

# INNOVATIVE APPROACHES TO IP PROTECTION FOLLOWING RECENT DEVELOPMENTS

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## AGENDA

- A Decade of Change Affecting Patent Protection and Enforcement Value
- Recent Changes Affecting Trade Secret Protection and Enforcement
- Trademark Protection strategy and Changes Affecting Enforcement
- Recent Developments in Copyright Law Affecting Protection and Enforcement

## A DECADE OF CHANGE AFFECTING PATENT PROTECTION AND ENFORCEMENT VALUE

1. Injunctive Relief Uncertain, even for a direct competitor
2. Patent damages are uncertain-recovery theories in flux
  - Willful infringement with trebling of recovery has higher standard than historical past
3. Procedural hurdles: venue narrowing and joinder restricted
4. Predictability of Validity is difficult, at best
  - America Invents Act (AIA) created a relatively fast, affordable way to challenge patents in litigation with results that historically have favored defendants
  - Attacks on validity in substantive areas include claim indefiniteness, novelty (obviousness) and patentable subject matter

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## A DECADE OF CHANGE AFFECTING PATENT PROTECTION AND ENFORCEMENT VALUE

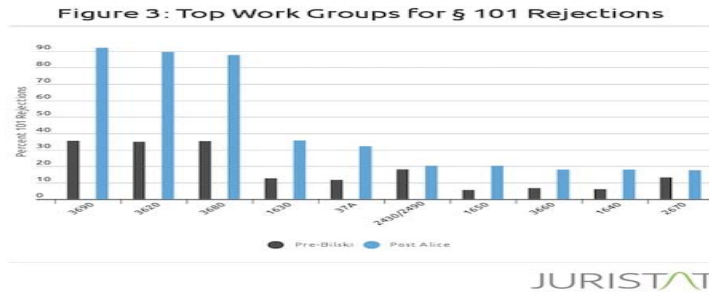
- *Alice Corp. v. CLS Bank* (134 S.Ct. 2347 (2014)) (No patent protection if patent claims are directed to an abstract idea, law of nature, or natural phenomena, and there is no other transforming 'inventive concept'. Claims must be directed to "significantly more" than an abstract idea.)
  - Since *Alice*, here are the overall 2014-2016 35 U.S.C. § 101 numbers compiled as of 12/22/2016 by Robert Sachs available at <http://www.bilskiblog.com>

	Total	Total Invalid Under §101	% Invalid
Fed. Ct. Decisions	405	274	67.7%
Federal Circuit	73	65	89.0%
District Courts	332	209	63.0%
Patents	798	481	60.3%
Claims	20383	13207	64.8%
Motions on Pleadings	224	141	62.9%
PTAB CBM Institutions	143	121	84.6%
PTAB CBM Final	101	98	97.0%
ITC	12	5	41.7%

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## A DECADE OF CHANGE AFFECTING PATENT PROTECTION AND ENFORCEMENT VALUE

- Since *Alice*, § 101 rejection rates in some art units in the USPTO have jumped to around 90%. Top art units with rejections are: E-commerce, molecular biology, amusement/education devices, cryptography and security, microbiology, wave communications, immunology and printers/scanners.

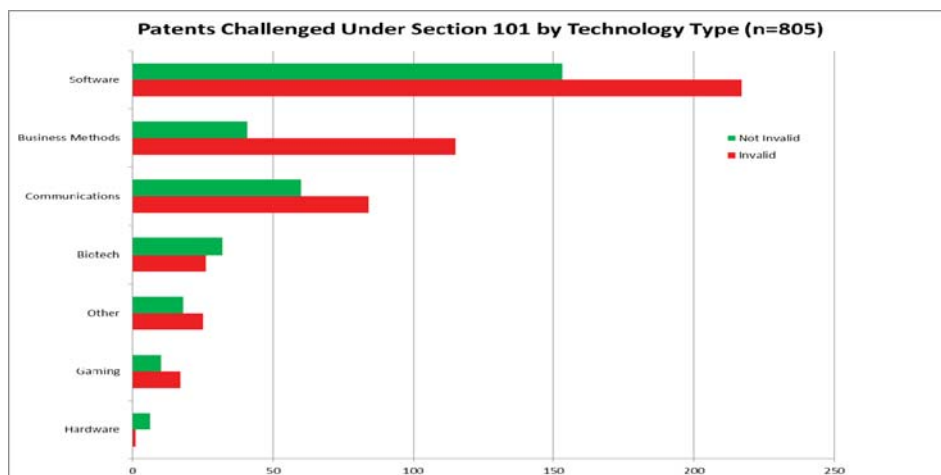


- Source: Data published 3/7/2017 by James Cosgrove from Juristat and available at <http://www.ipwatchdog.com/2017/03/07/101-rejections-post-alice-era/id=78635/>

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## A DECADE OF CHANGE AFFECTING PATENT PROTECTION AND ENFORCEMENT VALUE

- Section 101 Patent challenges by Technology



- Source: Data published 12/23/2016 by Robert Sachs and available at <http://www.bilskiblog.com/blog/2016/12/alice-brings-a-mix-of-gifts-for-2016-holidays.html>

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## Title search: Innovative Approaches to IP Protection following Recent Developments

Also available as part of the eCourse  
[2017 Technology Law eConference](#)

First appeared as part of the conference materials for the  
30<sup>th</sup> Annual Technology Law Conference session  
"Innovative Approaches to Protecting IP in the Technology Sector"