



THINK FORWARD

Alice One Year Later - Litigation Trends in Districts Courts and the PTAB

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June 10, 2015

Almost one year ago, the Supreme Court issued its decision in *Alice v. CLS Bank*, a decision that fundamentally changed the way software claims are analyzed for patent eligibility. Following the decision, *Alice* has been used aggressively by litigants to challenge the validity of many different types of software and internet-based patents under 35 U.S.C §101.

The *Alice v. CLS Bank* Decision

On June 19, 2014, the Supreme Court issued a unanimous decision in *Alice v. CLS Bank*. The claims at issue were directed to financial-trading systems on which trades between two parties who were to exchange payment were settled by a third party in ways that reduce the risk of the transaction. The Court determined that the claims were not patent eligible because they were directed towards an abstract idea and did not contain an inventive concept sufficient to transform the abstract idea into a patent-eligible concept. The Court stated that tying an abstract idea, i.e. a method of reducing risk by using a third party in a financial transaction, to generic computer components was insufficient to transform the idea into patent-eligible subject matter.

Litigation Trends

The Supreme Court's *Alice* decision has had a significant impact on motion practice involving software and internet-based patents in district courts across the country. Since *Alice* and as of June 9, 2015, district courts issued over 70 decisions addressing pretrial dispositive motions based on patent-ineligible subject matter under 35 U.S.C §101. District courts found the asserted patents invalid in 53 of 75 (71%) of those decisions. Breaking the types of pretrial motions down into smaller groups, district courts granted 14 of the 19 Rule 12(b)(6) motions (74%), 15 of the 22 Rule 12(c) motions (68%) and 24 of the 34 Rule 56 motions (71%). Not included are partial rulings of invalidity pursuant to two Rule 12(b)(6) motions and two Rule 56 motions.

Additionally, since *Alice* and as of June 9, 2015, the Patent Trial and Appeals Board ("PTAB") issued 30 final written decisions addressing unpatentability challenges under 35 U.S.C §101. The PTAB deemed all of the challenged claims unpatentable.

Going Forward

Companies accused of infringing software and internet-based patents should give careful consideration to filing dispositive motions based upon *Alice* under 35 U.S.C §101. Those companies should also consider filing *Alice*-type dispositive motions early in litigation as Rule 12(b)(6) or 12(c) motions, or petitioning for *inter-partes* review or other PTAB proceeding, to invalidate patents that cannot pass the Supreme Court's *Alice* test. At the same time, owners of software and internet-based patents need to give careful consideration to the patent eligible subject matter of their patents when considering making

an accusation of infringement or filing suit.