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Will 101 lead to mutually assured destruction?

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Although the Supreme Court's decision in *Alice Corp. v. CLS Bank International* has been hailed by some as an important development in the efforts to curb abusive patent litigation by non-practicing entities, others have raised concerns about unintended effects. For example, software companies have been particularly concerned about the long-term impact of *Alice* on the viability of patent protection for software. More generally, it is important to note that *Alice* is not limited to NPEs, but affects even competitor (B2B) disputes.

We conducted a cursory search on decisions issued in 2014 through March 2015 that granted motions to dismiss or for summary judgment based on patent subject matter ineligibility. The results appeared relatively balanced between NPE and competitor suits, where we viewed any plaintiff that had commercial operations other than patent licensing and enforcement as a practicing entity. At a qualitative level, we did not notice any particular bias between NPE and competitor suits. It appears that 101 challenges are equally effective against both practicing and non-practicing entities. Thus, *Alice* may turn out to be less a weapon against NPEs and more of a mutually assured demise of a certain class of patents.

The March 10, 2015 grant of summary judgment in *Hewlett-Packard Company v. ServiceNow, Inc.*, a suit between competitors, is illustrative. In *Hewlett-Packard*, HP asserted 8 patents against ServiceNow, allegedly a direct competitor of HP in the Information Technology Service Management (ITSM) software market. ServiceNow moved for summary judgment of invalidity against 4 of the patents as being directed to abstract ideas. Initially, HP opposed the motion as being premature before claim construction. The court gave leave to HP to file proposed constructions and to ServiceNow to additionally brief whether or not the patents at issue would be invalid under the proposed constructions. For purposes of the motion, the court adopted HP's proposed construction.

The court applied the *Alice* analytical framework without any concessions or exceptions for the B2B context of the lawsuit. Some of the court's statements, reasoning and findings include:

- It is clear under Supreme Court precedent that simply reciting the phrase "instructions for" in front of the substantive functional limitations is insufficient to turn an otherwise ineligible abstract idea into a patent-eligible application.
- Similarly, the fact that the claims are limited to applying this abstract concept in the context of IT

help desks does not supply the necessary inventive concept.

- The court concludes that HP's proposed construction… is merely a functional description of what the otherwise generic data structure needs to accomplish. Similarly, any apparatus for organizing information hierarchically will require data structures "related to creating a hierarchy of information." This is again nothing more than a functional description of the data structure, rather than a substantive limitation on how the abstract idea is implemented.
- These terms are merely recitations of what it means to automate something on a computer…. In short, even after taking HP's proposed constructions into account, [the claims] are so broadly worded as to cover *any* attempt to automate….

The same or similar statements have been equally applied in other cases by other courts against NPE plaintiffs. Of particular note, the court rejected HP's "commercial success" argument. The court stated, "even accepting that HP was the first entity to successfully automate the resolution of IT incidents, this does not entitle HP to an patent on (the abstract idea of) the automated resolution of IT incidents."

So, it seems, at least for now, competitors need to take careful stock of 101 vulnerability of their own patents. Courts have shown, based on *Alice,* a penchant for get ridding of "abstract" patents, whoever owns them.
