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Federal Circuit Invalidates Online Advertising Patent As Unpatentable Abstract Idea

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Intellectual Property Litigation Alert

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On November 14, 2014, the Federal Circuit Court of Appeals issued its third ruling in the long-running patent infringement dispute between plaintiff Ultramercial and defendant Wildtangent. *Ultramercial Inc., et al. v. Hulu, Inc., et al.* (Fed. Cir. Nov. 14, 2014). In a departure from its two prior rulings in the case, the Federal Circuit affirmed the Southern District of California's 2010 dismissal of Ultramercial's patent infringement suit for failure to claim statutory subject matter under 35 U.S.C. § 101. The case began when Ultramercial sued videogame company Wildtangent and two other defendants for alleged infringement of Ultramercial's method patent for requiring internet users to watch advertisements in order to access copyrighted

video content at no cost while the advertiser pays for the copyrighted content. Wildtangent moved dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the patent did not claim patent eligible subject matter. The district court agreed and dismissed the case. The Federal Circuit reversed on appeal, but the Supreme Court vacated that decision and remanded for further consideration in light of its then-recent decision in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. __, 132 S. Ct. 1289 (2012).

On remand, the Federal Circuit again reversed the district court, which prompted Wildtangent to file a second petition for certiorari. While Wildtangent's petition was pending, the Supreme Court issued its ruling in *Alice Corp. v. CLS Bank Int'l,* 573 U.S. __, 134 S. Ct. 2870 (2014), that a claim directed toward a patent-ineligible abstract idea does not move into patent eligibility territory under §101 by "merely requir[ing] generic computer implementation." The Supreme Court once again vacated the Federal Circuit's ruling in Ultramercial's favor and remanded for further consideration in light of *Alice Corp*.

Back on remand for the second time, the Federal Circuit found that Ultramercial's patent "describes only the abstract idea of showing an advertisement before delivering free content," that is, "a method of using advertising as an exchange or currency." The court explained that the limitations of the patent do not transform the abstract idea into patent-eligible subject matter because "the claims simply instruct the practitioner to implement the abstract idea with routine, conventional activity." In affirming the district court's dismissal, the Federal Circuit held that using the Internet to implement an abstract idea is not sufficient to save the patent and transform the idea into a patent eligible invention.

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