

# A Look At Post-Alice Rule 12 Motions Over The Last 2 Years

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Law360, New York (January 27, 2017, 12:55 PM EST) -- Nearly two years ago, an initial examination of post-Alice[1] challenges to computer-based patent claims found a dramatic increase both in the number of Rule 12 motions to dismiss and in the likelihood of succeeding on such motions.[2] This article revisits and updates that prior research, now that more than two and a half years have passed since the U.S. Supreme Court's decision in Alice. While the number of Rule 12 motions to dismiss computer-based claims pursuant to § 101 has continued to increase, the grant rate is beginning to level out. While 90 percent of those motions were granted in the nine months following Alice,[3] that percentage fell to 71 percent in 2015, and then fell to 53 percent in 2016.[4] Though the grant rate has decreased, it remains much higher than the pre-Alice rate,[5] and is comparable to the grant rate for analogous summary judgment motions in several key jurisdictions.



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This article examines the current trends in § 101 jurisprudence, comparing the relative success of motions challenging computer-based patent claims at both the Rule 12 stage and at the summary judgment stage, and provides several strategies for plaintiffs and defendants to deal with these trends.



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## The Supreme Court's Decision in Alice

In Alice, a unanimous Supreme Court held that patent claims covering methods and systems for managing risk in future events such as financial transactions were directed to patent-ineligible subject matter. In its decision, the court reaffirmed the two-part Mayo test[6] for evaluating whether claims for abstract ideas are patent-eligible: (1) Determine whether the claims are directed to a patent-ineligible concept; and then (2) if the claims are so directed, determine whether any additional elements, "both individually and 'as an ordered combination' ... 'transform the nature of the claim' into a patent-eligible application." [7] The court described the second step as a "search for an 'inventive concept,'" or, "an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.'" [8]

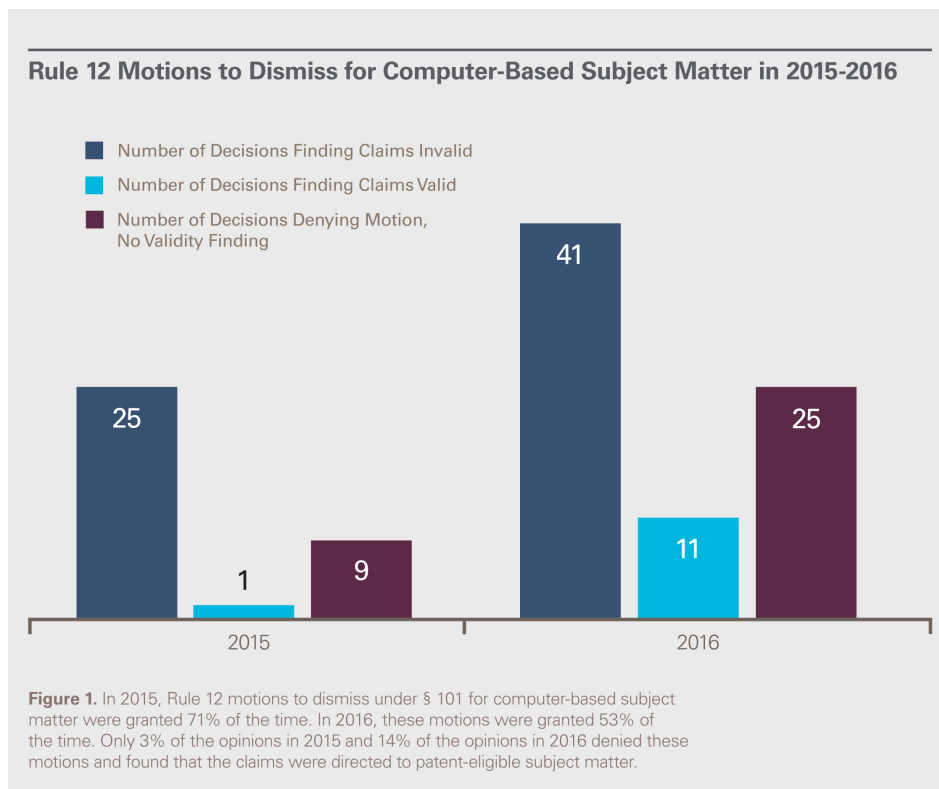
Under this framework, the court first found that the claims in Alice were drawn to the abstract idea of "intermediated settlement," noting that this concept is a "fundamental economic practice long prevalent in our system of commerce." [9] The court then turned to the second step of the test, and highlighted that the claims "do not ... purport to improve

the functioning of the computer itself" or "effect an improvement in any other technology or technical field." [10] Thus, because the claims were directed to an abstract idea that could be "performed by a generic computer," the court found that the claims were directed to patent-ineligible subject matter and were invalid under § 101. [11]

## The Success Rate of Motions To Dismiss Based on § 101 Has Decreased, But Remains Much Higher Than Pre-Alice

Armed with the Alice precedent, the number of § 101-based Rule 12 motions to dismiss filed has increased each year since Alice was decided in June 2014. Nineteen such motions were filed between June 2014 and the end of that year, and then that number nearly doubled in 2015, with 35 motions filed. In 2016, 77 motions to dismiss computer-based patent claims under § 101 were filed. As one court noted, Alice opened "the proverbial motions practice floodgates" such that § 101 is "being litigated daily (if not hourly) in federal courts across the country." [12]

As the number of motions to dismiss has increased, the grant rate has decreased, falling from 71 percent in 2015 to 53 percent in 2016, as illustrated below:



Though district courts are granting these motions at a lower rate, the grant rate varies substantially among jurisdictions. The four most active venues for Rule 12 motions to dismiss computer-based patent claims are the District of Delaware, the Eastern District of Texas, the Eastern District of Virginia, and the Central District of California. In the nine months after Alice, the District of Delaware led the way in granting Rule 12 motions to

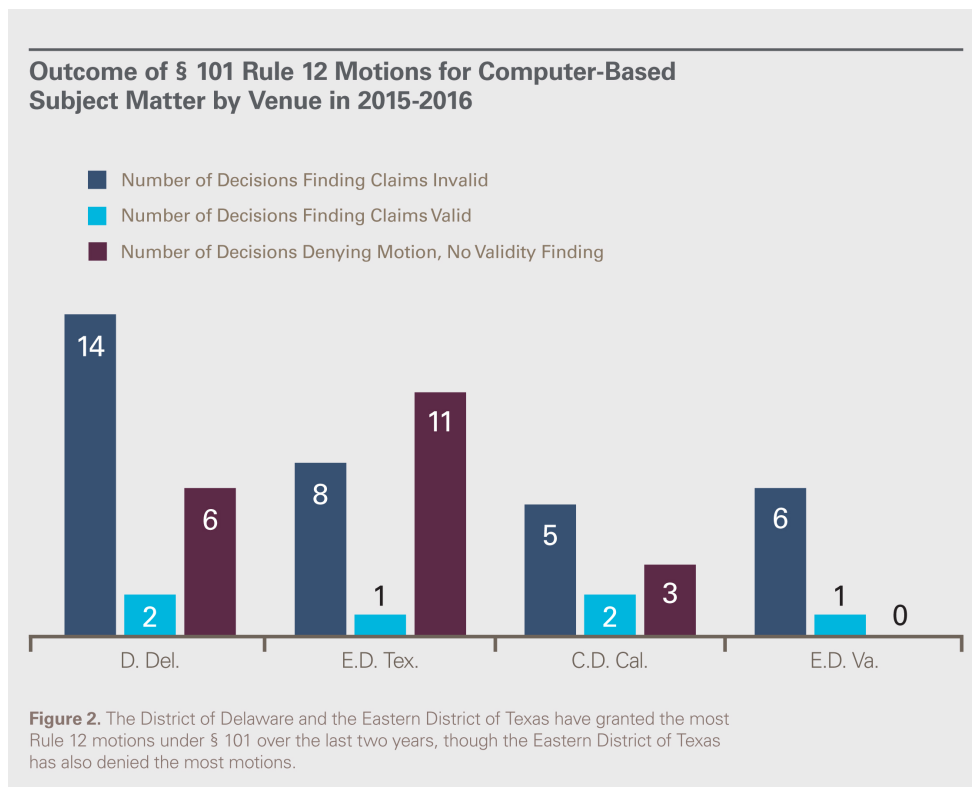
dismiss computer-based infringement claims under § 101, granting all five motions to dismiss that were heard during that period.[13] In 2015 and 2016, the District of Delaware also issued the most opinions on computer-based claims and granted the most motions to dismiss — notwithstanding that the Eastern District of Texas has more patent cases than does Delaware.[14] Though the District of Delaware has granted the greatest number of motions to dismiss under § 101, its 2015-2016 grant rate was 64 percent, which is only slightly higher than the national average of 59 percent over the same two-year span.

The Eastern District of Texas issued the second most opinions and granted the second most motions to dismiss computer-based claims under § 101 over the course of 2015 and 2016. Consistent with its reputation as a patentee-friendly forum, its grant rate was the lowest of the four most active venues for § 101 motions to dismiss, at 40 percent.

Surprisingly, the Central District of California — which has a higher likelihood of pro-defendant outcomes for patent infringement cases than in Delaware and in the Eastern District of Texas[15] — granted such motions less frequently than the national average, at 50 percent for 2015-2016. However, defendants may have been emboldened by the perception that this was a relatively friendly forum to bring § 101 challenges, and thus tried to challenge stronger patents. Indeed, the Central District of California determined that a challenged patent was valid at the motion to dismiss stage at nearly double the rate of the national average (20 percent compared to 11 percent). This suggests that the patents being challenged in this forum were relatively less susceptible to validity challenges than those that were encountered in other jurisdictions.

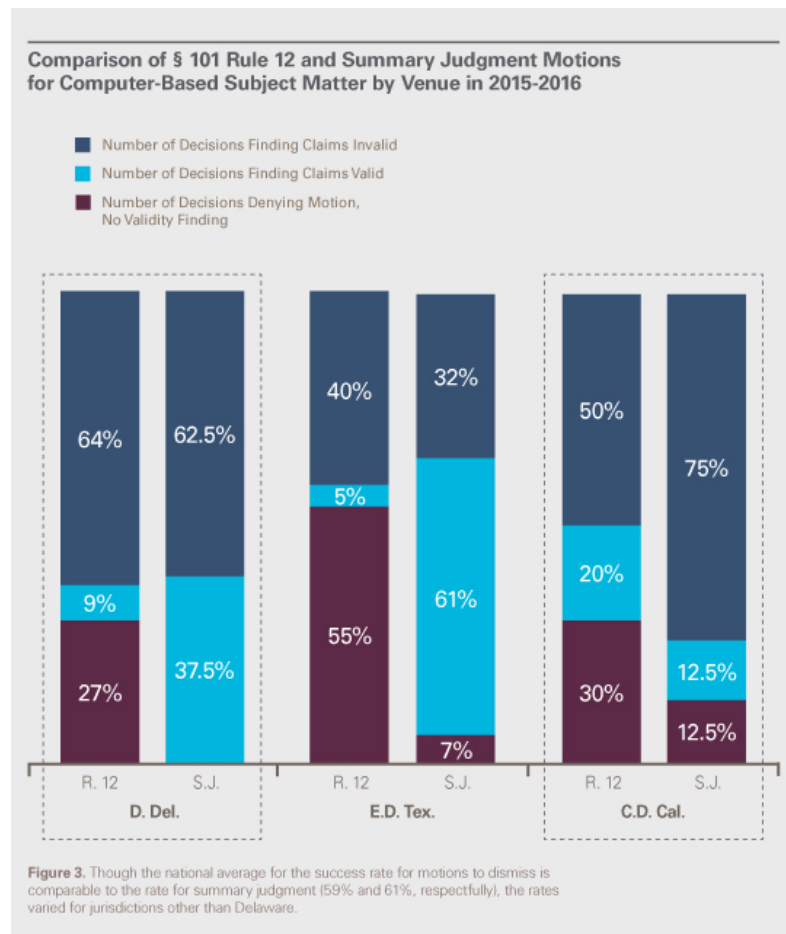
The Eastern District of Virginia, also largely considered a defendant-friendly forum,[16] had an extremely high grant rate of such motions, at 86 percent (although its sample size is the lowest of any of the four jurisdictions considered in the article). That said, the Eastern District of Virginia denied only one § 101 motion to dismiss, and in that case it found that the patents were directed to eligible subject matter.[17]

The disposition of Rule 12 motions challenging computer-based patent claims in the four most active jurisdictions for such motions is summarized below:



The decreasing success of § 101 Rule 12 motions mirrors the recent trend in the Patent Trial and Appeal Board's decisions on inter partes review institutions. For the first calendar year the proceeding was available, the PTAB instituted 87 percent of the petitions. But in fiscal year 2015, the grant rate dropped to 68 percent and held steady through FY 2016. [18] Just as the first inter partes review decisions often involved patents that were extremely susceptible to prior-art-based challenges, it appears that the early post-Alice § 101 challenges may have likewise targeted the most vulnerable patents. Defendants may also have been encouraged to challenge subject-matter eligibility by the dearth of Federal Circuit decisions in this area.

Notably, although the grant rate for § 101 motions to dismiss has fallen over the past two years, it remains comparable to the grant rate for § 101 summary judgment motions. The chart below compares the recent grant rates for these § 101 motions among the District of Delaware, Eastern District of Texas and Central District of California:[19]



Among these jurisdictions, the District of Delaware has been the most receptive to § 101 challenges at the Rule 12 stage, although the grant rate for § 101 summary judgment motions is virtually identical (64 percent vs. 62.5 percent, respectively).

Interestingly, the Eastern District of Texas — which is less likely than the District of Delaware to dismiss computer-based infringement claims at the outset of litigation — is even less likely to do so at summary judgment. In 2015-2016, the Eastern District of Texas granted only 32 percent of § 101 summary judgment motions for computer-based claims, which is roughly half of the national average rate of 61 percent.

In contrast, § 101 motions in the Central District of California fared far better than in the

Eastern District of Texas. Although the Central District of California has granted § 101 motions to dismiss at a rate below that of both Delaware and the national average, this jurisdiction grants summary judgment of invalidity for computer-based claims under § 101 at a rate that is substantially higher than the national average (75 percent vs. 61 percent).

The foregoing statistical analysis itself allows litigants to make better informed decisions regarding where to file infringement suits, whether to challenge the subject matter eligibility of computer-based claims, and when to do so. For instance, the best chance of succeeding on a Rule 12 motion to dismiss such claims has statistically been in the District of Delaware, while the best chance of doing so at summary judgment is in the Central District of California. And while the Eastern District of Texas has been the least receptive of these jurisdictions to Rule 12 challenges, it is also the least likely to find claims valid at the Rule 12 stage, meaning that there is little risk in challenging such patent claims there through a motion to dismiss.

## **Strategies for Litigants in Light of the Recent Trends in § 101 Jurisprudence**

The use of Rule 12 motions by defendants facing infringement claims based on computer-based subject matter is likely here to stay. But now that there have been hundreds of post-Alice decisions resolving such motions, several guiding principles for both plaintiffs and defendants have emerged. In addition to the statistical insights discussed above, there are also some specific strategies that can be employed when navigating the new § 101 landscape.

In denying § 101 motions to dismiss computer-based patent claims, courts have typically relied on one of the following rationales: (1) claim construction is necessary to resolve the § 101 challenge; or (2) the defendant did not meet the burden on at least one of the two Alice steps and thus the motion was dismissed without prejudice to developing § 101 arguments later in the case.[20]

Patent owners have had mixed results in raising issues of claim construction to avoid an ineligibility determination at the motion to dismiss phase, but introducing claim construction as a threshold issue can allow the court to sidestep the Alice analysis in its entirety. The best chance of success for patent owners tends to be based on adopting a strategy of (1) portraying the parties as engaged in a fundamental dispute over the basic character and coverage of the patent claims, and/or (2) a specific and detailed claim construction argument based on expert testimony.

An example of the first strategy is found in *WAG Acquisition LLC v. Multi-Media LLC*. [21] In that case, the court declined to conduct the Alice analysis until after claim construction and credited the patent owner's argument that "the parties disagree on key areas of interpretation, including the fundamental question of what [the] patents are about." [22] Similarly, the second strategy of focusing on specific claim limitations succeeded in *Wetro Lan LLC v. Phoenix Contact USA Inc.* [23] In that case, the court credited the patentee's expert's proposed construction of a disputed term in concluding that claim construction "will assist ... in determining whether the claims are direct[ed] to [patent-eligible] improvements in computer technology." [24]

On the other hand, if patent owners attempt to raise claim construction as a threshold barrier to dismissal, defendants can attempt to portray these arguments as an improper attempt to sidestep the § 101 analysis by demonstrating how claim construction would not change the § 101 analysis. [25] Defendants can fault plaintiffs that do not propose particular constructions, but still argue that claim construction would be an essential predicate step to the § 101 analysis. [26] If plaintiffs do propose a construction, defendants can moot plaintiffs' calls for claim construction by accepting plaintiffs' proposed construction for the motion and arguing that they still fail under § 101. [27]

In addition to arguments relating to claim construction, parties should devote a significant portion of their written submissions to a discussion of how their case does (or does not) fit within the precedent established by the Federal Circuit. Although patent litigants often cite general Federal Circuit precedent regarding claim construction or invalidity, many litigants are often reluctant to rely too heavily on factual analogies, given that each patent is a unique document that stands on its own. The heavy use of factual precedent in the § 101 context therefore appears to be an important and new development.

Since *Alice*, the Federal Circuit has found computer-based claims to be patent-eligible subject matter only five times: *DDR Holdings* in December 2014; [28] *Enfish* in May 2016; [29] *Bascom* in June 2016; [30] *McRO* in September 2016; [31] and *Amdocs* in November 2016. [32] However, these decisions can be potent weapons for litigants — the more that the patent claims in question can be directly analogized to (or distinguished from) one of these five cases, the more likely it is that the court will make a definitive ruling at the Rule 12 stage. District courts have consistently and repeatedly drawn from the recent Federal Circuit cases in denying § 101 motions and finding the claims to be eligible: Two-thirds of the district court cases finding computer-based claims valid at the motion-to-dismiss stage in 2015 and 2016 specifically and directly analogized the factual content of the claims at issue or plaintiff's underlying rationale to those in at least one of five Federal Circuit decisions.

Indeed, while different Federal Circuit panels approach the *Alice* analysis in different ways, the court in *Amdocs* observed that courts are using "classic common law methodology" for § 101 motions by "examin[ing] earlier cases in which a similar or parallel descriptive nature can be seen — what prior cases were about, and which way they were decided." [33] For example, in *F5 Networks Inc. v. Radware Inc.*, [34] the district court reasoned that the claims were akin to a "filtering mechanism," which the Federal Circuit found to be eligible in *Bascom*. The court found *Bascom* instructional in both steps of the *Alice* analysis, reaching the same conclusion that the claims were directed to an abstract idea, but were saved by an inventive concept, because the claims describe "how its particular arrangement of elements is a technical improvement over prior art ways of filtering such content" and were sufficiently narrow to not risk preemption of all filtering mechanisms. [35]

Even if the challenged subject matter is not substantially similar to the claims held eligible by the Federal Circuit, patent owners can take advantage of trends underlying the rationale for computer-based claims. For example, in *Proxyconn Inc. v. Microsoft Corporation*, [36] the court rejected the defendant's argument that a patent covering a method for increasing data access in networks was directed to an abstract idea because, like *Enfish*, the claims were directed to an improvement on "the way the computer functions," [37] and like *McRO*, the claims incorporated "rules that are specifically conceptualized to improve an existing technological process." [38] The court did not analyze Step 2 after finding that the patent was not directed to an abstract idea. [39]

In analyzing the post-*Alice* developments in § 101 challenges to computer-based claims at the motion to dismiss stage, special attention must be paid to the District of Delaware, for two reasons. First, this is the jurisdiction with the largest number of these motions filed (and granted). Second, this jurisdiction is likely to see an even greater number of patent cases (and such motions) in the future. [40]

In the District of Delaware, Judge Sue L. Robinson has articulated a somewhat unique test derived from Federal Circuit cases on patent eligibility of computer-based claims: "the claims (informed by the specification) must describe a problem and solution rooted in computer technology, and the solution must be (1) specific enough to preclude the risk of pre-emption, and (2) innovative enough to 'override the routine and conventional' use of the computer." [41] Judge Robinson expressed dismay at what she deemed to be an overly

stringent or difficult-to-discern analysis developed by the Federal Circuit.[42] Of the five opinions that she has issued in the last two years on Rule 12 motions under § 101 for claims directed to computer-based subject matter, only two have been granted (40 percent).[43] In addition to factually analogizing Federal Circuit cases, litigants appearing before Judge Robinson should focus on the particular test that has been enumerated for this analysis.

On the other hand, Judge Richard G. Andrews in the District of Delaware has found at least one claim ineligible in all six § 101 motions to dismiss computer-based claims that he has ruled on in the last two years. In his opinions, Judge Andrews took care to distinguish patentees' arguments and the patent claims from those in Federal Circuit cases finding patents eligible. For example, in *Visual Memory LLC v. NVIDIA Corp.*, Judge Andrews noted that Enfish does not "exempt[] from § 101 scrutiny all patents which purport to improve the functioning of a computer." [44] Likewise, in *Nice Systems Ltd. v. ClickFox Inc.*, Judge Andrews held that "unlike in *DDR Holdings*, the problem [this] patent purportedly addresses is not itself inherently limited to the specific technological environment claimed by the patentee." [45] Both cases are on appeal in the Federal Circuit.

## Conclusion and Final Thoughts

In the past two years, an initial post-Alice deluge of decisions granting motions to dismiss computer-based patent infringement claims has subsided somewhat, so that defendants today have only slightly better than a 50 percent chance of invalidating such claims based on § 101 at the Rule 12 stage of litigation. That said, while district courts denied motions at a higher rate in 2015 and 2016, there is little risk to bringing § 101 challenges early in the litigation as courts rarely find patents eligible at that stage. Indeed, in the Eastern District of Texas, defendants may face a better chance at securing dismissal at an early stage rather than at summary judgment.

Though it may be statistically more difficult than it was two years ago to succeed on a Rule 12 motion challenging computer-based claims pursuant to § 101, patentees should still consider vulnerabilities on eligibility early, while infringement defendants should focus on minimizing issues of claim construction and factually distinguishing the claims asserted in their cases from those at issue in the five post-Alice Federal Circuit opinions finding subject matter eligibility.

Motions to dismiss computer-based claims are likely not merely a temporary aberration, and are therefore something that both plaintiffs and defendants should continue to consider as part of their calculus early on in litigation.

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[1] *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

[2] See generally Edward L. Tulin & Kristen Voorhees, *Fast & Furious: Post-Alice Dismissals of Patent Infringement Cases Using Rule 12 Motions*, 89 *Patent, Trademark, & Copyright J.* 1394 (Mar. 20, 2015).

[3] *Id.* at 1395 & n.13.

[4] This article summarizes primary research conducted by the authors through Docket Navigator. The percentages cited herein were calculated by analyzing roughly 150 federal district court decisions addressing the merits of a § 101 motion to dismiss that were issued between January 1, 2015 and December 31, 2016, and nearly 90 federal district court decisions addressing the merits of a § 101 summary judgment motion that issued between the same dates. Decisions that published after that period are not included in the analysis, and decisions from the same court covering the same patent have been removed from the data set.

[5] Kevin J. McNamee, *A View From the Trenches: Section 101 Patent Eligibility Challenges in the Post-Bilski Trial Courts*, NYIPLA Bull., Dec. 2013/Jan. 2014, at 3 (reporting that only 7 of 20 post-Bilski motions to dismiss resulted in invalidation of patent claims).

[6] *Mayo Collaborative Servs. v. Prometheus Labs. Inc.*, 566 U.S. 66 (2012).

[7] *Alice*, 134 S. Ct. at 2355 (quoting *Mayo*, 566 U.S. at 72, 78-79).

[8] *Id.* (quoting *Mayo*, 566 U.S. at 72-73) (emphasis added).

[9] *Id.* at 2355-57.

[10] *Id.* at 2357-60.

[11] *Id.*

[12] *Intellectual Ventures I LLC v. Erie Indem. Co.*, 134 F. Supp. 3d 877, 895 (W.D. Pa. 2015).

[13] See *Tulin & Voorhees*, *supra* note 2, at 1398.

[14] Data on new patent cases is compiled by Docket Navigator, <https://www.docketnavigator.com/stats>.

[15] Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 407-08 (2010) (showing 36% patentee win rate compared to Delaware's 45% and the Eastern District of Texas' 40%).

[16] See generally *id.* (showing 30% patentee win rate but suggesting that other parameters such as percentage of cases brought to trial favor patentees).

[17] *Audio MPEG, Inc. v. Dell, Inc.*, No. 2-15-cv-00073, 2016 WL 7010947 (E.D. Va. July 1, 2016).

[18] Compare USPTO Patent Trial and Appeal Board Statistics (Sept. 30, 2015), <https://www.uspto.gov/sites/default/files/documents/2015-09-30%20PTAB.pdf> with USPTO Patent Trial and Appeal Board Statistics (Oct. 31, 2016), [https://www.uspto.gov/sites/default/files/documents/aia\\_statistics\\_october2016.pdf](https://www.uspto.gov/sites/default/files/documents/aia_statistics_october2016.pdf); see also Henry Chen, *Recent Statistics Reveal Trends for PTAB Post-Grant Proceedings* (Mar. 1, 2016), <http://www.ptabblog.law/?p=234>.

[19] The Eastern District of Virginia did not decide any summary judgment motions on § 101 grounds during 2015-2016.

[20] There are also limited instances where such motions were denied on essentially procedural grounds, such as when proceedings relevant to the litigation were pending in another tribunal. E.g., Memorandum & Order at 11-12, *CTP Innovations, LLC v. Publ'n Printers Corp.* (In re *CTP Innovations, LLC*), No. 1-14-MD-02581-MJG (D. Md. Oct. 2,



2015), ECF No. 233 (declining to conduct Alice analysis when the case was stayed as to all but six claims pending IPR proceedings because "all defendants in all pending cases" must be provided an "opportunity ... to participate").

[21] No. 14-cv-02340, 2015 WL 5310203 (D.N.J. Sept. 10, 2015).

[22] *Id.* at \*6.

[23] No. 2-15-cv-00421-RSP, 2016 WL 1228746 (E.D. Tex. Mar. 29, 2016)

[24] See *id.* (denying motion to dismiss without conducting Alice analysis).

[25] See, e.g., *Boar's Head Corp. v. DirectApps, Inc.*, No. 2-14-cv-01927, 2015 WL 4530596 (E.D. Cal. July 28, 2015) (granting motion and noting that "[a]lthough it is defendants' burden to show ineligibility, a court should look to the plaintiff to show some factual dispute requiring claim construction" (citation omitted)); *Order, Groundswell Techs., Inc. v. Synapsense Corp.*, No. 2-15-cv-06024 (C.D. Ca. April 28, 2016), ECF No. 43 (granting motion to dismiss); *Asghari-Kamrani v. United Servs. Automobile Ass'n*, No. 2-15-cv-00478, 2016 WL 3670804 (E.D. Va. July 5, 2016) (same); *Smart Software, Inc. v. PlanningEdge, LLC*, No. 15-cv-13814, 2016 WL 3390691 (D. Mass. June 17, 2016) (same).

[26] E.g., *Visual Memory LLC v. NVIDIA Corp.*, No. 15-cv-789-RGA, 2016 WL 3041847, at \*5 (D. Del. May 27, 2016) (Andrews, J.) ("Without providing a proposed construction ... Plaintiff's protestations about claim construction are unavailing." (citation omitted)).

[27] See *Preservation Wellness Techs., LLC v. Allscripts Healthcare Solutions, Inc.*, No. 2:15-cv-1559-WCB, 2016 WL 2742379 (E.D. Tex. May 10, 2016) (Bryson, J.) (granting motion and construing claims in the manner most favorable to the plaintiff).

[28] *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014).

[29] *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016).

[30] *BASCOM Global Internet Servs. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016).

[31] *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299 (Fed. Cir. 2016).

[32] *Amdocs (Isr.) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288 (Fed. Cir. 2016).

[33] *Id.* at 1294.

[34] No. 2:16-cv-00480-RAJ, 2016 WL 6947414 (W.D. Wash. Nov. 14, 2016).

[35] *Id.* (quoting *Bascom*, 827 F.3d at 1350).

[36] *Order Denying Motion To Dismiss Complaint*, No. 16-cv-01102 (C.D. Cal. Sept. 29, 2016), ECF No. 35.

[37] *Id.* at 8 (citing *Enfish*, 822 F.3d at 1336).

[38] *Id.* at 9 (citing *McRO*, 837 F.3d at 1313-14).

[39] See also *Treehouse Avatar LLC v. Valve Corp.*, 170 F. Supp. 3d 706, 721 (D. Del. 2016) (Robinson, J.) (finding claims eligible at motion to dismiss stage based on rationale in *DDR Holdings* for both Alice steps).

[40] *In re TC Heartland LLC*, 821 F.3d 1338 (Fed. Cir. 2016), cert. granted sub nom. *TC*

Heartland LLC v. Kraft Food Brands Grp. LLC, 2016 WL 4944616 (U.S. Dec. 14, 2016) (No. 16-34), the Supreme Court will consider whether the patent venue statute requires that patent infringement cases may only be brought in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business, or whether such cases can be brought anywhere that a defendant is subject to personal jurisdiction (as is currently the case). Should the Supreme Court side with TC Heartland, this ruling could redistribute a significant portion of new patent cases. In 2015, 44% of patent cases were filed in the Eastern District of Texas, and only 14% of patent cases were brought in the defendant's home state. Colleen V. Chien & Michael Risch, Recalibrating Patent Venue, Santa Clara Univ. Legal Studies Research Paper No. 10-1 (Oct. 7, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2834130](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834130). Ironically, though the appeal challenges the District of Delaware's ability to hear this case, it may have the effect of pushing litigation from the Eastern District of Texas to Delaware as the majority of large corporations are incorporated there.

[41] E.g., Network Congestion Solutions LLC v. U.S. Cellular Corp., 170 F. Supp. 3d 695, 703 (D. Del. 2016) (quoting DDR Holdings, 773 F.3d at 1258-59) (denying motion to dismiss).

[42] E.g., Improved Search LLC v. AOL Inc., 170 F. Supp. 3d 683, 690 (D. Del. 2016) ("[E]ven though most of the patent claims now being challenged under § 101 would have survived such challenges if mounted at the time of issuance, these claims are now in jeopardy under the heightened specificity required by the Federal Circuit post-Alice.").

[43] Device Enhancement LLC v. Amazon.com Inc., No. 1-15-cv-00762, 2016 WL 2899246 (D. Del. May 17, 2016); Parus Holdings, Inc. v. Sallie Mae Bank, 137 F. Supp. 3d 660 (D. Del. 2015).

[44] No. 1-15-cv-00789, 2016 WL 3041847 (D. Del. May 27, 2016).

[45] No. 1-15-cv-00743, 2016 WL 4941984 (D. Del. Sept. 15, 2016).