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A "Marketplace" of (Applied) Ideas?

INTRODUCTION

The Supreme Court's 2010 decision in Bilski v. Kappos appears to have provided inadequate guidance to the courts and the Patent Office regarding the scope of the abstract-ideas exclusion from patentable subject matter. Federal Circuit Chief Judge Randall R. Rader, however, has found in that decision a clear vindication of his own view that the "machine-or-transformation" test is incorrectly grounded in "the age of iron and steel at a time of subatomic particles and terabytes," and thus fails, for example, to accommodate advances in "software [that] transform[] our lives without physical anchors." Judge Rader has subsequently authored a series of opinions identifying "the marketplace" as an operational context in which a claimed invention is not likely to be unpatentably abstract. This Article examines and critiques this reliance on "the marketplace" — itself an economic abstraction — as a measure of the abstractness of a claimed invention.