
Litigating E-Commerce Patents

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In 1998, a federal appeals court surprised the growing e-commerce industry by dispelling the widely-held notion that business methods could not be patented. Since that time, the number of applications for business method patents has increased at a significant rate, doubling from 1,300 in 1998 to 2,600 in 1999, and the number of applications is expected to double again by 2003, reaching over 5,000. Because it typically takes between two and three years for applications to issue as patents, we are just beginning to see the enforcement of these patents through the courts, and the number of infringement suits can be expected to increase substantially in the future.

Our [May 22, 2000 Internet Alert](#) discussed business method patents from the perspective of the Patent Office, and provided an example of how one court had analyzed an infringement suit relating to a method for express online purchasing. Since that time, there have been several developments in the litigation arena that warrant taking another look at business method patents.

Recently, [Jack Regan](#), co-chair of our Intellectual Property Litigation Group, presented a paper, entitled [Business Method Patent Litigation in an Uncertain World](#) at an electronic commerce law symposium. The paper traces the origins of business method patents, and discusses some of the proposed administrative and legislative reforms to address criticisms of such patents. The paper also analyzes the few additional cases that have considered infringement issues, and addresses the challenges of making business decisions in the midst of such a young and rapidly emerging area of patent law.

In that paper, Jack offers guidance to entrepreneurs and lawyers from the existing cases, as follows:

- He foresees a trend towards narrow construction of patent claims in this area.
- Both plaintiffs and defendants will be affected by that trend, because both infringement and anticipation by prior art will be more difficult to prove.
- Inconsequential advances will still be measured by traditional invalidity defenses,

particularly obviousness.

- As time passes, he believes that the differences between business method patent litigation and traditional patent litigation should become more subtle.

For further questions about these issues, please contact [Jack Regan](#) at john.regan@haledorr.com.

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