Software Patents: Supreme Court Ruling Leaves Too Many Questions

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A unanimous US Supreme Court confirmed today that the claims of Alice Corp. to its computer-implemented method and system for mitigating "settlement risk" in financial transactions are not patent-eligible subject matter.

Once again, the court resorted to the "abstract idea" analysis it promulgated in the recent Bilski and Mayo cases. Once again, the court gave virtually no guidance as to how one could tell what qualifies as an "abstract idea." The opinion simply used qualitative terms such as "concept," "fundamental," and "building block" to reach the conclusion that the claims here were drawn to an abstract idea.

The court went so far as to say that it "need not labor to delimit the precise contours of the 'abstract ideas' category in this case." However, we are all left wondering how anyone is supposed to undertake this analysis with such little guidance being provided. The court has told us to ignore computer implementation unless it does more than "apply the abstract idea... using some unspecified, generic computer." Accordingly, the potential impact of this case on other software patents is large, but significant further litigation will be needed before we see the contours of what is considered "abstract" by courts.

In the coming months and years, courts and the US Patent and Trademark Office will be called upon almost daily to determine whether this or that invention draws on an "abstract idea." In undertaking their analysis, neither the courts nor the PTO will have anything concrete on which to base their analysis. It is a fairly simple exercise to describe almost any invention based on its specific, real-world application or based on the underlying concepts and principles that make the invention possible. Inevitably, this means that both courts and the PTO will have little difficulty in deciding the ultimate question first and then writing an explanation supporting that decision.

Given the huge uncertainty in industry that can come from such a "result-oriented" approach that has little objective, testable analytic rigor, today's Supreme Court decision is likely to trigger a call to Congress to provide clarity to the patent statute. The "abstract idea" exception to patent eligibility is a judicially created exception to language in the patent statute, and it is well within the power of Congress to address this issue.

However, until Congress acts, we will need to await a gradual growth of case law to determine just which types of inventions are considered to correspond to "abstract ideas," and it is anyone's guess how that case law will develop.

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