2014 Year in Review: Intellectual Property

by Adam Sanderson, Texas Lawyer

The prevalence of patent litigation in Texas is well known, with the U.S. District Court for the Eastern District seeing more patent infringement filings than any other venue in the United States during the past 10 years. The biggest development in patent circles during the past year is the seminal decision by the U.S. Supreme Court in *Alice v. CLS Bank*, which addressed whether, and under what circumstances, software may be patented.

The number of software patents issued has increased every year since 1991. By 2011, software patents, which make up the majority of infringement claims, accounted for the majority of all patents issued.

The contested patent in *Alice* covered a software system for mitigating settlement risk in financial transactions. Relying on its 2009 decision in *Bilski v. Kappos*, which addressed the patentability of business methods, and applying the two-part test introduced in *Mayo v. Prometheus Labs* in 2012, the court held that the *Alice* patent was invalid. In particular, the court held that the patent violated the longstanding rule that an abstract idea cannot be patented.

The court emphasized that merely adding a generic computer to an abstract idea does not transform the patent-ineligible idea into a patent-eligible invention. The Supreme Court, however, admitted that "at some level, all inventions embody, use, reflect, rest upon, or apply … abstract ideas." The court also was careful to say that a computer-implemented invention would continue to receive patent protection if it demonstrates an "inventive concept" that transforms the invention into something beyond merely an abstract idea. The difficulty is "distinguish[ing] between patents that claim the building blocks of human ingenuity [which are not patent eligible] and those that integrate the building blocks into something more [which are patent eligible]."

The *Alice* decision does not provide a rigid, bright-line test for making this distinction. Instead, the court opted for a flexible approach to be applied on a case-by-case basis. For instance, in *Alice*, the court noted that the patent did not "purport to improve the functioning of the computer itself or effect an improvement in any other technology or technical field." The court also referred in agreement with its 1981 decision in *Diamond v. Diehr*, which held that a computer-implemented process for curing synthetic rubber was more than an abstract idea and was, in fact, patentable. The court distinguished the *Alice* patent from the *Diehr* patent by noting that the *Diehr* patent was valid because it disclosed a process designed to solve a technological problem.

One thing that patent lawyers and software clients can do to avoid the fate of the *Alice* patent is to establish how their computer-enabled inventions are designed to improve on existing technological processes and remedy existing unsolved problems. A defendant, on the other hand, may be best served by arguing that its adversary's software patent should be invalid under *Alice* because it merely adds a generic computer to an already well-known, long-since-solved problem.

This give-and-take between litigants likely will become the focal point of future software patent suits. Eastern District courts already have begun deciding cases based on *Alice*. Given the ubiquity of software patents and the prominence of software infringement suits in Texas, the *Alice* decision will prove to be the year's most important development in Texas intellectual property law.

Adam Sanderson is a partner and trial lawyer at Reese Gordon Marketos in Dallas, where he represents owners, businesses, and entrepreneurs in complex, commercial lawsuits, especially cases involving software and other proprietary technologies.