Q2 (2B) – Golden Flakes Of Utility

Gold mining as a research topic occupied a substantial amount of my time in high school, largely in part to the Discovery Channel show *Gold Rush*. I often thought of gold mining as the search for golden nuggets, seemingly large pieces of gold that meant you were instantly rich. It was in my watching, and in my research that I discovered something interesting – the golden nugget accounts for less than 2% of all gold found. The majority of gold finds are flour or flakes; tiny, seemingly worthless shiny specks that take a long time to sift and separate from the surrounding muck. But when accumulated the ounces start to tick up, and so do the dollar signs. This analogy serves as the basis for my opinion that a minimalist view of the utility requirement serves the public interest more than a robust showing of substantiality ever could.

From a superficial examination it might appear that requiring substantial utility is better than a minimalist view. The right to exclude others should be treated carefully, and only afforded to someone for good reason. These principles might suggest then that the right to exclude should only be awarded for an invention that substantially adds to the public good. However, in practice such a requirement would take away from the central concern in patent law – encouraging innovation. If a person was only awarded for finding the golden nugget of utility, then the vast majority would go unrewarded. What incentive would there be then for a person to attempt to innovate? How would they be able to sustain their careers as inventors, if their inventions are continuously shot down for not having enough utility? Excuse my use of the rhetorical – the answer is there would be little incentive and they wouldn’t be able to sustain such a career. Gold miners could not seek out gold if they had to find nuggets every time they went on a gold mining adventure. Surely gold nuggets are the goal, as are inventions with substantial utility to the public,
but the flakes and flour are what sustain inventors and create an environment that encourages people to try.

Asides from stifling innovation, a heightened utility requirement would be a subjectively imposed nightmare, both at the USPTO and in the courts. There are too many questions with no clear, objective answer that must be asked in determining whether something is useful. Here are a few: useful to who? Useful to how many? Is something more useful because it serves to further research or more useful because it has practical applications immediately apparent? These questions having no clear answer means the likely result from the courts would be a multi-factor test with no single factor being determinative. The likely result of said multi-factor test would be uncertainty among inventors as to whether or not their idea for an invention was truly useful. And only after the courts had packaged the heightened utility requirement in a neat multi-factor box would they recognize what I see as the only possible result – less inventions are patented.

In *Gold Rush*, there were multiple outfits of teams searching for gold. You had very organized crews like the Hoffman’s but also smaller crews like the Schnabel crew. The hits for both crews are sometimes hundreds of thousands of dollars apart, due largely in part to resources available to the crews. Larger crews have access to more tools and more bodies, and likely more attractive claims (pieces of land thought to have gold on them). This reality becomes an allegory for the advantages inherent in being wealthy and goes to my next point of a higher utility requirement’s stifling of independent inventors. Larger crews, big universities and companies probably won’t be hit as hard by the utility requirement as the underdogs – individuals looking for their flakes to keep them going until they hit the big nugget. These individuals don’t have the same safety nets that the big crews have. If they stake their claim and found no nuggets, they’d go under, and wouldn’t be able to invent full-time.
At this point I admit it is possible that I have reached the limits of my analogy. I also am willing to recognize that the facts may suggest that in patent world, gold nuggets are more common than 2%, in fact they may represent the majority of finds. But my reasoning remains the same up until that percentage hits very high numbers. Utility should be a low bar because the accumulated value of the flakes, the small advances made by patents with little utility, is greater than the accumulated value of the nuggets, even if our motivation is always in the nuggets. For these reasons, and possibly many more, the utility requirement should remain a low bar to being granted a patent.

(Word Count: 801)