



Lessons From the Allvoice Patent Case

What the speech developer's suit against Microsoft means for software makers

On May 22, 2015, the United States Court of Appeals for the Federal Circuit seemingly ended the case of Allvoice Developments US, LLC v. Microsoft Corp. (“Allvoice”). Although Allvoice is non-precedential, its result is instructive.

Allvoice sued Microsoft alleging infringement of multiple speech recognition patents. The court ultimately held that:

- several of Allvoice's patents were invalid, and even if they had been valid, no infringement occurred; and
- there was no infringement of the patents that were valid.

This case was rife with technicalities, raising this question: Did Allvoice lose because of flaws in its patents or because Microsoft did not infringe, or did Allvoice lose on technicalities?

At the beginning of the legal process, a hearing is typically held in which both sides present to the court their definitions of terms. The judge then determines the scope and meaning of key terms to be used in the case.

This is called claim construction, and patent litigation often turns on how the parties explain their positions to the judge. The strength of the parties' positions may shift based on the interpretation of the claims, even to the point of preventing the case from moving forward; deciding what the claims mean, some say, is nearly always to decide the case.

If the court adopts one's adversary's definition(s), the non-prevailing party will often seek leave to amend its claim construction to base it on the court's. In Allvoice, the court's definitions were unfavorable to Allvoice, prompting it to do just that. Ultimately, the court denied Allvoice's requests.

“Everything you say in a patent application, even the position of a punctuation mark, can influence the scope and enforceability of the patent,” says patent attorney Lance Pritikin.

Here, at least one definition, of RAM, turned out to be dispositive: Allvoice had used the word “file” in drafting its patents and argued, without the benefit of amending its claim, that RAM constituted a file. The court disagreed, causing several of Allvoice's patents to fail for not falling under any category enumerated in Section 101 of the Patent Act. More specifically, the court found that these claims did not put forth something tangible in memory for a long enough period of time to fall under Section 101. According to patent attorney Pejman Yedidson, it comes down to this: “Are you writing software, or are you writing software that's controlling the machine and making the machine special?”

In a patent application, patent attorneys often submit multiple claims written multiple ways because laws, among other factors, may change over time. These changes may result in legitimate judicial critique of claims during litigation, causing some claims to fail, even years after the patent was granted.

Pritikin believes that because of the way Allvoice drafted its patents, when it subsequently identified Microsoft as potentially infringing, Allvoice could not prove the validity of its claims because they did not survive scrutiny under Section 101.

With regard to the patents that were held valid but not infringed upon, what if the two patents were not identical, but were really, really similar?

If Patent A is for Widget + Widget and Patent B is for Widget + Widget under Table, has Patent A been infringed upon? It depends. If Patent A does not mention the table,

it shouldn't make a difference that the widget is under a table in Patent B because the claim does not require a table.

What can we learn from Allvoice? First and foremost, patents require artful drafting.

And here are additional lessons:

- Screen the invention properly in advance of drafting.
 - Is it qualified under the safe harbor of Section 101?
 - Is the subject matter allowable?
 - Is it too abstract under Alice?
- Manage expectations from a business standpoint.
 - Can your business model stand an appeal, if necessary?
- Allow recent case law to inform how patent-related software claims are drafted.

“If software makes something available that was not available before, it is eligible for patent protection,” Yedidson says. He believes that in this case, the court thought this was just any old computer not doing anything special.

The case is being considered for certiorari by the United States Supreme Court, the issue presented being, is software stored on a computer-readable medium a “manufacture” under Section 101? It will be interesting to see whether the court accepts cert, and if so, how it will decide. ☒

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