ABA- IPL
33rd Annual Intellectual Property Law Conference
The New §101 Landscape: By The Numbers

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David J. Kappos
Alice Aftermath

Alice Corp. v. CLS Bank Int’l

- Despite an express warning in *Alice* to “tread carefully” in construing the exclusionary principle of unpatentable abstract ideas, lower courts and the USPTO have relied on *Alice* to a remarkable extent in order to invalidate software patents.

![Patents Invalidated for Lack of Patentable Subject Matter](source)

*Source: BilskiBlog.com by Robert R. Sachs, Fenwick & West LLP, Lex Machina*
Weakening U.S. Patent System

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<tr>
<th>U.S. TIED FOR 1ST PLACE IN RANKING OF PATENT SYSTEM STRENGTH</th>
<th>U.S. FALLS to 10th PLACE IN RANKING OF PATENT SYSTEM STRENGTH</th>
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<td>2016 Chamber Index</td>
<td>2017 Chamber Index Marks First Time U.S. Has Not Ranked #1</td>
<td>2018 Chamber Index</td>
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Seven Way Tie

Cravath, Swaine & Moore LLP
Upsurge in Push-Back on Competetiveness Grounds

New patent subject-matter eligibility test hurts US competitiveness
We began compiling applications that were declared unpatentable in the US in the two years following Alice and its progeny, but were granted patents in China and Europe.

The results were staggering, particularly in the biotech and software fields, with over 100 valuable patent applications found ineligible in the U.S. but granted abroad.

Here is a condensed sample of just a few of our numerous results.

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**Cravath, Swaine & Moore LLP**
Clear Trend Among the Courts

Subject Matter Eligibility Court Decisions (1923 Through 2/5/2018)

- Supreme Court: 53.8% eligible, 46.2% ineligible, 97% held ineligible
- Federal Circuit: 78.6% held ineligible
- Non-Precedential (Fed. Cir. Only): 97% held ineligible

Note:

- Cases that had claims ruled both ineligible and eligible were counted in each category.
- There has yet to be a single Supreme Court case since the 1981 Diehr decision where all claims were held patent eligible.

Source: USPTO
Clear Trend Among the Courts

Subject Matter Eligibility Court Decisions (2009 Through 2/5/2018)

- Supreme Court: 80% Eligible, 0% Ineligible, 20% Percent Held Ineligible
- Federal Circuit: 77.8% Eligible, 22.2% Ineligible, 22.2% Percent Held Ineligible
- Non-Precedential (Fed. Cir. Only): 97% Eligible, 3% Ineligible, 3% Percent Held Ineligible

Note:
- Cases that had claims ruled both ineligible and eligible were counted in each category.
- There has yet to be a single Supreme Court case since the 1981 Diehr decision where all claims were held patent eligible.

Source: USPTO
Clear Trend Among the Courts

Subject Matter Eligibility Court Decisions
(Post-Alice Through 2/5/2018)

- **Supreme Court**: 76.2% Eligible, 96.9% Eligible
- **Federal Circuit**: 76.2% Eligible, 0% Ineligible
- **Non-Precedential (Fed. Cir. Only)**: 96.9% Eligible

**Note:**
- There has yet to be a single Supreme Court case since the 1981 *Diehr* decision where all claims were held patent eligible.

Source: USPTO
Potential Solutions from PTAB and Courts
Contact Information

David Kappos
dkappos@cravath.com
+1 212.474.1168