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Fed. Circ. Flouted Alice In Memory Patent Case, Nvidia Says

By **Nicole Narea**

Law360, New York (September 18, 2017, 2:24 PM EDT) -- Nvidia Corp. has asked the full Federal Circuit to rehear its challenge to Visual Memory LLC's computer memory patent, arguing that the court panel's patentability finding is a throwback to now-discredited pre-Alice case law.

In its Thursday petition for rehearing, Nvidia argued that the panel wrongly relied on the first step of the test established by the 2014 U.S. Supreme Courtcase Alice Pty. Ltd. v. CLS Bank International and determined that the patent was valid since it aims to improve computer technology, rather than reaching the test's core purpose of weeding out patents that describe abstract ideas.

As a result of that decision, intellectual property attorneys have braced themselves for panel-dependent decisions rather than consistent outcomes at the appeals court.

"By departing sharply from the Supreme Court's case law and this Court's post-Alice case law, the majority's precedential decision leaves district courts with irreconcilable holdings, and leaves patentees and accused infringers unable to predict what is patent eligible," the company said.

The Supreme Court in Alice held that abstract ideas implemented using a computer are not patent-eligible under Section 101 of the Patent Act.

Visual Memory's patent teaches computer memory systems and methods. A Delaware district court found the patent invalid as abstract under the Alice test, determining that it described the idea of categorical data storage.

But a split Federal Circuit panel reversed the district court's ruling in a 2-1 precedential decision in August, acknowledging that the patent described an abstract idea, but ultimately finding that it expressed an "improvement in computer technology" by tailoring the memory system to the kind of processor connected to it, according to court filings. The panel focused on one claim of the patent, which describes a computer memory system with a main memory and a cache linked to a generic computer processor and a mechanism that dictates the kind of data stored in the cache.

In the dissent, Circuit Judge Todd Hughes countered that what the majority identified as a technological innovation was, in fact, "nothing more than a black box for performing the abstract idea of storing data based on its characteristic, and the patent lacks any details about how that is achieved."

In its Thursday petition, Nvidia argued that the patent is "exactly the type prohibited by Alice" in that its claims are "broadly phrased and recite no particular way of implementing the alleged improvement." If any patent that improves computer technology is patent-eligible, "it is hard to envision what computer claims would not satisfy" the requirement, it said.

Richard Frenkel, counsel for Nvidia, told Law360 on Monday that Alice involves challenging interpretations of patent law that would benefit from en banc review.

"Without getting that kind of clarification, there's going to be some confusion due to fact patterns that support either side of the issue," he said.

Nvidia also asserted in the petition that the appeals court had overlooked the patent claims' lack of specificity in citing 250 pages of code that Visual Memory submitted, even though precedent suggests that it should have rejected such "concededly unclaimed details." The court also determined that the patent claims are not obligated to state a "limiting detail" narrowing them to a "particular solution to the alleged [technological] problem," despite the court's own precedent dictating otherwise, Nvidia said.

Furthermore, the idea of customizing a computer memory storage system to a processor is "indistinguishable from other purported improvements for tailoring computer content that this court has found abstract," the company argued. It cited the examples of tailoring computer device profiles to device features and internet content to user profiles.

The court asked Visual Memory to provide its response to Nvidia's petition for en banc rehearing by Sept. 29.

The patent-in-suit is U.S. Patent Number 5,953,740.

Counsel for Visual Memory did not immediately respond to requests for comment Monday.

Nvidia is represented by Maximilian A. Grant, Gabriel K. Bell and Richard G. Frenkel of Latham & Watkins LLP.

Visual Memory is represented by Richard C. Weinblatt and Stamatios Stamoulis of Stamoulis & Weinblatt LLC.

The case is Visual Memory LLC v. Nvidia Corporation, case number 2016-2254 in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Matthew Bultman and Ryan Davis. Editing by Emily Kokoll.

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