

Yaniv Heled

How Abortion Politics Gave Us the Distinction Between Patentably Non-Human and Patently Human

Abstract

On September 8, 2011 Congress passed the Leahy-Smith America Invents Act (AIA). AIA was “in the making” for about six years and its enactment is considered as the most significant patent legislation since the 1952 Patent Act. Yet, in a “last minute” addition, Congress added to the AIA bill language similar to that of the Weldon Amendment. Tacked on to each year’s consolidated appropriations bill regularly since 2004, the Weldon Amendment dictates that “[n]one of the funds appropriated or otherwise made available under this Act may be used to issue patents on claims directed to or encompassing a human organism.” Outspokenly seeking to achieve the same objective as the Weldon Amendment, AIA Section 33 decrees that “[n]otwithstanding any other provision of law, no patent may issue on a claim directed to or encompassing a human organism.” But what is a “human organism?” The AIA does not say, nor does it indicate where one may look for such a definition. And so the question becomes: what is a “human organism” for patent law purposes? What was Congress seeking to prohibit by excluding “human organisms” from patentable subject matter? Was such a prohibition really necessary under current patent law? And what are going to be the likely outcomes (if any) of the prohibition on the patenting “human organisms”? The history of legislation teaches us that often the inclusion of obscure language, especially when such language is ridden with ethical disagreement, might result in wildly different consequences than those originally intended. Will this prohibition on the patenting of “human organisms” be another such case or was this particular letter of the law born dead?