

# INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY

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The [Fourth Edition of our casebook \(2018\)](#) is the current edition. In 2019, there were a few significant legal developments, but they were sufficiently short that we thought it better to issue them as a supplement than as a new edition. This supplement makes the following changes to the fourth edition of the casebook:

- **Trademark law: Chapter 6.** In June 2019, the Supreme Court invalidated § 1052(a)'s bar on federal registration of immoral or scandalous marks in *Iancu v. Brunetti*. The supplement provides an excerpt from the Supreme Court's opinion.
- **Copyright law: Chapters 2, 10, 11, and 13.** These chapters are updated with brief notes regarding the "Classics Protection and Access Act" from the 2018 Music Modernization Act (Chapter 2), the entry of works from 1923 into the public domain in 2019 and the grant of certiorari in *Georgia, et al. v. Public.Resource.Org* (Chapter 10), an August 2019 decision finding a banana costume copyrightable in the wake of *Star Athletica v. Varsity Brands* (Chapter 11), and two 2019 cases finding in favor of fair use – one involving *Oh, the Places You'll Boldly Go!*, a mash-up of Dr. Seuss and Star Trek, and one involving Andy Warhol's "Prince Series" (Chapter 13).
- **Patent law: Chapter 18.** The supplement includes additional summaries of post-*Alice* Federal Circuit decisions, a Senate bill from May 2019 that would significantly change the threshold for subject matter eligibility, and the PTO's 2019 *Revised Patent Subject Matter Eligibility Guidance*.

You can find free downloads of both the casebook and a 2019 edition of our statutory supplement at <https://law.duke.edu/cspd/openip/>.

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**Chapter Two, INTELLECTUAL PROPERTY & THE CONSTITUTION, Page 70, question 5**  
**Update on the Classics Protection and Access Act**

*The following replaces the text in Question 5.), updating it to reflect the passage of the Classics Protection and Access Act, as part of the 2018 Orrin G. Hatch–Bob Goodlatte Music Modernization Act.*

5.) The works whose copyright extension was upheld in *Eldred* began to enter the public domain in 2019; there has been no push to further expand their copyright terms.

There has been one legislative development regarding the copyright term for a specific subset of works: pre-1972 sound recordings. In 2018, Congress passed the “Classics Protection and Access Act” (“Classics Act”) as part of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (“MMA”). This law grants certain federal rights to pre-1972 sound recordings (previously, federal copyright law did not cover sound recordings fixed before February 15, 1972; instead they were covered, if at all, by a patchwork of state laws). An earlier version of the Classics Act provided that these rights would not expire until 2067, giving recordings from 1923 a sweeping 144-year term. After objections were raised, the act was amended, and older recordings will now enter the public domain gradually, beginning in 2022: recordings published before 1923 will enter the public domain in 2022, and recordings published between 1923-1946 will enter the public domain after the end of a 100-year term, from 2024-2029. Intriguingly, the Classics Act also contains a limited exception allowing the use of orphan works: it exempts noncommercial uses of pre-1972 sound recordings that are not being commercially exploited, so long as the user has conducted a good faith, reasonable search for the rights owner, and the rights owner has not objected within 90 days. (Note that the MMA contains other revisions that are beyond the scope of this chapter. For example, the “Music Licensing Modernization Act” provides a blanket licensing scheme for digital music services under 17 U.S.C. §115.)

## Chapter Six, GROUNDS FOR REFUSING REGISTRATION, pages 156-161

### *Iancu v. Brunetti* invalidates the bar on federally registering immoral or scandalous marks

*This replaces the section on “ii.) Immoral or scandalous marks” from the bottom of page 156 through 161.*

**ii.) Immoral or scandalous marks.** In 2019, the Supreme Court affirmed the Federal Circuit’s decision in *In re Brunetti* and invalidated § 1052(a)’s bar on registering immoral or scandalous marks. Here is a short excerpt from the majority opinion.



### *Iancu v. Brunetti*

588 U.S. \_\_\_\_ (2019)

KAGAN, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, ALITO, GORSUCH and KAVANAUGH, JJ., joined. ALITO, J., filed a concurring opinion. ROBERTS, C. J., and BREYER, J., filed opinions concurring in part and dissenting in part. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined.

Two Terms ago, in *Matal v. Tam*, this Court invalidated the Lanham Act’s bar on the registration of “disparag[ing]” trademarks. 15 U. S. C. §1052(a). Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of “immoral[ ] or scandalous” trademarks. We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

#### I

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing’s brand name) is pronounced as four letters, one after the other: F-U-C-T. But you might read it differently and, if so, you would hardly be alone. That common perception caused difficulties for Brunetti when he tried to register his mark with the U. S. Patent and Trademark Office (PTO)....

#### II

...[In *Matal*,] [t]he Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys.... So the key question becomes: Is the “immoral or scandalous” criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based. The meanings of “immoral” and “scandalous” are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material “immoral”? According to a standard definition, when it is “inconsistent with rectitude, purity, or good morals”; “wicked”; or “vicious.” Webster’s New International Dictionary 1246 (2d ed. 1949). Or again, when it is “opposed to or violating morality”; or “morally evil.” Shorter Oxford English Dictionary 961 (3d ed. 1947). So the Lanham Act permits registration of marks that champion society’s sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material “scandalous”? Says a typical definition, when it “giv[es] offense to the conscience or moral feelings”; “excite[s] reprobation”; or “call[s] out condemnation.” Webster’s New International Dictionary, at 2229. Or again, when it is “shocking to the sense of truth, decency, or propriety”; “disgraceful”; “offensive”; or “disreputable.” Funk & Wagnalls New Standard Dictionary 2186 (1944). So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of

overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. “Love rules”? “Always be good”? Registration follows. “Hate rules”? “Always be cruel”? Not according to the Lanham Act’s “immoral or scandalous” bar.

The facial viewpoint bias in the law results in viewpoint-discriminatory application. Recall that the PTO itself describes the “immoral or scandalous” criterion using much the same language as in the dictionary definitions recited above. The PTO, for example, asks whether the public would view the mark as “shocking to the sense of truth, decency, or propriety”; “calling out for condemnation”; “offensive”; or “disreputable.” Using those guideposts, the PTO has refused to register marks communicating “immoral” or “scandalous” views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics.... [A]s the Court made clear in *Tam*, a law disfavoring “ideas that offend” discriminates based on viewpoint, in violation of the First Amendment....

We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

[PROBLEM 6-1 is deleted]

**Chapter Ten, INTRODUCTION TO COPYRIGHT: THEORY & HISTORY, page 288**

**Works published in 1923 entered the US public domain in 2019; the Supreme Court grants certiorari in *Georgia, et al. v. Public.Resource.Org***

*This is a general update to some of the material regarding the public domain in Chapter Ten.*

As you learned in Chapter Two, works from 1923 were originally set to go into the public domain in 1999, but in 1998 Congress extended their copyright term for 20 years. Those 20 years have now passed, and on January 1, 2019, works published in 1923 entered the United States public domain. Therefore, in this chapter, “1923” should be changed to “1924” when referring to the cut-off date for the public domain. For example, on page 288, the middle of the second full paragraph should read:

“Successive extensions of the copyright term (see below) mean that only works published before 1924 are conclusively in the public domain. However, because of the 1909 Act’s notice and renewal requirements, works from 1924–1977 published without notice, as well as works from 1924–1963 that were published with notice but whose copyrights were not renewed, are also in the public domain...”

Another public domain-related development is the Supreme Court’s 2019 grant of certiorari in *Georgia, et al. v. Public.Resource.Org*. 17 U.S.C. §105 makes clear that works of the United States government (such as the cases and statutes in this book) cannot be copyrighted, but what about works from state and local governments? In the lower court decision, the Eleventh Circuit invalidated the copyright claim in the Official Code of Georgia Annotated, holding that “official legal promulgations of government...are intrinsically public domain material and, therefore, uncopyrightable.” The Supreme Court will now have the opportunity to decide whether citizens have “unfettered access to the legal edicts that govern their lives” (quoting from the Eleventh Circuit decision).

**Chapter Eleven, COPYRIGHTABLE SUBJECT MATTER, Useful Articles, page 343, question 6**  
**Post-*Star Athletica* decision in *Silvertop Associates v. Kangaroo Manufacturing***

*On page 343, this case summary replaces the second paragraph in Question 6 discussing Puma's claims over shoes from its Fenty line.*



Take a look at the banana costume on the left. Assuming that the originality requirement is satisfied, is it copyrightable, so that the costumes to its right are infringing? Specifically, 1) are there sculptural features that are separable under the test in *Star Athletica* from the useful article (a banana costume)? And if so, 2) does the expression of those features merge with the underlying idea?

In August 2019, the Third Circuit held in *Silvertop Associates v. Kangaroo Manufacturing* that this costume was, indeed, copyrightable. Applying *Star Athletica*, the court found that “one can still imagine the banana apart from the costume as an original sculpture.” While *Star Athletica* involved a two-dimensional design, the court explained that the decision “also provided helpful examples addressing three-dimensional articles.” These included the following: “a replica of a useful article (cardboard model car) could be copyrightable, although the underlying article (the car itself) could not” and “a shovel, ‘even if displayed in an art gallery,’ still has an intrinsic utilitarian function beyond portraying its appearance or conveying information. So it could not be copyrighted, even though a drawing of a shovel or any separately identifiable artistic features could.” Do you find these examples from *Star Athletica* helpful in dealing with the banana costume?

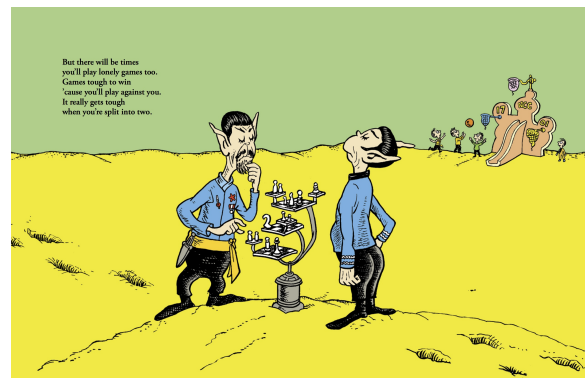
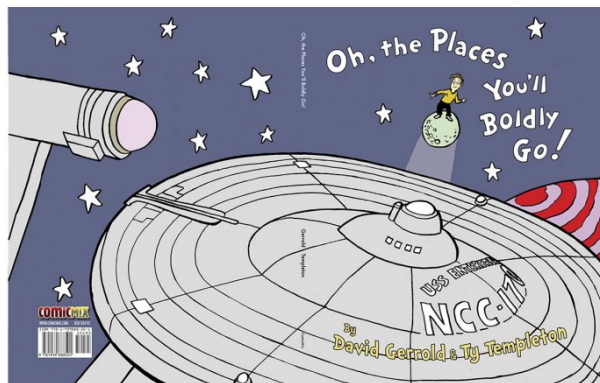
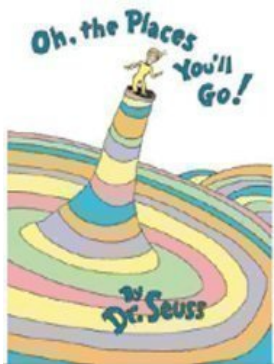
Moving onto the question of merger, the court held that “copyrighting Rasta’s [the plaintiff’s] banana costume would not effectively monopolize the underlying idea because there are many other ways to make a costume resemble a banana,” and pointed to over 20 non-infringing examples of banana costumes provided by the plaintiff. Later, when discussing the related doctrine of *scenes a faire* (explored in Chapter Twelve), the court added: “Although a banana costume is likely to be yellow, it could be any shade of yellow—or green or brown for that matter. Although a banana costume is likely to be curved, it need not be—let alone in any particular manner. And although a banana costume is likely to have ends that resemble a natural banana’s, those tips need not look like Rasta’s black tips (in color, shape, or size).” Do these kinds of observations resolve the merger question? Is this case consistent with *Kalpakian*, or with the statement in *Proctor & Gamble* that “[w]e cannot recognize copyright as a game of chess in which the public can be checkmated”?



## Chapter Thirteen, LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE, page 490, Notes

### New fair use decisions

On page 490, these Notes on recent fair use developments follow the Notes on the Google Books and Cariou cases.



In *Dr. Seuss Enterprises v. ComicMix* (S.D. Cal. 2019), the court held that the mash-up *Oh, the Place You'll Boldly Go!* (“*Boldly*”) – which combined elements from works by Dr. Seuss including *Oh, the Places You'll Go!* (“*Go!*”) with elements from the *Star Trek* franchise – was protected by fair use. Dr. Seuss Enterprises brought the lawsuit, and had argued that the *Oracle v. Google* fair use decision that you have just read was persuasive, but the court disagreed:

[T]here is a key distinction: in *Oracle*, the Defendants copied the 37 SE API packages wholesale, while in *Boldly* “the copied elements are always interspersed with original writing and illustrations that transform *Go!*’s pages into repurposed, *Star-Trek*-centric ones.” Defendants did not copy verbatim text from *Go!* in writing *Boldly*, nor did they replicate entire illustrations from *Go!* Although Defendants certainly borrowed from *Go!*—at times liberally—the elements borrowed were always adapted or transformed. The Court therefore concludes...that Defendants’ work, while commercial, is highly transformative.

On the third fair use factor, the court determined that even though *Boldly* “borrowed heavily” from Dr. Seuss’s works, it used “no more than was necessary” for its transformative purpose. For example, “[i]nstead of replicating Plaintiff’s rainbow-ringed disc, Defendants drew a similarly-shaped but decidedly non-Seussian spacecraft — the USS Enterprise — at the same angle and placed a red-and-pink striped planet where the larger of two background discs appears on the original cover.” The court also concluded that the fourth market harm factor was neutral because “the harm to Plaintiff’s market remains speculative.”

Do you find the fair use claim in this case more compelling than the one in *Oracle*? How are they different?



AWF-2001 (Ex. 48)  
Andy Warhol, *Prince*, 1984, acrylic and  
silkscreen ink on linen, 20 x 16 inches



AWF-1992 (Ex. 39)  
Andy Warhol, *Prince*, 1984, acrylic and  
silkscreen ink on linen, 20 x 16 inches



AWF-1993 (Ex. 40)  
Andy Warhol, *Prince*, 1984, acrylic and  
silkscreen ink on linen, 20 x 16 inches



AWF-1995 (Ex. 42)  
Andy Warhol, *Prince*, 1984, acrylic and  
silkscreen ink on linen, 20 x 16 inches



AWF-2002 (Ex. 49)  
Andy Warhol, *Prince*, 1984, acrylic and  
silkscreen ink on linen, 20 x 16 inches



AWF-1994 (Ex. 41)  
Andy Warhol, *Prince*, 1984, acrylic and  
silkscreen ink on linen, 20 x 16 inches



AWF-2003 (Ex. 50)  
Andy Warhol, *Prince*, 1984, acrylic and  
silkscreen ink on linen, 20 x 16 inches



AWF-1997 (Ex. 44)  
Andy Warhol, *Prince*, 1984, acrylic and  
silkscreen ink on linen, 20 x 16 inches



AWF-1996 (Ex. 43)

AWF-1999 (Ex. 46)

AWF-2004 (Ex. 51)

AWF-2002 (Ex. 52)

In *The Andy Warhol Foundation for the Arts v. Lynn Goldsmith* (S.D.N.Y. 2019), the court held that Warhol’s “Prince Series” (eight of the sixteen works in the series are above, right) did not infringe copyright in Goldsmith’s photograph of Prince (above, left) because the Prince Series was transformative and protected by fair use. (The Warhol Foundation is the plaintiff because it brought a declaratory judgment action.) Here is an excerpt from the decision:

[Goldsmith’s] photographic work centers on helping others formulate their identities, which she aims to capture and reveal through her photography. Her photoshoot illustrated that Prince is “not a comfortable person” and that he is a “vulnerable human being.” The Goldsmith Prince Photograph reflects these qualities.

Warhol’s Prince Series, in contrast, can reasonably be perceived to reflect the opposite. In all but one of the works, Prince’s torso is removed and his face and a small portion of his neckline are brought to the forefront. The details of Prince’s bone structure that appear crisply in the photograph, which Goldsmith sought to emphasize, are softened in several of the Prince Series works and outlined or shaded in the others. Prince appears as a flat, two-dimensional figure in Warhol’s works, rather than the detailed, three-dimensional being in Goldsmith’s photograph. Moreover, many of Warhol’s Prince Series works contain loud, unnatural colors, in stark contrast with the black-and-white original photograph. And Warhol’s few colorless works appear as rough sketches in which Prince’s expression is almost entirely lost from the original.

These alterations result in an aesthetic and character different from the original. The Prince Series works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure. The humanity Prince embodies in Goldsmith’s photograph is gone. Moreover, each Prince Series work is immediately recognizable as a “Warhol” rather than as a photograph of Prince — in the same way that Warhol’s famous representations of Marilyn Monroe and Mao are recognizable as “Warhols,” not as realistic photographs of those persons.

Do you find this reasoning persuasive?

## Chapter Eighteen, PATENTABLE SUBJECT MATTER, page 694, Notes

### Post-Alice case law, new subject matter eligibility bill, new PTO guidelines

*This material should be inserted on page 694 after the Note on subject matter eligibility, which it supplements, and before Problem 18-2.*

#### Additional post-Alice case summaries

Here are the PTO's summaries of some recent Federal Circuit decisions regarding patentable subject matter. In the following two decisions, the Federal Circuit held that improvements to computer technology were not "abstract ideas," and were therefore eligible subject matter. (All of the language in quotes is from the PTO's "[Memorandum - Recent Subject Matter Eligibility Decisions: \*Finjan\* and \*Core Wireless\*](#).")

- "In *Finjan Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299 (Fed. Cir. 2018), the claimed invention involves a method of virus scanning that scans an application program, generates a security profile identifying any potentially suspicious code in the program, and links the security profile to the application program. The claims were held patent eligible because the court concluded that the claimed method recites specific steps that accomplish a result that realizes an improvement in computer functionality. In particular, the method generates a security profile that identifies both hostile and potentially hostile operations, and can protect the user against both previously unknown viruses and 'obfuscated code.' This is an improvement over traditional virus scanning, which only recognized the presence of previously-identified viruses. The method also enables more flexible virus filtering and greater user customization."
- "In *Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc.*, 880 F.3d 1356 (Fed. Cir. 2018), the claimed invention involves a graphical user interface (GUI) for mobile devices that displays an application summary of each application on the main menu while those applications are in an unlaunched state. The claims to computing devices were held patent eligible because the court concluded that they are directed to an improved user interface for electronic devices, not to the abstract idea of an index. In particular, the claims contain precise language delimiting the type of data to be displayed and how to display it, thus improving upon conventional user interfaces to increase the efficiency of using mobile devices."

By contrast, in the following cases, the Federal Circuit held that software-related inventions were not eligible subject matter because they were abstract ideas that did not include an inventive concept: "*Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F.3d 1372 (Fed. Cir. 2017) (local processing of payments for remotely purchased goods); *Two-Way Media Ltd. v. Comcast Cable Communications, LLC*, 874 F.3d 1329 (Fed. Cir. 2017) (sending, directing, monitoring receipt of, and accumulating records about information; monitoring delivery of real-time information to users; measuring delivery of real-time information for commercial purposes); *Smart Systems Innovations, LLC v. Chicago Transit Authority*, 873 F.3d 1364 (Fed. Cir. 2017) (collection, storage, and recognition of data related to financial transactions for a mass transit system); *Secured Mail Solutions LLC v. Universal Wilde, Inc.*, 873 F.3d 905 (Fed. Cir. 2017) (using a marking affixed to the outside of a mail object to communicate information about the mail object)."

#### Section 101 reform legislation

In 2019, the Senate Judiciary Subcommittee on Intellectual Property began exploring legislation that would significantly change the standard for patent-eligible subject matter. In May 2019, Senators Thom Tillis and Chris Coons released this revision of Section 101:

### Section 101:

(a) Whoever invents or discovers any useful process, machine, manufacture, or composition of matter, or any useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

(b) Eligibility under this section shall be determined only while considering the claimed invention as a whole, without discounting or disregarding any claim limitation.

### Additional Legislative Provisions:

The provisions of section 101 shall be construed in favor of eligibility.

No implicit or other judicially created exceptions to subject matter eligibility, including “abstract ideas,” “laws of nature,” or “natural phenomena,” shall be used to determine patent eligibility under section 101, and all cases establishing or interpreting those exceptions to eligibility are hereby abrogated.

The eligibility of a claimed invention under section 101 shall be determined without regard to: the manner in which the claimed invention was made; whether individual limitations of a claim are well known, conventional or routine; the state of the art at the time of the invention; or any other considerations relating to sections 102, 103, or 112 of this title.

How would this alter the current threshold for subject matter eligibility? Who would benefit from the new legislation, and who would be harmed? Is the bill consistent with the goals of patent law?

### New PTO Eligibility Guidance

In January 2019, the PTO released its own *Revised Patent Subject Matter Eligibility Guidance*, citing the need to “increase clarity and consistency” in the area. While this guidance “does not constitute substantive rulemaking and does not have the force and effect of law,” it does “sets out agency policy with respect to the USPTO’s interpretation of the subject matter eligibility requirements,” so it will be important for anyone seeking a patent. Here are some highlights.

First, the PTO distills the category of “abstract ideas” into the following three groups:

- **“Mathematical concepts** – mathematical relationships, mathematical formulas or equations, mathematical calculations;
- **Certain methods of organizing human activity** – fundamental economic principles or practices (including hedging, insurance, mitigating risk); commercial or legal interactions (including agreements in the form of contracts; legal obligations; advertising, marketing or sales activities or behaviors; business relations); managing personal behavior or relationships or interactions between people (including social activities, teaching, and following rules or instructions);
- **Mental processes** – concepts performed in the human mind (including an observation, evaluation, judgment, opinion).”

In addition, the PTO will exclude a claim that recites a judicial exception (laws of nature, natural phenomena, abstract ideas) only if it “fails to integrate the exception into a practical application.” Therefore, the following claims would constitute patent-eligible subject matter because they “apply, rely on, or use the judicial exception in a manner that imposes a meaningful limit on the judicial exception, such that the claim is more than a drafting effort designed to monopolize the judicial exception”:

- “an additional element reflects an improvement in the functioning of a computer, or an improvement to other technology or technical field

- an additional element that applies or uses a judicial exception to effect a particular treatment or prophylaxis for a disease or medical condition
- an additional element implements a judicial exception with, or uses a judicial exception in conjunction with, a particular machine or manufacture that is integral to the claim
- an additional element effects a transformation or reduction of a particular article to a different state or thing
- an additional element applies or uses the judicial exception in some other meaningful way beyond generally linking the use of the judicial exception to a particular technological environment, such that the claim as a whole is more than a drafting effort designed to monopolize the exception.”

If a claim *is* directed to a judicial exception (and fails to integrate it into a practical application), then the PTO will proceed to evaluate whether it provides an “inventive concept” by asking whether there are additional elements that:

- “add a specific limitation or combination of limitations that are not well-understood, routine, conventional activity in the field, which is indicative that an inventive concept may be present
- or simply append well-understood, routine, conventional activities previously known to the industry, specified at a high level of generality, to the judicial exception, which is indicative that an inventive concept may not be present.”

The full guidance can be found at <https://www.govinfo.gov/content/pkg/FR-2019-01-07/pdf/2018-28282.pdf>. Is the excerpted guidance consistent with the case law that you have read?