpretation of *Alice*. She argues that patents that privatize social progress, as opposed to the technological progress, are bad policy based on concerns about human flourishing, politics, and culture—i.e., reasons other than the conventional, economically oriented reasons for limits on patentability that focus on innovation incentives.

I found *Patenting the Social* to be both interesting and timely for two reasons. First, I believe that defining the abstract with reference to the social offers a plausible story for explaining, at least in part, why the Supreme Court reached the conclusion that it did in its *Alice* opinion and, perhaps more importantly, its earlier opinion in *Bilski v. Kappos*, on which *Alice* relies. The Court's choice not to even attempt to define an abstract idea in these opinions is by now infamous. Whether you personally agree with it as a policy matter or not, this hypothesis that the Court's discomfort with the privatization of new patterns of contractual commitments—which are nothing but legally enforceable patterns of social obligations—is grounded in part in non-economic reasoning should not be lightly dismissed. *Patenting the Social* gives voice to this hypothesis more thoroughly than other academics have to date managed to do. Second, I find the notion that privatization of the social is problematic to be an interesting counterpoint to the message of the Supreme Court's other opinions on patent-ineligibility in *Association for Molecular Pathology v. Myriad Genetics* and *Mayo v. Prometheus*. In these biomedical cases, the Court focused on the privatization of the natural as the crux of the problem that limits on patent-eligibility can solve. Under Ford's interpretation, *Bilski* and *Alice* provide an intriguing bookend to *Myriad* and *Mayo*: both the social and the natural are off limits.

To illustrate what patents on computer-mediated social relationships and interactions might look like, *Patenting the Social* offers a deep dive into a number of Facebook patents. It is unclear whether these patents are representative of the bulk of patents that the courts have invalidated in the wake of *Alice*, but the laser-like focus of *Patenting the Social* on such patents only goes to show that the concept of an abstract idea does not have a single definition. Rather, it is a poly-nodal or multiply ambiguous concept. It means different things when used in reference to different patents.

Patenting the Social offers a line-drawing proposal under which social ends are patent-ineligible but "efficient causal means of achieving social ends" are patent-eligible. This proposal clearly echoes the Court's line articulated in *Alice*—namely that improvements in the functioning of a computer itself are patent-eligible—but its intellectual origins are, curiously, entirely different. The proposal draws from sociology's response to the now-discredited functionalist explanation of social phenomena, rather than the economics of patent scope, to suggest this focus on causal means rather than social ends as the locus of patent-eligible invention.

A number of additional, well-articulated arguments fill out the pages of *Patenting the Social*. But, rather than plumb any specific, individual argument in greater depth, I want to conclude by reiterating my principal point. You may or may not

believe that sociological concerns about patenting the social should limit the reach of patent-eligibility. However, given the plausibility of the hypothesis that such concerns did in fact motivate, at least in part, the Supreme Court's *Bilski* opinion that set the course for the doctrine of patent-eligibility on which we find ourselves today, I believe that *Patenting the Social* is a worthwhile read for anyone thinking about what courses can and should be charted for tomorrow.

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