

'Indefensible' Patent Eligibility Rule Must Go, Justices Told

By **Tiffany Hu**

Law360 (January 9, 2020, 2:45 PM EST) -- Trading Technologies is hitting back at the solicitor general's recommendation that the U.S. Supreme Court decline to hear an appeal seeking to clarify what is eligible for patent protection, telling the justices that the "indefensible rule" excluding software tools like its own requires review.

In a brief filed Monday, Trading Technologies International Inc. doubled down on its petition asking the high court to take up its appeal of a Federal Circuit decision invalidating its patents, following the solicitor general's brief last month telling the justices to deny the bid.

The solicitor general had called the case an "unsuitable vehicle" for addressing what is patent-eligible under Section 101 of the Patent Act, but Trading Technologies disagreed, pointing out that the solicitor general in a separate brief said that the eligibility issues have "sent shock waves" through the patent world. The same consequences of the "current uncertainty of the law" warrant review in this case, it said.

"The serious consequences of that indefensible rule call for the court's review," Trading Technologies wrote. "The government is right to suggest that this court's review will be required to resolve '[t]he confusion that lower courts confront in applying Section 101 [of the Patent Act],' but wrong to suggest that this case is not an appropriate vehicle in which to do so."

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 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 then claimed its patents "embody as much innovation, inventiveness, and human benefit as any of the dozens of improved scalpels and forceps" that have been given patent protection, even if they didn't improve hardware, according to the September certiorari petition.

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

"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 at the time.

In addition to the present case, the solicitor general said last month that the justices should decline to hear two cases that he similarly said were not the right vehicles for redoing its patent eligibility framework, pointing instead to a case over the eligibility of diagnostic test patents as a better candidate.

Andrew Grossman of BakerHostetler, an attorney for Trading Technologies, told Law360 on Thursday that the government agreed that the Federal Circuit's case law is "in shambles," noting that the case is the "perfect vehicle" for the justices to clarify the confusion over software patents.

"More broadly, it presents the court with the opportunity to conform patent law with the language of the Patent Act by abandoning the hopelessly vague and unworkable 'abstract idea' exception to patent eligibility," Grossman said by email.

Counsel for IBG did not immediately respond to a request for comment Thursday.

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. Bembem 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 19-353, in the Supreme Court of the United States.

--Additional reporting by Dani Kass. Editing by Abbie Sarfo.