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Tech Giants Say Justices Can Bolster Software Patent Rules

By **Ryan Davis**

Law360, New York (March 13, 2014, 1:17 PM ET) -- The U.S. Supreme Court has an opportunity in a case set for argument this month to ensure that truly innovative software can be patented while barring patents that merely claim an abstract idea implemented on a computer, a group representing leading technology firms said Thursday.

While its members include companies that own numerous software patents like IBM Corp. and Microsoft Corp., BSA | The Software Alliance has urged the justices in an amicus brief to invalidate Alice Corp. Pty. Ltd. patents covering a computerized trading platform.

In a conference call with reporters Thursday, BSA CEO Victoria Espinel said Alice's patents do not cover software at all, but a way of executing the abstract concept of escrow using a computer. They are an example of the kind of overly broad patents used by so-called patent trolls to target companies like BSA's members with "predatory lawsuits," she said.

Although it may seem surprising that a group representing the technology industry would come out against a patent on a computerized system, "We think that the patent in this case should not have been issued and hope that court finds invalid," Espinel said.

However, she said that the high court, which agreed to hear the case last year, can easily set a rule that abstract ideas implemented using a computer cannot be patented without in any way hindering patent protection for software that "everyone would agree is clearly innovative."

She used the example of software the runs smartphones and helps car airbags effectively deploy as the kinds of things that would be eligible for protection under the standard the group is proposing. There are no concerns among the group's members that such a standard would broadly threaten software patent protection.

"I don't think this was a hard one for us," she said. "It was pretty evident to our members that the patent in this case did not meet the standard, but if you have a true innovation, then you should be issued a patent."

Andrew Pincus of Mayer Brown LLP, who filed the amicus brief on behalf of BSA, said on the call that the court can easily crack down on "illegitimate claims masquerading as software." If a patent claims an abstract concept like escrow and simply appends a reference to a computer, it should not be patentable, he said.

"I don't think any legitimate innovation is threatened by a rule that says a general reference to implementing an idea on a computer is not sufficient," he said.

If a patentee comes up with an innovative way to do something on a computer, rather than seeking to patent all computerized uses of an idea, that should be eligible for a patent, he said.

Espinel said that by weeding out patents that should never have been issued, the Supreme Court's decision can go a long way toward reducing abusive patent litigation, but that BSA also supports the legislative reforms under consideration by Congress to crack down on patent trolls.

"We're still seeing too many attempt to use patent law as a get-rich-quick scheme," she said.

Oral arguments are set for March 31.

The patents-in-suit are U.S. Patent Numbers 5,970,479; 6,912,510; 7,149,720; and 7,725,375.

CLS is represented by Mark Perry, Helgi Walker, Brian Buroker and Alex Harris of Gibson Dunn.

Alice is represented by Carter Phillips, Jeffrey Kushan, Constantine Trela Jr., Tacy Flint, Timothy Hargadon and Benjamin Flowers of Sidley Austin LLP, Adam Perlman ofWilliams & Connolly LLP, and Robert Sokohl of Sterne Kessler Goldstein & Fox PLLC.

The case is Alice Corp. Pty. Ltd. v. CLS Bank International et al., case number 13-298, in the U.S. Supreme Court.

--Editing by John Quinn.

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