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Concrete Thoughts About Abstract Ideas: Why a Nebulous Exception to Patentability Should Not Swallow Computer Software

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The United States patent system is supposed to protect “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” This language, from Section 101 of the Patent Act, was historically interpreted to “include anything under the sun that is made by man.” Recently, however, lower courts have invalidated software patents relating to everything from organizing digital photographs to online restaurant menus. They have done so on the grounds that the inventions failed to satisfy the requirements of Section 101. Yet photographs, menus, and associated software are all clearly “made by man.” So why aren't they patentable subject matter?