

Invalidating Abstract Patents Isn't Working, Justices Told

By **Dani Kass**

Law360 (September 16, 2019, 9:36 PM EDT) -- The U.S. Supreme Court needs to throw out the idea that patents can be invalidated for being abstract, as courts can't pin down what it means and the Federal Circuit has created a mess of contradicting precedent, Trading Technologies told the justices Monday.

The petition for a writ of certiorari urges the justices to either define what exactly is abstract — and therefore ineligible for protection under Section 101 of the Patent Act — or do away with the concept altogether. The status quo is unworkable because courts can't reach a cohesive understanding of what "abstract" entails, Trading Technologies International Inc. said.

More specifically, in trying to define when computer patents are abstract, the Federal Circuit has created two lines of authority. One track allows patenting of interactive graphical interfaces and other non-hardware changes, and one allowing the exact opposite, Trading Technologies said.

"The Federal Circuit's jurisprudence on patent eligibility is in complete disarray, what that court's former chief judge called a state of 'chaos,'" Trading Technologies said. "The growing pile of conflicting decisions on patent eligibility means that outcomes in many cases are increasingly a function of the random selection of panel members more than the consistent application of law."

The appeal stems from an April Federal Circuit decision invalidating three Trading Technologies patents covering graphical user interfaces used in electronic trading. The appeals court had upheld a Patent Trial and Appeal Board ruling that the patents were abstract in a challenge launched by IBG LLC and Interactive Brokers LLC.

Trading Technologies claims its patents "embody as much innovation, inventiveness, and human benefit as any of the dozens of improved scalpels and forceps" that were given patent protection, even if they didn't improve hardware.

This case provides an "ideal vehicle" to decide whether the idea of an abstract idea exception to patent eligibility, created by judges, fits with the Patent Act, the petition states.

"By finally answering that question, the court could, once and for all, dispose of an unworkable and ill-considered vestige of ancient, obsoleted jurisprudence and put an end to the decades of turmoil as courts have struggled to apply the inherently shapeless 'abstract idea' exception to the inventions of the modern age," Trading Technologies said.

Andrew M. Grossman of BakerHostetler, an attorney for Trading Technologies, added that he hopes the case could "clean up what has been a very messy area of the law in recent years."

Counsel for IBG didn't immediately respond to requests for comment Monday.

The patents-in-suit are U.S. Patent Nos. 7,533,056; 7,212,999; and 7,904,374.

Trading Technologies is represented in-house by Steven F. Borsand, and by Andrew M. Grossman and Renee M. Knudsen of BakerHostetler.

IBG and Interactive Brokers were represented at the Federal Circuit by Byron L. Pickard, Robert E. Sokohl, Richard M. Bemben and Jon Wright of Sterne Kessler Goldstein & Fox PLLC, and Michael T. Rosato of Wilson Sonsini Goodrich & Rosati PC.

The case is Trading Technologies International Inc v. IBG LLC et al., case number unavailable, in the Supreme Court of the United States.

--Editing by Adam LoBelia.