The Useless, Essential and Ordinary Dimensions of Patentable Subject Matter

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The patentable subject matter doctrine is heralded for its role in safeguarding essential knowledge from private appropriation through its ambiguous doctrines of exclusion, which depropertize certain kinds of subject matter. Simultaneously, the doctrine is criticized because it seemingly expands to confer propertization on subject matter far removed from the initial understanding of the patent system as a legal regime designed to facilitate technological progress. We have a climate where the doctrine can be celebrated for its exclusions, while lamented for its inclusive elasticity. Recent developments in patentable subject matter jurisprudence illustrate a chaotic legal mix of deference and disregard, generating new turbulence in the patentability of software and business/human activity methods and a continuing struggle over the patenting of basic scientific knowledge.

Does the patentable subject matter doctrine now propertize the useless and depropertize the essential? The doctrine has an inherent shape-shifting quality that tracks technological developments, but frustrates coherent legal analysis. Does the doctrine continue to play a critical role in the patent system? If the patentable subject matter doctrine is downgraded from its gatekeeper position – and its screening functions are shifted to the disclosure and prior art doctrines – what is lost? Frustration with the unwieldy nature of the patentable subject matter doctrine has made this question relevant, and it will be addressed in this paper with reference to current developments in the patenting of software, business/human activity methods, and fundamental scientific knowledge. The paper will further discuss the guardianship of "essential" subject matter by the doctrine of patent eligibility, with a particular focus on the impact of a weakened patentable subject matter doctrine on the life sciences.

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