

No. 19-1602

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

ECOSERVICES, LLC,

Plaintiff-Appellee,

v.

CERTIFIED AVIATION SERVICES, LLC,

Defendant-Appellant,

On appeal from the
United States District Court for the Central District of California,
No. 5:16-cv-01824-RSWL-SP,
Hon. Ronald S.W. Lew

APPELLEE'S RESPONSE TO PETITION FOR REHEARING EN BANC

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December 23, 2020

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CERTIFICATE OF INTEREST

Counsel for Appellee EcoServices, LLC, certifies the following:

1. The full name of party represented by me:

EcoServices, LLC

2. The name of real party in interest (please only include any real party in interest NOT identified in Question 3) represented by me is:

EcoServices, LLC

3. The parent corporations and publicly held companies that own 10 percent or more of stock in the party:

ST Engineering North America, Inc. (f.k.a. Vision Technologies Systems, Inc.)
Pratt & Whitney Line Maintenance Services, Inc.
Singapore Technologies Engineering Pte. Ltd.
United Technologies Corporation

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me before the agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Greenberg Traurig LLP: David A. Coulson, Leanna Costantini, Shaun A. Hoting
Goodwin Procter LLP: Natasha E. Daughtrey

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal:

This appeal concerns, among other issues, the validity of U.S. Patent No. 9,162,262, which is subject to ex parte Reexamination No. 90/014,356, filed August 8, 2019, and currently pending.

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6)

None/Not Applicable.

December 23, 2020

/s/ William M. Jay

William M. Jay

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INTRODUCTION

The relevant holding of the panel’s nonprecedential decision is straightforward: the claims-in-suit are not directed to an abstract idea because they are “configured in a certain way to create technical improvements to systems for washing jet engines.” Op. 17.

CAS raised half a dozen issues on appeal from the two-patent jury verdict and subsequent judgment, and was successful on one (damages). It has now dropped everything except a subject-matter eligibility challenge to the ’262 patent. But its bid for rehearing on that issue does not warrant the full Court’s attention. CAS simply disagrees with the nonprecedential decision’s assessment of what the claims of a single patent are “directed to.” And in its effort to elevate the importance of the decision, it misdescribes what the panel actually held. The panel did not hold “inapplicable” any aspect of this Court’s eligibility doctrine, as CAS would have it. Rather, it just applied established law to answer the “directed to” question.

Nor did the panel validate the idea that claims can be directed to “automation alone,” which is a quote that CAS repeatedly cherry-picks out of context. To the contrary, it held that just because the claims involve some degree of automation does not end the Section 101 analysis at the first step. Indeed, as the panel explained, automation is most relevant at the *second* step of the analysis. At the first step, the question is to what the claims are directed. In the cases CAS cites, the claims were

directed to an abstract idea, such as a fundamental economic practice; at the second step, automating those abstract ideas on a computer did not add an inventive concept. In this case, by contrast, the panel held based on the specifics of the claims-in-suit and the written description that the patented engine-washing system is not directed to an abstract idea *at all*. That patent-specific conclusion is perfectly consistent with the applicable legal principles, and it does not warrant any further consideration en banc.

In any event, this case would be a poor vehicle to reconsider Section 101 en banc even if this case did present any of the contested doctrinal issues over which the court has sometimes disagreed. This is a post-trial appeal, but CAS did not raise at trial any of the facts on which a step-two argument would rest. And the challenged patent accounts for only a small portion of the judgment in any event, especially given the panel’s conclusion that the damages expert “awarded little, if any, value to the ’262 patent.” Op. 33.

ARGUMENT

I. This Nonprecedential Decision Is Not A Candidate For Rehearing En Banc

In its repeated assertions that the panel’s decision will “damage” this Court’s precedent, CAS barely acknowledges the decision’s nonprecedential status, and its attempts to inflate the decision’s importance demonstrate that its arguments rest on exaggeration. The decision does not break new ground; it merely applies existing

law to the claims of a single patent. CAS’s disagreement with that case-specific holding winds up being the foundation stone of all its other arguments, and because its premise is wrong, its other arguments fall away. The panel did not hold broadly that claims directed to automation alone are non-abstract; it held narrowly that this system for washing jet engines is not directed to the abstract idea of automating a routine task.

A. CAS Dramatically Overstates The Nonprecedential Decision’s Impact In An Unpersuasive Attempt To Justify Rehearing En Banc.

This is not one of the rare cases in which a nonprecedential decision would warrant the attention of the full Court. For instance, this is not a case in which an unpublished decision serves as a vehicle to reconsider previously settled circuit precedent. Indeed, CAS does not challenge *any* of the underlying decisions on which the panel rested. Rather, its challenge is to the panel’s decision alone. And by definition, a decision that creates no precedent cannot “undermine” or “undercut” this Court’s existing precedent.

CAS acknowledges briefly (at 5) that the decision is nonprecedential, but resorts to misdirection in its efforts to claim that the decision nonetheless is highly important. For instance, CAS claims that a “34-page opinion” cannot be ignored, even if nonprecedential. *Id.* But the opinion is 34 pages long purely because CAS raised six distinct issues, on two different patents—not because any of them was

especially meritorious. Subject-matter eligibility consumes fewer than ten pages of the Court’s opinion.

Similarly overblown is CAS’s attempt (at 5) to claim that the panel’s decision “has already been cited” twice. The first citation, in a district-court summary-judgment brief, is for the following completely uncontroversial proposition: “The second step of the eligibility test requires an examination of the elements of the claims in order to determine whether the claims contain an ‘inventive concept’ sufficient to transform the claimed abstract idea into a patent-eligible application.” Pl.’s Opp. to Defs.’ Mot. for Summ. J. on Patent Eligibility at 7, *CellSpin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05933, ECF No. 198 (N.D. Cal. filed Oct. 30, 2020). The second citation is in a petition for certiorari broadly complaining that this Court has issued too many decisions rejecting Section 101 challenges, and seeking Supreme Court review of one such decision. The sole discussion of this case is a one-word parenthetical in a grab-bag string-cite—“(same)”—noting that this case, like an earlier one, was a “2-1 decision finding claims patent eligible.” Pet. for Cert. at 13, *InfoBionic, Inc. v. Cardionet, LLC*, No. 20-604 (filed Nov. 2, 2020).

CAS may be right about one thing—that Section 101, as a general matter, raises some of “the most volatile issues in patent law.” Reh’g Pet. 5. But if that simplification were enough to justify rehearing, this Court would sit en banc on Section 101 issues all year round. The Section 101 analysis encompasses multiple

issues, and they are not all “volatile.” Accordingly, this Court has declined to consider many Section 101 issues en banc, including in *published* decisions that (like this case) feature a dissent and (unlike this case) raise issues closer to the cutting edge of eligibility. *See, e.g., Am. Axle & Mfg. v. Neapco Holdings*, 966 F.3d 1347, 1357 (Fed. Cir. 2020) (Chen, J., concurring in denial of rehearing en banc) (“Differences of opinion within our court on how to apply [Section 101] principles to a particular case inevitably arise from time to time, given the inherently imprecise nature of the legal framework.”). If this Court were to hear a Section 101 issue en banc for the first time since *Alice* itself, this would not be the case to choose.

B. CAS Disagrees With The Panel Over A Case-Specific Question: What This Specific Patent Is “Directed To”

Reflecting the narrow disagreement here, the principal thrust of CAS’s argument is that the panel misunderstood what aspects of the patented system are the point of novelty for purposes of the Section 101 analysis. Reh’g Pet. § I.A. The panel held that “when considered as a whole, and in light of the written description, claims 1, 9, and 14 of the ’262 patent are directed to an improved system for washing jet engines and not to an abstract idea.” Op. 14-15. “To conclude otherwise would be to oversimplify the claims, which we have cautioned against.” Op. 21. CAS does not disagree with considering the claims “as a whole, and in light of the written description”; it disagrees with the panel’s assessment of what one finds there. That

is not a dispute that calls for the attention of the full Court—which is why CAS primarily focuses on the patent itself and not any caselaw. *See* Reh’g Pet. 7-9.

Seeking to add a few dabs of legal color to its patent-specific argument, CAS contends that the panel “acknowledge[d]” the point-of-novelty inquiry, but “declare[d] the inquiry inapplicable.” Reh’g Pet. 6; *accord* Reh’g Pet. 9 (treating the opinion as holding that “the point-of-novelty inquiry does not apply here”). “Inapplicable” is not a quotation, and it is not an accurate description of what the panel held. Rather, the panel extensively canvassed the applicable caselaw holding that the court must begin by examining “what a claim is ‘directed to’” and whether the answer to that question is an abstract idea. Op. 14 (quoting *CardioNet, LLC v. Infobionic, Inc.*, 955 F.3d 1358, 1368 (Fed. Cir. 2020), *petition for cert. pending*, No. 20-604 (filed Nov. 2, 2020)); *accord* Op. 12-13 (assessing CAS’s cited caselaw governing “our step one analysis of what the claims of the ’262 patent are ‘directed to’”). In *applying* that uncontested law, the panel held that the patent is directed to a machine for washing jet engines, which is not an abstract idea. Again, CAS is free to disagree with that answer, but it is not free to portray the panel as never having asked the right question.

Similarly, as CAS acknowledges, the panel held that the “specific combination” of elements that make up the patented system are directed to more than just the abstract idea of automation; the combination is “configured in a certain

way to create technical improvements to systems for washing jet engines.” Op. 17; *see also* Op. 15-16 (cataloguing the “described advantages” that “are important to our determination that the claims provide a technical improvement to jet engine washing”). CAS disagrees that the combination is sufficiently “specific,” Reh’g Pet. 16-17. CAS is incorrect, as discussed further below, but in any event, CAS never explains why *en banc* consideration is needed to further ventilate CAS’s highly case-specific disagreement with the panel over what the claims are “directed to,” whether it provides a “technical improvement,” and whether the panel provided sufficient “explanation” (Reh’g Pet. 16, 17) of why it saw the claims differently than CAS does.

C. The Premise Of CAS’s Remaining Arguments Is A Misreading Of The Court’s Statement About “Automation Alone”

The remainder of CAS’s petition advances arguments that are, in a word, abstract—they attack a conclusion that the Court itself did not draw. CAS portrays the panel as upholding the patent even though it is directed to the abstract idea of “automation alone.” Reh’g Pet. 4, 6, 9-13. That is a plain misreading of the Court’s holding. The Court could not have been more clear: “the claims are not directed to ‘a result or effect that itself is the abstract idea’ of, e.g., automated jet engine washing.” Op. 15. The panel did not hold that automation is nonabstract; it held that these claims as a whole are not directed to the abstract idea of automation. Much of CAS’s petition therefore attacks a straw man.

Here is the quotation that the petition targets, but placed in its full context (from the tail end of the Section 101 discussion): “Moreover, as we have previously stated, automation alone is not necessarily abstract. Specifically, as we have stated, ‘processes that automate tasks that humans are capable of performing are patent eligible if properly claimed.’ The system claims at issue provide examples of such proper claiming.” Op. 21 (quoting *McRO, Inc. v. Bandai Namco Games Am.*, 837 F.3d 1299, 1313 (Fed. Cir. 2016); citations omitted). In other words, the Court held that the automation of a human process does not *alone* mean that the claims are directed to an abstract idea. The analysis depends on the whole of what is claimed, not whether automation is *part of* what is claimed.

That is confirmed by referring back, as the Court itself did, to what the Court “previously stated,” Op. 21. The Court explained at the outset that “the fact that the claims require an ‘information unit’ that can be a computer and that, therefore, the system provides an improvement over human-operated engine washing does not *necessarily* mean the claims are directed to an abstract idea.” Op. 16 (emphasis added). The Court then discussed *McRO*, in which the Court had “noted that the claim did not use a computer as a tool to automate conventional activity and instead employed a computer ‘to perform a distinct process to automate a task previously performed by humans.’” *Id.* (quoting *McRO*, 837 F.3d at 1314). Applying that rule here, the Court explained: “That the claimed system achieves automation of a task

previously performed by humans . . . does not mean the claimed system is *necessarily* directed to an abstract idea. Op. 16-17 (emphasis added).¹ The two “necessarily” adverbs in the passage on page 16 are doing the same work as “alone” in the passage on page 21 recapping what the Court had “previously stated.” The fact that the claims involve automation does not *alone* mean that the claims are directed to an abstract idea.

CAS’s cherry-picking of the “automation alone” quote ignores the rest of the Court’s discussion, including its treatment of *McRO*. And CAS does not disagree with *McRO*’s statement of the law; it just disagrees that these claims are sufficiently specific under *McRO*. Reh’g Pet. 14. A stray quote in a nonprecedential decision would not be a basis for rehearing en banc under any circumstances, but here, CAS’s repeated insistence that the panel held “automation alone” patentable rests on a plain misreading of the decision.

II. The Court’s Decision In This Case Does Not Contravene “Settled Law”

Washing a jet engine is not an abstract idea, a mental process, or a fundamental human practice. And the system recited in the claims is not a general-purpose computer or a piece of software that automates such an abstract idea, mental process, or human practice. The system includes a washing unit for delivering

¹ See also Op. 19 n.5 (“Just as the inclusion of a computer cannot ‘save’ an abstract idea, it cannot convert a non-abstract idea into an abstract one.”).

washing liquid to the turbine engine, an information detector for use in identifying the engine type, and a control unit that determines the appropriate washing program for the engine type *and regulates the washing unit* in accordance with that program. To take claim 9, the most specific of the claims-in-suit (since CAS infringed all three and could win no appellate relief unless it invalidated all three), the system uses the engine type to precisely regulate the washing time. Appx108(9:11-13). It does so by directing the opening of one or more valves of the valved-pumping system until the desired flow of washing liquid is achieved, and then by shutting down the valve once the ideal washing time is reached. Appx107(7:11-25).

The Court correctly concluded that this system is not directed to the abstract idea of automation, but to “a specific system that improves jet engine washing.” Op. 15; *accord* Op. 17 (“a specific combination, . . . configured in a certain way to create technical improvements to systems for washing jet engines”). The Court based that conclusion on the advantages set forth in the specification, including the higher quality of engine wash, the lower risk of misconfiguration, and the higher degree of safety. Op. 3-4, 15-16. “These described advantages [we]re important to [the Court’s] determination that the claims provide a technical improvement to jet engine washing.” Op. 16.

Thus, like the “speedier” and “more accurate” medical device claimed in *CardioNet*, 955 F.3d at 1370, the patented system captures the performance benefits

of optimized washing. Improved precision is precisely the kind of technical improvement that this Court—and the Supreme Court—have long recognized is not an abstract idea. Automatically opening a rubber-molding press at the ideal time, using “computer components and the well-known Arrhenius equation,” is one famous example. *XY, LLC v. Trans Ova Genetics, LC*, 968 F.3d 1323, 1331 (Fed. Cir. 2020) (discussing *Diamond v. Diehr*, 450 U.S. 175, 179 n.5, 193 n.15 (1981)). Another is a method of using known technology in a way that “classifies and separates individual particles from a sample more accurately.” *Id.* (citation omitted). The system here achieves similar benefits in a nonabstract way.

CAS contends that precedent instead *compelled* the Court to conclude that the role of automation in the claims renders the invention abstract at step one of the *Alice* inquiry. But in CAS’s cases, “automation” did not drive the step-one inquiry. Rather, just as the Court explained in this case, the claims in those cases were already directed to an abstract, longstanding, pre-computer idea; adding the computer was not enough to make them patent-eligible at step *two*. Op. 19-20. “At step one, it is not enough to merely identify a patent-ineligible concept underlying the claim; [the court] must determine whether that patent-ineligible concept is what the claim is ‘directed to.’” *Thales Visionix Inc. v. United States*, 850 F.3d 1343, 1349 (Fed. Cir. 2017) (citation omitted).

Consider the decisions that CAS identifies (at 1) as “contrary to” the panel decision: *Alice Corp. Pty Ltd. v. CLS Bank Int’l*, 573 U.S. 208 (2014); *McRO*, discussed above; and *OIP Technologies v. Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir. 2015). *McRO* found, at step one, that the claims were *not* directed to an abstract idea. 837 F.3d at 1316. And the other two decisions did not deal with “automation” as an abstract idea. Rather, both of them dealt, at step two, with computer implementation of an economic concept that was already found abstract at step one. *Alice*, of course, dealt with claims directed to the abstract idea of “intermediated settlement,” a “fundamental economic practice” and “a building block of the modern economy.” 573 U.S. at 219-20 (citation omitted).² The language CAS quotes (at 10) is from a paragraph expressly addressing “step two.” *Id.* at 222.³ And *OIP Technologies* involved claims directed to the similar concept of “offer based pricing,” which was “similar to other ‘fundamental economic concepts’ found to be abstract ideas.” 788 F.3d at 1362; *see* Op. 19. So too with the only case CAS cites for the proposition that automation should drive the step *one* inquiry: the claims there

² CAS’s assertion (at 12-13) that under the panel’s reasoning, the claims in *Alice* could pass muster at step one is therefore absurd. As shown in the text, automation did not drive the step-one inquiry in *Alice*. The point at step one is that *escrow* is abstract, whether automated or not. Thus, not only does this point rest on misreading “automation alone,” *see* pp. 7-9, *supra*, it fails on its own terms.

³ Notably, CAS truncates the quote from *Alice* in an attempt to make it seem more relevant. Where CAS uses “a [principle],” the Supreme Court actually says “a *mathematical* principle”—*i.e.*, an abstract idea. 573 U.S. at 222 (emphasis added).

were “directed to the abstract idea of using a computer to deliver targeted advertising to a user.” *Customedia Techs., LLC v. Dish Network Corp.*, 951 F.3d 1359, 1362 (Fed. Cir. 2020). There is a substantial difference between a system for delivering digital advertising, *id.* (patent claimed a “data delivery system”), and a system for delivering washing liquid into a jet engine.

With no on-point precedent, CAS thus is left to complain that its conception of automation—as an all-powerful talisman that compels the conclusion that the claims are directed to something abstract—is compelled by policy and logic. But its reasoning is entirely circular. CAS claims that “the idea of ‘automation alone’ is either inventive or it is not,” so it must be fatal at both steps one and two. Reh’g Pet. 12. But the step-one inquiry focuses on *abstractness*, not on “inventiveness.” It is step two that asks whether an “inventive concept” makes an abstract idea patentable nonetheless; “[i]f the claims are not directed to a patent-ineligible concept under Alice step 1, the claims satisfy § 101 and [the court] need not proceed to the second step.” *CardioNet*, 955 F.3d at 1368.

CAS’s reasoning is remarkable for its breadth. If CAS were right—that under existing precedent, anything that automates something a human could do is *necessarily* directed to the abstract idea of “automation”—the implications for innovation in areas such as robotics would be stark. *Cf. Smart Sys. Innovations v. Chicago Transit Auth.*, 873 F.3d 1364, 1378 (Fed. Cir. 2017) (Linn, J., dissenting in

part and concurring in part) (“[T]he danger of getting the answers to these questions wrong is greatest for some of today’s most important inventions in computing, medical diagnostics, artificial intelligence, the Internet of Things, and robotics, among other things.”). Fortunately CAS is not right.

III. The Posture Of This Case Further Counsels Against Rehearing En Banc

This case would be a poor vehicle for en banc consideration in any event, given its post-trial posture and CAS’s failure to win relief as to the other patent on which the judgment is based.

This appeal arises from a jury trial and a subsequent denial of CAS’s motion for judgment as a matter of law. CAS bore the burden of demonstrating any fact pertinent to the Section 101 analysis “by clear and convincing evidence.” *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1368 (Fed. Cir. 2018). The standard of review would weigh heavily against CAS if it had attempted to put in evidence at trial on these issues. In fact, it did not even *attempt* to do so—it rested its Section 101 argument purely on the intrinsic record. Here CAS does not rest its assertions about pre-existing systems on the intrinsic record. *See* Reh’g Pet. 7-8. The issue would become even starker if the analysis were to reach *Alice* step two, as CAS proposes: CAS put forward no evidence to show that the elements of all the claims (including a washing unit whose valves were opened and closed at time intervals controlled by computer, as in claim 9) were well-understood, routine, and

conventional. EcoServices Panel Br. 36. CAS’s only reply on this point was to bluster that the point was inarguable—it identified nowhere in the trial record where it had argued it. Reply Br. 12.⁴ What CAS did argue was that the claims were *obvious*—but the jury concluded that they represented a patentable innovation over the prior art. In light of the silent trial record, this would be a singularly poor case in which to take up a more detailed Section 101 analysis.

Furthermore, at this point the ’262 patent is too small a part of this case to be worthy of the full Court’s time. The district court did not enter an injunction or award lost profits. Op. 8. The panel concluded (Op. 32-33 & n.8) that the jury’s reasonable-royalty damages verdict for past infringement rested largely on the now-expired ’860 patent, and “that EcoServices’ [damages] expert awarded little, if any, value to the ’262 patent.” The jury’s award for past damages is only \$27,100 above the amount that would have been justified by a reasonable royalty for the ’860 patent alone. *See* Op. 32 n.8. And to the extent that CAS continued to infringe without designing-around, the panel has now set aside the supplemental damages and the running royalty and instructed that any new award exclude any value attributable to the ’860 patent.

⁴ The dissent sought to fill this evidentiary gap by citing part of EcoServices’ brief opposing partial summary judgment of noninfringement. Dissent 4 (citing Appx411-412). That is not *evidence* that the claimed system is routine or conventional.

CONCLUSION

The petition for rehearing and rehearing en banc should be denied.

December 23, 2020

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITS

The attached response complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and the Federal Circuit Rules because it has been prepared using a proportionally spaced typeface and contains 3,857 words according to the word-count function of the word-processing system, excluding the items listed as exempted in the rules.

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