
It’s open season on software patents.

That’s the message federal courts have sent in recent weeks after a U.S. Supreme Court ruling in June that tackled the question of whether—and when—computer programs can qualify for intellectual-property protection.

Since the country’s top court struck down patents on a computer program that reduces risk in financial transactions, federal trial courts have rejected software patents in nine cases, according to Lex Machina, which supplies patent data to lawyers. The U.S. Court of Appeals for the Federal Circuit, which sets much of the nation’s patent law, has nixed software patents in three others.

Courts have been taking the ax to software patents.

- July 8: A U.S. court in New York invalidated a patent for an online dieting tool.
- July 17: A federal appeals court struck down a patent on the idea of keeping the look of digital photos consistent when moved across devices.
- Sept. 3: A federal court in Texas invalidated a patent on the idea of using a computer to convert one retailer’s reward points to another’s.

The trend represents a worst-case scenario for patent-licensing firms, which their detractors call "patent trolls." In recent years, such firms have bought up masses of patents on software and other technology, hoping to make money by licensing those patents to other companies or suing them for patent infringement.

Knocking down flimsy software patents, some patent experts say, will help keep these licensing firms in check.

But the recent court rulings, including those from the Federal Circuit, which sets much of the nation’s patent law, have also triggered a broader concern.

Some patent experts wonder whether the rationale behind the Supreme Court ruling—that some software patents describe ideas that are too “abstract” to warrant legal protection—might ultimately affect patents in other fields, such as biotechnology and medical diagnostics.

"This is only the beginning of the fallout," said Mark Lemley, a patent lawyer and law professor at Stanford University.

In the Supreme Court case, known as CLS Bank International v. Alice Corp., the court was asked to consider whether software could be patented at all—a question courts have largely left unanswered for years.

The high court’s unanimous opinion, written by Justice Clarence Thomas, said that for a software patent to be valid, it must describe more than an old idea, such as escrow, simply applied to a computer.
The court "has changed things fundamentally," said William Lee, a leading patent litigator at Wilmer Cutler Pickering Hale & Dorr LLP in Boston. Mr. Lee said he thinks the CLS Bank ruling, and its aftermath, might prompt some inventors and "endlessly creative lawyers" to rely on trademark or trade-secrets law, rather than patent law, to protect their ideas.

Since mid-June, lower courts have invalidated one software patent after another. In July, the Federal Circuit struck down a patent—originally granted to Polaroid Corp.—on a way to ensure that digital images maintain their original color and proportions when moved from one device to another. This month, the Federal Circuit ruled against a patent that described the process of using a guarantee from a third party to ensure an online transaction.

Some patent lawyers think the reckoning is long overdue. "Many of these patents are just taxes and impediments to those companies that are doing the hard work of building products and putting them in the hands of customers," said Suzanne Michel, senior patent counsel at Internet giant Google Inc. "This is a good thing for innovation."

In the mid-1990s, the Patent and Trademark Office began granting a flood of patents for computer programs. Many of those patents ultimately ended up in the hands of patent-licensing firms, which used them to file thousands of infringement suits, typically against well-heeled corporate defendants.

Rather than spending the time and money to fight these infringement claims all the way to trial, many companies paid relatively small sums—often in the five-figure range—to settle the suits and put the dispute behind them.

But the CLS Bank ruling, and its aftermath, has raised hopes among some of these repeat defendants that federal courts will continue to crack down on patents used largely in licensing and litigation, especially those related to software.

Others, however, question whether the crackdown on software patents is for the best. Their fear: that courts may start invalidating patents on other ideas, especially those requiring costly research-and-development efforts.

"You need strong legal protections to spur invention, bring ideas to market," said Timothy Holbrook, a patent expert and law professor at Emory University. "I worry about those protections falling away."