

The Erosion of Software Patent Protection



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Game Developers Conference
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Traveling Laptop

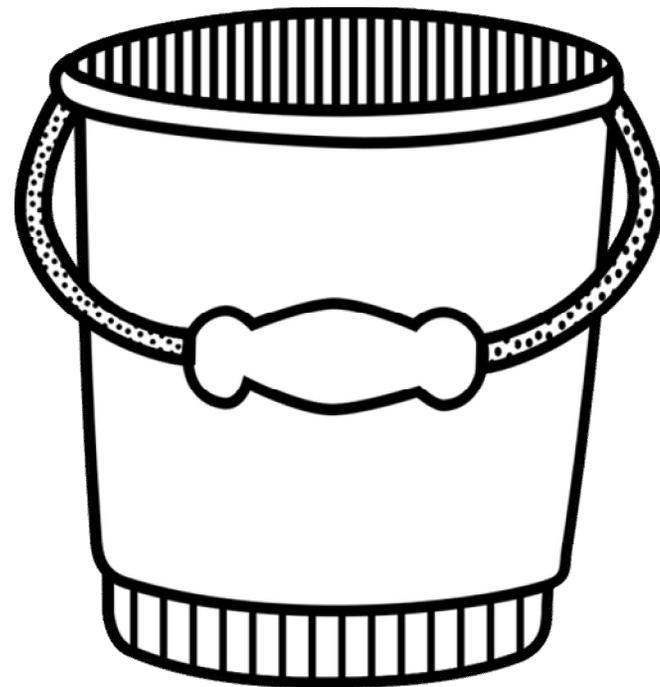


Intellectual Property

- Definition: Rights protecting the intangible products of human intelligence and creation

Primary IP Types

- Copyright
- Trademark
- Trade Secrets
- Patents



Copyright

- Protects “original works of authorship fixed in a tangible medium of expression.”
- Based on Expression
- Two Types for Videogames
 - Audiovisual works ... the visual and aural display of the game while being played
 - Literary works ... the game’s computer code

Copyright Limits

- Copyright protects the expression of the idea, but not the idea itself.
- No protection for: ideas, procedure, process, system, methods of operation, concept, principle or discovery.
- “Scenes a Faire Doctrine” states there is no protection for expressions that are a standard (e.g., wizards, trolls, orcs in a fantasy game).

Developers and Copyright

- Developers negotiate with publishers regarding copyright ownership.
- Publishers may require an assignment of copyright in negotiation.
- Extremely long duration; 95 years after publication for a work-for-hire project in US.

Trademarks

- **Definition: recognizable sign, design, or unique expression related to products or services from a particular source**

Microsoft[®]

BLIZZARD[®]
ENTERTAINMENT



SONY



Trademarks

- Central Registry
 - Patent and Trademark Office in US
- International
- Dependent on Public Perception
- Unlimited duration

Trademarks

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

U.S. APPLICATION SERIAL NO. 86801899

MARK: LET'S PLAY

86801899

CORRESPONDENT ADDRESS:

KYLE SAMIA
SONY COMPUTER ENTERTAINMENT
AMERICA LLC
2207 BRIDGEPOINTE PKWY
SAN MATEO, CA 94404

**CLICK HERE TO RESPOND TO THIS
LETTER:**

http://www.uspto.gov/trademarks/teas/response_forms.jsp

[VIEW YOUR APPLICATION FILE](#)

APPLICANT: Sony Computer Entertainment America
LLC

**CORRESPONDENT'S REFERENCE/DOCKET
NO:**

LET'S PLAY

CORRESPONDENT E-MAIL ADDRESS:

trademarks@playstation.sony.com

Trademarks

Section 2(e)(1) Refusal: Merely Descriptive

Registration is refused because the applied-for mark merely describes a feature of applicant's services. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1); *see* TMEP §§1209.01(b), 1209.03 *et seq.*

Trade Secrets

- **Definition: formula, practice, process, design, instrument, pattern, commercial method, or compilation of information which is not generally known or reasonably ascertainable by others**

**TOP
SECRET**

Trade Secrets

- State Law Defined
 - Interesting Issues
- Non-Transferable
- Non-Negotiable
- Unlimited Duration

**TOP
SECRET**

Patents

- Definition: the exclusive right granted by a government to an inventor to manufacture, use, or sell an invention for a certain number of years.



Example Invention

Patents

- Owners have right to exclude others
- Invention must be:
 - Useful
 - New and nonobvious
 - Prior to June 2014, software patents must be linked to a particular machine, or transform data.

Who Has Patents?

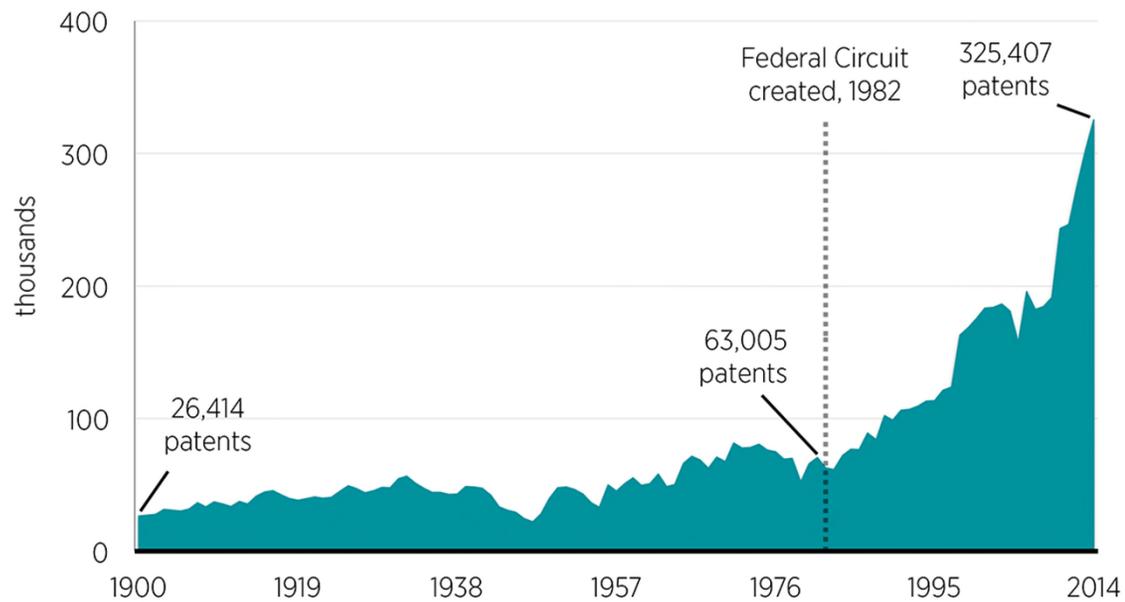
- Activision – 73
- Aspyr Media – 2
- Bungie – 2
- Codemasters – 7
- Crytek – 14
- Epic Games – 7
- Glu Mobile – 1
- Hands-On Media – 4
- Harmonix – 130
- Immersion – 1100
- Kabam – 58
- Konami – 1003
- NCSOFT – 1
- Nintendo – 1655
- Novalogic – 4
- PopCap Games – 3
- Sega – 650
- Square Enix – 210
- Supercell – 5
- Take Two Interactive – 10
- Ubisoft – 9
- Valve – 40
- Wizards of the Coast – 4
- Worlds, Inc. – 7
- Zynga – 217

Actual numbers may be different due to holding structures (e.g., offshore companies, differently named subsidiaries).

Patents

- Time-Limited Monopoly Rights
- Strict Liability for Infringement
- Robust Third Party Market for Patents
- Strongest Form of Intellectual Property

Total US Patents Issued Annually, 1900–2014



Source: "Table of Annual U.S. Patent Activity Since 1790," US Patent and Trademark Office, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.htm.
Produced by Eli Dourado, Mercatus Center at George Mason University, April 6, 2015.

Changes



Alice Corp. v. CLS Bank Int'l (2014)

SUPREME COURT OF THE UNITED STATES

Syllabus

**ALICE CORPORATION PTY. LTD. *v.* CLS BANK
INTERNATIONAL ET AL.**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT**

No. 13–298. Argued March 31, 2014—Decided June 19, 2014

Alice Corp. Patent



US005970479A

United States Patent [19]
Shepherd

[11] **Patent Number:** **5,970,479**

[45] **Date of Patent:** **Oct. 19, 1999**

[54] **METHODS AND APPARATUS RELATING TO THE FORMULATION AND TRADING OF RISK MANAGEMENT CONTRACTS**

[75] Inventor: **Ian K. Shepherd**, Toorak, Australia

[73] Assignees: **Swycho Infrastructure Services Pty. Ltd.**, Melbourne, Australia; **Swycho Support Services Pty. Ltd.**, Sydney, Australia

[21] Appl. No.: **08/070,136**

[22] Filed: **May 28, 1993**

[30] **Foreign Application Priority Data**

May 29, 1992 [AU] Australia PL 2677
Jun. 30, 1992 [AU] Australia PL 3216

OTHER PUBLICATIONS

“The DTB—West Germany’s New Options and Futures Exchange. (2 of 2),” *Business Briefing* published in *Institutional Investor*, Aug. 31, 1989.
Murphy, “Soffex Well—Established After First Six Months,” *Business Briefing* published by Reuters News Service, Nov. 16, 1988.

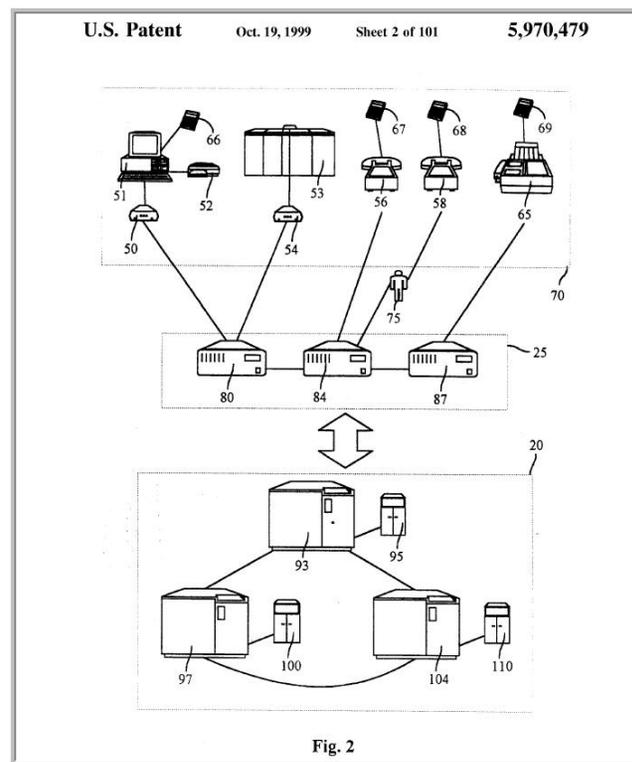
(List continued on next page.)

Primary Examiner—Gail O. Hayes
Assistant Examiner—Barton L. Bainbridge
Attorney, Agent, or Firm—Sterne, Kessler, Goldstein & Fox P.L.L.C.

[57] **ABSTRACT**

Methods and apparatus which deal with the management of risk relating to specified, yet unknown, future events are disclosed.

Alice Corp. Patent



Alice holding

Two-step test to determine if claims are patent-ineligible under 35 U.S.C. § 101:

1. do the claims recite an abstract idea?
2. If yes, do the claim elements, individually or in combination, contain an inventive concept that transforms the claims into a patent-eligible application of the abstract idea?

The Influence of *Alice*



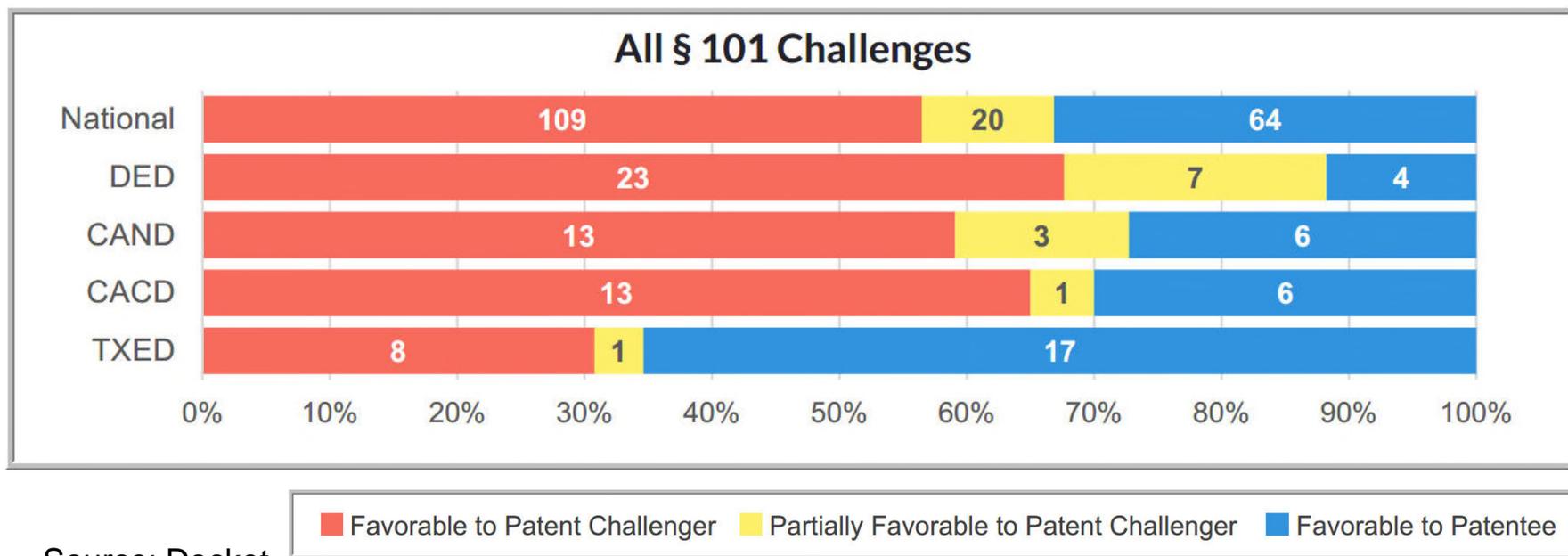
Note: simply reciting a generic computer or conventional/routine elements does not transform an abstract idea into a patent-eligible invention.

The Influence of *Alice*

- By January 2016, **208** opinions based on *Alice*.
- Of the 208, **150** (72.1%) found claims invalid.
- 23 Federal Circuit *Alice* opinions, and in only **one** case, *DDR Holdings*, did the Federal Circuit find claims patent-eligible (95.7% invalid!).



The Influence of *Alice*



Source: Docket
Navigator 2015 Year
in Review

What does this mean to you?

- Reexamine issued patents.
- Competitively, think about your competition's patents.
- Move forward with new patents, but with careful advice.



Inter Partes Review (IPR)

- New AIA process with the Patent Office to inexpensively challenge patent claims.
- Definition: procedure that allows third parties to challenge claims in a granted patent based on prior art patents and printed publications



Thank you!



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