

## Fed. Circ. Skeptical Of Arguments To Restore Web Patent

By **Michael Macagnone**

*Law360, Washington (March 9, 2016, 10:09 PM ET)* -- Federal Circuit judges Wednesday grilled the inventor of a web referral patent nixed under the Supreme Court's Alice decision about whether any aspect of the system could satisfy the high court's standard that patents cannot be granted to abstract concepts.

Federal Circuit Judge Todd M. Hughes led the questioning on whether to overturn U.S. District Judge James V. Selna's February 2015 ruling that Essociate Inc. had claimed an abstract idea with its e-commerce patent that allowed online merchants to track user traffic from sites that weren't part of their affiliate system.

Judge Hughes said that given the abstract nature of referral systems, which allow web sites to determine advertisement rates based on how much traffic the ads generate in getting users to follow links to the vendor's own site, Essociate's patent would have to demonstrate further improvements to the ideas to receive patent protection.

"The referral system is abstract; it is unpatentable," Judge Hughes said. "In improving an abstract idea, you still haven't convinced me you have improved in a way sufficient to be patentable."

Essociate had launched patent infringement suits against Clickbooth.com Inc. in 2013 and Crakmedia in 2014, and the two defendants moved for judgments on the pleadings. That resulted in U.S. District Judge James V. Selna's summary judgment of patent invalidity and the current appeal.

The patent simply covered the abstract idea of keeping track of which customers come from various referrers, Selna ruled.

"Regardless of whether a merchant is seeking customers on or off the Internet, it is a fundamental economic practice to keep track of who is directing customers to one's business, and compensate or provide incentives to that referring source to ensure the continuing flow of customers from that source," Judge Selna wrote.

But Essociate counsel Derek Newman said Wednesday the patent doesn't deal with those sorts of abstract concepts. He said the patent allows for easing the previously complicated process of getting the referral system up and running, a problem inherent to the Internet.

"The gist of the patent is access. The gist of the patent is not the abstract idea of tracking and receiving a

referral,” he said.

Judge Hughes took issue with that description, however, saying, “You’re talking about this [access] as if the claims actually say this,” while he pointing to the described steps in the patent, which detail the handling of referrals.

Clickbooth.com pushed even further, saying Essociate’s claimed invention only reorganized the economic relationship between vendor and website so Essociate could insert itself as a middleman. Darren Franklin, counsel for Clickbooth.com, said it was “really a system that takes over the bookkeeping from the broker’s computer and moves it to the Essociate’s computer.”

Franklin said the supposed “access” provided by Essociate's patent is just putting bookkeeping for a referral program on a computer.

“‘Access’ is just the flip side of receiving and tracking referrals, and Essociate’s patent is directed to the tracking and receiving of referrals,” Franklin said.

The U.S. Supreme Court rendered its decision that abstract concepts could not be patented in *Alice Corp. v. CLS Bank International* in June 2014.

The patent-at-issue is U.S. Patent Number 6,804,660.

Federal Circuit Judges Jimmie V. Reyna, Evan J. Wallach and Todd M. Hughes sat on the panel.

Essociate is represented by Derek Alan Newman, Derek Linke and Keith P. Scully of Newman Du Wors LLP.

Appellee Clickbooth.com is represented by Darren Matthew Franklin and Andrew T. Kim of Sheppard Mullin Richter & Hampton LLP and Richard Newman of Hinch Newman.

Appellee 4355768 Canada Inc., also known as Crakmedia, is represented by Ben M. Davidson and William G. Jenks.

The case is *Essociate, Inc. v. Clickbooth.com, LLC*, case number is 15-1332, in the United States Court of Appeals for the Federal Circuit.

--Editing by Jill Coffey.

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