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Symposium Presentation: Business and Patents and Business Patents

by
MICHAEL A. GLENN*

MODERATOR: Michael Glenn is a patent attorney with many years of experience in technical matters, and he will be talking about business patents and business patent models.

MICHAEL GLENN: How many people here are students? OK. How many are practitioners? And how many are patent practitioners?. . .And how many are students who want to become patent practitioners?

OK. Now, what we just did is what e-commerce is all about, in a sense. If you ever visit some of the web sites that do e-transactions, they'll ask you, for example, what do you like? Or they'll learn about you from the way you click your mouse, and next time you go to a web page, you'll get a banner ad for something that's interesting to you. Sometimes you'll be looking at Yahoo!,[1] for example. You'll do a search at Yahoo!, and you'll be looking at cars, and all of a sudden banner ads will come up for cars.

What they're doing is filtering. They're trying to determine a profile. And I've just tried to determine a profile also so that I can make this presentation more useful to you because now I know that there are not a lot of patent lawyers in the room, so I can tell you anything I want and you won't know whether

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1. *See* Yahoo!, (visited October 19, 2000) <http://www.yahoo.com>. Yahoo! is an Internet search engine that enables a user to locate Internet sites that provide information regarding a particular subject matter.

I'm telling you the truth or not!

In regard to business and patents, I'm going to give you a quick tutorial about patents, and that's going to be a jump-start to get you up the learning curve so that we all have some terms defined, so when I go into the more detailed aspects of patents, you have some idea of what I'm talking about.

Patent law actually comes out of the Constitution. article one, section eight, clause eight: "to promote the progress of science and useful arts, by securing for limited times to authors and inventors" – so that's copyright and patent – "the inclusive right to their respective writings and discoveries."[2] There was no disagreement on patents at the Continental Congress, as there was with such things as religion and speech, which had to get stuck in at the end in the form of amendments. The patent system went right into the body of the Constitution because it was very important.

What are patents good for? The reason you want to know that is because if you have a client who comes to you, mentions the word "patent," you'd like to know if there is anything useful about them.

There are three uses that I find for patents: one is to raise capital. If I'm going to invest in your e-commerce company, I'm not going to put money into it if, once you get through making the product, anybody else can get a free ride on what I've paid to develop. So if I'm going to invest, I could be an active investor either by contributing capital, or by forming a partnership, or by allowing use of my infrastructure. For example, you might be using my business site, you might be using some of my wires, and I might be donating them to you so we can work together – I would like to know that there's going to be some exclusivity for me. You can protect your R & D investment.

Second, you can also trade IP instead of margin or obtain a cross-license. And what does this mean? This means that as you become a bigger company, people who have patents are going to come after you. If you don't have any patents to trade, you've got to give them margin, you've got to give them money that comes off the top of your business. After a while there's no margin left, there's no business left. So if you do

2. U.S. CONST. art. I, § 8, cl. 8.

have a cross-licensing situation, where somebody wants to get a license from you, they want to hit you on the head with their patent, then you can hit them back with your patent.

A third and final use is to assert that patent to stop someone else from using your invention.

What are some bad things about patents? Well, as a patent lawyer, I would say there's nothing bad about patents. They're good for everybody. You should get as many as you possibly can, and tell your kids and your family to get them, too.

But, in fact, there are some things that you need to be aware of, and one is that they're expensive to obtain and maintain. Now, obtaining means you've got to pay the patent lawyers and the government. If you're going to get an international patent, the foreign governments get even more money. I once heard Larry Goffney, former Assistant Commissioner of Patents describe our system – and I'm paraphrasing now – as sort of the K-Mart of patent systems, where you get pretty good service, you get pretty good quality. Is it the best? No. Is it the fastest? No. But it's reasonably priced.

The Europeans probably have the Bloomingdale's of patent systems, where you get the best service, the best products, and the highest price. So there are economic decisions to be made, and in our system it's not as expensive to get the patent in terms of the government fees, but the patent lawyers are expensive here. To maintain a patent, there are maintenance fees to be paid, but that's not a big cost. The cost comes in when you actually want to assert a patent. They are expensive and difficult to enforce. In fact, a patent is presumed to be valid, but it's only really valid when it's being successfully enforced.

So, if I have a patent, and I want to assert it against you, you're probably not going to want to pay me money right away unless you have some idea that you're actually infringing or that the patent's actually valid, so you're going to go and prove it to yourself. The ultimate test of a patent, then, is in court. So, if you wind up in court, then the lawyers get even more money, often millions of dollars to see a suit through to judgment.

These can be bad things, and they are subject to abuse. There are a lot of companies that go around, and they have

patents, but they don't make anything. The idea of a patent is really to protect your innovations, so that when you go to the marketplace you can get the exclusive right to sell that product, and make it, and bring it to the public, without any competition. That's the idea behind it. There are people who just get patents and never make anything. They get the patents so they can go around and tax people on them. That's the kind of abuse that you have to deal with. If a company comes after you and they're just a patent licensing organization, there is not much you can do to fight against them.

The scope of coverage is uncertain. Patents have claims, and the claims are drafted by human beings using words. I think people can have disagreements over very simple things. Imagine the kind of disagreements you get over what a patent claim really means. So you don't really know what they cover until they're also tested in a court. So these are some of the bad things about patents.

There used to be, with regard to software inventions, computer inventions, and Internet inventions, a notion that copyright would be a good way to protect things. Now that people realize that copyrights don't do it anymore, they're starting to get patents. So you have companies like Oracle, who used to rally around the flag against patents for software, and all of a sudden they're filing hundreds of applications a year to catch up with Microsoft, which has always filed them. Section 102(b) of the Copyright Act bars protection for any menu command hierarchy – such as Lotus 1-2-3 – despite its expressive characteristics, because it assists users in communicating with a computer program in order to perform useful operations.[3]

What does that mean? Well, it means that the appearance, the look and feel in a computer screen or on web pages, which are what we're talking about in e-commerce, these things are not the types of expression that can be protected because the expression is merged with the function of what you see on the web page. So a radio button, you know, the "click here," one-click button, can't be copyrighted.

Now, does that leave you out in the cold? No, we'll talk

3. *See* Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807, 815-16 (1st Cir. 1995).

about how you protect it, but copyrightability of these functional elements of e-commerce is not really the type of thing you're going to want to rely on for protection.

The other thing is: let's say that you do get a copyright in your software. Software is very easy to design around. You simply take the code, you go through a clean-room procedure, you rewrite the code – no more protection. Patents protect the underlying innovations. So, for example, a web page may be copyrightable based on specific expression, but the functionality is not copyrightable. If you have an e-commerce application that's implemented in web-page metaphor, you want to make sure that you don't rely only on copyright.

The life cycle of a patent consists of procurement, which is getting your lawyer to draft it, and enforcement, which is getting your lawyer to sue somebody. Actually, enforcement isn't always suing. In fact, I think that no more than two or three percent of patents are ever litigated – often, people will see, through the process of negotiation, that it's not appropriate to pursue enforcing a patent, or to take a license, because you're going to lose, or because it costs more to try to win than to settle.

The first thing you do in procurement is to do a search to see if the invention is in the public domain, to see if somebody else has a patent on it, or to see if your invention is novel. So the first thing you're going to want to do is see if you actually have an invention that can be patented.

Then you're going to establish invention. You're going to keep records, you're going to keep track of offers for sale, because an offer for sale can create a bar. If you wait more than a year from your offer of sale, you have a bar to getting a patent.[4] Public disclosure can also create a bar to getting a patent, so you have to watch for that.[5] And, if you're talking about foreign protection, any public disclosure of your invention will destroy your right to get a foreign patent. So as your clients come to you, you have to be able to at least look out for some of these bigger gotchas, even though you may not practice as a patent lawyer.

In patent applications, there are tests for patentability.

4. *See* 35 U.S.C. § 102(b) (1994).
5. *See id.*

Utility, novelty, and obviousness are the three classic tests.[6] I won't describe them in great detail. The patent application has a requirement that you must reveal the best mode, and that it must enable others to produce the patented product.[7] Let's talk about these things very quickly.

Utility means that it's patentable subject matter.[8] The greater part of my discussion today will be about patentable subject matter. Novelty simply means that it's new.[9] And obviousness means that it wouldn't be obvious to a person skilled in the art at the time the invention is made.[10] What does that mean? I don't know. It seems to me that once you know the secret, everything is obvious.

This reminds me of my Christopher Columbus story. I understand Christopher Columbus had some people over for dinner one night. He poured out a glass of wine. He said (and they were drinking pretty well), "Can anybody turn this glass over without spilling a drop?" And they drank some more wine, and nobody could figure it out, and they said, "Gee, Chris, you got us. It can't be done."

He said, "All right," picked up the glass of wine, drank it, and turned it over without spilling a drop.

Well, everybody said, "Gee, that's obvious."

And see, that's the problem in patent law. When you do have obviousness? What is obvious? We don't know what obviousness is, because once you're part of the scene, once you know the invention, how can you then take the invention out of your mind for the purpose of determining obviousness? It's kind of like the Heisenberg observer problem, where the observer becomes part of what's being observed. So, that's the metaphysical test of patent laws.

When you write a patent application, you have a statutory obligation to teach the invention, the best way you know how to do it at the time, to the public.[11] A patent is really a contract with the Government. What is the contract? You put your invention in the public domain, and you teach

6. *See* 35 U.S.C. §§ 101-103 (1994).
7. *See* 35 U.S.C. § 112 (1994).
8. *See* 35 U.S.C. § 101 (1994).
9. *See* 35 U.S.C. § 102 (1994).
10. *See* 35 U.S.C. § 103(a) (1994).
11. *See* 35 U.S.C. § 112 (1994).

it to the public, in exchange for which the Government will let you use the courts to enforce your exclusive right for the term of the patent, which is currently twenty years from the filing date.[12] To make sure the Government gets its best deal, that it gets what you're supposed to give it, you have to teach the best way you know how to make it. You can't teach some way that doesn't work. You can't "hide the ball." And you have to put enough detail in that somebody skilled in the art can actually make it.[13] The Government doesn't expect you to teach a person off the street how to make your invention if it's a very complicated invention, but somebody else should be able to make the invention, so that the public can have advantage of what the government asks for.

The claims are what you actually enforce. There's also the record you create with the Patent Office when you prosecute your application through the Patent Office.[14] For enforcement, you have two choices: licensing and litigation.

Licensing is the easy way, but not so easy. You have two types of licensing. There's de facto licensing: "We got patents, you got patents." Mutually Assured Destruction, the Russians versus the US during the Missile Crisis. "We're not gonna license you on paper, you're not gonna license us on paper, but the effect of your patents and our patents is that we're never gonna talk about patents together, so we have de facto licensed ourselves." Or there's a negotiated, or de jure, license, where you actually sit down and cut a deal. You do that because you think you're going to get some money out of the other side. If you think it's a net zero game, there's no point in engaging in the activity.

And then there's litigation. Let's talk about litigation. This is my favorite quote, from the *Marconi* case: "It is an old observation that the training of Anglo-American judges ill fits them to discharge the duties cast upon them by patent

12. *See* 35 U.S.C. § 154(a)(2) (1994).

13. *See id.*

14. When the patent office reviews an application, it often makes objections to which the applicant may respond. Such objections and responses establish the potential patent's prosecution history. If the patent is granted and later needs to be defended, the inventor cannot make arguments contrary to the prosecution history. This doctrine is known as prosecution history (or file wrapper) estoppel. *See* Warner-Jenkinson Co., Inc. v. Hilton Davis Chems. Co., 520 U.S. 17 (1997).

legislation."[15] That means that patent litigation is very difficult for judges to conduct, it's very difficult for juries to understand, it's a very tricky and expensive thing, and you get battles of the experts, though not so much now as you used to. Another quote that I like, which isn't in my presentation, is that patent litigation is the sport of kings because only kings can afford it.

This doesn't mean that litigation is always a thing that you shouldn't do. In fact, if your strategy is to keep your market share, if you've got eighty percent of a hundred million dollar market, it's probably worth spending two or three million dollars to keep somebody from taking any of that market share away from you. So, litigation is a valid way to go. Even if you don't win, sometimes you can hobble the other company so much that you can keep your market share.

Now, patents for new technologies. I say, "new technologies," because there are so many buzzwords around, I don't know what one to use – "cyberspace," "e-commerce," "Internet" – so I just say, "new technologies." In fact, it's kind of redundant to say, "Patents for new technologies," because the idea of a patent is that you're always going to be protecting something new. So I'm kind of saying it twice: "Protecting something new for something new.'

Networks. This is all about the Internet and e-commerce. This is the underbelly of the Internet. Hardware and software that make the packets in the Ethernet go back and forth using TCP/IP. Computers are the machines that actually make this stuff move around on the network. GUIs (Graphic User Interfaces) create the user experience, this is what you see when you go to Amazon.com[16] and you're compelled to click that one click-button and buy that book because it's so easy. Web applications, this is basically PriceLine[17] or eBay,[18] which is the world's greatest money and time waster.

Today's climate. Imagine a lemonade stand. No customers, no profits. Guess there's only one thing to do. Go

15. Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 60-61 (1943).

16. *See* Amazon.com (visited October 22, 2000) <http://www.amazon.com>.

17. *See* Priceline.com (visited October 22, 2000) <http://www.priceline.com>.

18. *See* Ebay.com (visited October 22, 2000) <http://www.ebay.com>.

public: lemonade.com. The world is going crazy because of the Internet. It is a new form of business. It is the new economy that's emerging. It is not a fad. It's not an economic fad. In my opinion the reason we have this long expansion isn't because we're such a great economy, but because there's simply a new technology being put in place, and it's going to take some time to get it put in place, and while it's getting put in place, everybody's busy working to put it in place. We'll see, a few years from now, if the economy's going to keep going once we have all this commerce, e-commerce, and infrastructure put in. For now, that's what's driving everything, everybody's going public. Take the NASDAQ: a few years ago everybody used to think it was going to hit a thousand. It's over four thousand. It's growing much faster than the DOW. Every day the DOW goes down, the NASDAQ goes up. That's because the money's going from one part to the other.

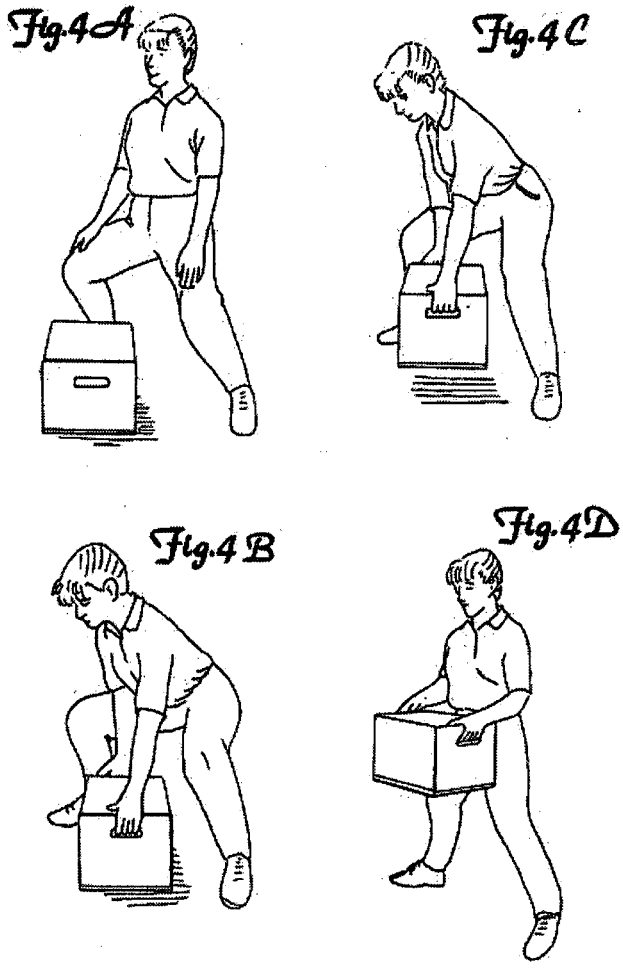
Patentability of business methods. "[A]nything under the sun made by man"[19] may be patentable subject matter. *Diamond v. Chakrabarty* involved a patent application for a kind of bacteria that breaks down crude oil from oil spills.[20] And they said, "Well, bacteria can't be patented because it's a living thing.' And the Supreme Court said, "No, that bacteria wasn't a living thing until man made it live." And so, it's patentable. This principle is a principle you should always keep in mind when you're trying to see if something's patentable – anything under the sun.

Here's a method of lifting a box:[21]

19. Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980).

20. *See Chakrabarty*, 447 U.S. at 305.

21. *See* U.S. Patent No. 5,498,162 (issued March 12, 1996) ("Method for Demonstrating a Lifting Technique").



You see, basically, you have to straddle the box with your legs. You remember, it used to be you'd bend over and pick up a box, and your Mom would say, "You'll hurt your back! Bend your knees!' Well, there's actually another way of lifting a box. Method for demonstrating a lifting technique: Patent

Number 5,498,162.[22]

This next patent should demonstrate to you that anything is patentable.[23]

This invention involves a device, referred to herein as a "cabinet," which provides physical and biochemical support for an animal's head which has been "discorporated" (i.e., severed from its body). This device can be used to supply a discorped head with oxygenated blood and nutrients, by means of tubes connected to arteries which pass through the neck. After circulating through the head, the deoxygenated blood returns to the cabinet by means of cannulae which are connected to veins that emerge from the neck. A series of processing components removes carbon dioxide and adds oxygen to the blood. If desired, waste products and other metabolites may be removed from the blood, and nutrients, therapeutic or experimental drugs, anti-coagulants, and other substances may be added to the blood. The replenished blood is returned to the discorped head via cannulae attached to arteries. The cabinet provides physical support for the head, by means of a collar around the neck, pins attached to one or more vertebrae, or similar mechanical means.[24]

This is a method for basically cutting the head off an animal and just keeping it alive separated from the body, and the corporation that owns this patent is called "Dis Corporation."[25] Discorporation. The DIS Corporation.

Now, the whole point of this, this is kind of amusing, but it's also to get you thinking, when you think about methods of doing business. We've recognized for a long time in the patent area that if something new comes along, it's new. You don't say, "Well, it's different somehow, so it can't be patented." Well, this has been the cry about business methods and software by people who got caught up short, like Oracle Corporation and others who thought they didn't need patents. You get caught up short, and then you say, "Well, patents shouldn't be going for software and methods of doing business, because there's something different about it."

22. *See id.*

23. *See* U.S. Patent No. 4,666,425 (issued May 19, 1987) ("Device for Perfusing an Animal Head").

24. *Id.* (abstract).

25. *See id.*

But that's the whole point of the patent system. There's something different, it should be patented – unless it's naturally occurring.[26]

Methods of doing business. Here's the language from the Manual of Patent Examining Procedure ("MPEP"). The MPEP now reads: "Office personnel have had difficulty in properly treating claims directed to methods of doing business. Claims should not be categorized as methods of doing business."[27] In other words, there is no such thing as a "method of doing business." It's just an invention. "Instead such claims should be treated like any other processed claims."[28]

In *State Street Bank*, which was, I think, the leading case on this issue, the court said, "We agree that this is the manner in which this type of claim should be treated. Whether the claims are directed to subject matter within § 101" – § 101 is the utility requirement: is it the type of thing that can be patented?[29] – "should not turn on whether the claim has subject matter does 'business' instead of something else."[30] This position is also supported by the U.S. Patent and Trademark 1996 Examination Guidelines for Computer-Related Inventions.[31] So, the fact that it's a business method – who cares? Is there something new about it?

Here's the Amazon patent.[32] This is the one I really wanted to talk about. How many of you have heard about the suit against Barnes and Noble? This is a claim for it:

> A method of placing an order for an item comprising:
>
> under control of a client system, displaying information identifying the item; and in response to only a single action being performed, sending a request to order the item along with an identifier of a purchaser of the item to a server system;
>
> under control of a single-action ordering component of the server system, receiving the request; retrieving additional

26. *See* 35 U.S.C. § 101; *see also* Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980).

27. Manual of Patent Examining Procedure § 706.03(a) (1994).

28. *Id.*

29. *See* 35 U.S.C. § 101 (1994).

30. State Street Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d 1368, 1377 (Fed. Cir. 1998).

31. *See* Examination Guidelines for Computer-Related Inventions, 61 Fed. Reg. 7478 (1996).

32. *See* U.S. Patent No. 5,960,411 (issued Sept. 28, 1999).

> information previously stored for the purchaser identified by the identifier in the received request; and generating an order to purchase the requested item for the purchaser identified by the identifier in the received request using the retrieved additional information; and
>
> fulfilling the generated order to complete purchase of the item whereby the item is ordered without using a shopping cart ordering model.[33]

This is what they've got protection for. If you use each and every element of the claim, you are infringing this patent. I will represent you. I've done an opinion on this claim for a client. This claim does cover, in fact, the one-click purchase method that you see on the Amazon screen,[34] but that's all it covers. It does not cover what Barnes and Noble is doing, as far as I can see.

Here's the Amazon versus Barnes and Noble case[35] in the Western District of Washington. Barnesandnoble.com was enjoined by Judge Pechman. She wrote the following: "Encouraging Amazon.com to continue to innovate – and forcing competitors to come up with their own ideas – unquestionably best serves the public interest."[36]

I think that's right. That's the whole idea of a patent system. Now, a lot of people don't like this. They go to their Congressman, and they complain. Senator Schumer, he's a New Yorker, and there's nothing wrong with being from New York, but his interests are not necessarily those of our industry here in California. What he says here is, "This is one of those issues where you can't avoid intervention."[37]

Basically, you have to use the word "intervention." In other words, there should be some exception. I mean, this invention is different than other inventions. Well, again, if we start with the premise that all inventions are different and all inventions are new, then something that's new and different from everything else, well that's new and different.

See, this is political. This has nothing to do with the law, it has nothing to do with reality, just with politics. All the

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33. *See id.* at claim 1.

34. *See* Amazon.com (visited October 23, 2000) <http://www.amazon.com>.

35. *See* Amazon.com, Inc. v. Barnesandnoble.com, Inc., 73 F. Supp. 2d 1228 (W.D. Wash. 1999).

36. *Id.* at 1249.

37. *See* Internet Patent News Service (visited October 23, 2000) <http://lpf.ai.mit.edu/Patents/ipns/ipns-19991214.txt>.

money's in California. All the e-commerce is in California. The people in New York are not happy about it. Wait until Silicon Alley in New York City gets going and really makes a lot of money. They will not be saying that any more because Schumer's people will not be saying that to him.

In fact, I'm surprised to see this coming out of New York, because IBM, which is a big corporation in New York, and Computer Associates, and other companies have a lot of political influence and have an interest in e-commerce patents. So I think he's got a certain constituency that he's going to please here, but it's not going to be the main constituency of New York for much longer.

OK, so there's his criticism.[38] As a result of all this politics about methods of doing business, we now have a change in the law. We have basically a defense to infringement based on earliest inventor.

It shall be a defense to an action for infringement . . . with respect to any subject matter that would otherwise infringe one or more claims for a method in the patent being asserted against a person, if such person had, acting in good faith, actually reduced the subject matter to practice at least one year before the effective filing date of such patent, and commercially used the subject matter before the effective filing date of such patent.[39]

This is sometimes referred to as "The Prior Invention Right." In other words, if you're using a method, and somebody gets the patent on it, and you can prove you used it before they got the patent, you're basically excused from the infringement.[40]

Well, guess what this defense is for? Only for methods of doing business.[41] Any other invention, you don't get this defense, but in the code now we have a defense for methods of doing business. Do they define "methods of doing business" in the Act? No. What is a "method of doing business?" I don't know. It's like "obviousness." Who knows? I know it when I see it.

38. *See id.*

39. *See* 35 U.S.C. § 273(b)(1) (1994).

40. *See id.*

41. *See* 35 U.S.C. § 273(a)(3) (1994) (stating that, "[f]or the purposes of this section . . . the term "method" means a method of doing or conducting business.").

But this is great for lawyers, because every time this defense comes up, we're going to have to argue to the Court de novo what this means. Since there's no jurisprudence on it, it could mean anything. Every District Court will have a different opinion, until finally the Court of Appeals for the Federal Circuit decides it fifteen years from now, after hundreds of millions of dollars have gone to lawyers fighting over what it means.

If you can show that you were doing this before they went out and got their patent, and before they invented it, you've got a safe harbor – if it's a method of doing business.[42] This protects the banking industry, and I think that Schumer was representing the banking industry when he came forward and did that. It's going to come back and bite him, because there are other interests in his state. This is for the banking industry, but I've got clients who are banks and they don't necessarily support this because now they're filing their own patents. In fact, Citicorp has about thirty-five issued patents right now.

Guidelines for computer-related inventions. The Patent Office has published instructions on what you have to do to have a statutory claim, and it lists the steps for you.[43]

I want to talk about *Beauregard*[44] for a second. This is a case that IBM initiated. This was a real send-up from IBM. In the past, IBM would go after people for infringement. However, they'd go after the software companies, and the software companies would say, "I'm not infringing. Your claim says the computer, and a memory, and a keyboard, and the display, and I'm just making software. I'm not a direct infringer." It was driving IBM crazy. So they wrote a claim. The claim was a "Beauregard claim" because the inventor was Mr. Beauregard, and what the claim said was, a computer program on a disk, a computer program in some tangible medium, for performing this process.

They sent it into the Patent Office, and of course the Patent Office rejected it because they said, "Well, there's no elements here. There's no combination. There's no process.

42. *See* 35 U.S.C. § 273(b)(1) (1994).

43. *See* Examination Guidelines for Computer-Related Inventions, 61 Fed. Reg. 7478 (1996).

44. *In re* Beauregard, 53 F.3d 1583 (Fed. Cir. 1995).

There's just simply a disk with instructions on it. That can't be patentable."

So they brought a test case. They went up to the Court of Appeals for the Federal Circuit.[45] Then the Patent Commissioner, who was supposedly adversarial to IBM, comes in, and basically says, "We think this should be patented."[46] So you have two people going to court and agreeing with each other on either side of the table. You have Judge Archer, Chief Judge of the Court of Appeals for the Federal Circuit, rubber-stamping it.[47] So now you have basically a disk with code on it as the patented item.[48]

Now, what's interesting about this, of course, is that, what if I have a cookbook? A method for manufacturing something that you eat. Can I then patent a recipe in a cookbook? Can the cookbook itself be patentable? I don't see why not. In fact, that's going to be a great test case. If I ever get less busy, that's the case I'm going to bring.

The other thing I'm going to tell you that's interesting about Judge Archer, and you see the politics in all this, is that about six or eight months before he wrote the opinion which said that a disk with code on it is patentable, he wrote the dissent in the *Alappat* case,[49] in which he said software can never be patented because it's no different than music.[50] So in eight months he must have had an epiphany, going from there is no patenting for it, to: "Yeah, any way you serve it up, it's patentable."

Jurisdiction and the Internet. This has been a topic that's been hot today. At least with regard to patent infringement, the answer has come forward with regard to that. A subsidiary's web site conveying the impression that the parent and the subsidiary acted in concert established a purposeful contact within the forum for personal jurisdiction over the parent, even if the parent did not control the subsidiary's activities or web site.[51] This is from the

45. *See id.*

46. *See id.* at 1584.

47. *See Beauregard*, 53 F. 3d 1583.

48. *See id.* at 1584. *See also* Figure 15.

49. *See In re* Alappat, 33 F.3d 1526 (Fed. Cir. 1994).

50. *See id.* at 1551-68.

51. *See* Kollmorgen Corp. v. Yaskawa Electric Corp., No. 99-308-R, 1999 U.S. Dist. LEXIS 20572, at *15-17 (W.D. Va. 1999 Dec. 13, 1999).

Kollmorgen case. It recently came out of a District Court in Virginia where, in regard to patent infringement, if you have web activity in a forum, even if it's not you, but it's your subsidiary, you're there for purposes of service of process.[52]

I'll just mention that design patents are useful for the Internet because the icons are patentable as designs. The Patent Office has promulgated guidelines for design patents on computer icons.[53]

Finally, now that we know that everything is patentable, I was once having pho, which is the Vietnamese soup, at a restaurant on my way to be deposed, and on the menu they had the algorithm of pho service, which is basically, prepare the broth, cook the noodles, eat the soup, put your spices in, order some more. I would represent to you that if that wasn't so old and notorious, you could probably get a patent on that method of doing business. Thank you.

52. *See id.*

53. *See* Guidelines for Examination of Design Patent Applications for Computer-Generated Icons, 61 Fed. Reg. 11380 (1996).

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