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PATENT PROTECTION FOR ENTERTAINMENT SOFTWARE INVENTIONS

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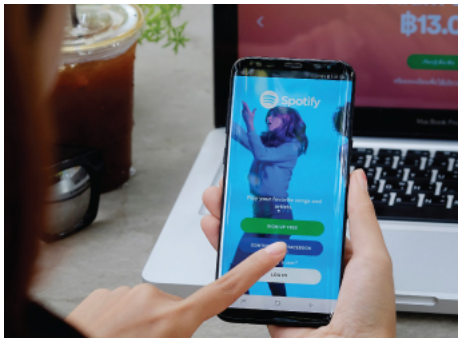

Innovators seeking patent protection for entertainment software inventions should be aware that all software inventions face patent-eligibility issues.[1] Nevertheless, patent practitioners who are experienced in the art of software patent prosecution can help ensure that software inventions get maximum protection.

The recent decision in *Guvera v. Spotify* provides one example of why patent applications for entertainment software inventions should be drafted according to a clear technological problem-solution framework to be accepted as disclosing patent-eligible subject matter.[2]

In September of 2022, Guvera, a patent owner (and former music-streaming company), lost its patent infringement case against the music-streaming giant Spotify after the U.S. District Court for the Southern District of New York held that Guvera's patent was not eligible for patent protection.[3]

Guvera's patent claims involved methods of generating playlists with targeted advertising. The Southern District of New York held that the patent claims at issue were directed to an abstract idea, lacked an inventive concept, and were, therefore, ineligible for patent protection under 35 U.S.C. § 101 ("Section 101").

Ever since the U.S. Supreme Court's *Alice* decision in 2014, Section 101 has been used to invalidate countless software patents.[4] *Alice* and subsequent Section-101 case law have established that software inventions must include features that provide technological improvements.[5]

The *Alice* decision was intended, in part, to stop patents from being granted for basic and well-known concepts (i.e., abstract ideas) merely implemented by way of a generic computer.[6] As the court noted in *Guvera v. Spotify*, "merely adding computer functionality to increase the speed or efficiency of the process does not confer patent eligibility."[7]

Applying the *Alice* two-step test for subject-matter eligibility, the court, in *Guvera v. Spotify*, first determined that Guvera's patent claims were "directed to the abstract idea of matching content using data identifiers."[8] Next, the court determined that the patent claims did not contain an "inventive concept" and, thus, did not add significantly more to the abstract idea of content matching because, "[a]t bottom, the claims recite the process for implementing the abstract idea of matching content on a computer," and, "[a]t best, the patent improves the efficiency of content matching...."[9]

How could Guvera's patent application have been written differently to avoid a determination of invalidity under Section 101?

One of the more reliable ways to overcome a challenge under Section 101 is to show that some of the features in the patent claims provide an improvement to computer functionality. Under Section-101 case law, patent claims that are directed to an improvement to computer functionality are *not* directed to an abstract idea and are, therefore, patent eligible.[10]

One of the more reliable ways to show that features in the patent claims provide an improvement to computer functionality is to describe those features, in the detailed description of the patent application, within a technological problem-solution framework. One way to determine whether a technological problem-solution framework has been provided for a feature is to ask whether the patent application explains how that feature makes the computer (i.e., the device on which the software feature runs) operate more efficiently than with other approaches.

Guvera was unable to show that its claimed approach provided an improvement to computer functionality.[11] Notably, the patent at issue in the case, U.S. Patent No. 8,977,633 (the "'633 Patent"), did not include a clear technological problem-solution statement.

The '633 Patent provides insight into when a software patent may be in danger of being invalidated under Section 101 because no portion of the patent explains how any disclosed feature makes a computer operate more efficiently. (Note: the application for the '633 Patent was filed before the *Alice* decision.)

In summation, when determining whether a software invention is eligible for patent protection, try to think of the idea in terms of how it improves computer functionality in a way that is different from other approaches.

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[1] *See Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014) (setting forth a two-step test for patent subject-matter eligibility that turned the software patent world upside down).
[2] *Guvera IP Pty Ltd. v. Spotify, Inc.*, No. 21-CV-4544 (JMF), 2022 WL 4537999 (S.D.N.Y. Sept. 28, 2022).
[3] *Id.* at *1.
[4] 573 U.S. 208 (2014).
[5] *See, e.g.*, *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016); *BASCOM Glob. Internet Servs., v. AT&T Mobility LLC*, 827 F.3d 1341, 1349 (Fed. Cir. 2016).
[6] *Alice*, 573 U.S. at 223.
[7] *Guvera v. Spotify*, 2022 WL 4537999, at *7.
[8] *Id.* at *4.
[9] *Id.* at *7.
[10] *Enfish*, 822 F.3d at 1335 (explaining that it is "relevant to ask whether the claims are directed to an improvement to computer functionality versus being directed to an abstract idea... for which computers are invoked merely as a tool").
[11] *Guvera v. Spotify*, 2022 WL 4537999, at *7.

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