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'Section 101 Day' Yields Quick Ruling On Patent Eligibility

By **Matthew Bultman**

Law360 (February 28, 2019, 6:58 PM EST) -- Sitting behind the bench at the Wilmington, Delaware, federal courthouse, Chief Judge Leonard Stark explained that his docket had become flooded with legal briefs arguing that a patent covers ineligible material. The judge was about to conduct an experiment.

In the courtroom that early February day were more than two dozen lawyers, representing companies in several different patent infringement cases. Some lawsuits were related; others were not. What each had in common was a question about whether an invention was directed to an abstract idea that is not eligible for patent protection under Section 101 of the Patent Act.

Judge Stark laid out the ground rules. He and Magistrate Judge Christopher Burke would listen to a round of arguments, with each side getting a turn to speak. Following an afternoon break, the lawyers would return and everyone would be on the hook to face questions. As it turned out, decisions on patent eligibility would swiftly follow.

Welcome to Section 101 Day in Delaware.

“This is all, I will admit, something of an experiment,” Judge Stark told the lawyers, according to a transcript of the Feb. 8 hearing. “We’ll see how it goes.”

The experimental hearing came amid a swell in Delaware’s patent caseload that has followed the U.S. Supreme Court’s 2017 decision in TC Heartland v. Kraft Food, which restricted where patent lawsuits can be filed.

There were close to 880 new patent complaints brought in the district last year, nearly double the number of new cases filed there in 2016 and the most of any judicial district in the country. Perhaps it is no surprise the court is looking for ways to improve efficiency.

“Necessity is the mother of invention,” Lewis Popovski, a partner at Patterson Belknap Webb & Tyler LLP who argued at the hearing, told Law360 this week. “Kudos to a progressive, creative court for trying to find ways to make sure that it can give the parties the time they need to make their case and yet efficientize its own docket.”

Judge Stark’s 101 Day involved seven cases, three of which were brought by a company called Location Based Services LLC. LBS’ lawsuits, filed against Sony Electronics Inc., Fantastic Fox Inc. and Mapillary Inc.,

involved a patent related to image mapping.

Another enterprise, MOAEC Technologies LLC, was the plaintiff in suits against Deezer SA, SoundCloud Inc. and Spotify USA Inc. over a music organization patent. The final case involved a Search and Social Media Partners LLC patent on a social networking system that Facebook Inc. was accused of infringing.

All the defendants maintained that the patents they were accused of infringing were invalid for being directed to an abstract idea.

Shortly after 10 a.m., a lawyer speaking for the companies sued by MOAEC kicked off the arguments, fielding questions from both Judge Stark and Judge Burke. MOAEC's attorney then took his turn, making a case for why the invention was patent-eligible.

Sony, Fantastic Fox and Mapillary were next, followed by an attorney for LBS. And so it went until just after 1 p.m. when Judge Stark called a recess. Following a nearly three-hour break, everyone was back in court.

'Efficiencies to Be Gained'

The hearing is the latest example of judges in some of the busiest patent districts around the country trying creative approaches in an effort to find efficiencies.

Judge William Alsup in the Northern District of California, for example, has created what he calls "shootout hearings." In Texas, the chief judge of the state's Northern District sat with a judge in the Eastern District last year for a joint claim construction hearing.

Judges Stark and Burke are not strangers when it comes to sharing a courtroom. Facing a flurry of transfer requests in the aftermath of the TC Heartland ruling, the two judges sat together to hear arguments in several cases over the course of one afternoon in 2017.

Explaining the thinking behind the Section 101 hearing, Judge Stark said he had seen a common thread in a number of the patent cases that are before him, according to the transcript.

"I was motivated to schedule this experiment when I first noticed, to no one's surprise, I had a lot of Section 101 motions on my docket," he said, adding there tends to be a lot of commonalities in 101 arguments, including discussions of much of the same legal precedent.

"So it occurred to me," he said, "that perhaps there may be some efficiencies to be gained by doing something like this experiment and hearing multiple motions in multiple cases on the same day."

Judge Stark also said he noticed the Federal Circuit has been "somewhat active" in this area of law recently, issuing about two opinions on Section 101 per month, according to the transcript. Judge Stark noted it takes him and Judge Burke, on average, two months after an argument to issue an opinion.

"So if I did the math correctly, I think that means on average about four new Federal Circuit opinions are coming out in the lag time between argument and written decision, and that is challenging in terms of subsequent authority, etc.," the judge said.

"I don't want that to happen on the motions that were argued today," he said as the hearing reached its

end. “I have decided what to do, and I’m just going to tell you.”

With that the judge handed down his rulings, finding the disputed claims in both LBS and MOAEC’s patents were invalid because they were directed to nothing more than abstract ideas. None of those cases was more than a year old.

The judge also denied a request to reconsider his September ruling that part of the Search and Social Media Partners patent covered only the abstract idea of providing news items to a subscriber who is part of a group.

The day wrapped up shortly before 5 p.m.

More Lively Discussions to Come

Popovski, who argued for Sony and the other defendants in the LBS cases, spoke highly of the hearing and its format, which he said has several benefits.

He said resolving questions about patent eligibility early in litigation can help both sides in terms of valuing a case. Popovski also said it is good to know if a patent covers ineligible subject matter before engaging in substantial discovery.

Another attorney who argued that day, Stefani Shanberg of Morrison & Foerster LLP, said the focus of the hearing, with everyone in the courtroom there to talk about Section 101, led to a “lively and in-depth discussion.”

“That type of focus and thorough analysis I think was enhanced by the fact that there was a single topic for the day,” said Shanberg, who represented Spotify and argued for the defendants in the MOAEC cases.

Outside observer Kenneth Weatherwax, a founding partner of Lowenstein & Weatherwax LLP, said the idea of bringing together cases that have a common issue but are otherwise unrelated is not all that different from what the U.S. Supreme Court often does. He said considering cases together as they bear on the same issue can enhance the understanding of that issue.

“I think on balance this should be a good way to have such hearings,” Weatherwax said.

As the hearing came to a close, Judge Stark said he may host another 101 Day, while cautioning that the outcome of this particular hearing, with all claims being invalidated, was nothing more than the “luck of the draw.”

“It absolutely does not follow that you should expect that I am going to invalidate every ... patent I see on a 101 motion,” the judge said, adding that he will “look at each case on its own, applying the law to the facts and circumstances, considering, of course, all the arguments made.”

--Editing by Jill Coffey and Kelly Duncan.