Supreme Court Could Limit Computer Software Patents

Sam Hananel, Associated Press

WASHINGTON (AP) — Is it too easy for high-tech companies to patent inventions that are not really new, but simply take an old idea and blend it with computer wizardry?

The Supreme Court wrestled with that question on March 31, 2014, as justices considered making it tougher for the government to issue patents for computer software.

The outcome could send tremors through an industry that touches virtually every sector of the economy, from gadgets on smart phones to advances in anti-lock brakes.

The issue has divided the nation's technology giants, with companies like Microsoft and IBM warning that new restrictions could nullify thousands of existing patents that are the product of billions in research and development. On the other side, firms including Google, Facebook and Netflix say the free flow of software patents has become a "plague" on the industry, blocking companies from promoting innovation.

The justices weighed arguments in a case involving Alice, an Australian financial company that in the 1990s patented a computer program to reduce the risk in financial transactions. The software allows a neutral third party to make sure all parties to a trade have lived up to their obligations.

New York-based CLS Bank International challenged the patent as invalid, arguing Alice merely took a concept that has been around since ancient human history and programmed it to run through a computer.

Justice Anthony Kennedy suggested a bunch of second year college engineering students could come up with the same software over a weekend.

"My guess is that would be fairly easy to program," Kennedy told Carter Phillips, the attorney representing Alice.

Justice Stephen Breyer suggested the idea was no different than when King Tut of ancient Egypt used an abacus to keep track of how much gold to give away. If businesses can simply take an abstract idea and patent it because it runs on a computer, instead of true competition, "you will have competition on who has the best patent lawyer," Breyer said.

Phillips responded that Alice's system was much more complicated, allowing multiple parties around the world to settle transactions in real time. He said the position CLS was taking meant that essentially no computer software would be eligible for patent protection. That would undercut hundreds of patents, including those that have been issued for word processing or browsing the Internet, he said.

Patents give inventors legal protection to prevent others from making, using or selling a novel device, process or application. The Supreme Court has previously ruled that abstract ideas, natural phenomena and laws of nature cannot be patented. But the court has not laid out detailed criteria for determining when computer software patents are valid.

Last year, the court ruled that human genes could not be patented, ending three decades of patent awards by government officials. In 2012, the court threw out patents that protected medical diagnostic tests.

The U.S. Court of Appeals for the Federal Circuit ruled that Alice Corp.'s patents couldn't be granted, but its decision was fractured, with no majority opinion. Only five of the 10-member panel of judges agreed that Alice merely took a well-settled economic concept and put it into a computer program.

One dissenting judge warned that the appeals court decision would "decimate the electronics and software industries." Another dissenter said it would cause "the death of hundreds of thousands of patents." Since the Federal Circuit's ruling was so divided, technology companies are hoping the Supreme Court offers more clarity.

Mark Perry, arguing for CLS Bank, said the computer must be essential to the operation of the program and not just an advance in technology. He said encryption technology that allows financial information to move securely over the Internet is an example of an invention worthy of a patent.

"This is not the death of software patents," Perry said. Noting that dozens of friend of the court briefs were submitted by major software companies — mostly siding with CLS — Perry said: "The software industry is all before this court saying 'This is fine with us.' "

Solicitor General Donald Verrilli, arguing on behalf of the Obama administration, said the court could simply rely on recent precedents to find the Alice program didn't deserve a patent. But he urged the court to issue more clarity to help lower courts decide what is and isn't valid.

Verrilli said several factors should be considered, including whether the software improves how the computer functions or uses a computer to improve how another technological process works.

But Chief Justice John Roberts said he was "doubtful that that's going to bring about greater clarity and certainty."

A decision is expected by June.

The case is Alice Corp., v. CLS Bank International, 13-298.

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