

## ***Bilski's* Blind Spot: The Meaning Turn in Section 101, Factual Laws of Nature, and Test-and-Correlate-with-Software Claims**

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The doctrine of patentable subject matter has developed a blind spot that neither courts nor commentators to date have noticed. The blind spot exists in the machine-or-transformation test for patentable subject matter recently articulated by the Federal Circuit Court of Appeals (Federal Circuit) in *In re Bilski*, but it does not originate with *Bilski*.

To demonstrate the existence of the blind spot, this Article alters the conventional terms of the debate over patentable subject matter by introducing two new concepts. The first concept is *the meaning turn*—the main event in a revisionist re-reading of the history of the doctrine's application to claims to computer programs. The meaning turn made the meaningful nature of the data manipulated by a computer program—and thus by whatever mathematical algorithms the program happens to employ—a sufficient condition to establish the computer program as patentable subject matter. The second concept is a distinction between two different types of laws of nature: *formal* or *analytical* on the one hand, and *factual* or *empirical* on the other. Formal truths can be proven to be true through a self-contained conceptual rule set. In contrast, factual truths can be proven to be true only by empirical investigation into the state of affairs in the world to which they refer.

Considered together, the meaning turn and the laws-of-nature typology reveal the blind spot in courts' ability to identify claims to programmed computers that are premised on newly discovered laws of nature. The meaning turn does reign in patentable subject matter when claims implicate mathematical algorithms that express formal truths. However, the meaning turn does not restrict the scope of software claims implicating mathematical algorithms expressing factual truths. Meaning inheres in the variables of algorithms and formulae expressing factual truths, so the meaning turn's requirement that claims describe only the processing of meaningful data is superfluous. In sum, section 101 doctrine that follows the meaning turn—including the machine-or-transformation test of *Bilski*—does nothing to restrict patentable subject matter when an inventor's software claim is premised on a newly discovered factual law of nature. This is *Bilski's* blind spot. To illustrate the blind spot in a concrete manner, this Article discusses the unquestioned patentability of *test-and-correlate-with-software* claims under *Bilski*.

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