Business Method Patents

Strategic Claiming for Business Method Inventions

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Navigating the path to protection

- Exemplary business method system to be protected
  - Identify patentable features
  - How can you claim them?
    - Apparatus
    - Means-plus-function
    - Method
    - Computer-readable medium
    - Data Structure

- Claiming with an eye toward litigation
  - Infringement overview
  - Considering a claim’s perspective

- Section 101 considerations
Exemplary System
Data processing system for creating custom song compilations

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Client Side Processing

- Element 120 - Client machine
  - includes processor, memory, I/O, and secondary storage
- The memory includes a customer interface client program 124
  1) receives information including billing information, customer ID, and song IDs from the customer
  2) sends this information to the server
  3) receives billing and order information from the server for confirmation by the customer
  4) upon confirmation, receives ISO CD image from the server
Server Side Processing

- Element 100 - Server
  - includes processor, memory, I/O, and secondary storage

- The memory 108 includes a customer interface server program 110
  1) receives customer identifier, billing information, and song identifiers from client
  2) performs customer authentication and billing
  3) invokes compilation engine 118 via the API to create an ISO CD image
  4) receives ISO CD image from compilation engine 118
  5) sends ISO CD image to client
  6) maintains customer records including customer identifier 112, song identifiers 114, and customer preferences 116
The memory 108 also includes the compilation engine 118.

1) searches for and retrieves song data in the database 106
2) creates ISO CD image from the song data
3) returns ISO CD image to the customer interface server program 110
Types of Infringement

- **Direct - 35 U.S.C. § 271(a)**
  - 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.
  - “In order for a court to find infringement, the plaintiff must show the presence of every limitation or its substantial equivalent in the accused device.” *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1364 (Fed. Cir. 2001).
Types of Infringement

  - 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.

- Elements of contributory infringement:
  - direct infringement
  - sale of a component with no substantial non-infringing uses
  - component is a material part of the invention, and
  - seller *knows* the component to be made for an infringing device which is not licensed. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964); *Trell v. Marlee Electronics Corp.*, 912 F.2d 1443 (Fed. Cir. 1990).
Types of Infringement

- Inducement - 35 U.S.C. § 271(b)
  - Whoever actively induces infringement of a patent shall be liable as an infringer.
  - Elements of inducing infringement:
    - direct infringement
    - active and knowing assistance, with specific intent, to induce a third party in infringing the patent. *Manville Sales Corp. v. Paramount Systems, Inc.*, 917 F.2d 544 (Fed. Cir. 1990).
    - “Inducement requires proof that the accused infringer knowingly aided and abetted another’s direct infringement of the patent.” *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294, 1306 (Fed. Cir. 1999).
    - Active inducement requires an affirmative act. “Of course inducement has connotations of active steps knowingly taken--knowingly at least in the sense of purposeful, intentional as distinguished from accidental or inadvertent.” *Tegal Corp. v. Tokyo Electron Co., Ltd.*, 248 F.3d 1376, 1378-79 (Fed. Cir. 2001).
Preference for Direct Infringement

- Direct infringement makes a stronger case for settlement or licensing.

- Direct infringement does not require any proof of a defendant’s state of mind.
  - Do not need to show knowledge (Contributory infringement)
  - Do not need to show specific intent (Inducing infringement)

- Contributory infringement and inducing infringement may be problematic to prove for Internet technologies.

- Direct infringement is easier to prove than contributory infringement or inducing infringement.
Identify Patentable Features
Identify Patentable Features: Client and Server

Client 120
- Processor
- Memory 124
- Input Device
- Secondary Storage

Server 100
- Processor 102
- Memory 108
  - 110
  - 112 114 116
- API
  - 118
- Display
- Input Device
- Secondary Storage 104
  - Database 106

Network 122
Identify Patentable Features: Client

Client 120
- Processor
- Memory 124
- Secondary Storage

Network 122
- Server 100
  - Processor 102
  - Memory 108
    - 110
    - 112 114 116
    - 118
  - API
  - Database 106
  - Input Device
  - Secondary Storage 104
  - Display
  - Network

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Identify Patentable Features:
Customer Interface Client Program

- Network
- Client
  - Processor
  - Memory
  - Input Device
  - Secondary Storage
- Server
  - Processor
  - Memory
  - Input Device
  - Secondary Storage
  - Database

API

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Identify Patentable Features: Network

Client 120
- Processor 124
- Memory
  - Input Device
  - Secondary Storage

Server 100
- Processor 102
- Memory 108
  - API
    - 110
    - 112
    - 114
    - 116
    - 118
- Display
  - Input Device
  - Secondary Storage 104
    - Database 106
Identify Patentable Features: Server

Client 120
- Processor
- Memory 124
- Input Device
- Secondary Storage

Network 122

Server 100
- Processor 102
- Memory 108
- Input Device 112
- Secondary Storage 104
- Database 106
- Display

API

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Identify Patentable Features:
Customer Server Interface Program
Identify Patentable Features:
Compilation Engine
Identify Patentable Features:
Data Structure
Identify Patentable Features:
Interface
Identify Patentable Features: Customer

Network

Client 120
- Processor
- Memory 124
- Input Device
- Secondary Storage

Server 100
- Processor 102
- Memory 108
  - 110
  - 112 114 116
- API
  - 118

- Display
- Input Device
- Secondary Storage 104
- Database 106
What Claim Types are Available?

- **Apparatus claims**
  - avoid means-plus-function
  - invoke means-plus-function

- **Method claims**

- **Computer-readable medium claims**
  (a.k.a., article of manufacture claims, computer program product claims, Beauregard claims)

- **Data structure claims**
Exemplary Apparatus Claim

- Issued Claim Example - U.S. Pat. No. 5,794,207: Priceline Reverse Auction, Claim 12:
  An apparatus for facilitating a transaction between a buyer and at least one of a plurality of sellers, comprising:
  a storage device; and
  a processor connected to the storage device,
  the storage device storing a program for controlling the processor; and
  the processor operative with the program to receive a conditional purchase offer which includes an offer price...

- Compilation System Claim Example
  A data processing system comprising:
  a memory comprising a compilation engine program that receives song identifiers and that constructs an ISO CD image from song data corresponding to the song identifiers and a customer interface server program that receives the song identifiers from a client and that sends the song identifiers to the compilation engine program; and
  a processor that runs the customer interface server program and the compilation engine program.
§ 112(6)

- An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification, and equivalents thereof. 35 U.S.C. § 112, ¶ 6.


§ 112(6), Continued

Avoiding § 112(6):

- the word “means” in the element raises a presumption that the element is a means-plus-function element; *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294, 1302 (Fed. Cir. 1999); *Sage Products, Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1427 (Fed. Cir. 1997).

- the presumption is overcome if the claim recites sufficient structure or material for performing the claimed function, or when the claim fails to recite a function associated with the means; *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d at 1302; *Sage*, 126 F.3d at 1427-28.


- when the element invokes purely functional terms, without recital of specific structure, the element may receive § 112(6) treatment. *Watts*, 232 F.3d at 880; *Cole v. Kimberly-Clark Corp.*, 102 F.3d at 530.
Exemplary M-P-F Claim

- Issued Claim Example - U.S. Pat. No. 5,139,056: State Street, Claim 1:

  A data processing system for managing a financial services configuration of a portfolio established as a partnership, each partner being one of a plurality of funds, comprising:
  (a) computer processor means for processing data;
  (b) storage means for storing data on a storage medium;
  (c) first means for initializing the storage medium;
  (d) second means for processing data regarding assets in the portfolio...

- Compilation System Claim Example

  A data processing system comprising:
  means for receiving a customer identification and song identifiers from a client;
  means for retrieving song data specified by the song identifiers;
  means for constructing an ISO CD image; and
  means for transmitting the ISO CD image to the client.
Beware of Unintended Means-Plus-Function Treatment

A data processing system comprising:
- a first component for receiving a customer identification and song identifiers from a client;
- a second component for retrieving song data specified by the song identifiers;
- a third component for constructing an ISO CD image; and
- a fourth component for transmitting the ISO CD image to the client.

The word “means” is not present in any element, which would generally make means-plus-function treatment inappropriate.

Is there sufficient structure?

Would this claim be treated as means-plus-function?
Intent of the Applicant

“In this case, by contrast, the element in question did not use conventional ‘means-plus-function’ language, no other element of the claim was in means-plus-function form, and nothing cited to us from the prosecution history or elsewhere suggests that the patentee intended to claim in that fashion.”

Intent of the Applicant, Continued

- Add a classical means-plus-function claim:
  - A data processing system comprising:
    means for receiving a customer identification and song identifiers from a client;
    means for retrieving song data specified by the song identifiers;
    means for constructing an ISO CD image; and
    means for transmitting the ISO CD image to the client.

- Intent-revealing statements in the prosecution history.
Exemplary Method Claim

- Issued Claim Example - U.S. Pat. No. 5,960,411: Amazon One-click, Claim 1:

- 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...

- Compilation System Claim Example

- A method in a data processing system, the method comprising the steps of:
  receiving song identifiers and billing information from a client, the billing information associated with a customer;
  retrieving song data associated with the song identifiers;
  constructing an ISO CD image from the song data;
  billing the customer by utilizing the billing information received from the client; and
  transmitting the ISO CD image to the client.
Step-Plus-Function
Overview

- An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification, and equivalents thereof. 35 U.S.C. § 112, ¶ 6.

- Reasons to avoid S-P-F treatment:
  - S-P-F elements receive a narrow construction.
  - The Invalidity Trap: A step in a method claim can prompt step-plus-function treatment when the step is directed to a function without reciting the supporting acts, and it is not clear what constitutes a "function" and what constitutes an "act."
The Invalidity Trap subjects a S-P-F element to unanticipated invalidity challenges from

- Failure to particularly point out and distinctly claim the subject matter of the invention under 35 U.S.C. § 112, ¶ 2.
- Failure of the written description to support the breadth of the claims under 35 U.S.C. § 112, ¶ 1.
- Failure of the specification to provide an enabling disclosure, also under 35 U.S.C. § 112, ¶ 1.
Step-Plus-Function Invalidity Trap
§ 112(2) Challenge

- The applicant must describe the acts supporting the function, otherwise the applicant has failed to particularly point out and distinctly claim the invention. *In re Donaldson Co.*, 16 F.3d 1189, 1195 (Fed. Cir. 1994).

- However, the applicant may never have intended that the claims be interpreted in accordance with § 112(6), and thus may not have provided sufficient disclosure of “acts.”
Step-Plus-Function Invalidity Trap
Written Description Challenge

- The applicant must provide a specification that allows one of ordinary skill to recognize that the inventor invented what is claimed. The specification must describe the invention with all its claimed limitations. *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473, 1479 (Fed. Cir. 1998).

- § 112(6) mandates that a claim cover the acts described in the specification. Thus, a specification that omits the acts underlying a function may be held invalid under the written description requirement. *See In re Knowlton*, 481 F.2d 1357, 1366 (C.C.P.A. 1973) (section 112, paragraph 6 does not create an exception to the written description requirement).
The applicant must provide a specification that allows one of ordinary skill to make and use the invention without undue experimentation. *Northern Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 941 (Fed. Cir. 1990).

Thus, a specification that does not disclose the acts required to implement a function is not enabled unless one of ordinary skill would know the required acts, or be able to ascertain them without undue experimentation.
Step-Plus-Function
Federal Circuit Framework

- Very little guidance available.
- "[Section 112, ¶ 6] is implicated only when steps plus function without acts are present." *O.I. Corp. v. Tekmar Co. Inc.*, 115 F.3d 1576, 1583 (Fed. Cir. 1997).
- "We interpret the term ‘steps’ to refer to the generic description of elements of a process, and the term ‘acts’ to refer to the implementation of such steps." *Id.* at 1582-83.
- *Serrano v. Telular Corp.*, 111 F.3d 1578, 1583 (Fed. Cir. 1997) (The element “is not drafted in ‘step plus function’ form. That is because it does not recite a function. *See 35 U.S.C. § 112, ¶ 6 (1994).* Rather, it recites only the act of determining a last-dialed digit.”)
Step-Plus-Function
Federal Circuit Framework, Continued

- Judge Rader provided some insight in a concurrence in *Seal-Flex, Inc. v. Athletic Track & Court Construction*, 172 F.3d 836, 847-851 (Fed. Cir. 1999).
  - The phrase “steps of” to introduce steps should not generally invoke § 112(6)
  - The phrase “step for” will generally invoke § 112(6), although if sufficient acts are recited for performing the function, then § 112(6) is not implicated
  - The phrase “step for” is not necessary to invoke § 112(6)
  - Distinction between “acts” and “functions”… the function of a method element is what the element ultimately accomplishes in relation to what other elements of the claim and the claim as a whole accomplish … acts correspond to how the function is implemented.
Step-Plus-Function
Federal Circuit Framework, Continued

- Of what value is the insight in the *Seal-Flex* concurrence? District courts are following it:

Step-Plus-Function
Avoiding the Invalidity Trap

- Don't use "step for"
- Always use "steps of," even in your dependent claims
- Use a verb that either:
  (1) is a nondecomposable step,
  (2) has an art-recognizable meaning, *Greenberg v. Ethicon Endo-Surgery, Inc.*, 91 F.3d 1580, 1583 (Fed. Cir. 1996) ("detent"), or
  (3) is defined in the specification to include a particular set of steps
- If you can't do any of these,
  • verb plus purpose
Exemplary Computer-Readable Medium Claim

Example - U.S. Pat. No. 5,710,578: Beauregard, Claim 1:

An article of manufacture comprising: a computer usable medium having computer readable program code means embodied therein for causing a polygon having a boundary definable by a plurality of selectable pels on a graphics display to be filled, the computer readable program code means in said article of manufacture comprising: computer readable program code means for causing a computer to effect, with respect to one boundary line at a time, a sequential traverse of said plurality of selectable pels of each respective said boundary line...

Compilation System Claim Example

A computer-readable medium encoded with instructions that cause a data processing system to perform a method comprising the steps of: receiving song identifiers and billing information from a client, the billing information associated with a customer; retrieving song data associated with the song identifiers; constructing an ISO CD image from the song data; billing the customer by utilizing the billing information received from the client; and transmitting the ISO CD image to the client.
Computer-Readable Medium Claim
Subject to § 112(6)?

- An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof... § 112(6)

- Is the computer-readable medium a claim for a combination? It includes the medium itself, and instructions encoded on the medium.

- *In re Farrow*, 554 F.2d 468, 473 (C.C.P.A. 1977) (section 112 “clearly sanctions the use of mean-plus-function limitations in claims drawn to a ‘combination’, and does not distinguish between claims drawn to apparatus or articles of manufacture.”)
Computer-Readable Medium Claim, Another Example, Potentially Subject to § 112(6)

- Compilation System Claim Example

- A computer-readable medium encoded with:
  first program code for receiving song identifiers and billing information from a client, the billing information associated with a customer;
  second program code for retrieving song data associated with the song identifiers;
  third program code for constructing an ISO CD image from the song data;
  fourth program code for billing the customer by utilizing the billing information received from the client; and
  fifth program code for transmitting the ISO CD image to the client.
Exemplary Data Structure Claim

- Issued Claim Example - U.S. Pat. No. 5,664,177: Lowry, Claim 1:
  A memory for storing data for access by an application program being executed on a data processing system, comprising:
  a data structure stored in said memory, said data structure including information resident in a database used by said application program and including:
  a plurality of attribute data objects stored in said memory, each of said attribute data objects containing different information from said database...

- Compilation System Claim Example
  A computer-readable memory device encoded with a data structure accessed by a customer interface server program that is encoded in the computer-readable memory device and that is run by a processor in a data processing system, the data structure comprising a plurality of entries, each entry comprising:
  a customer identifier, and
  a plurality of song identifiers, wherein the customer interface server program accesses the data structure to determine a royalty payment by using both the customer identification and the plurality of song identifiers.
Claim Perspectives

- The claim’s “perspective” reflects the actor or actors associated with the claim elements.

- The perspective determines which entities will be considered direct infringers as opposed to contributory infringers or inducers.

- When the Perspective Encompasses Multiple Actors, There are Potentially Fewer Direct Infringers
System Wide Perspective

- As an example:
  - A computer-readable medium encoded with instructions that cause a data processing system that includes a client program and a server program to perform a method comprising the steps of:
    - sending song identifiers from the client program to the server program;
    - receiving song identifiers by the server program;
    - causing an ISO CD image to be constructed from the song data by the server program;
    - transmitting the ISO CD image to the client program by the server program; and
    - receiving the ISO CD image by the client program.

- Claim requires one entity to sell both a client program and a server program in order to be a direct infringer.
- It is more common that an entity would sell either the client program or the server program individually.
- Thus, claims should be directed to a perspective that individually addresses the client program and the server program.
Client Side Perspective

- As an example:
- A computer-readable medium encoded with instructions that cause a data processing system to perform a method, the method comprising the steps of:
  - sending song identifiers to the server
  - whereupon the server constructs an ISO CD image by using the song identifiers; and
  - receiving the ISO CD image constructed by the server.

- This claim requires action only by the client software.
- Thus, an entity that sells the client software alone is a direct infringer.
Server Side Perspective

- As an example:
- A computer-readable medium encoded with instructions that cause a data processing system to perform a method, the method comprising the steps of:
  receiving song identifiers from a client;
  constructing an ISO CD image containing song data corresponding to the received song identifiers; and
  transmitting the constructed ISO CD image to the client.

- This claim requires action only by the server software.
- Thus, an entity that sells the server software alone is a direct infringer.
Section 101 Issues

- 35 USC § 101: Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent...

  - Congressional Intent: “anything under the sun that is made by man”
  - But not (1) laws of nature, (2) natural phenomenon, or (3) abstract ideas.
  - Mathematical algorithms, standing alone, are simply abstract ideas (and thus unpatentable).
  - “a claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula, computer program, or digital computer.” *Diamond*, 450 U.S. at 187.
Consider Claim 15:

15. A rasterizer for converting vector list data representing sample magnitudes...

Claim 15 under consideration in *In re Alappat*, 33 F.3d 1526, 1542 (Fed. Cir. 1994).

- “Because claim 15 is directed to a ‘machine,’ which is one of the four categories of patentable subject matter enumerated in § 101, claim 15 appears on its face to be directed to § 101 subject matter.”
Post *Diamond* Treatment of § 101

Category 2 (Patentable): Transformation or generation of a physical entity or data representative of a physical entity

- Consider Claim 1:
- 1. A method for analyzing electrocardiograph signals to determine the presence or absence of a predetermined level of high frequency energy in the late QRS signal, comprising the steps of:
  - converting a series of QRS signals to time segments...
  - applying a portion of said time segments in reverse time order to high pass filter means;
  - determining an arithmetic value of the amplitude of the output of said filter...

  - The claimed steps of ‘converting’, ‘applying’, ‘determining’, and ‘comparing’ are physical process steps that transform one physical electrical signal into another.
  - The number obtained is not a mathematical abstraction; it is a measure in microvolts of a specified heart activity...

- U.S. Pat. No. 4,422,459.
Post *Diamond* Treatment of § 101

Category 3 (Not Patentable): Software or Mathematical Algorithm in the Abstract

- Consider Claim 5:
  5. A method of displaying data in a field comprising the steps of calculating the difference between the local value of the data... and the average value of the data... and displaying the value of said difference...

- Claim 5 under consideration in *In re Abele*, 684 F.2d 902, 908 (Fed. Cir. 1982).
  - Court concluded that “claim 5 is directed solely to the mathematical algorithm portion of appellants’ invention and is, thus, not statutory subject matter”
Post *Diamond* Treatment of § 101

Category 4 (Not Patentable): Steps performed by a human

- Consider Claim 1:
  1. A method of competitively bidding on a plurality of items comprising the steps of identifying a plurality of related items in a record, offering said plurality of items to a plurality of potential bidders, receiving bids from said bidders … entering said bids in said record … indexing each of said bids … identifying in said record all of said bids corresponding to said prevailing total price.

- Claim 1 under consideration in *In re Schrader*, 22 F.3d 290, 294 (Fed. Cir. 1994).

- The court’s rationale:
  - There is nothing physical about bids and a grouping of bids cannot constitute a physical change, effect, or result.
  - Therefore, we do not find in the claim any kind of data transformation.
  - Entering data into a record is indistinguishable from data gathering steps which were held insufficient to impart patentability to a claim involving the solving of a mathematical algorithm.

- Schrader’s claims were thus unpatentable.
Post *Diamond* Treatment of § 101

*State Street Bank* and *AT&T*

- Claim 1 under consideration in *State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1375 (Fed. Cir. 1998):
  - 1. A data processing system for managing a financial services configuration of a portfolio established as a partnership.
- Category 1 (machine): “claim 1 is directed to a machine” and produces a useful, concrete, and tangible result.
- Not an example of the expansion of the scope of section 101.

- Claim 1 under consideration in *AT&T Corp. v. Excel Communications, Inc.*, 172 F.3d 1352, 1358 (Fed. Cir. 1999):
  - 1. A method for use in a telecommunications system.
- Category 1 (process in a machine): because the process produces “a useful, concrete, tangible result without pre-empting other uses of the mathematical principle,” it is statutory.
- Not an example of the expansion of the scope of section 101.
Statutory Claims?

- U.S. Pat. No. 6,269,347 directed to a “Method for Calculation of a Reduced Interest Mortgage Payment Plan”

- 1. A method of implementing a fixed term loan repayment plan which comprises:

  determining an amount of loan principal to be provided; calculating a repayment schedule based on a conventional loan amortization table for a given interest rate, repayment term and the selected principal amount; providing a repayment schedule which applies such monthly payments to repayment of principal due on said loan first; accumulating interest payable and adding such to the principal amount due; and applying said term payments to reduction of interest due only after the principal has been repaid.
U.S. Pat. No. 5,616,089 directed to a “Method of putting”

1. A method of gripping a putter comprising the steps:
   gripping a putter grip with a dominant hand;
   placing a non-dominant hand over an interior wrist portion of the dominant hand behind a thumb of the dominant hand;
   resting a middle finger of the non-dominant hand on the styloid process of the dominant hand;
   pressing a ring finger and a little finger of the non-dominant hand against the back of the dominant hand;
   pressing the palm of the non-dominant hand against a forward surface of the putter grip as the non-dominant hand squeezes the dominant hand.
Conclusions

- The established claim types for business method patents
  - Method
  - Apparatus
  - Means-plus-function
  - Computer-Readable Medium
  - Data Structure
- Avoid unintentional § 112(6) treatment
- Develop a perspective that yields claims that can be directly infringed
- Ordinary meaning of claim terms