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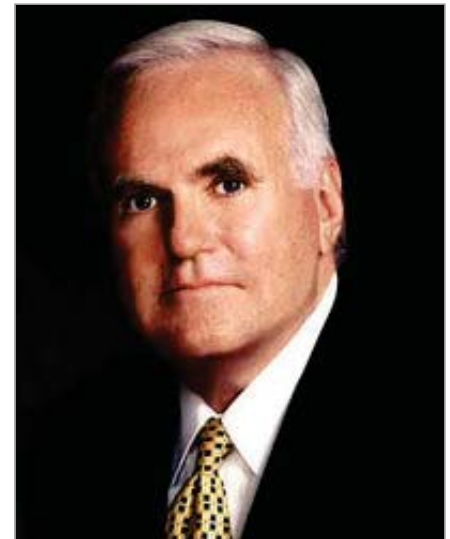
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## Key Cases Shaping The Future For Patent Litigation Funders

Law360, New York (April 27, 2015, 10:13 AM ET) -- Several patent law decisions made in the last year or so are shaping the future of patent litigation. This article looks at the major cases that impacted patent law in 2014 and early 2015 and evaluates what they mean for litigation funders who finance patent lawsuits.

### Alice Corp. v. CLS Bank

The most talked-about patent case decision in 2014 was *Alice Corp. v. CLS Bank Int'l* (S. Ct. 2014), which narrowed the scope of patent protection. The U.S. Supreme Court revisited what is patentable under Section 101 of the Patent Act and unanimously decided that Alice Corp.'s claims described "abstract ideas," which in turn makes them unpatentable. This decision calls into question the value of software patents and implies that a claim covering a computer process needs to include a unique computing solution to be patentable.



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While the court offered no new guidance for what constitutes an unpatentable "abstract idea," it did outline a two-part framework (adopted from *Mayo Collaborative Services Inc. v. Prometheus Inc.*) to help determine subject matter eligibility for products and processes.

Since the decision, the court of appeals has found a number of software patents invalid, and both the lower courts and the U.S. Patent and Trademark Office have challenged overly broad software patents. *Ultramercial Inc. v. Hulu LLC*, a case that the Federal Circuit originally concluded the plaintiff had patent-eligible subject matter, was eventually sent back to the Federal Circuit for further consideration in view of the Alice decision. It was later ultimately decided that the Ultramercial's claims were invalidated. Only one case to date, *DDR Holdings LLC v. Hotels.com LP* has survived a post-Alice patent validity challenge. The Alice decision will no doubt prompt patent holders to rethink whether to pursue litigation. Data has already shown that new patent complaints filed in 2014 decreased by 18 percent compared to 2013. While the Alice decision may have made it easier to challenge the validity of software claims, only time will tell how software patents tied to legitimately unique computer solutions will hold out in court.

### Limelight Networks v. Akamai Technologies

In *Limelight Networks Inc. v. Akamai Technologies*, the Supreme Court reversed a Federal Court Decision making it more difficult to establish induced infringement on a patent. The patent in question was Akamai's method on content delivery requiring a content delivery

network (CDN) to “tag” content on its servers. Limelight, a competing CDN, performs each step of Akamai’s method, except for the tagging, which is done by their users on their servers. The court held that in order for a patent holder to establish inducement, they need to show that a single actor performed all the steps of the claimed method or directed or controlled others to do so. Because Limelight did not perform all the steps of the method and did not control its user’s use of tagging, induced infringement could not be established.

Moving forward, patent owners, pursuing patent infringement, need to ensure that the steps in a method claim are all being performed by one party. A failure of an entity to perform even one of the steps in a claimed method will result in no direct infringement.

The Supreme Court’s decision will likely affect patented method claims in technology systems in which a claimed step can be performed by a third-party end user. Unless the patentee can show that the defendant exercised “control or direction” over the end users, the patent will be unenforceable.

## **Nautilus v. BioSig**

In the *Nautilus v. BioSig* case, the Supreme Court issued a decision that raises the bar for “definiteness” in patent claims. The court rejected the Federal Circuits threshold in only requiring a claim to be “amenable to construction” and not “insolubly ambiguous” to satisfy the definiteness requirements of 35 U.S.C. § 112, paragraph 2. The disputed issue in the case was precisely how much imprecision in claiming does Section 112, paragraph 2 tolerate before a claim is rendered invalid.

The answer, according to the court, requires a “delicate balance.” The court recognized that on one hand there will always be some degree of uncertainty because of the inherent limitations of language. On the other hand, the public notice function of patents requires clear notice of what is claimed and what is still open for use. In attempting to balance these interests, the court set forth a new “reasonableness” test. A patent is invalid for indefiniteness if its “claims, read in light of the patent’s specification and prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.”

The *Nautilus* decision represents the importance of drafting patent claims with thorough specifications. Patentees pursuing patent infringement claims should review their patent claims to ensure they meet the new definiteness standards as indefiniteness could become a very attractive invalidity defense for patent infringement defendants.

## **Octane Fitness v. Icon Health & Fitness**

*Octane Fitness LLC v. Icon Health & Fitness Inc.* is one of two U.S. Supreme Court decisions in 2014 that relaxed what is considered “exceptional” standards when deciding whether the loser will pay for prevailing defendant’s attorney costs (the other case being *Highmark v. Allcare Health*).

The court decided that the precedent set by the appellate court regarding the attorney fees statute was too rigid and would restrict the circumstances in which one could recover attorney fees. The justices also held that the district courts were better suited to decide when a case is exceptional, and that they should use their “discretion” to decide whether fees are appropriate.

These two decisions increase the chances of a prevailing party recovering attorney fees in frivolous lawsuits. Patentees, especially nonpracticing entities (patent trolls) will have to carefully analyze the strengths of their case as it will now be much riskier to assert baseless claims in hopes of a quick payoff.

## Teva v. Sandoz

In early 2015, in *Teva Pharmaceuticals USA Inc. v. Sandoz Inc.*, the Supreme Court set a new precedent for Federal Circuit review of a lower court's ruling, holding that the Federal Circuit must defer to a lower court's factual findings about the claim construction ruling.

The claim construction issue was the interpretation of "molecular weight" in a Teva patent. The district court, after taking evidence from expert witnesses, ruled in favor of Teva, finding the claims were not indefinite. The case was sent to appeals, where the Federal Circuit reviewed the claim construction case "de novo" and overturned the district court's ruling. When the case reached the Supreme Court, the issue on hand focused on the Federal Rule of Civil Procedure 52(a)(6), which states that a court of appeals "must not ... set aside" a district court's "[f]indings of fact" unless they are "clearly erroneous."

The Supreme Court ruled that when a federal court is reviewing a finding of fact on a patent claim construction it must apply a "clear error," not a de novo, standard of review.

It is still too early to determine the long-term effects *Teva v. Sandoz* will have on future claim construction cases. More than likely, litigants will now be encouraged to add emphasis on extrinsic evidence, especially expert testimony in order to achieve deferential review. This in turn will increase the cost and complexity of claim construction proceedings and make claim construction verdicts harder to overturn on appeal.

### What This Means for a Litigation Funder

Shortly after the *Alice* case, patent filings dropped significantly. While there may be a correlation between the *Alice* ruling and decreased patent filings, the other Supreme Court rulings from the last year may have made assertions of dubious patent issues less appealing to nonpracticing entities. Yet, while the new laws may have curbed nuisance patent claims, it will not be the end of patent litigation.

The affect these new laws have for litigation funders is mixed. On one hand, stricter guidelines and the lower bar to recovering legal costs for frivolous lawsuits indicate that there will not be as many patent cases to review for potential funding. And such matters that are brought forward will have to go through more stringent evaluations to ensure the patent will not be invalidated based on the new standards. This enhanced evaluation will be an added cost to the funder, which may restrict the number of patent cases it agrees to evaluate. Funders would be wise to monitor the types of patents that are being invalidated in order to determine whether they want to expend the resources involved in the underwriting of similar patent claims for which funding is sought.

On the other hand, the new standards and guidelines provide somewhat more clarity for funders by giving them more information to utilize when determining the strength of a patent claim. In turn, a patent claim that passes the more stringent evaluations may warrant stronger consideration for funding. Additionally, the decline in overall patent lawsuits may also precipitate a decrease in the time it takes for them to be resolved, which in turn makes them more appealing to funders.

For claimants, litigation funders can bring value in case strength determination. Because funders will now have to perform more extensive patent evaluations, particularly when dealing with software patents, a claimant may want to retain a litigation funder to afford themselves the opportunity to obtain a rigorous analysis of their case before substantial financial resources have been expended. The increased costs and complexities of certain patent cases may also warrant claimants to reach out to a third-party funder versus paying for the legal expenses out of pocket.

It's still too early to tell what long-term effects the patent case decisions made in 2014 and

2015 will have on overall patent litigation funding, but one thing is for sure — litigation funders will be particularly cautious in assessing whether a patent case is strong enough to warrant funding.

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