WildTangent Says Alice Ruling Dooms Ultramercial Ad Patent

By Ryan Davis

Law360, New York (August 28, 2014, 8:02 PM ET) -- The U.S. Supreme Court's Alice Corp. ruling barring patents on computer-implemented abstract ideas means that Ultramercial Inc.'s patent on online advertising technology is invalid, accused infringer WildTangent Inc. told the Federal Circuit on Wednesday.

Both sides in the contentious case filed briefs staking out their positions after the Supreme Court ordered the Federal Circuit in June, in the wake of the Alice Corp. ruling, to reconsider its prior decision that Ultramercial's claimed invention is not a patent-ineligible abstract idea.

Ultramercial's patent covers a method of requiring web users to view ads in order to access copyrighted online video content. Online gaming network WildTangent argued that patent simply involves using advertising on the Internet to make money, which it maintains is an abstract idea that cannot be patented under Section 101 of the Patent Act.

According to WildTangent, "that basic concept of using advertising as a form of currency, which has grounded the broadcast television industry for decades, is unquestionably a 'fundamental economic practice,' " like the computerized method of managing risk in financial trading that the Supreme Court invalidated in Alice Corp.

"This case is tailor-made for dismissal under Section 101," it said. "Ultramercial not only has made no meaningful inventive contribution to the public, but it seeks to use its patent as a sword to thwart the genuine innovation of others, like WildTangent, that program, design, and operate popular websites."

While the high court said in Alice Corp. that an abstract idea can be patented if it involves additional features beyond the idea itself, WildTangent argued that Ultramercial's patent only involves the use of a generic computer, which the justices said is not sufficient.

The patent does not involve an specific programming or particular method of restricting content, so what is left is the age-old concept of using ads to make money, WildTangent said.

"Having to sit through a television commercial (at least before DVRs) or movie preview before gaining access to the desired content are just two examples," it said.

Ultramercial's brief naturally takes a starkly different view of the patent, which it maintains "introduced a paradigm shift in the way companies monetized copyrighted content."
Before the patent existed, online advertising such as the use of banner ads was passive and viewers could choose to ignore it, but Ultramerical came up with a way to prevent viewers from seeing the content they want until they watched an ad.

"This sharply departed from all preexisting practice. Ultramerical's solution for monetizing copyrighted content (while guarding against digital piracy) was counter-conventional, and it certainly did not reflect any 'age-old' idea," it said.

WildTangent's invalidity argument improperly reduces the claimed invention to "artificial notion" of using advertising as currency, but that is not the appropriate way to evaluate patents under the Alice Corp. decision, Ultramerical said.

"WildTangent's sweeping view of abstractness ... would threaten scores of patents essential to a multitude of corporations across multiple industries, and, contrary to Congress's intent, it would undermine true inventiveness," it said. "Alice does not support this cramped view of Section 101."

Ultramerical said that if its "detailed, pathbreaking invention" is declared to be an abstract idea, virtually no process patents will be able to survive under Section 101.

The Federal Circuit is now reviewing the Ultramerical patent for the third time, having declared twice before that it is not an abstract idea because it involves "complex computer programming."

A district court judge invalidated the patent for claiming an abstract idea, but the Federal Circuit reversed in 2011. The Supreme Court ordered it to reconsider that ruling in view of a different Section 101 decision in 2012, and the Federal Circuit again found the patent valid. After that ruling, WildTangent appealed to the Supreme Court once more, leading to the current remand.

Federal Circuit Judge Randall Rader, who was on the panel for the previous decisions, retired in June. A different judge will be added to decide the case along with Judges Alan Lourie and Kathleen O'Malley.

The patent-in-suit is U.S. Patent No. 7,346,545.

WildTangent is represented by Gregory Garre, Gabriel Bell, Katherine Twomey, Richard Frenkel and Lisa Nguyen of Latham & Watkins LLP.

Ultramerical is represented by Lawrence Hadley of McKool Smith PC.

The case is Ultramerical Inc. v. WildTangent Inc., case number 2010-1544, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Patricia K. Cole.

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