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# Panel Pushes Back on Software Patent Challenge

Scott Graham, The Recorder

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Since the U.S. Supreme Court raised the bar for patent eligibility in *Alice v. CLS Bank*, more than 20 Section 101 appeals have ended in patent claim death at the Federal Circuit. Only one case, *DDR Holdings v. Hotels.com* has made it through unscathed.

Judging from arguments last week in a software patent case, that number could soon grow to two.

Judges Pauline Newman, Jimmie Reyna and S. Jay Plager sounded extremely skeptical Thursday about a decision by U.S. District Judge Leonie Brinkema of Virginia that invalidated two "data mediation" patents on Section 101 grounds.

It's sometimes hard to tell from arguments whether judges on the U.S. Court of Appeals for the Federal Circuit are really gearing up to push back on *Alice*, or just venting about having to apply a precedent they consider irrational and unworkable.

"It's a pla-a-a-gue on the patent system nowadays," was how Plager put it during Thursday's arguments in *Amdocs v. Openet Telecom*.

But *Amdocs* had the earmarks of a case that could make good Section 101 case law for patent holders. Newman, Plager and Reyna are not shy about rocking the jurisprudential boat. Patentee Amdocs (Israel) Ltd. is not a "patent troll" but a $3.5 billion-a-year publicly traded software company; it accuses competitor Openet Telecom Inc. of selling the infringing product for $100,000 a pop.

The court spent 53 minutes on the argument, almost double the standard allotment. And—perhaps most important—the Federal Circuit had already sent the case back to Brinkema once after she granted summary judgment of noninfringement. The judges intimated at times that Brinkema may have used *Alice* as an end-around their ruling on remand.

Amdocs' four patents-in-suit help network service providers such as AT&T and Verizon monitor customer usage by gathering pieces of data using a distributed architecture and converting it into a

single report.

Wiley Rein partner Brian Pandya argued that the patent claims an abstract idea. "It's computer code for receiving a first record from a first source, correlating the first record with a second record, using the second record to enhance the first record—that's all that's claimed. That's it."

Reyna and Plager quickly homed in on the difficulty of defining abstract. "At the end of the day, we can look at almost any software application and say it's abstract, correct?" Reyna asked him.

"I wouldn't go that far," Pandya said.

"So somewhere along the line, there is software that is patent-eligible, correct?" Reyna pressed.

Yes, said Pandya, but not the Amdocs patents, with their broadly worded titles such as "a method for reporting on the collection of network usage information from a plurality of network devices."

"How about 'a method for curing illness?' " Plager asked him. "Too abstract?"

"That is too abstract," Panya agreed.

"So any drug on the market would be too abstract," Plager said. "They're all methods for curing illness. Is that right?"

No, said Pandya, "the difference with a drug is you're claiming a chemical compound, you're claiming a formulation, something that's tied to a structure."

"How is this patent not tied to the problem that network service providers had in compiling adequate data for which to bill customers?" Reyna pressed.

Pandya argued that telephone companies have been generating bills from usage records for decades, but Reyna was not sympathetic.

"*These* bills have *not* been generated for decades," he said. "They've only been generated since the advent of the Internet, and because of the Internet."

Newman added that the patents claimed computer code for each step. "So at least that's something tangible," she said. "It seems to me to be an extraordinarily complex, and I gather valuable, procedure."

Plager complimented Pandya on his argument, but kept testing him. "Would you agree that the idea of an abstract idea is abstract?" he asked, drawing laughter in the courtroom. "Would you concede that much for me?"

"It's difficult," Pandya agreed. "It's a difficult question."

"It's difficult," Plager repeated. "You haven't really told us what an abstract idea is, but you notice the Supreme Court hasn't either."

"This is an issue the Supreme Court has been struggling with," Pandya agreed.

"Yes, and you know what?" Plager asked. "They'll continue to struggle with it, because the idea of an abstract idea is abstract." Wilmer Cutler Pickering Hale and Dorr partner S. Calvin Walden had an easier time, even though he faced essentially the same line of inquiry.

"Let me ask you a question Mr. Walden. It's a personal question," Plager cautioned. "Are you an abstract idea?"

"I am not an abstract idea," Walden declared.

"But the only way I know you're here," Plager said, is "I have an idea in my mind that there's some fella out there talking to me. Why aren't you an abstract idea?"

"It's a great question," Walden answered. "If I have a concept for a car, for example, that's an idea, but it's not an abstract idea. If I have a concept for a distributed architecture to utilize devices on the Internet in unconventional ways and to make data records from that … these have left the realm of the abstract."

Walden appeared to have the winning argument. But Plager just wrote a big decision upholding a Section 101 challenge in *Versata v. SAP*, even while shrugging off such challenges as "a major industry" after *Alice,* and Reyna just upheld a Section 101 challenge to a genetic testing method in *Ariosa Diagnostics v. Sequenom*, upsetting the biotechnology industry.

So who knows, maybe Thursday's argument was itself just an abstract idea.

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