

**United States Court of Appeals
for the Federal Circuit**

ULTRAMERCIAL, INC., AND ULTRAMERCIAL, LLC,
Plaintiffs-Appellants,

v.

HULU, LLC,
Defendant,

AND

WILDTANGENT, INC.,
Defendant-Appellee.

2010-1544

Appeal from the United States District Court for the
Central District of California in No. 09-CV-6918, Judge R.
Gary Klausner.

Decided: November 14, 2014

LAWRENCE M. HADLEY, McKool Smith Hennigan, P.C.,
of Los Angeles, California, for plaintiffs-appellants.

GREGORY G. GARRE, Latham & Watkins LLP, of
Washington, DC, for defendant-appellee. With him on the
supplemental brief were GABRIEL K. BELL, of Washington,
DC, and RICHARD G. FRENKEL and LISA K. NGUYEN, of

Menlo Park, California. Of counsel were RICHARD P. BRESS and Katherine I. Twomey, of Washington, DC.

CHARLES DUAN, Public Knowledge, of Washington, DC, for amicus curiae Public Knowledge.

DANIEL NAZER, Electronic Frontier Foundation, of San Francisco, California, for amicus curiae Electronic Frontier Foundation. With him on the brief was VERA RANIERI. Of counsel was JULIE P. SAMUELS.

DARYL L. JOSEFFER, King & Spalding LLP, of Washington, DC, for amicus curiae Google Inc. With him on the brief was ADAM M. CONRAD, of Charlotte, North Carolina.

JAMES L. QUARLES III, Wilmer Cutler Pickering Hale and Dorr LLP, of Washington, DC, for amicus curiae The Clearing House Association, L.L.C. With him on the brief were GREGORY H. LANTIER, THOMAS G. SAUNDERS, and DANIEL AGUILAR.

Before LOURIE, MAYER,* and O'MALLEY, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* LOURIE.

Concurring Opinion filed by *Circuit Judge* MAYER.

LOURIE, *Circuit Judge.*

This appeal has returned to the court following an up and down journey to and from the Supreme Court. In our original decision, we reversed the district court's holding

* Pursuant to Fed. Cir. Internal Operating Procedure 15 ¶ 2 (Nov. 14, 2008), Circuit Judge Mayer was designated to replace Randall R. Rader, now retired, on this panel.

that granted WildTangent, Inc.'s ("WildTangent") motion to dismiss Ultramercial, LLC and Ultramercial, Inc.'s (collectively "Ultramercial") patent infringement complaint under Fed. R. Civ. P. 12(b)(6). See *Ultramercial, LLC v. Hulu, LLC*, 657 F.3d 1323 (Fed. Cir. 2011), *vacated sub nom. WildTangent, Inc. v. Ultramercial, LLC*, 566 U.S. ___, 132 S. Ct. 2431 (2012). The district court had held that U.S. Patent 7,346,545 (the "'545 patent"), the basis for the complaint, does not claim patent-eligible subject matter under 35 U.S.C. § 101. See *Ultramercial, LLC v. Hulu, LLC*, No. 09-06918, 2010 WL 3360098 (C.D. Cal. Aug. 13, 2010)

The present posture of the case is that Ultramercial is again appealing from the decision of the United States District Court for the Central District of California. Upon review of the '545 patent and the standards adopted by the Supreme Court, for the reasons set forth below, we conclude that the '545 patent does not claim patent-eligible subject matter and accordingly affirm the district court's grant of WildTangent's motion to dismiss.

BACKGROUND

Ultramercial owns the '545 patent directed to a method for distributing copyrighted media products over the Internet where the consumer receives a copyrighted media product at no cost in exchange for viewing an advertisement, and the advertiser pays for the copyrighted content. Claim 1 of the '545 patent is representative and reads as follows:

A method for distribution of products over the Internet via a facilitator, said method comprising the steps of:

a first step of receiving, from a content provider, media products that are covered by intellectual property rights protection and are available for purchase, wherein

each said media product being comprised of at least one of text data, music data, and video data;

a second step of selecting a sponsor message to be associated with the media product, said sponsor message being selected from a plurality of sponsor messages, said second step including accessing an activity log to verify that the total number of times which the sponsor message has been previously presented is less than the number of transaction cycles contracted by the sponsor of the sponsor message;

a third step of providing the media product for sale at an Internet website;

a fourth step of restricting general public access to said media product;

a fifth step of offering to a consumer access to the media product without charge to the consumer on the precondition that the consumer views the sponsor message;

a sixth step of receiving from the consumer a request to view the sponsor message, wherein the consumer submits said request in response to being offered access to the media product;

a seventh step of, in response to receiving the request from the consumer, facilitating the display of a sponsor message to the consumer;

an eighth step of, if the sponsor message is not an interactive message, allowing said consumer access to said media product af-

ter said step of facilitating the display of said sponsor message;

a ninth step of, if the sponsor message is an interactive message, presenting at least one query to the consumer and allowing said consumer access to said media product after receiving a response to said at least one query;

a tenth step of recording the transaction event to the activity log, said tenth step including updating the total number of times the sponsor message has been presented; and

an eleventh step of receiving payment from the sponsor of the sponsor message displayed.

'545 patent col. 8 ll. 5–48. As the other claims of the patent are drawn to a similar process, they suffer from the same infirmity as claim 1 and need not be considered further.

As indicated above, Ultramercial sued Hulu, LLC (“Hulu”), YouTube, LLC (“YouTube”), and WildTangent, alleging infringement of all claims of the '545 patent. *Ultramercial*, 2010 WL 3360098, at *1. Hulu and YouTube were dismissed from the case for reasons we need not concern ourselves with here, *Ultramercial*, 657 F.3d at 1325, but WildTangent moved to dismiss for failure to state a claim, arguing that the '545 patent did not claim patent-eligible subject matter. *Ultramercial*, 2010 WL 3360098, at *2. The district court granted WildTangent’s pre-answer motion to dismiss under Rule 12(b)(6) without formally construing the claims. *Id.* at *6–7. Ultramercial timely appealed.

We reversed, concluding that the district court erred in granting WildTangent’s motion to dismiss for failing to

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