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Oral arguments in *Alice v CLS Bank*

The US Supreme Court recently heard arguments on whether a computerised system for managing settlement risk constitutes patent-eligible subject matter, a question that had left an en banc Federal Circuit divided and without a majority opinion. While this case is similar in many respects to *Bilski v Kappos*, neither Bilski nor subsequent Supreme Court and Federal Circuit decisions have articulated a definitive test to determine whether computer-implemented inventions are eligible for patenting. Perhaps perceiving a need for such a test, the justices focused several questions on where and how a line should be drawn between patent-eligible and patent-ineligible subject matter.

The patent holder, Alice Corp, argued that 35 USC § 101 should only bar claims directed to fundamental truths, laws of nature, or mere implementations thereof, and should be used as a "coarse filter" before focusing on patentability under 35 USC §§ 102, 103, and 112. While none of the justices explicitly criticised Alice Corp's test, none explicitly endorsed it. Instead, the justices questioned Alice Corp as to why straightforward programming of a computer to implement an abstract idea imparted patent eligibility.

For instance, Justice Kagan asked whether an invention would remain if the computer features in the claims at issue were put aside. Perhaps more sympathetic to Alice Corp, Justice Scalia pointed out that the Court had not ruled that a claim directed to how an abstract idea is implemented is patent ineligible, which Alice Corp agreed was the circumstance in the subject patent claims.

Counsel for accused infringer CLS Bank Int'l declined to opine on where the line should be drawn, but maintained that the patents in question recite ineligible subject matter under *Bilski* and *Mayo v Prometheus*.

The United States, as amicus curiae, argued that improvements in computing technology or computer-based innovations that improve other technological functions should be patent-eligible, but that simply reciting the use of a computer to implement an abstract idea should not. Chief Justice Roberts, however, was sceptical that the government's proposed factor-based eligibility test would provide greater clarity and certainty, a point the Solicitor General appeared to concede.

It is difficult to predict based on oral argument how the Court will decide this case, but the justices' questions, especially in light of this case's history, suggest that the Court may refine its previous articulations of what constitutes eligible subject matter.