

THE BEST OF BILSKI

By: Bob Latham & Carl Butzer

It seems impossible these days for any commentary on patent law to refrain from making some mention of *Bilski v. Kappos* which was argued before the United States Supreme Court on November 9, 2009 – a case that could provide some definitive guidance on what is and what is not patentable subject matter. But who would have thought that such a case would provide so many instances of laughter being officially recognized in the transcript of the oral argument? Indeed there were at least five instances of levity, each time triggered by one of the justices’ pet peeves about patentability.

Justice Scalia started off the comedic tone by offering up an opinion on Dale Carnegie and patentability. “Of course the government says that the -- that the term on which it hangs its hat is the term ‘useful arts’ and that that meant, originally, and still means manufacturing arts, arts dealing with workmen . . . not somebody who writes a book on how to win friends and influence people.”

Justice Sotomayer followed suit by asking the petitioners their view on patentability and speed dating. “So how do we limit it to something that’s reasonable? Meaning, if we don’t limit it to inventions or to technology, . . . then why not patent the method of speed dating?”

As an aside, is it counterintuitive that Justice Scalia should be talking about how to win friends and influence people and Justice Sotomayer should be talking about speed dating?

Justice Breyer’s concern was a more personal one seeking (presumably facetiously) an endorsement that his antitrust teaching law methods were patentable:

JUSTICE BRYER: So you are going to answer this question yes. You know, I have a great, wonderful, really original method of teaching antitrust law, and it kept 80 percent of the students awake. They learned things –

(Laughter.)

JUSTICE BREYER: It was fabulous. And I could probably have reduced it to a set of steps, and other teachers could have followed it. That you are going to say is patentable, too?

MR. JAKES: Potentially.

The hypotheticals regarding what is patentable or not patentable took a historical turn when

Justice Scalia raised the specter of the patentability of horse whispering:

JUSTICE SCALIA: You know, you mention that there are all these -- these new areas that didn't exist in the past because of modern business and whatnot, but there are also areas that existed in the past that don't exist today. Let's take training horses. Don't you think that -- that some people, horse whisperers or others, had some, you know, some insights into the best way to train horses? And that should have been patentable on your theory.

MR. JAKES: They might have, yes.

JUSTICE SCALIA: Well, why didn't anybody patent those things?

MR. JAKES: I think our economy was based on industrial process.

JUSTICE SCALIA: It was based on horses, for Pete's sake. You --

(Laughter.)

Consensus seemed to be reached at the end, however, when no one objected to Justice

Kennedy's confirmation that the alphabet cannot be patented.

JUSTICE KENNEDY: But it would be different, it seems to me, than what you are -- let's assume you can't patent an alphabet. I assume that's true.

Someday soon, the *Bilski* opinion will be issued and will overshadow these vignettes.

However, for the moment, let's appreciate entertainment in one of the most unlikely of settings.