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Patent Eligibility of Software

September 16, 2014

Last year, a deeply divided set of opinions in an en banc Federal Circuit decision left doubt as to whether software programs would remain eligible for patent protection. Recently, the U.S. Supreme Court brought closure by passing on the opportunity to declare software *per se* unpatentable. In *Alice Corp. Pty. Ltd. v. CLS Bank Int'l.*, the Court unanimously held that the computer-implemented inventions recited in the patent claims at issue were drawn to an abstract idea. The Court reasoned that merely requiring a generic computer implementation fails to transform that abstract idea into a patent-eligible invention. The patents at issue disclosed a computer-implemented scheme for mitigating "settlement risk" (*i.e.*, the risk that only one party to a financial transaction will pay what it owes) by using a third-party intermediary. The question presented was whether such claims are patent-eligible under 35 U.S.C. §101, or are instead drawn to a patent-ineligible abstract idea. Following issuance of this opinion, the U.S. Patent and Trademark Office (USPTO) Deputy Commissioner for Patent Examination Policy clarified that software is still patent-eligible, advising USPTO patent examiners by memo that, "*Alice Corp.* neither creates a per se excluded category of subject matter, such as software or business methods, nor imposes any special requirements for eligibility of software or business methods." According to this memorandum, the basic inquiries to determine subject matter eligibility remain unchanged. It remains to be seen how patent examiners will implement these guidelines, and how the courts and the Patent Trial and Appeal Board will interpret *Alice*.

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