THE STATE OF "ALICE" 2020: IS CONGRESSIONAL REFORM ON THE HORIZON?

ludwig APC

AN INTELLECTUAL PROPERTY FIRM

In 2014, the U.S. Supreme Court's 9-0 decision in *Alice v. CLS Bank* put an end to, or at least hampered, the prevalence of potentially "bad patents" being granted that covered abstract ideas, especially in the area of software.

At the heart of the landmark 2014 case was Alice Corporation's claims that its patent for a financial transaction process using computers and electronic media was being infringed upon by CLS Bank, which had been using a similar process *dating back to 2002*. Central to the ruling was the idea that certain vague abstract ideas were patent-ineligible under *Section 101* of Title 35, which governs all aspects of patent law in the United States.

With the decision by SCOTUS, software patents in particular suddenly became tougher to acquire, necessitating much more in-depth descriptions of how the software performs, what it does, and the process (or processes) controlled by it. General descriptions of a process simply alluding to computers and software were no longer adequate.

For and Against

- **Proponents** of the decision have lauded the Supreme Court for *gutting the system of problematic patents* involving abstract ideas or covering known processes—some of them longstanding business practices—that were simply made to appear as new inventions or innovations because they were being carried out by or with the aid of a conventional computer.
- **Opponents** have argued that the Supreme Court decision was going to *make it more difficult* for legitimate patent seekers to protect their inventions against infringement because the process of getting a patent would be much more time consuming and expensive. They argued that many individuals and companies would simply hold onto their inventions as trade secrets, stifling innovation.

Alice's Impact on Patents

The Alice decision has had a profound impact of patents in the United States. In a recent *www.Heritage.org* article, *Congress Should Reform Patent Eligibility Doctrine to Preserve the U.S. Innovation Economy*, the author stated that patent application data "confirms extensive invalidations of patents and rejections of patent applications under (Alice) outside of historical norms."

In the year following the decision, more than 60 percent of the software patents challenged using the new Alice standard had at least one claim rejected for being unpatentable. Since then, though, the percent of successful software patent challenges related to Alice has dropped each year and now stands at around 50 percent. This number remains historically high but is seemingly leveling off.

This *leveling trend* is expected to continue in 2020 as companies—especially large companies with extensive patent portfolios in emerging technologies and software—get better at finding ways to work within the framework of the Alice ruling.

However, what shouldn't be overlooked is the potential impact the ruling continues to have on innovation in this country. To illustrate, in the same *www.Heritage.org* article noted above, the author wrote that "well over 1,000 patent applications were abandoned" between 2014 and 2017 because they were found to be unpatentable under the Alice guidelines. The result? China and/or the European Patent Office granted patent applications for many of these same inventions.

Current Situation

As of this writing, here's a brief recap of where the US Patent & Trademark Office, the Supreme Court, and Congress are in relation to the Alice decision and any potential for changes:

- In 2019, US Patent & Trademark Office Director Andrei Iancu issued new guidelines governing how USPTO examiners were to apply Section 101 to their patent application reviews. Since implementation of the guidelines, fewer patent applications have been rejected by USPTO, so there appears to have been some impact.
- The Supreme Court is appears to be *distancing itself from making any new rulings* that would affect case law related to Alice. In fact, SCOTUS has denied numerous certiorari petitions related to denied patent cases.
- Congress, however, is beginning to look anew at Section 101 and the affect that the Alice decision has had on it. While there is no legislation currently up for a vote, there is a "discussion draft" circulating in the Senate of a proposed amendment to Section 101. Released in May 2019, the language asserts that "no implicit or other judicially created exceptions to subject matter eligibility, including 'abstract ideas,' 'laws of nature,' or 'natural phenomena,' shall be used to determine patent eligibility under Section 101, and all cases establishing or interpreting those exceptions to eligibility are hereby abrogated."

What It Could Mean

"No matter which side of the Alice decision you find yourself on, some developments related to the reform of Section 101 are likely coming in 2020, or soon thereafter," explains Eric Ludwig, whose California-based law firm specializes in intellectual property and business litigation around the globe. "Patent holders, or those thinking of applying for a patent, especially in the tech and software fields, would do well to keep their attention on all things Alice."

Will it be a return to the pre-2014 "wonderland" of potentially unworthy or bad patents? Ludwig thinks not. "But 2020 could see the intellectual property space see more software patents survive an Alice challenge in litigation," he says.

Protect Your Product. Your Business. Your Dreams.

Contact *Eric Ludwig* today for one-hour consultation to discuss whether you need to apply for copyright, patent, and/or trademark protection . . . and how to do it.

(619) 929-0873 | *consultation@ludwigiplaw.com*