

No. 11-962

In the
Supreme Court of the United States

WILD TANGENT, INC.,

Petitioner,

v.

ULTRAMERCIAL, LLC, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

**BRIEF OF GOOGLE INC. AND VERIZON
COMMUNICATIONS INC. AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether, or in what circumstances, a patent's general and indeterminate references to "over the Internet" or at "an Internet website" are sufficient to transform an unpatentable abstract idea into a patentable process for purposes of 35 U.S.C. § 101.

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INTEREST OF *AMICI CURIAE*¹

Amici Google and Verizon are innovative leaders in high technology. Having obtained patents based on their own research and development efforts, and having had to defend themselves against hundreds of infringement claims involving invalid patents, *amici* support a strong and rational patent system.

The decision below threatens *amici* and other innovators by upholding a sweeping claim over the distribution of content online and opening the door to other patents over abstract ideas about how to do business online. The decision below and others like it expose high-tech companies to increased litigation risk by sanctioning sketchy, high-level claims that lack the specifics that transform abstract ideas into patentable processes. For example, one court recently rejected Google's challenge to a patent that may have been "abstract" and thus invalid under *Bilski v. Kappos*, 130 S. Ct. 3218 (2010). Relying on the decision below, the court instead found that the claim was not "so manifestly abstract" as to be invalid. *Iconfind, Inc. v. Google, Inc.*, No. 11-cv-0319, 2012 WL 158366, *3 (E.D. Cal. Jan. 18, 2012).

Google's subsidiary YouTube, LLC, was formerly a defendant in this case. The parties stipulated to

¹ *Amici* timely notified counsel for the parties of their intention to file this brief. They consented in letters on file with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

YouTube’s dismissal before the appeal to the Federal Circuit. Verizon has never been a party.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is vital to fostering online innovation that this Court set aside the decision below. In *Bilski*, this Court reaffirmed that “limiting an abstract idea to one field of use or adding token postsolution components [does] not make the concept patentable” under § 101. 130 S. Ct. at 3231. In this case, the panel essentially rejected that holding in the important and innovative field of the Internet. The panel agreed that using an advertisement to pay for copyrighted content was an abstract idea. But the panel held that Ultramercial could claim any and every application of this abstract idea “on an Internet website.”

The court’s ruling conflicts with *Bilski* and eviscerates 35 U.S.C. § 101, transforming it from a meaningful check on the otherwise broad scope of patentability to an easily-evaded technicality, especially considering the Internet’s ubiquity in modern life and commerce. The decision would impede innovation by allowing a person to exclude others from practicing every application of an abstract idea related to conducting business online — including implementations that the “inventor” never contemplated and that have not yet been invented. That would turn the patent system upside down by converting it into a tax, instead of an incentive, for actual innovation.

For 150 years culminating in *Bilski*, this Court has used the requirement of patentable subject matter to guard against claims this sweeping. The Fed-

eral Circuit, however, has now issued a series of conflicting decisions on this important topic. Action by this Court is needed to ensure that § 101’s limitations are restored to their rightful place and to resolve the confusion in the Federal Circuit. That legal uncertainty is itself bad for innovators because it creates business uncertainty that deters investment and encourages costly litigation. The ongoing harm to *amici* and others confirms the need for this Court to set aside the decision below.

ARGUMENT

I. THE DECISION BELOW THREATENS INNOVATION BY ALLOWING PATENTS ON ABSTRACT IDEAS ABOUT CONDUCTING BUSINESS ONLINE

A. The Decision Below Conflicts with *Bilski* and Eviscerates Section 101’s Protection Against Abstract Patents

1. Under *Bilski* and this Court’s longstanding § 101 precedents, the category of “processes” that qualify as patentable subject matter is broad — but not unlimited. Crucially, two limits are well-settled.

First, an “abstract idea, law of nature, or mathematical formula” may not be patented, even if dressed up as a series of steps that superficially resemble a process. *Bilski*, 130 S. Ct. at 3230; *e.g.*, *Gottschalk v. Benson*, 409 U.S. 63, 68 (1972); *Parker v. Flook*, 437 U.S. 584, 594–95 (1978). Although not dispositive standing alone, *Bilski* endorsed the “machine or transformation” test as a “useful and important clue, an investigative tool,” for identifying abstract claims. *Bilski*, 130 S. Ct. at 3227; *see Diamond v. Diehr*, 450 U.S. 175, 187 (1981).

Second, “the prohibition against patenting abstract ideas ‘cannot be circumvented by attempting to limit the use of the formula to a particular technological environment’ or adding ‘insignificant post-solution activity.’” *Bilski*, 130 S. Ct. at 3230 (quoting *Diehr*, 450 U.S. at 191–92). For example, *Bilski* did not involve an open and avowed effort to patent the abstract idea of hedging risk. Rather, the abstraction was framed as a multi-step process for applying hedging concepts “in the energy market.” 130 S. Ct. at 3231. This Court unanimously rejected this patent at the threshold. Hedging risk is an abstract idea, and “limiting an abstract idea to one field of use or adding token postsolution components [does] not make the concept patentable.” *Id.*; *see also id.* at 3232 (Stevens, J., concurring in judgment); *id.* at 3257 (Breyer, J., concurring in judgment).

Similarly, the Court has made clear that abstract ideas cannot be made patentable simply by reciting that they will be implemented by a computer. For example, in *Benson*, this Court unanimously rejected a claim that ostensibly described a multi-step process for applying an unpatentable algorithm for converting binary-encoded decimal numbers (“BCD”) to pure binary using “general-purpose digital computers.” 409 U.S. at 64. The Supreme Court explained that the core problem with this claim was that it was “so abstract and sweeping as to cover both known and unknown uses of the BCD to pure binary conversion.” *Id.* at 68. And in *Flook*, the Court held that a patent on the use of an algorithm could not be saved by describing the patent as a multi-step process for applying that algorithm to the

petrochemical and oil-refining industries. *Flook*, 437 U.S. at 590.

2. The decision below conflicts with *Bilski*, *Benson*, and *Flook* and eviscerates the anti-circumvention principle that § 101 does not permit claims on every possible means of applying an abstract idea in a field. Ultramercial claims the “process” of conducting business online by showing a viewer an advertisement to pay for content. The panel agreed that the idea of showing an advertisement before content “is abstract, just as the vague, unapplied concept of hedging proved patent-ineligible in *Bilski*.” App. 10a. But the panel found Ultramercial’s claim to be patent-eligible because it in essence limited the application of this abstract idea to use “on an Internet website.” *Id.*

The panel recognized that Ultramercial “broadly claimed” this method for online advertising, but it stated that it was not holding that § 101 permits patents over any abstract idea “us[ing] an Internet website.” App. 11a–12a. The only other “factor” the panel identified, however, is a makeweight: It emphasized that implementing “many” of the steps — such as “providing” the content and “restricting” unauthorized access to it — would require “complex computer programming.” App. 10a–11a. But implementing *any* abstract business model online involves “complex computer programming.” And the panel recognized that Ultramercial failed to “specify a particular mechanism” for implementing those steps — or any others. App. 12a. The panel nonetheless held that “[t]his breadth and lack of specificity” was not fatal because a claim is patentable unless it is “so manifestly abstract as to override the

statutory language of section 101.” App. 8a, 12a (quoting *Research Corp. Techs. v. Microsoft Corp.*, 627 F.3d 859, 869 (Fed. Cir. 2010) (Rader, J.)).

This ruling conflicts with *Bilski* in three ways. First, the panel’s ruling that “on an Internet website” is sufficient to render patentable an otherwise invalid abstract patent is squarely contrary to *Bilski*, *Flook* and *Benson*. Adding “in the energy markets” did not save the otherwise abstract claim in *Bilski*. Adding “in the petrochemical and oil-refining industries” did not save the otherwise abstract claim in *Flook*. Adding “on a general-purpose computer” did not save the otherwise abstract patent in *Benson*. Adding “on an Internet website” should have fared no better here.

If anything, as the Internet becomes more and more ubiquitous in modern life, the limitation “on an Internet website” should be even less effective at evading § 101 than the limitations this Court rejected in *Bilski*, *Flook*, and *Benson*. It is inconceivable that *Bilski*’s claim would have survived had the hedging process been performed on the Internet.

Second, *Bilski* and its predecessors establish that § 101 precludes claims on “abstract ideas” — not claims that are “manifestly” abstract as the panel required. Compare *Bilski*, 130 S. Ct. at 3225, 3226, 3229, 3230, with App. 8a. The panel underscored that this change was more than semantic by holding that the claim below was not “abstract” even though it was “broa[d]” and lacked “specificity.” App. 12a. In other words, claims that satisfy dictionary definitions of “abstract” can still pass muster under the panel’s test. Webster’s New Int’l Dictionary 8 (3d ed. 1981) (“abstract” means “considered apart from

any application to a particular object or specific instance”); *e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 n.7 (2007) (Roberts, C.J.) (contrasting an “abstract” claim from a “specific” one); *id.* at 497 (Scalia, J. concurring) (same).

Third, in conflict with *Bilski*'s holding that the “machine or transformation” test is a “useful and important” tool in evaluating patentability, the panel skipped the test entirely. App. 7a. The panel explained that the test should effectively be abandoned for “Information Age” patents, as “[t]echnology without anchors in physical structures and mechanical steps simply defy easy classification under the machine-or-transformation categories.” *Id.* at 8a. The panel thus wholly failed to consider a factor that *Bilski* highlighted as important.

Furthermore, the panel's assertion that this is an “Information Age” patent uses the tail to wag the dog. Ultramercial's claim does not specify any software, hardware, or other “Information Age” technology for applying its abstract idea online. Other than the qualification at step 3 that the content must be provided “on an Internet website,” Ultramercial has simply described the abstract idea of showing advertisements to pay for content. The claim consists of: (1) “receiving” content; (2) “selecting” an advertisement; (3) “providing” the content; (4)-(6) “restricting” access to the content but allowing the public to view it if they agree to watch an advertisement; (7) “facilitating the display” of the advertisement; (8)-(9) “allowing” access to the content if the advertisement is not interactive or requiring interaction first if it is; (10) “recording” what happened; and (11) “receiving payment” from the advertiser. App. 2a-3a. These

steps do not narrow Ultramercial’s claim or make it any less abstract. The drafter’s effort to stretch this simple, abstract business model into 11 separate steps does not render the abstract patentable.

Crucially, there are countless ways to implement this abstract business method online — and Ultramercial is claiming *every possible one of them*. Pet. 8. This is no more an Information Age patent than *Benson* was an Information Age patent or *Bilski* was an energy patent.

More fundamentally, the panel elevated form over substance. Under the panel’s analysis, drafting an abstract business method as a multi-step “process” and “limiting” the claim to applications “on an Internet website” has an enormous impact on the § 101 analysis: This is sufficient to water down the test for patentability to accept claims that utterly lack “specificity” regarding how to implement that idea, and thereby encompass every possible way of doing so; to ignore the otherwise “important and useful clue” that such abstract claims do not satisfy the machine-or-transformation test; and thereby to deny a § 101 challenge to a claim that would prohibit anybody else from using that business model online.

But this Court’s precedents leave no doubt that § 101’s limits are substantive, not formalistic, and thus may not be evaded by such clever drafting tricks. *Bilski*, 130 S. Ct. at 3230; *Diehr*, 450 U.S. at 191–92. Indeed, *every* method this Court has held to be invalid under Section 101 was drafted as a series of steps. The form of the claim thus should have been as irrelevant here as it was in *Bilski*, *Flook*, and *Benson*.

B. The Panel's Errors Are Important Because They Sanction Innovation-Blocking Patents That Will Impair and Tax Genuine Innovation Online

As *amici* and other innovators recognize, it is easy to think of abstract ideas about what a website should do. The difficult, valuable, and often groundbreaking part of online innovation comes next: designing, analyzing, building, and deploying the interface, software, and hardware to implement that idea in a way that is useful in daily life.

For example, Google's search engine is popular not because Google merely decided to do business online through a search engine. Google is successful because it undertook the enormous investment, risk, and hard work needed to build the complex technology that powers a search engine that is easy to use, fast, and provides relevant results. Particular aspects of this and other online technologies are patentable. The mere idea of searching and finding information "on an Internet website" must not be.

Bilski, *Benson*, and *Flook* provide critical protection against such innovation-blocking abstract claims. Patent claims on every use of an abstract idea in a particular field deter innovation by preempting future development and refinement in that field by others, and provide an unduly sweeping monopoly that disrupts the quid pro quo that is the basis of the patent system. "At their limit," abstract patents "claim everything and contribute nothing." Mark A. Lemley et al., *Life After Bilski*, 63 *Stan. L. Rev.* 1315, 1338 (2011). "By requiring that patent claims be limited to a specific set of practical appli-

cations of an idea, the abstract ideas doctrine both makes the scope of the resulting patent clearer and leaves room for subsequent inventors to improve upon — and patent new applications of — the same basic principle.” *Id.* at 1317. That space for innovation is critical to *amici*, their industries, and consumers.

The decision below significantly weakens these important protections. Section 101 cannot impose a meaningful check on patentability if a patent must be “manifestly” abstract to be invalid, if “breadth and lack of specificity” do not show that a claim is abstract, and if a concededly abstract method for conducting business is nonetheless patentable when limited to “an Internet website.”

Threatened by claims on this and similar patents, online innovators will face a choice of gambling on litigation or paying license fees for technology they already paid once to develop independently. Either path imposes significant costs that effectively tax innovation. With respect to licensing, the patentee can use the innovator’s sunk costs “as negotiating leverage for a higher royalty than the patented technology could have commanded *ex ante*.” Federal Trade Comm’n, Report, *Evolving IP Marketplace* 8 (Mar. 2011) (“FTC Report”), <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>. With respect to litigating, patent suits are extraordinarily expensive and, by their nature, subject to material uncertainty. Dep’t of Commerce, *Patent Reform: Unleashing Innovation, Promoting Economic Growth & Producing High-Paying Jobs* at 5–6 (Apr. 13, 2010) (“DOC Report”), http://www.commerce.gov/sites/default/files/documents/migrated/Patent_Reform-paper.pdf. The

decision below also reduces the chances of dismissal at the threshold, making it more likely that defendants will face expensive discovery on 35 U.S.C. §§ 102, 103, 112, and other issues, thereby increasing the nuisance value of settlement.

Even before the decision below, low-quality patents in the software and information technology industries have been raising costs and placing a drag on innovation. One study found that patents in these industries have produced net litigation costs that have far exceeded the net profits derived from the patents themselves. James Bessen & Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk*, 15–16, 144 (2008) (“Patent Failure”); *see also* DOC Report at 5. Weak policing of § 101 significantly increases these litigation costs: “Why are software patents more frequently litigated? In a word, abstraction.” *Patent Failure* at 22. “[S]oftware is an abstract technology,” making it “difficult, if not impossible, to relate the words that describe patent boundaries to actual technologies.” *Id.* By weakening § 101, the decision below is thus likely to exacerbate the already serious problems presented by abstract software claims.

The decision below would also increase the costs imposed by patent-assertion entities (“PAEs”). PAEs obtain patents on technology they themselves did not invent and, rather than developing that technology or licensing it *ex ante*, they wait and see if others do the hard work of innovating independently — and then sue the companies that have succeeded. *See* FTC Report at 8–9, 60–61. One study found that PAE suits were associated with “*half a trillion dollars* of lost wealth to defendants from 1990 through

2010.” James Bessen et al., Private and Social Costs of Patent Trolls, 34 Regulation 26, 26 (2011) (emphasis added), <http://www.cato.org/pubs/regulation/regv34n4/v34n4-1.pdf>.²

Although Ultramercial may not be a PAE, the decision below will facilitate such innovation-taxing patent traps. “[O]verbroad, vague claims” can be asserted against a broader range of activity, yet are harder for innovators to identify *ex ante*. FTC Report at 9, 50–51. And as set forth above, the decision below significantly weakens § 101 as a meaningful check on the most overbroad and vague claims: patents on a concededly abstract business method when applied “on an Internet website.”

II. THE DECISION BELOW WARRANTS SUMMARY REVERSAL, PLENARY REVIEW, OR, AT A MINIMUM, THE PETITION SHOULD BE GRANTED, VACATED, AND REMANDED IN LIGHT OF *MAYO*

1. For the reasons set forth above, this Court should summarily reverse. Only two years ago, *Bilski* reaffirmed that § 101 does not allow a patent on every application of an abstract idea in a field of use. 130 S. Ct. at 3230–31. The panel reached a contrary conclusion, allowing Ultramercial to claim every application of an abstract idea “on an Internet website.” The decision below is also important. It upholds a sweeping claim over the online content in-

² Bessen et al. use the term “non-practicing entity” (“NPE”), but define it to mean PAE. Bessen et al., *supra* at 28.

dustry and facilitates other innovation-chilling claims on abstract ideas about using the Internet.

This is an unusually clean vehicle. In some cases, it is challenging to distinguish between claims that are too abstract rather than sufficiently concrete and specific. But this case does not involve that line-drawing problem: The panel found that “the mere idea that advertising can be used as a form of currency is abstract, just as the vague, unapplied concept of hedging proved patent-ineligible in *Bilski*.” App. 10a. The only reasons the panel reversed was because the patent described that idea as a series of steps and purported to apply that “process” “on an Internet website.” *Bilski*, *Benson*, and *Flook* each hold that § 101’s prohibition on patenting an abstract idea cannot be evaded through draftsmanship and a field-of-use restriction. The decision below conflicts with that rule and should be summarily reversed.

2. Plenary review would also be appropriate for essentially the same reasons. The decision below conflicts with this Court’s decisions in *Bilski*, *Benson*, and *Flook*; the question of whether abstract ideas about the use of “an Internet website” are patentable is unquestionably important; and this is an unusually good vehicle. *See* Sup. Ct. R. 10(c). Because the Federal Circuit has exclusive jurisdiction over patent appeals, 28 U.S.C. § 1295(a)(1), there is also no possibility that a circuit split will develop.

This Court’s guidance is further warranted because the Federal Circuit’s § 101 jurisprudence is inconsistent. *See* Pet. 9–10, 19–21. The Federal Circuit invariably invokes the “so manifestly abstract” test and relies on the decision below, but at least

three other Federal Circuit panels have come out the other way, correctly concluding that a field-of-use restriction is inadequate: “[s]imply adding a ‘computer aided’ limitation to a claim covering an abstract concept, without more, is insufficient to render the claim patent eligible.” *Dealertrack, Inc. v. Huber*, ___ F.3d ___, Nos. 2009-1566, -1588, 2012 WL 164439, *17 (Fed. Cir. Jan. 20, 2012); *see also Fort Properties, Inc. v. Am. Master Lease LLC*, ___ F.3d ___, No. 2009-1242, 2012 WL 603969, *6 (Fed. Cir. Feb. 27, 2012) (same); *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1375 (Fed. Cir. 2011) (similar).

There is no meaningful distinction to explain these disparate outcomes. The *Dealertrack* panel stated that Ultramercial “claimed a practical application with concrete steps requiring an extensive computer interface,” while the patent there failed § 101 because it “recite[d] only that the method is ‘computer aided’ without specifying any level of involvement or detail.” 2012 WL 164439, *17; *see Fort Properties*, 2012 603969, at *6. But Ultramercial’s claim suffers from precisely the same problems. Both methods require building “an extensive computer interface,” but neither “specif[ies] any level of involvement or detail” about that interface. And both reach every interface that implements the method either online or on a computer. Nonetheless, the panels reached polar opposite results: *Dealertrack* affirmed a dismissal at the threshold, while the panel below reversed.

The Federal Circuit’s panel-by-panel decisions give rise to legal uncertainty that is itself damaging to those attempting to plan in light of its decisions.

Considering the conflict between the decision below and *Bilksi*, the practical importance of the issue, and Federal Circuit’s disparate caselaw, this Court should grant certiorari to clarify the scope of § 101.

3. At a minimum, this Court should hold this petition pending *Mayo Collaborative Services v. Pro-metheus Laboratories*, No. 10-1150 (argued Dec. 7, 2011), and grant, vacate, and remand if *Mayo* bears on the lower court’s decision. Both *Mayo* and this case involve questions about the scope of § 101. *E.g.*, *Mayo* Pet. Br. at i, 2011 WL 3919717 (Sept. 2, 2011) (question presented); *Mayo* Argument Tr. 41 (“[W]hat has to be added to a law of nature to make it a patentable process?”) (Breyer, J.). *Mayo* thus may have “a legal bearing upon the decision” below, making this an excellent candidate for a GVR. *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam); *id.* at 191–92 (Scalia, J., dissenting) (same).

CONCLUSION

For the foregoing reasons, this Court should summarily reverse, grant the petition, or hold pending a decision in *Mayo* and grant, vacate, and remand in light of that decision if appropriate.

RESPECTFULLY SUBMITTED

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