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## Business Method Patents – Defining Your Viewpoints and Your Rights

BUSINESS LAW

by Robert C. Kain

**B**usiness method patents are a class of patents which permit the owner to exclude others from making, using, selling, or offering to sell<sup>1</sup> the services or functions set forth in the patent rights-defining claimed method, the data exchanged with the claimed method, or a computer program which embodies functional steps of the claimed method. Although computer program financial patents have been the subject of patent protection for many decades,<sup>2</sup> most people believe business method patents cover unique or unusual business practices regardless of whether the methods are embodied in a computer program or are a series of novel and nonobvious steps employed to produce a product or deliver a service.<sup>3</sup> Business method patents often encompass Internet or e-commerce systems.

Patent attorneys employ business method patents to protect current commercial processes because many of these processes involve computers. However, there is a growing body of noncomputer-related business method patents. A computer search through abstracts of issued U.S. patents with the term “business method” revealed 32 patents, a majority of which are computer-related program patents<sup>4</sup> and a distinct minority of which are associated with noncomputer-related patents.<sup>5</sup> The distinction is significant because a method of doing business embodied as a computer program necessarily uses some computing data communication system (sometimes the

Internet),<sup>6</sup> whereas a true or pure business method patent is simply a series of steps. One example is a method for producing revenue from a gypsum-based refuse site. This patent includes “providing at least one facility suitable for containment of non-gypsum waste materials, . . . a container . . . being formed substantially from said gypsum refuse . . . and renting, leasing or otherwise driving revenue from said at least one facility suitable for the containment of said non-gypsum waste materials.”<sup>7</sup>

A spotlight was cast on business method patents during the dot-com boom in 1999 when Amazon.com, Inc., sued Barnes & Noble.com, Inc., for infringement of Amazon’s “one-click” patent in *Amazon.com, Inc., v. Barnes and Noble.com, Inc.*, 239 F.3d 1243.<sup>8</sup> Amazon’s broadest patent claim establishes Amazon’s exclusive patent rights as:

a method for ordering an item using a system, the method comprising: displaying information identifying the item and displaying an indication of a single action that is to be performed to order the identified item; and in response to only the indicated single action being performed, sending to a server system a request to order the identified item whereby the item is ordered independently of a shopping cart model and the order is fulfilled to complete a purchase of the item.

Although the trial court in the *Amazon* case initially issued a preliminary injunction prohibiting Barnes & Nobles’ use of the one-click process, the Court of Appeals for the Federal Circuit<sup>9</sup> reversed and held that Barnes & Noble had raised a substantial question of patent in-

validity regarding the asserted patent.<sup>10</sup> After this preliminary adverse ruling by the Federal Circuit, patent owner Amazon settled with Barnes & Noble early in 2002.

Several organizations, including the Electronic Frontier Foundation (EFF), strenuously objected to the scope of Amazon’s one-click patent arguing that it prohibited a substantial portion of on-line shopping activities. This argument was then expanded to computer-related business patents in general and the EFF publicly announced that many of these patents, issued by the U.S. Patent and Trademark Office (PTO), were invalid and should be struck down by the court system or recalled (reexamined) by the PTO. In April 2004, the EFF launched its “Patent Busting Project” stating that many business-related patents had a chilling effect on public and consumer interests. The EFF also indicated its intent to file multiple reexamination requests with the PTO to invalidate these patents.<sup>11</sup>

Numerous computer-based or computer-related method of doing business patents continue to effect the electronic commerce (e-commerce) businesses. For example, Double-Click has a banner ad patent, U.S. Patent No. 5,948,061, for “A Method of Delivery, Targeting, and Measuring Advertising Over Networks” which was cited in a class action suit for data misuse, but the patent claims were never litigated.<sup>12</sup> An open market electronic shopping cart patent, U.S. Patent No. 5,715,314, for a “Network Sales System,” is subject

to ongoing litigation in Texas also involving Amazon.com, Inc.<sup>13</sup> Patents have also been issued for an online shopping reward or "click reward program," U.S. Patent No. 5,774,870; a system that provides a financial incentive to view Internet political messages, U.S. Patent No. 5,855,008; an online auction system sometimes known as a "name your price" or a "reverse auction" patent, U.S. Patent No. 5,794,207; and a process that reacts to such auctions, U.S. Patent No. 5,845,265.<sup>14</sup>

A review of Federal Circuit case law relating to "business method patents" shows that the appellate court is relatively active in expanding the use of business method patents under current U.S. patent law.<sup>15</sup> In 2005, a district court refused to issue a permanent injunction after a jury verdict of infringement stating its "growing concern over the issuance of business method patents, which forced the PTO to implement a second-level review policy and caused legislation to be introduced in Congress to eliminate the presumption of validity for such patents." On appeal, the Federal Circuit reversed the trial court's denial of injunctive relief stating that such reasons were not grounds to deny the permanent injunction.<sup>16</sup>

In August 2005, the Federal Circuit issued another ruling in *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005), involving the popular Blackberry™ email communicators that effectively established that, with respect to method

patent claims, all the rights-defining claimed steps must be executed or practiced (found) in the U.S. *NTP* made a distinction between system or apparatus computer claims and method claims. "The use of a claimed system under Section 271(a) [35 U.S.C. §271(a)] is the place at which the system as a whole is put into service, i.e., the place where control of the system is exercised and beneficial use of the system is obtained."<sup>17</sup> However, with respect to the asserted method claims, the Federal Circuit stated "[w]e reach a different conclusion as to *NTP*'s asserted method claims. Under Section 271(a), the concept of 'use' of a patented method or process is fundamentally different from the use of a patented system or device."<sup>18</sup> "We therefore hold that a process cannot be used 'within' the United States as required by Section 271(a) unless each of the steps is performed within this country."<sup>19</sup> Since defendant RIM employed an essential computer communications interface in Canada, the Federal Circuit held that RIM did not infringe the method claims. However, since the beneficial result of the overall Blackberry system was obtained in the U.S., the court held that RIM infringed the computer system (apparatus) claims. This litigation is ongoing.

According to 35 U.S.C. §271(a), patent infringement occurs "when the defendant makes, uses, offers to sell, or sells any patented invention within the United States or imports into the United States any patent in-

vention during the term of the patent therefore." Active inducement and contributory patent infringement are also defined in the patent statute.<sup>20</sup>

In addition to concerns about direct or indirect patent infringement, the patent owner should also be concerned about recovery of patent damages. The patent law, 37 U.S.C. §284, states that "[u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court." Several commentators have indicated that 25 to 35 percent of the defendant's profit is a reasonable estimation of minimum "reasonable royalty" damages for patent infringement.<sup>21</sup> The amount of potential patent damages directly impacts patent licensing negotiations.

In light of the Federal Circuit's redefining the geographic scope of method claims in *NTP v. RIM*, and taking into account patent damages and maximization of patent licensing opportunities, if the client can afford the cost, good practices may require that business method patents, for both computer-related methods and true business processes, have rights-defining patent claims which are written from different viewpoints. With respect to computer program patents, the business person should attempt to secure patent coverage for several sets of claims, with each set having a different viewpoint or focus.



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One set of claims covers the process employed over the entire system.<sup>22</sup> Another set of claims should be directed to functions carried out on a server computer with mention of data flow components to a client computer (the client-consumer computer being set forth in the introduction or preamble of the claim).<sup>23</sup> A third set is written from the perspective of the client computer and referencing data flow to and from the server computer listed in the preamble.<sup>24</sup> A fourth set of claims may cover computer-readable medium having programming instructions stored thereon.<sup>25</sup> The programming instructions are functional statements from the claimed method program. A fifth set of claims for computer-related systems<sup>26</sup> may generally be characterized as apparatus or system claims covering an information processing system.<sup>27</sup>

In certain situations, the business person may also seek computer-related patent claims to a data package which is transmitted between the various computers in the system.<sup>28</sup> All these claims, from whatever perspective, must be deemed novel and nonobvious by the PTO before exclusionary patent rights are granted by the government.

Other commentators have suggested that in drafting business method claims, the patent practitioner should focus on a) the system as a whole, and then, b) separately focus on each entity which utilizes each major functional component of the business method patent.<sup>29</sup> In other words, in an Internet-based consumer transaction, the merchant, or its designated representative, operates a server (the "merchant-server") and the consumer operates a client computer which communicates with the merchant-server computer at a domain name address, www.merchant.com. The consumer-client computer and the merchant-server computer thereafter exchange information based upon various inputs from the consumer. The five sets of claims discussed above apply to this merchant-server and consumer-client computer system.

For patent royalty licensing purposes, the patent owner desires

## In sophisticated business method patents, several entities may be engaged in supplying and exchanging information with the computer-based system.

to include as many entities in the patent claim as possible in order to expand the royalty base and hence its total patent licensing royalty. The monetary value of a patent royalty is based upon 1) the patent royalty rate, typically a percentage of gross sales, and 2) the royalty base, that is, the goods or services which together encompass "gross sales." If the claims "read on" more entities, this translates into higher profit margins generated by the operation of the system and hence causes an increase in the royalty base against which the royalty rate is applied. Therefore, system-wide method claims, which include all entities handling the data, expand the royalty base. Careful drafting of patent claims to include higher level components also increases the royalty base. Royalties collected on the entire computer (for example, a main frame computer) are higher than royalties collected on one integrated computer chip in the computer. Including higher level computer elements in the approved patent claim increases the royalty base.

From an enforcement perspective, the patent litigator is reluctant to sue thousands of customers operating consumer-client computers but is primarily interested in pursuing patent infringement against the key or primary manufacturer or financial entity controlling or operating the server. Hence, a set of claims unique-

ly crafted to "read on" the manufacturer-server provides for clear, direct infringement of the patented business method. Again, carefully drafted patent claims which cover a single entity enable the litigator to establish direct patent infringement without resorting to contributory infringement theories.

If the business method can be configured as a computer program to be distributed on a CD, DVD, or downloaded via the Internet, a set of patent claims classified as "computer readable medium" claims is appropriate. These claims contain programming instructions written as method steps which essentially duplicate the claimed method. Litigators and licensing experts view computer readable medium claims as clearly defining a different source of revenue from system-wide method claims.

In sophisticated business method patents, several entities may be engaged in supplying and exchanging information with the computer-based system. Having multiple claims directed to each one of these entities may be of great assistance if the patent is ever litigated or licensed. In litigation, proof of direct patent infringement is easier to establish than contributory infringement. With an aggressive licensing program, each entity is required to pay a license fee.

In closing, business method patents have been consistently upheld by the courts as being within the scope of the patent statute and these intellectual property assets provide significant benefits to patent owners.<sup>30</sup> In a defensive patent strategy, a business method patent may be useful as a shield if the patent owner is sued and allegations are made that his or her patented system infringes upon an earlier patented system. Judges and juries sometimes find it difficult to comprehend how one later patented system can infringe upon an earlier patented system. Carefully crafted, multiple sets of patent rights-defining claims are important in establishing the scope of the patent rights and the royalty base and, hence, the overall value of the patent. □

<sup>1</sup> 35 U.S.C. §271. The laws regarding patents are set forth in full at 35 U.S.C. §1 *et seq.* (the "patent statute").

<sup>2</sup> See *Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 564 F. Supp. 1358 (D. Del. 1983). In this case, Paine Webber sought a declaratory judgment of patent invalidity and noninfringement of U. S. Patent No. 4,346,442 titled "Securities Brokerage-Cash Management System" owned by Merrill Lynch. Merrill Lynch counterclaimed charging that Paine Webber's cash management account infringed the 442 patent. After the trial court ruled that the computer program patent was proper subject matter under the patent statute, the case was settled.

<sup>3</sup> All patents, of whatever nature, must be deemed novel pursuant to 35 U.S.C. §101 by the Patent and Trademark Office (PTO), that is, different in some respect compared to prior or pre-existing technical art. To be issued a patent, the invention set forth in the claims must also be deemed nonobvious under 35 U.S.C. §103 by the PTO. In very simplistic terms, nonobvious means that the claimed invention is more than just a simple engineering change from the prior art.

<sup>4</sup> Of the 32 patents retrieved while searching for "business method" in the abstract, a large majority relate to computer programs. See U.S. Patent No. 6977740, Method and system for centralized information storage retrieval and searching; U.S. Patent No. 6976163, Methods, systems, and computer program products for rule based firmware updates utilizing certificate extensions and certificates for use therein; U.S. Patent No. 6973440, Method of managing a deposit exchange to offer price reductions; and U.S. Patent No. 6968325, System and method for automatically adjusting merchandise pricing at a service-oriented interface terminal based upon the quantity of users present at the terminal.

<sup>5</sup> Other retrieved method patents do not seem limited to computer pro-

grams. See U.S. Patent No. 6908107, Off-road vehicle safety cage structural member attachment apparatus and method; U.S. Patent No. 6846131, Methods and facilities for producing revenue from gypsum-based refuse sites; U.S. Patent No. 6560973, Method for manufacturing a vending machine for serving extremely cold frozen product and method for distributing same; and U.S. Patent No. 6510596, Creamatory egg interment system.

<sup>6</sup> See *e.g.*, U.S. Patent No. 6973440, Method of managing a deposit exchange to offer price reductions. The abstract for the 440 patent states: "A business method which uses a computer program to establish and maintain a deposit exchange. Customers deposit money with the deposit exchange and register with clients of the deposit exchange to use these deposits as discounts toward the price of goods or services the customer buys from the client. These discounts accumulate according to a formula similar to that used to calculate compound interest."

<sup>7</sup> The patent rights-defining claims in U.S. Patent No. 6846131 to Ianniello, *et al.*, Methods and Facilities for Producing Revenue from Gypsum-based Refuse Sites, set forth a true method of doing business and provide for: "A method for producing revenue from one or more facilities formed from gypsum refuse, said method comprising the steps of: A. providing at least one facility suitable for the containment of non-gypsum waste materials, said facility comprising a container having one or more concavities, said container being formed substantially from said gypsum refuse consisting of one or more existing gypsum stacks or a gypsum waste stream as it is forming or enlarging a gypsum stack, and B. renting, leasing or otherwise deriving revenue from said at least one facility suitable for the containment of said non-gypsum waste materials."

<sup>8</sup> U.S. Patent No. 5,960,411, Method and System for Placing a Purchase Order via a Communications Network.

<sup>9</sup> This appellate court hears all patent related appeals. 28 U.S.C. §1295.

<sup>10</sup> The Federal Circuit reversed the trial court's issuance of a preliminary injunction barring Barnes & Noble from using the one-click patent stating "that BN had raised a substantial question of invalidity of the asserted claims. . . [and] [v]alidity challenges during preliminary injunction proceedings can be successful, that is, they may raise substantial questions of invalidity, on evidence that would not suffice to support a judgment of invalidity at trial." *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1358-1359 (Fed. Cir. 2001). To obtain a preliminary injunction, "[t]he patentee must, however, present a clear case supporting the validity of the patent in suit. Such a case might be supported, for example, by showing that the patent in suit had successfully withstood previous validity challenges in other proceedings. Further support for such a clear case might come from a long period of industry acquiescence in the patent's validity. Neither of those considerations benefit Amazon in this case, however, because the '411 patent has yet to be tested by trial, and it was issued only a few weeks before the start of this litigation." *Id.*

<sup>11</sup> "Ten Most Wanted," The Patent Busting Project at [www.eff.org/patent/wanted](http://www.eff.org/patent/wanted) (March 3, 2006).

<sup>12</sup> This DoubleClick patent is currently subject to a reissue proceeding, Serial No. 09/577,798 filed May 24, 2000. DoubleClick has appealed the patent examiner's final rejection of all the claims.

<sup>13</sup> See preliminary published opinion *Soverain Software, LLC v. Amazon.com, Inc.*, 383 F. Supp. 2d 904, 906 (E.D. Tex. 2005).

<sup>14</sup> Reexamination requested by eBay, Inc., Reexam No. 90/006,956 filed March 8, 2004.

<sup>15</sup> "In our recent decision in *State Street*, this court discarded the so-called 'business method' exception." *AT&T Corp. v. Excel Communs., Inc.*, 172 F.3d 1352, 1356 (Fed. Cir. 1999)(citing *State*

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*Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1374-75 (Fed. Cir. 1998), *cert. denied*, 119 S. Ct. 851 (1999)). The Federal Circuit in *State Street* held “[s]ince the 1952 Patent Act, business methods have been, and should have been, subject to the same legal requirements for patentability as applied to any other process or method.” *Id.*, at 1375.

<sup>16</sup> “In this case, the district court did not provide any persuasive reason to believe this case is sufficiently exceptional to justify the denial of a permanent injunction.... A general concern regarding business-method patents, however, is not the type of important public need that justifies the unusual step of denying injunctive relief.” *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005). *MercExchange* alleged that eBay, Inc. and others infringed three patents pertaining “to a system for selling goods through an electronic network of consignment stores.” *Id.* at 1327. The appellate court reversed the denial of a permanent injunction and upheld a jury verdict of infringement of the ‘265 patent but invalidated other patents.

<sup>17</sup> *Id.* at 1317.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1318.

<sup>20</sup> 35 U.S.C. §271 establishes infringement of a patent as follows: “(a) Except as otherwise provided in this title [35 USCS §1 *et seq.*], whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent. (b) Whoever actively induces infringement of a patent shall be liable as an infringer. (c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.” The patent statute thereafter defines aspects of contributory infringement (§271(d)); infringement relative to “using recombinant DNA, recombinant RNA, hybridoma technology, or other processes involving site specific genetic manipulation techniques” (§271(e)); infringement for components of patented systems imported and exported from the U.S. (§271(f)); and infringement relative to the importation of product made by off-shore processes (§271(g)).

<sup>21</sup> See R.B. Young, *An Industry Perspective of Licensing*, in *THE LAW AND BUSINESS OF LICENSING: LICENSING IN THE 1990's*, 323, 332 (Paul Bell & Jay Simon, eds., 1991) (when royalty is based on anticipated profit of licensee, 25 to 35 percent of such profit is a typical agreed royalty); see also

*Syntex (U.S.A.) Inc. v. Paragon Optical, Inc.*, 7 U.S.P.Q.2d (BNA) 1001, 1027 (D. Ariz. 1987) (reporting testimony of damages expert Dudley Smith). Smith opined, that as a starting point, with nothing else known other than its existence and the amount of profit expected to be earned by sale or use of the invention, 25 percent to 33 percent of the anticipated profit would be a reasonable royalty. *Syntex*, 7 U.S.P.Q.2d (BNA), at 1027. From that starting point, one should analyze the factors set forth in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1123-32, (S.D.N.Y. 1970), *modified*, 446 F.2d 295, (2d Cir.), *cert. denied*, 404 U.S. 870 (1971). These factors include: 1) patent owner's policy to maintain, and actual maintenance of, monopoly in the absence of infringement; 2) profitability of the patented product; 3) potential for increased profitability of the patented product; 4) patent owner's profits from collateral or conveyed sales; 5) substantial profits that infringer could reasonably expect to earn from production of the infringed product; and 6) profits that infringer could reasonably expect to earn on collateral or conveyed sales.

<sup>22</sup> As an example: A method for downloading transactional data from a server computer to a client computer comprising steps of: obtaining a first input from said client computer; obtaining a response from said server based upon said first input; and completing the transaction by combining said first input and said response resulting in the delivery of audio files to said client computer.

<sup>23</sup> See, *supra* note 22.

<sup>24</sup> As an example: A method for downloading transactional data from a server computer to a client computer wherein said server computer provides a response and an audio output comprising steps of: providing an input from said client computer sent to said server computer; receiving said response based upon said first input; and receiving said audio file at said client computer indicative of a completion of the transaction.

<sup>25</sup> As an example: A computer readable medium containing programming instructions for downloading transactional data from a server to a client computer comprising: obtaining a first input from said client computer; obtaining a response from said server based upon said first input; and completing the transaction by combining said first input and said response resulting in the delivery of audio files to said client computer.

<sup>26</sup> Special care should be exercised by the patent draftsman when preparing the claims. The Federal Circuit recently ruled that a method claim, which depended from an apparatus or system claim, was invalid under 35 U.S.C. §112, 2d para., because it mixed statutory classes. *IPXL Holdings, LLC v. Amazon.com, Inc.*, 2005 U.S. App. Lexis 25120 (Fed. Cir. 2005). Such claim is fatally flawed because it is unclear whether infringement occurs by the manufacturer making the system capable of doing the method or when the

method is actually used by the user.

<sup>27</sup> As an example: An information processing system for downloading transactional data from a server computer to a client computer comprising: means for obtaining a first input from said client computer; means for obtaining a response from said server based upon said first input; and means for completing the transaction by combining said first input and said response resulting in the delivery of audio files to said client computer. It may also be good practice to provide a set of apparatus claims for each set of method claims.

<sup>28</sup> The following data package claim was approved as being patentable by the Federal Circuit: A method for use in a telecommunications system in which interexchange calls initiated by each subscriber are automatically routed over the facilities of a particular one of a plurality of interexchange carriers associated with that subscriber, said method comprising the steps of: generating a message record for an interexchange call between an originating subscriber and a terminating subscriber, and including, in said message record, a primary interexchange carrier (PIC) indicator having a value which is a function of whether or not the interexchange carrier associated with said terminating subscriber is a predetermined one of said interexchange carriers. *AT&T Corp. v. Excel Communications, Inc.*, 172 F.3d 1352 (Fed. Cir. 1999).

<sup>29</sup> M. Lemley *et al.*, *Divided Infringement Claims*, 33 AIPLA QTR. J. no.3, pp. 255, 272 (Summer 2005).

<sup>30</sup> Business method patents are subjected to a double examination or two-tier review by the PTO. *Automated Financial or Management Data Processing Methods (Business Methods)*, USPTO White Paper, 2000 at [www.uspto.gov/web/menu/busmethp/](http://www.uspto.gov/web/menu/busmethp/). Nonbusiness method patents are reviewed and approved by a single, qualified patent examiner. This increased scrutiny of business method patents may not be acceptable to some clients. Carefully drafting the application claims may avoid the application as being classified as a business method patent thereby by passing this higher level review by the PTO.

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**Robert C. Kain, Jr.**, has practiced exclusively in the patent, trademark, copyright, and computer law fields for over 20 years. His firm, *Fleit, Kain, Gibbons, Gutman, Bongini & Bianco, P.L.*, is located in Miami, Ft. Lauderdale, and Boca Raton, Florida. The firm limits its practice to intellectual property law matters, related litigation, arbitration, and domain name disputes, domestically and in foreign patent and trademark offices.

This column is submitted on behalf of the Business Law Section, Mark J. Wolfson, chair, and Hans Christian Beyer, editor.