Ancora v. HTC — Enfish Secured; *Alice* Abridged

An Unconventional Use of Common Hardware Passes Muster Under § 101

The Queen of Hearts has been foiled, another software patent has dodged the sword, and in the process the Federal Circuit has penned another stroke on the sparse but developing map of Wonderland. As 2018 drew to a close, the Federal Circuit held that a patent directed towards improving the security of software licensing keys by storing the keys in BIOS memory rather than RAM was not directed towards an abstract idea, and thus was patentable under Step 1 of the test articulated in *Alice Corp. v. CLS Bank Int'l.*, 573 U.S. 208 (2014), reversing a dismissal under 35 U.S.C. § 101. *Ancora Techs., Inc. v. HTC America, Inc.*, No. 2018-1404 (Fed. Cir. Nov. 16, 2018).

The patentability of software has proven an infamously vexing issue even though the underlying legal principle can be stated with deceptive simplicity: abstract ideas are not eligible for patenting. *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012). However, the border between ideas that are "abstract" and those that are "not abstract" is blurry, especially as to inherently non-physical technology. The test set forth in *Alice* provided little clarity, requiring courts to first determine whether the claim was directed toward patent-ineligible subject matter (e.g. abstract ideas) ("Step 1"); and if so, to determine "whether the elements of the claim, considered individually or as an ordered combination transform the nature of the claim' into a patent-eligible application" ("Step 2"). *Ancora*, No. 2018-1404, at *7–8 (quoting *Alice*, 573 U.S. at 217). A chasm between the PTO's interpretation of an issuable claim and Courts' interpretation of a valid claim has likely resulted in the invalidation of thousands of software patents and a virtual death sentence for many more should they ever be litigated.

The Federal Circuit's decision in *Ancora* is significant as the latest in a string of recent opinions reinforcing a safe harbor established in *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016), for certain types of software patents that the Court finds non-abstract for improving a computer's "functionality." The *Ancora* Court's holding in particular rests upon the Court's determination that storing a software license key in a specific portion of BIOS memory is unconventional as it is typically used for other specialized purposes. *Ancora*, at *3–4. And because BIOS memory was substantially more difficult to hack than the memory locations used by prior art systems, the claim's particular requirement to use BIOS memory to store license keys constituted a specific technique for improving the functionality of a computer, i.e. "security against a computer's unauthorized use of a program," that departed from prior art techniques, and thus was not directed towards an abstract idea. *Id.* at *10–11.

Six years after the Federal Circuit smashed the looking glass into seven shards, and four years after *Alice* dragged the profession into the rabbit hole with naught but a pair of Prometheus' matchsticks to light the way, 35 U.S.C. § 101 remains something of an enigma. Patents directed towards the physically abstracted (but not necessarily abstract) realm of computer software and firmware continue to lose their heads to § 101 challenges more often than not. However, The Federal Circuit's decisions in *Ancora*, *Enfish,* and the now numerous like decisions in between make clear that *Enfish* was not an anomaly. Rather, *Enfish* marked out one safe road out of Wonderland for at least some lucky patentees to follow.