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Federal Circuit Reverses Dismissal Under 35 U.S.C. § 101.

In *Ultramercial v. Hulu*, Appeal No. 2010-1544 (Sept. 15, 2011), the Federal Circuit reversed the district court's grant of a motion to dismiss for failure to state a claim that the asserted '545 patent did not claim patent-eligible subject matter. The '545 patent claimed a method for monetizing and distributing copyrighted products over the Internet.

The Federal Circuit determined that the particular method for monetizing copyrighted products claimed in the '545 patent consisted of many steps which were likely to require intricate and complex computer programming. In addition, certain of the steps required specific application to the Internet and a cyber-market environment. The Federal Circuit held that viewing the subject matter as a whole, the invention involves an extensive computer interface and that the claims were, as such, were patent-eligible.

The Federal Circuit commented that the broadly claimed method in the '545 patent does not specify a particular mechanism for delivering media content to the consumer, but that the breadth and lack of specificity does not render the claimed subject matter impermissibly abstract. The "coarse eligibility filter" of § 101 should not be used to invalidate patents based on concerns about vagueness, indefinite disclosure, or lack of enablement, as these infirmities are expressly addressed by § 112.

The Federal Circuit reversed the district court's dismissal of Ultramercial's patent claims for lack of subject matter eligibility and remanded for further proceedings. The Federal Circuit also clarified that its decision did not opine on the patentability of the claimed invention under the substantive criteria set forth in §§ 102, 103, & 112.

Federal Circuit Vacates and Remands Summary Judgment of Noninfringement.

In *Markem-Imaje Corp. v. Zipher Ltd.*, Appeal No. 2010-1305 (Sept. 9, 2011), the Federal Circuit vacated the district court's grant of summary judgment of non-infringement.

Following a claim construction hearing, the district court construed "driveable" and "drive" to mean "rotateable" and "rotate," as proposed by Markem, rejecting Zipher's broader construction. The district court explained that the use of the plural word "spools" in the claim clause "to drive the spools to add or subtract the calculated length of tape" means that both spools must rotate. The district court further explained that both spools must rotate to add or subtract a single calculated length of tape. Zipher had argued that the term "drive" has a meaning similar to that of "control," and is not limited to rotation motion.

After reviewing the patent specification and prosecution history, the Federal Circuit held that "drive" is properly construed to mean the application of torque to the spools, whether the torque causes rotation or resists it. The Federal Circuit vacated the judgment of non-infringement, and remanded the case for determination of infringement on the corrected claim constructions.

Federal Circuit Dismisses Appeal of Order Granting Stay.

In *Spread Spectrum v. Eastman Kodak*, Appeal No. 2011-1019 (Sept. 26, 2011), the Federal Circuit dismissed an appeal of the district court order granting a stay.

Spread Spectrum had filed suit in the U.S. District Court for the Northern District of Illinois against Kodak and four of Kodak's Customers alleging infringement of U.S. Patent No. 5,689,623. The district court granted Kodak's motion to: (1) sever the claims against it from those against the other defendants; (2) stay the action against the Kodak Customers in Illinois; and (3) transfer the case against Kodak to the Western District of New York. Spread Spectrum appealed only from the portion of the district court order granting Kodak's motion to stay the case against the Kodak Customers pending the outcome of its action against Kodak in New York.

The Federal Circuit determined: (1) that the stay was not a final judgment under 28 U.S.C. § 1295; (2) that the district court's order did not put Spread Spectrum effectively "out of federal court;" and (3) that under the Supreme Court's decision in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the order was not "practically final."

The Federal Circuit further determined that it did not have jurisdiction under the customer suit exception, which provides that, in certain patent cases, "litigation against or brought by the manufacturer of infringing goods takes precedence over a suit by the patent owner against customers of the manufacturer."

Lastly, the Federal Circuit noted that the stay did not involve an injunction, and as such, there was no jurisdiction under 28 U.S.C. § 1292(a)(1) because the stay order was not an injunction barring Spread Spectrum from pursuing its case

In sum, the Federal Circuit dismissed the appeal of the order granting the stay for lack of jurisdiction because the appeal was not from a final judgment and did not otherwise qualify as an appealable order.

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