

Software Inventions, Trademarks & Copyrights

Kevin M. Kercher

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Client Privilege



Software Inventions

Topics to Cover

- Shattering the Patent Myths
- Why Patents Are So Important
- How can Software Inventions be Patented?
- How You Factor In The Road To Patentability

Shattering The Patent Myths

- Some of the Common Myths:
- IT Inventions are not patentable
- Software-related inventions are not patentable
- Must be high-tech to be patentable
- Must be ground-breaking to be patentable

None of these are true

Examples of Patents We've Obtained



(12) **United States Patent**
Rice, Jr.

(10) Patent No.: **US 6,839,609 B2**
(45) Date of Patent: **Jan. 4, 2005**

(54) **SYSTEM, METHOD AND APPARATUS FOR ON-DEMAND PRINTING OF HAZARDOUS MATERIALS PLACARDS FOR USE IN THE TRANSPORTATION AND/OR STORAGE OF HAZARDOUS MATERIALS**

(75) Inventor: **Richard Mark Rice, Jr.**, St. Charles, MO (US)

(73) Assignee: **Timothy Ridge LLC**, St. Charles, MO (US)

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 24 days.

(21) Appl. No.: **10/413,319**

(22) Filed: **Apr. 14, 2003**

(65) **Prior Publication Data**

US 2004/0204790 A1 Oct. 14, 2004

(51) Int. Cl.⁷ **G06F 7/00; G06F 17/00**

(52) U.S. Cl. **700/227; 700/233; 700/235; 700/215**

(58) Field of Search **700/213, 214, 700/215, 225, 226, 227, 233, 235**

(56) **References Cited**

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Hazardous Materials Placarding Chart; 2002; Identification No. 51-FA (Rev. 1/02) 1132; J. J. Keller & Associates, Inc.; USA.
Hazardous Materials Load and Segregation Chart; 2001; Identification No. 41-FB (Rev. 10/01); J. J. Keller & Associates, Inc.; USA.

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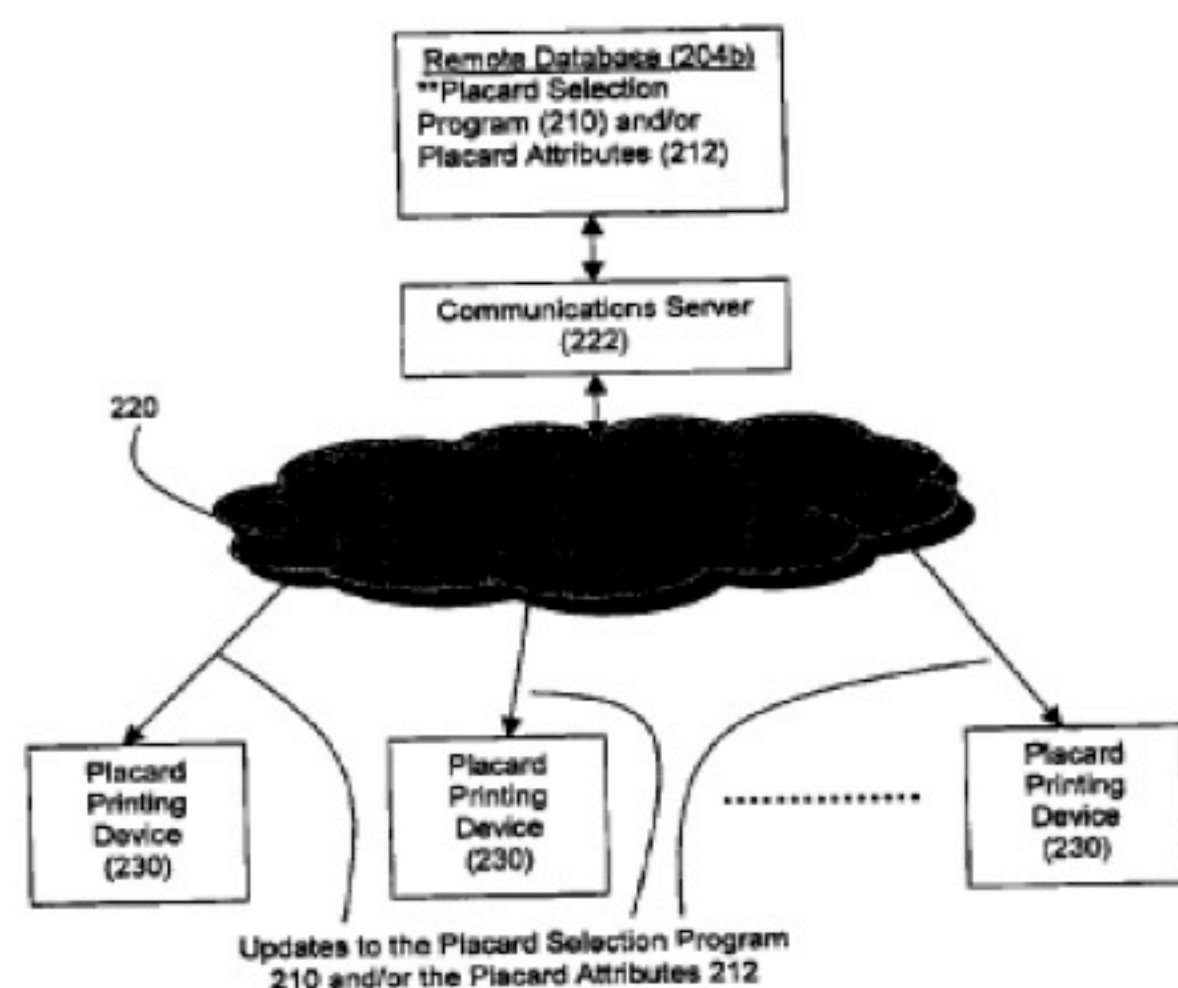
Primary Examiner—Gene O. Crawford

(74) Attorney, Agent, or Firm—Thompson Coburn LLP

(57) **ABSTRACT**

A system for on-demand printing of hazardous material placards, the system comprising: (a) an input device through which a user can input parameters relating to a hazardous material to be transported or stored; (b) a processor configured to determine a hazardous material placard for the hazardous material according to a computerized analysis of the input parameters; and (c) an output device configured to print the determined placard. Preferably, the processor determines the appropriate placard by executing a placard selection program that comprises a plurality of placard selection rules, wherein the placard selection rules define the conditions under which a placard is to be used. Further, the placard selection rules preferably comply with government regulations relating to the shipment and/or storage of hazardous materials. Also, the system may display a menu of placards selectable by the user for printing.

62 Claims, 14 Drawing Sheets



System, Method and Apparatus for On-Demand Printing of Hazardous Materials Placards for Use in the Transportation and/or Storage of Hazardous Materials

(12) **United States Patent**
Weinstock et al.

(10) **Patent No.:** US 7,275,038 B1
(45) **Date of Patent:** Sep. 25, 2007

(4) **WEB ENABLED BUSINESS TO BUSINESS
OPERATING SYSTEM FOR RENTAL CAR
SERVICES**

(75) **Inventors:** Timothy Robert Weinstock, St.
Charles, MO (US); Kimberly Ann
DeVallance, Maryland Heights, MO
(US); Randall Allan Haselhorst,
Imperial, MO (US); Craig Stephen
Kennedy, St. Louis, MO (US); David
Gary Smith, Wildwood, MO (US)

(73) **Assignee:** The Crawford Group, Inc., St. Louis,
MO (US)

(*) **Notice:** Subject to any disclaimer, the term of this
patent is extended or adjusted under 35
U.S.C. 154(b) by 942 days.

(21) **Appl. No.:** 09/641,820

(22) **Filed:** Aug. 18, 2000

(51) **Int. Cl.**
G06Q 10/00 (2006.01)

(52) **U.S. Cl.** 705/5; 705/4

(58) **Field of Classification Search** 705/1,
705/5, 6, 64, 13, 26
See application file for complete search history.

(56) **References Cited**

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Reeves, Nov. 1999, Denver Post Pg C-02, entire document.*

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Primary Examiner—John G. Weiss

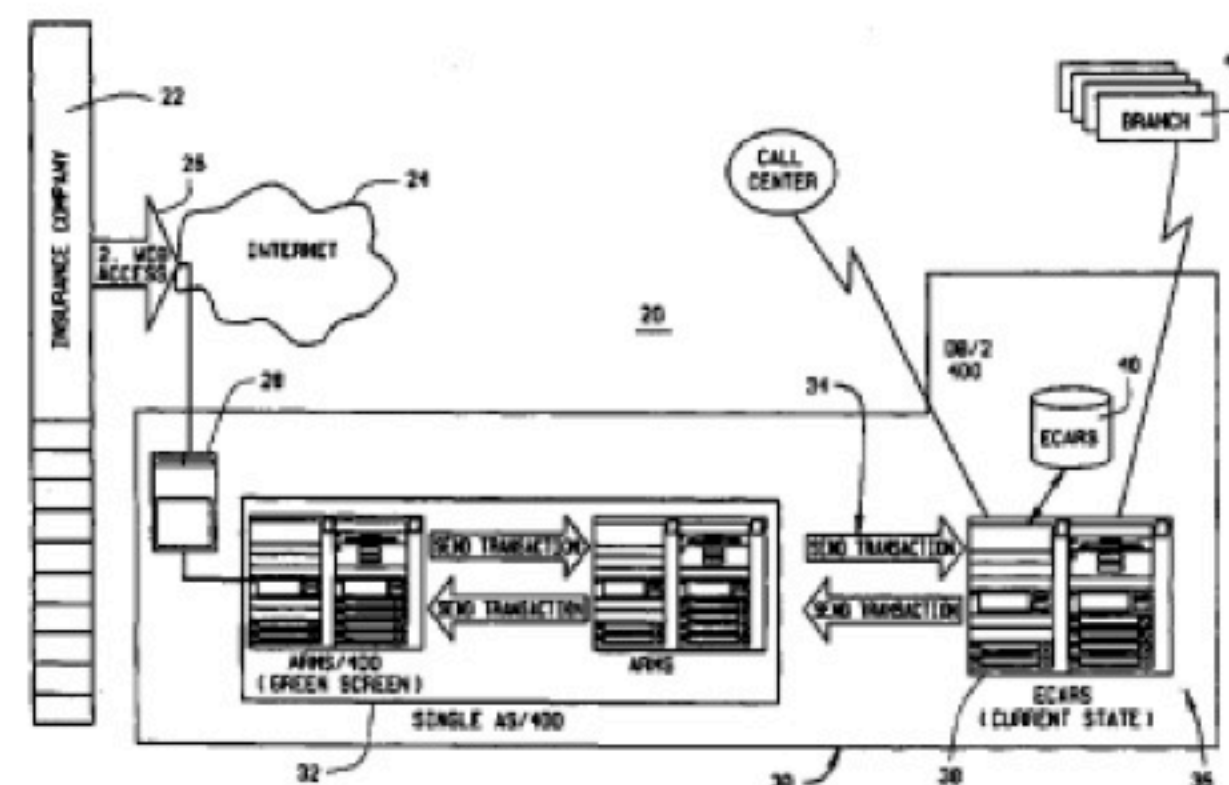
Assistant Examiner—Michael Fisher

(74) *Attorney, Agent, or Firm*—Thompson Coburn LLP

(57) **ABSTRACT**

An Internet enabled, business-to-business computerized transaction system is disclosed in its preferred embodiment for use in providing rental car services for high volume users and comprises an Internet web portal through which the high volume user may access an integrated business computer network for the rental vehicle service provider. The rental vehicle services provider computer network is configured to interconnect a geographically diverse plurality of branch offices, cataloguing their available rental vehicles and schedules for same as well as handling all transactional data relating to its business. The Internet web portal provides ubiquitous connectivity and portability for a multi-level business organization who regularly places high volumes of rental purchases with its business partner. Utilizing the method and apparatus of the present invention large volumes of rental transactions may be placed, monitored, altered during performance, and closed out with financial accounting and payment being made virtually without human intervention.

46 Claims, 2 Drawing Sheets



Web Enabled Business to Business Operating System for Rental Car Services

(12) **United States Patent**
Taylor

(10) **Patent No.:** **US 7,636,703 B2**
(45) **Date of Patent:** **Dec. 22, 2009**

(54) **METHOD AND APPARATUS FOR APPROXIMATE PATTERN MATCHING**

(75) **Inventor:** **David Edward Taylor, St. Louis, MO (US)**

(73) **Assignee:** **Exegy Incorporated, St. Louis, MO (US)**

(*) **Notice:** Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 223 days.

(21) **Appl. No.:** **11/381,214**

(22) **Filed:** **May 2, 2006**

(65) **Prior Publication Data**

US 2007/0260602 A1 Nov. 8, 2007

(51) **Int. Cl.**
G06F 15/00 (2006.01)

(52) **U.S. Cl.** **706/62**

(58) **Field of Classification Search** **None**
See application file for complete search history.

(56) **References Cited**

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Primary Examiner—David R Vincent

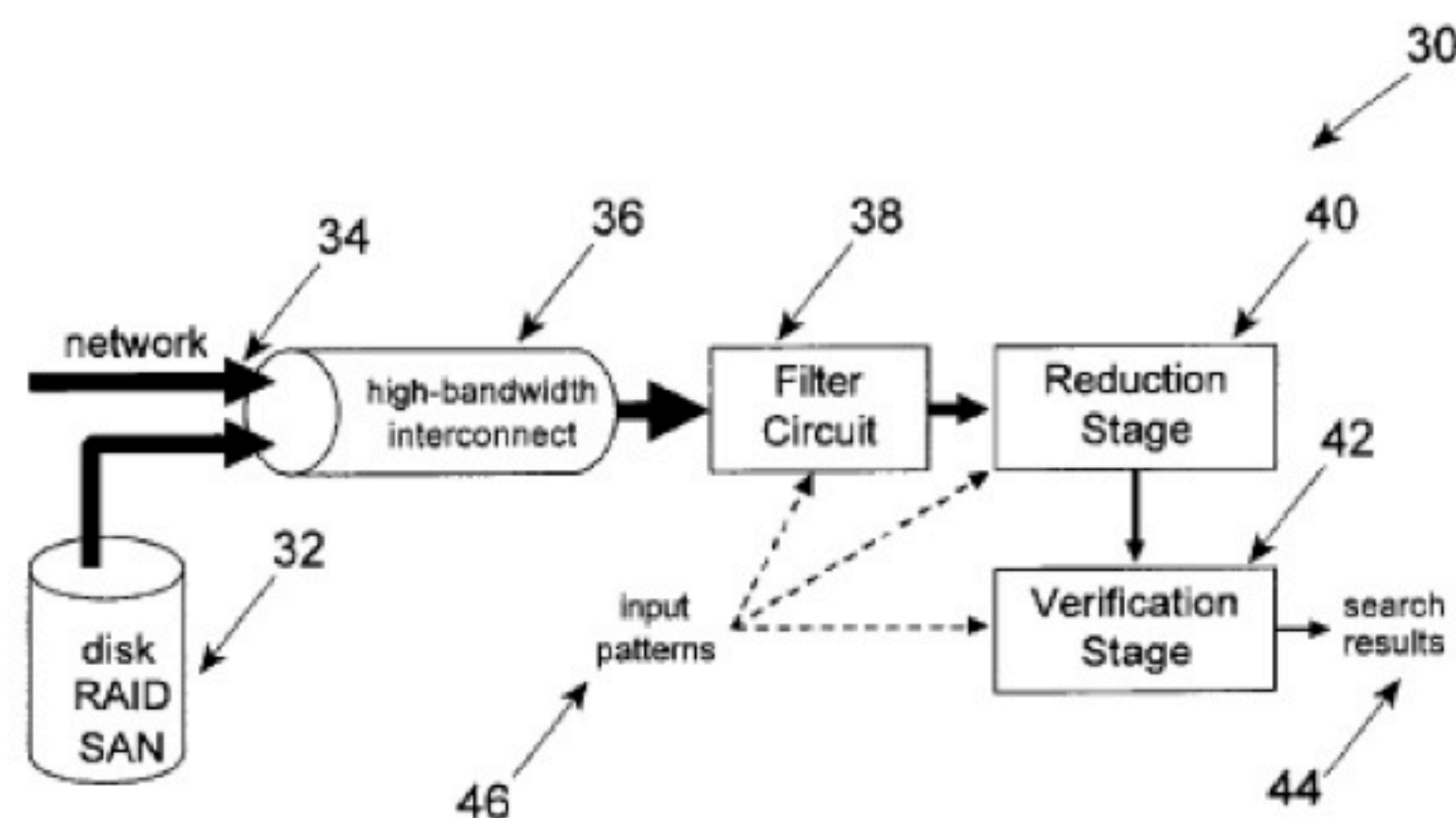
Assistant Examiner—Peter Coughlan

(74) *Attorney, Agent, or Firm*—Thompson Coburn LLP

(57) **ABSTRACT**

A system and method for inspecting a data stream for data segments matching one or more patterns each having a pre-determined allowable error, which includes filtering a data stream for a plurality of patterns of symbol combinations with a plurality of parallel filter mechanisms, detecting a plurality of potential pattern piece matches, identifying a plurality of potentially matching patterns, reducing the identified plurality of potentially matching patterns to a set of potentially matching patterns with a reduction stage, providing associated data and the reduced set of potentially matching patterns, each having an associated allowable error, to a verification stage, and verifying presence of a pattern match in the data stream from the plurality of patterns of symbol combinations and associated allowable errors with the verification stage.

95 Claims, 6 Drawing Sheets



Method and Apparatus for Approximate Pattern Matching

(12) **United States Patent**
Gourley

(10) **Patent No.:** US 7,640,170 B1
(45) **Date of Patent:** Dec. 29, 2009

(54) **METHOD AND APPARATUS FOR
PROCESSING PHARMACEUTICAL ORDERS
TO DETERMINE WHETHER A BUYER OF
PHARMACEUTICALS QUALIFIES FOR AN
"OWN USE" DISCOUNT**

(75) **Inventor:** Ewing B. Gourley, 1690 Royal Dr.,
Springfield, MO (US) 65809

(73) **Assignee:** Ewing B. Gourley, Springfield, MO
(US)

(*) **Notice:** Subject to any disclaimer, the term of this
patent is extended or adjusted under 35
U.S.C. 154(b) by 2101 days.

(21) **Appl. No.:** 09/710,227

(22) **Filed:** Nov. 10, 2000

(51) **Int. Cl.**
G06Q 30/00 (2006.01)
G06Q 50/00 (2006.01)
G06F 19/00 (2006.01)

(52) **U.S. Cl.** 705/2; 705/3; 705/1

(58) **Field of Classification Search** 705/2,
705/3

See application file for complete search history.

(56) **References Cited**

U.S. PATENT DOCUMENTS

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Primary Examiner—C. Luke Gilligan

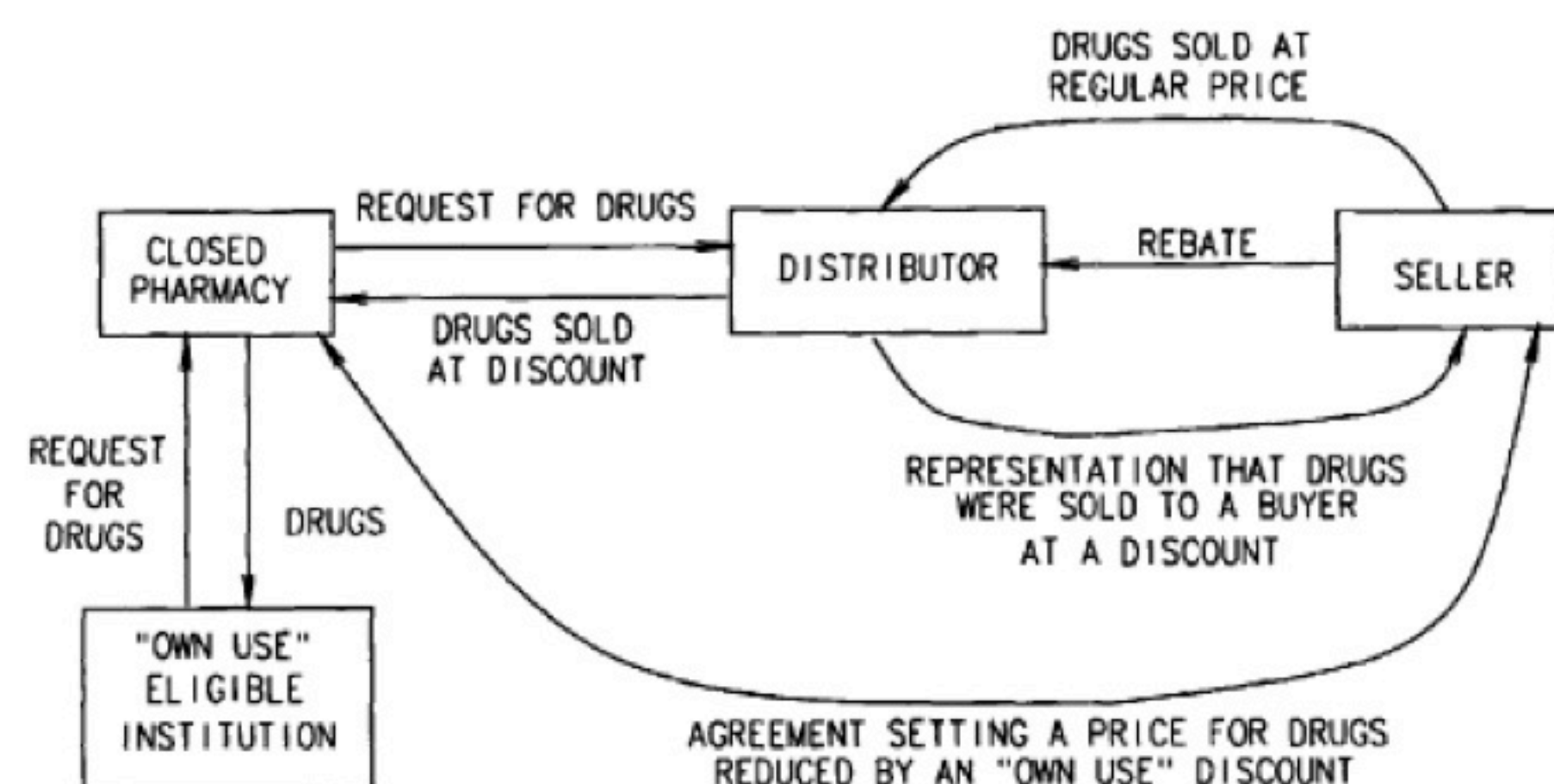
Assistant Examiner—Rachel L. Porter

(74) *Attorney, Agent, or Firm*—Thompson Coburn LLP;
Benjamin L. Volk, Jr. Esq.

(57) **ABSTRACT**

Disclosed is a method and apparatus for processing pharma-
ceutical orders to determine whether a buyer of pharmaceu-
ticals qualifies for an "own use" discount. "Own use" dis-
counts on pharmaceuticals are available for a limited class of
buyers under 35 U.S.C. §13c. Under one method, an auditor
receives an order for a quantity of pharmaceuticals, receives a
report associated with the order containing sufficient infor-
mation therein to perform an audit on the order, and compares
the information found in the order with the information found
in the associated report to make a status determination as to
whether a buyer qualifies for an "own use" discount. Prefer-
ably a second report containing additional audit information
is received as well. The auditor can also audit the order by
comparing the order to this additional information. If these
comparisons result in a determination that the buyer does in
fact qualify for an "own use" discount, the auditor can then
place the order with a pharmaceutical seller for a discounted
price. Also disclosed is a pharmaceutical order auditing sys-
tem that uses a computer to perform the above-described
audit.

54 Claims, 10 Drawing Sheets



Method and Apparatus for Processing Pharmaceutical Orders to Determine Whether a Buyer of Pharmaceuticals Qualifies for an "Own Use" Discount

(12) **United States Patent**
Schuchardt et al.

(10) **Patent No.:** **US 7,685,063 B2**
(45) **Date of Patent:** **Mar. 23, 2010**

(10) **Patent No.:** US 7,685,063 B2
(45) **Date of Patent:** Mar. 23, 2010

(54) CLIENT-SERVER ARCHITECTURE FOR
MANAGING CUSTOMER VEHICLE LEASING

OTHER PUBLICATIONS

(75) Inventors: **Jeff D. Schuchardt**, St. Louis, MO (US); **Mark E. McDaris**, Wildwood, MO (US)

Credit Risk in the Leasing Industry. Mathias Schmit. *Journal of Banking & Finance* 28 (2004) 811-833.*

(Continued)

(73) Assignee: **The Crawford Group, Inc.**, St. Louis, MO (US)

Primary Examiner—Frantzy Poinvil
Assistant Examiner—Jefford Madamba

(74) *Attorney, Agent, or Firm* Thompson Coburn LLP;
Benjamin L. Volk, Jr.

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 1143 days.

(57) **ABSTRACT**

(21) Appl. No.: 11/090,400

(22) Filed: **Mar. 25, 2005**

(65) **Prior Publication Data**

US 2006/0218085 A1 Sep. 28, 2006

(51) **Int. Cl.**
G06Q 40/00 (2006.01)

(52) **U.S. Cl.** 705/38; 705/36; 705/37;
700/99

(58) **Field of Classification Search** 705/35-45
See application file for complete search history.

(56) **References Cited**

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52 Claims, 64 Drawing Sheets

Client-Server Architecture for Managing Customer Vehicle Leasing

(12) **United States Patent**
Brown et al.

(10) **Patent No.:** US 7,721,315 B2
(45) **Date of Patent:** May 18, 2010

(54) **METHOD AND SYSTEM FOR ON-DEMAND
DELIVERY OF PERSONALIZED
INTERNET-BASED CONTENT TO
TELEVISION VIEWERS**

(75) Inventors: **Michael A. Brown**, University City, MO
(US); **Edward D. Briscoe**, Ladue, MO
(US)

(73) Assignee: **Vibe Solutions Group, Inc.**, St. Louis,
MO (US)

(*) Notice: Subject to any disclaimer, the term of this
patent is extended or adjusted under 35
U.S.C. 154(b) by 1551 days.

(21) Appl. No.: 11/015,325

(22) Filed: Dec. 17, 2004

(65) **Prior Publication Data**
US 2006/0146788 A1 Jul. 6, 2006

(51) **Int. Cl.**
H04N 7/17 (2006.01)

(52) **U.S. Cl.** 725/109; 725/115; 725/116;
725/121

(58) **Field of Classification Search** 725/109,
725/115-116, 121
See application file for complete search history.

(56) **References Cited**

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Primary Examiner—Hunter B. Lonsberry
(74) *Attorney, Agent, or Firm*—Thompson Coburn LLP;
Benjamin L. Volk, Jr.

(57) **ABSTRACT**

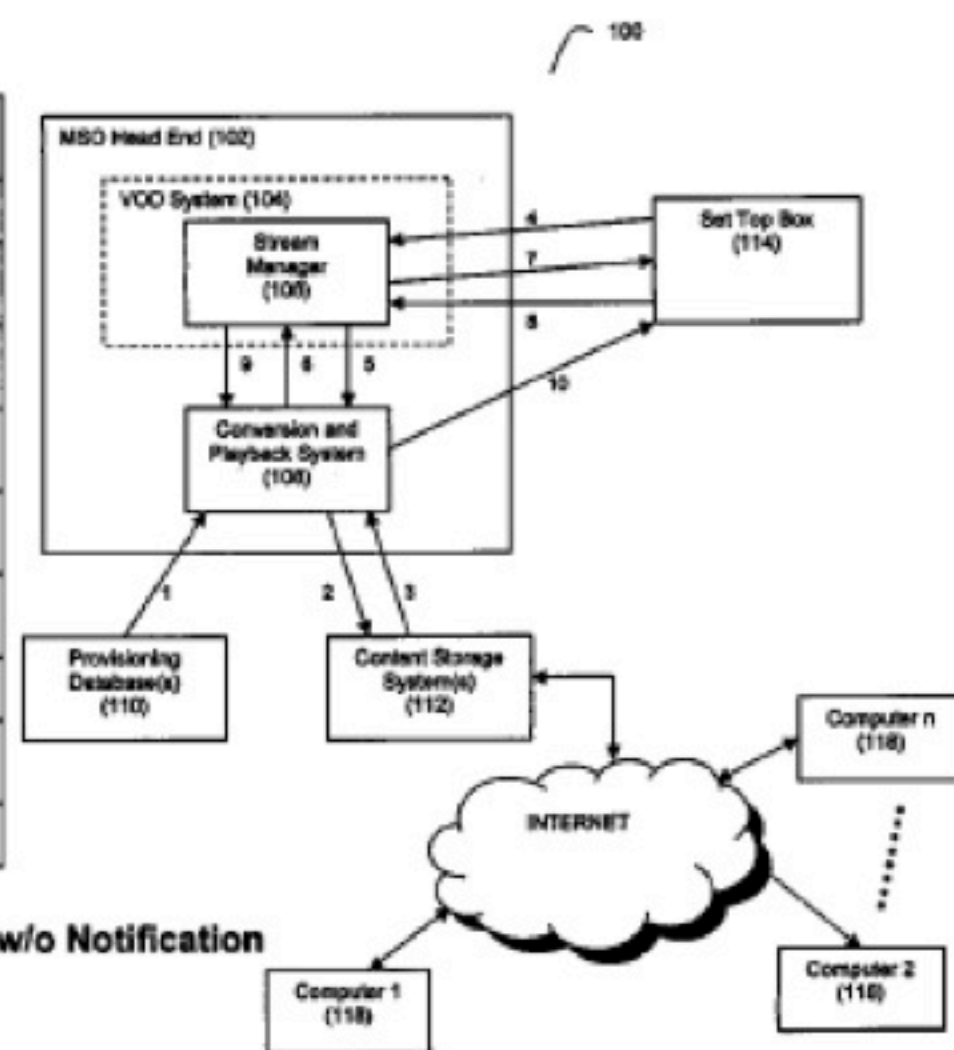
A method of delivering personalized content to customers of a subscription television service for display on their televisions, the method comprising: (a) converting Internet-based content from an Internet based format to a format suitable for display on a customer's television through a customer's set top box, and (b) after the conversion, delivering the converted content to a set top box associated with that customer for display on that customer's television. With such a method, the customer's set top box need not be Internet-enabled. Preferably, the customer's subscription television service is a cable television service.

24 Claims, 9 Drawing Sheets

Legend:

- (1) Establish link between user's messaging address and the Set Top Box
- (2) Establish association of clients served by proxy
- (3) Content files are sent to Conversion and Playback System and converted to MPEG2
- (4) User requests VoD content from Stream Manager via Set Top Box
- (5) Stream Manager requests VoD content from Conversion and Playback System
- (6) List of available VoDs for user is sent to Stream Manager
- (7) Stream Manager publishes available VoD content to the user
- (8) User chooses VoD content
- (9) Stream Manager notifies Conversion and Playback System of the user's choice
- (10) Chosen VoD content is sent to the user's Set Top Box

Content Delivery w/o Notification



► Method and System for On-Demand Delivery of Personalized Internet-Based Content to Television Viewers

(12) **United States Patent**
Singla et al.

(10) **Patent No.:** **US 7,840,482 B2**
(45) **Date of Patent:** **Nov. 23, 2010**

(54) **METHOD AND SYSTEM FOR HIGH SPEED
OPTIONS PRICING**

(75) **Inventors:** **Naveen Singla**, St. Louis, MO (US);
Scott Parsons, St. Charles, MO (US);
Mark A. Franklin, St. Louis, MO (US);
David E. Taylor, St. Louis, MO (US)

(73) **Assignee:** **Exegy Incorporated**, St. Louis, MO
(US)

(*) **Notice:** Subject to any disclaimer, the term of this
patent is extended or adjusted under 35
U.S.C. 154(b) by 289 days.

(21) **Appl. No.:** **11/760,211**

(22) **Filed:** **Jun. 8, 2007**

(65) **Prior Publication Data**
US 2007/0294157 A1 Dec. 20, 2007

Related U.S. Application Data
(60) Provisional application No. 60/814,796, filed on Jun.
19, 2006.

(51) **Int. Cl.**
G06Q 40/00 (2006.01)

(52) **U.S. CL.** 705/37; 705/36 R

(58) **Field of Classification Search** 705/36,
705/37
See application file for complete search history.

(56) **References Cited**
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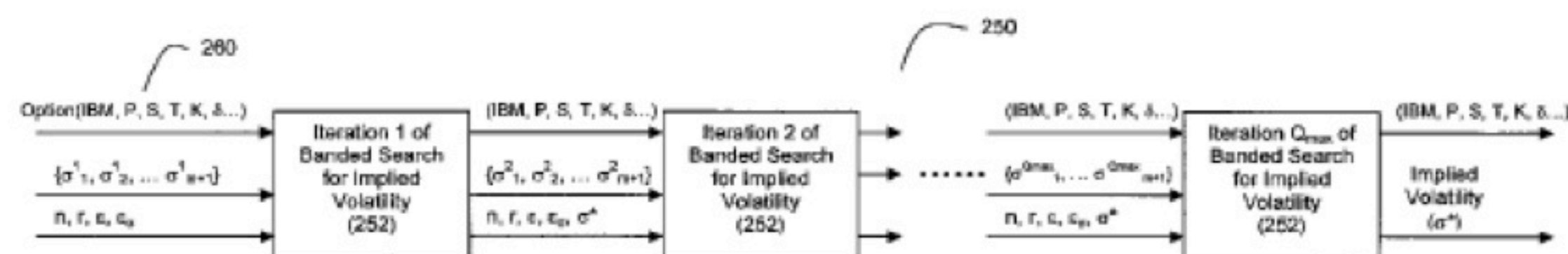
Primary Examiner—Jagdish N Patel
Assistant Examiner—Sara Chandler

(74) *Attorney, Agent, or Firm*—Thompson Coburn LLP;
Benjamin L. Volk, Jr., Esq.

(57) **ABSTRACT**

A high speed technique for options pricing in the financial
industry is disclosed that can provide both high throughput
and low latency. A parallel/pipelined architecture is disclosed
for computing an implied volatility in connection with an
option. Parallel/pipelined architectures are also disclosed for
computing an option's theoretical fair price. Preferably these
parallel/pipelined architectures are deployed in hardware,
and more preferably reconfigurable logic such as Field Pro-
grammable Gate Arrays (FPGAs) to accelerate the options
pricing operations relative to conventional software-based
options pricing operations.

22 Claims, 32 Drawing Sheets



Method and System for High Speed Options Pricing

(12) **United States Patent**
Indeck et al.

(10) **Patent No.:** US 8,069,102 B2
(45) **Date of Patent:** Nov. 29, 2011

(54) **METHOD AND APPARATUS FOR
PROCESSING FINANCIAL INFORMATION
AT HARDWARE SPEEDS USING FPGA
DEVICES**

(75) **Inventors:** **Ronald S. Indeck**, St. Louis, MO (US);
Ron Kaplan Cytron, St. Louis, MO
(US); **Mark Allen Franklin**, St. Louis,
MO (US); **Roger D. Chamberlain**, St.
Louis, MO (US)

(73) **Assignee:** **Washington University**, St. Louis, MO
(US)

(*) **Notice:** Subject to any disclaimer, the term of this
patent is extended or adjusted under 35
U.S.C. 154(b) by 718 days.

(21) **Appl. No.:** 11/561,615

(22) **Filed:** Nov. 20, 2006

(65) **Prior Publication Data**

US 2007/0078837 A1 Apr. 5, 2007

Related U.S. Application Data

(63) Continuation of application No. 10/153,151, filed on
May 21, 2002, now Pat. No. 7,139,743.

(51) **Int. Cl.**
G06Q 40/00 (2006.01)

(52) **U.S. Cl.** 705/35

(58) **Field of Classification Search** 705/35,
705/36 R, 36 T, 37

See application file for complete search history.

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Primary Examiner — Charles Kyle

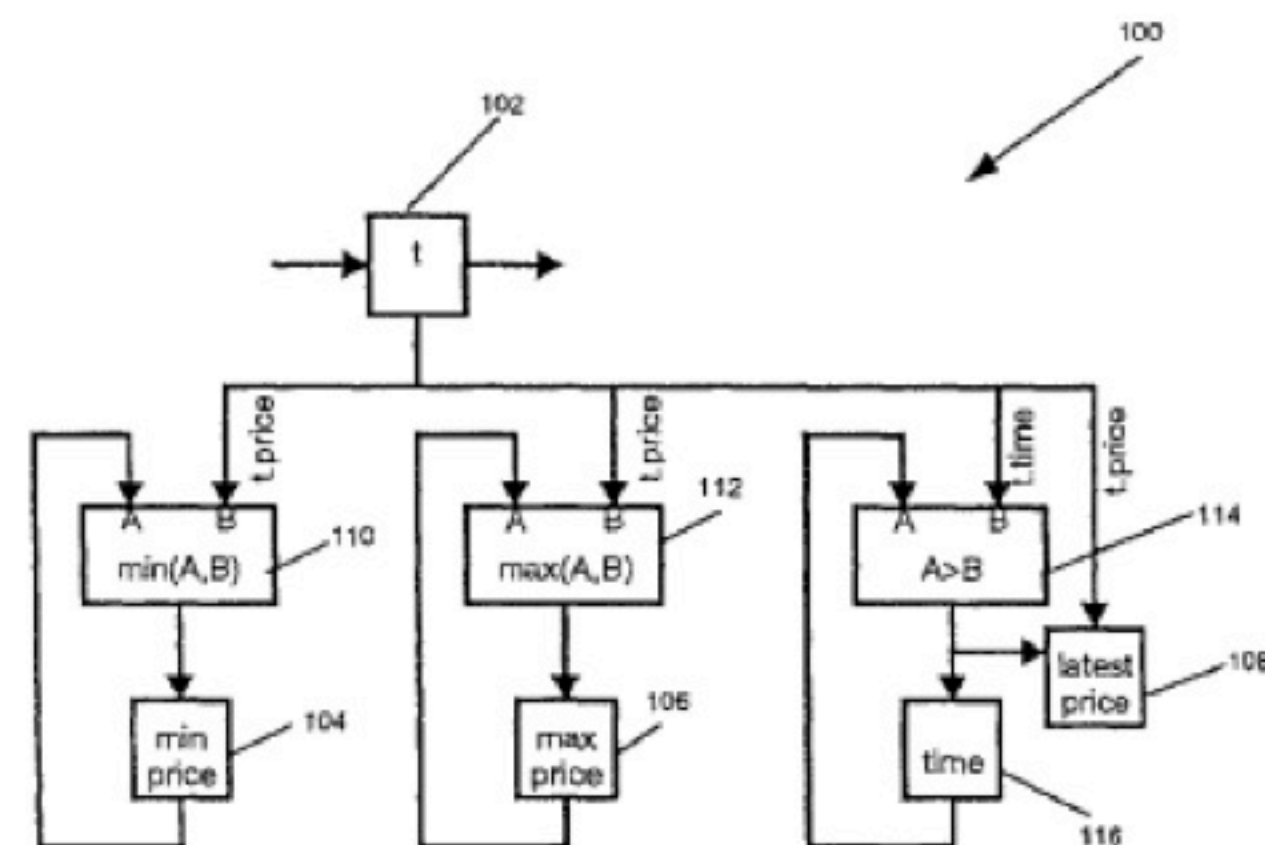
Assistant Examiner — Greg Pollock

(74) *Attorney, Agent, or Firm* — Thompson Coburn LLP

(57) **ABSTRACT**

A method and apparatus use decision logic deployed on a
reconfigurable logic device to process a stream of financial
information at hardware speeds. The decision logic can be
configured to perform data reduction operations on the finan-
cial information stream. Examples of such data reductions
operations include data processing operations to compute a
latest stock price, a minimum stock price, and a maximum
stock price.

34 Claims, 24 Drawing Sheets



Method and Apparatus for Processing Financial Information at Hardware Speeds Using FPGA Devices

Why Patents Are Important

- Statutory right to exclude
- Competitive Advantage
- Licensing Revenues
- Defense Mechanism
- Bottom line: they enhance the company's value

How Do You Know If It May Be Patentable?

- Is it new?
- Do you know of anyone else who's done it?
- It is useful?
- It is an improvement over something?
- It is non-obvious?
- Does it provide a competitive benefit?
- Would you pay \$ for it?

How You Factor In

- You are the key
- Your everyday activities may result in patentable subject matter
- We're not trying to change your job flow
- Basically, just track what you do

The Road to Patentability

- The 1st step: tracking your activities
- The 2nd step: the invention disclosure form
- The 3rd step: the patent review committee
- The 4th step: the lawyers file

Things to Beware or AVOID

- Pre-filing outside disclosures
- Pre-filing sales or commercialization
- One-year clock
- Foreign patent considerations
- Ownership issues when working with outside parties
- Standards setting activities

Pre-Filing Outside Disclosure

- No Confidentiality Agreement/NDA?
- May start one-year clock to file in U.S.
- May sacrifice foreign patent rights

Pre-Filing Sale or Commercialization

- Pre-filing sale?
- Pre-filing offer for sale?
- Other pre-filing commercialization?
 - Example: Using software internally to perform work for the business or customers?
- May start one-year clock to file in U.S.
- May sacrifice foreign patent rights

One-Year Clock

- Applicants have one year from a triggering event to file a patent application with the USPTO
- Otherwise, there is a **LOSS OF RIGHTS** and the invention is **DEDICATED TO PUBLIC!**

One-Year Clock

- BUT WATCH OUT FOR FOREIGN PATENT RIGHTS!
- Taking advantage of the U.S. one-year clock may sacrifice foreign patent rights

Foreign Patent Considerations

- Many foreign patent systems (e.g., Europe) do not provide the one-year clock
- Any pre-filing public disclosure triggers a loss of rights
- If foreign patent protection may be desirable, file U.S. patent application before any non-confidential disclosure or commercialization occurs!

Development Efforts with Outside Parties

- Outside vendors may assist with development work, coding, consulting, etc.
- Will want agreements in place that make it clear who owns all patent rights arising from the work
- Absent such agreements, outside parties could end up as co-owners of patent rights if any of their ideas work their way into the claimed invention

What Details go into a Patent Application?

- Quid Pro Quo of the patent system
- Statutory requirements:
 - Enabling disclosure
 - “Written Description” of the invention
 - “Best Mode” for carrying out the invention

What Details go into a Patent Application?

Standard for Enablement:

- Does the patent application enable a “person having ordinary skill in the art” to make and use the invention without “undue experimentation”?

What Details go into a Patent Application?

- Patent application must describe in detail how the invention would work and be implemented
- But, do not need to actually build the invention

What Details go into a Patent Application?

- Flowcharts
- Diagrams
- Descriptions of data and data associations
- Exemplary use cases
- Other details?
 - Alternative arrangements, etc.

What was Bilski's Invention?

A “pure” business method

- A method for entering into a series of commodities transactions in manner that hedged certain types of risk
- NO COMPUTER REQUIRED
- Bilski organized purely human activities to alter contractual rights and business risks

Bilski at the Supreme Court

The Supreme Court's pronouncement:

1. The “machine–or–transformation” test is not the exclusive test for patent–eligibility
2. A method is patent in–eligible if it is merely an “abstract idea”
3. Relied on past Supreme Court precedent to summarily conclude that Bilski's invention was merely an “abstract idea”

Three Principal Areas of Concern

Courts have found 3 general areas of exclusion:

1. Laws of nature

- $E=MC^2$
- $F=ma$

2. Natural phenomena

- Gravity
- Lightning
- Photosynthesis

3. Abstract ideas

But anything that is a practical application of the above may be patent eligible



Post-*Bilski*

Pure Business Methods

- No “machine”
- No physical transformation
- **Down but not out...**
 - Focus on the practical and real-world effects of the method
 - Make sure you have claims that specifically cover the practical/real-world application of the business method

Post-*Bilski*

Computer-Implemented Data Processing Inventions

- Computer-implemented business methods
- Computer Software
- Any type of data processing invention
- Data In/Data Out
- Number In/Number Out

Post-*Bilski*

Computer-Implemented Data Processing Inventions

- May pass as a “particular machine” if claims are tied to a computer

Trademarks

What is a trademark?

- ▶ A “brand”
- ▶ Any word, symbol or device that
 - identifies one’s product, and
 - distinguishes it from the products of others
- ▶ Examples:
 - NIKE for *shoes*
 - COACH for *purses*

What is a servicemark?

- ▶ A name sometimes used to identify marks that are used in connection with **services** rather than **products**
- ▶ People often refer to both servicemarks and trademarks as “trademarks”
- ▶ Examples:
 - THOMPSON COBURN for *legal services*
 - SANFORD–BROWN for *educational services*



Trademarks vs. Trade Names

- ▶ Trademark: describes the goods or services of a company (“a source indicator”)

Coca-Cola

- ▶ Trade name: identifies a company or business; can also be a trademark

The Coca-Cola Company

Types of Marks

- ▶ Word marks (i.e., the words per se)
- ▶ Slogans and tag lines
- ▶ Stylized words
- ▶ Designs, logos, etc.
- ▶ Trade dress/product configuration
- ▶ Colors, sounds, smells, etc.

Word Marks

NIKE

KODAK

COCA-COLA

BLACKBERRY

Slogans/Taglines

I'M LOVIN' IT

THERE ARE SOME THINGS MONEY CAN'T BUY...

THE ULTIMATE DRIVING MACHINE

Stylized Words

Coca-Cola

Google
images

facebook

CNN

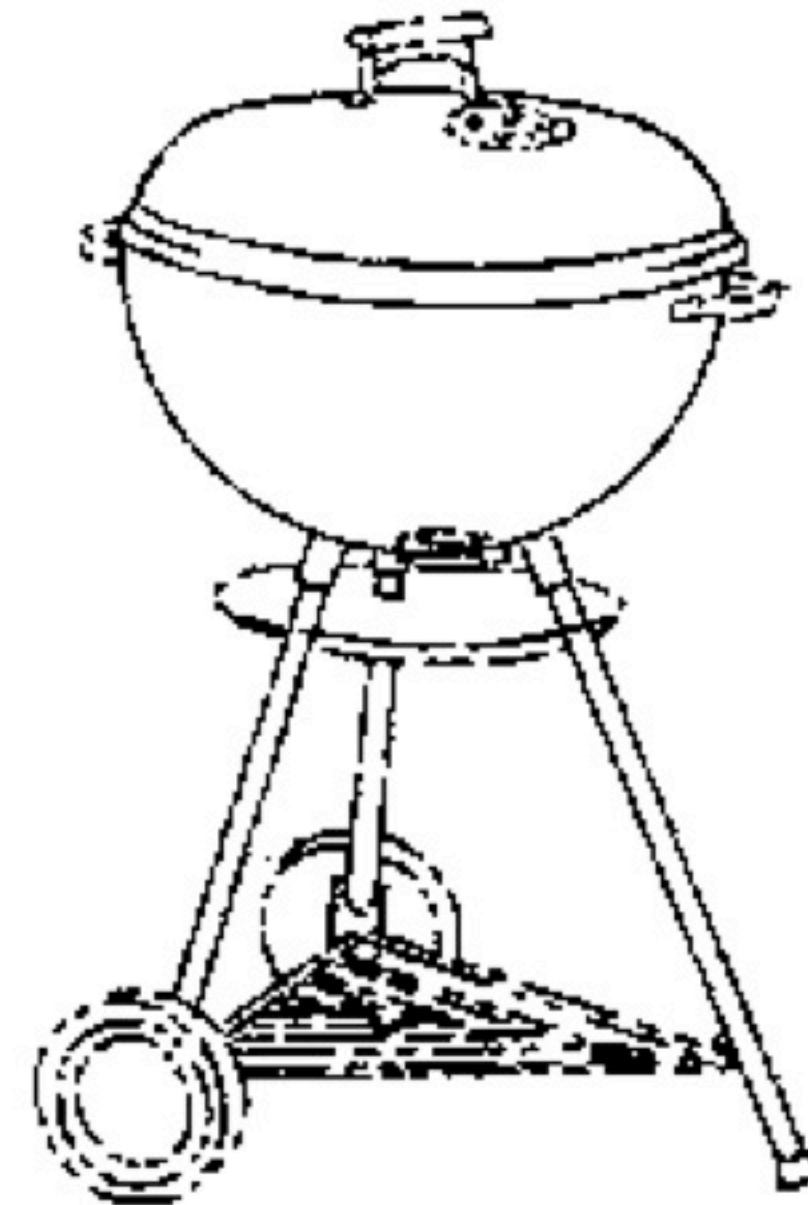
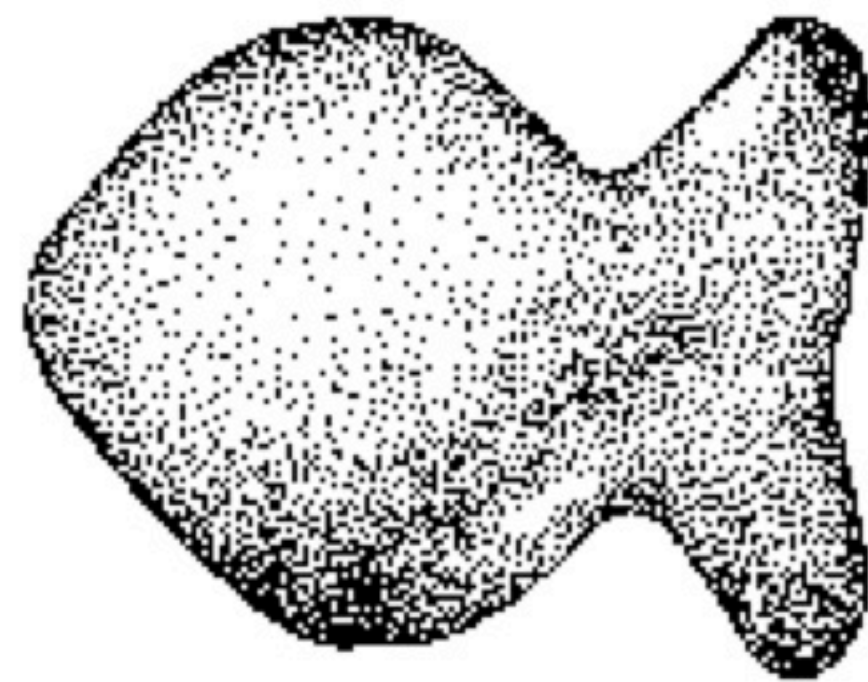
Logos / Designs



Trade Dress



Trade Dress



Trademarks

- ▶ Term – Perpetual, as long as the mark remains in bona fide use
- ▶ Purposes:
 - Identify the source of goods or services
 - Protect consumers from confusion
 - Indication of quality
 - Create business goodwill and brand identity

Trademarks

- ▶ Two basic issues clients face when adopting of a new trademark:
 - Can I use it?
 - Can I stop others from using it?

Can I use it?

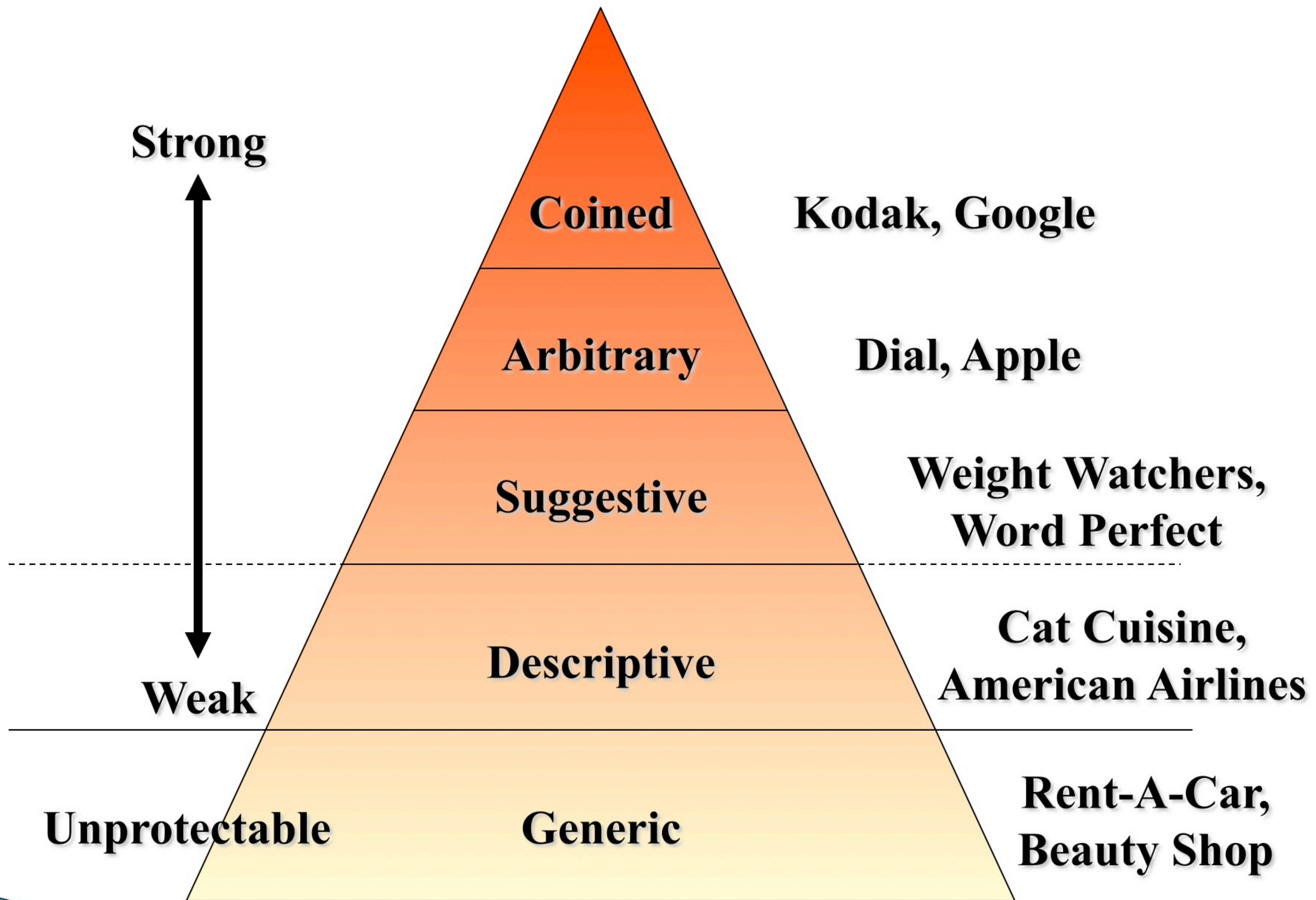
- ▶ Priority issues
- ▶ Conduct a Trademark Search!
- ▶ Based on the search results, we determine:
 - availability for use (does the mark conflict with marks owned by others?)
 - registrability

Can I use it?

- ▶ “Likelihood of confusion” is the standard for infringement
- ▶ Multifactor analysis considers:
 - Similarity of marks
 - Similarity of goods/services
 - Other marketplace factors
 - Intent
 - Actual confusion

Can I stop others from using it?

- ▶ Is the mark distinctive and protectable?
- ▶ The more distinctive the mark, the greater its level of legal protectability



Establishing Trademark Rights

- ▶ Use the mark = common law rights
- ▶ Apply for federal trademark registration
 - Priority date based on filing date

Establishing Common Law Rights Through Use: Priority

- ▶ Generally, in the United States, trademark rights are created by priority of use
- ▶ The first person or business to use a mark in a given geographic area is the owner of the mark in that area
- ▶ But, federal trademark applications and registrations can affect rights acquired through use

Establishing Common Law Rights Through Use

- ▶ Generally, protection begins only after the product or service is available in the market
- ▶ Thus, during the time between your decision to use the mark and bringing it to market, someone else can acquire prior rights

Establishing Rights in Descriptive Marks

- ▶ Suggestive, arbitrary and fanciful/coined marks:
 - Automatically protectable and registrable
- ▶ Descriptive marks, product configuration:
 - Protected and registered only upon a showing of secondary meaning
- ▶ Generic marks:
 - Not protectable or registrable

Secondary Meaning

- ▶ Consumers recognize the mark as a source indicator, not just a descriptor
- ▶ Generally, presumed after 5 years of substantially exclusive and continuous use of a mark

Pros: Benefits of Federal Trademark Registration

- ▶ Priority date based on application filing date
- ▶ Presumptions of ownership, distinctiveness and validity that facilitate enforcement
- ▶ Allows use of the ® symbol
- ▶ Provides nationwide protection
- ▶ Makes the mark easy to find in a search
- ▶ Access to enhanced remedies, including treble damages, and attorney's fees

Cons: Failure to Obtain a Federal Registration

- ▶ Priority based on first use in geographic area
- ▶ Rights limited to geographic area of use
- ▶ No presumption of ownership or distinctiveness, so must prove rights

Trademark Applications

- ▶ Applicant
- ▶ Drawing of mark
- ▶ Description of goods / services
- ▶ Filing basis
 - Use vs. Intent-to-use
- ▶ Specimen of use
- ▶ Signed declaration

Maintaining Trademark Rights

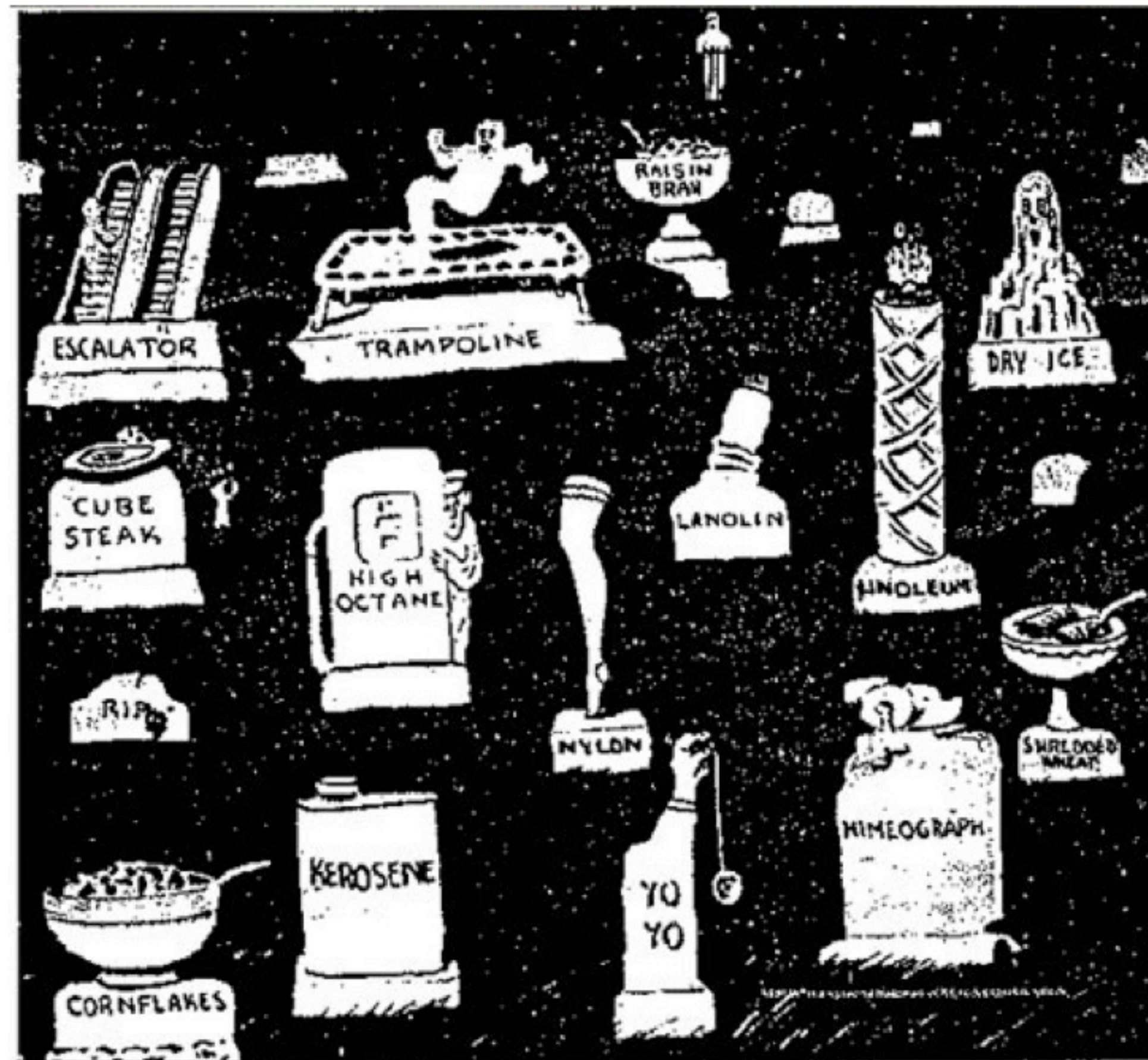
- ▶ Continue using mark
- ▶ Trademark registrations
 - Declaration of use
 - Between 5th & 6th year after registration
 - Renewal applications
 - Every 10 years after registration

Loss of Trademark Rights

- ▶ Abandonment (non-use)
- ▶ Genericide
- ▶ Improper licensing or assignment
- ▶ Failure to police
 - Third parties' unauthorized use, improper use
- ▶ Failure to comply with Trademark Office requirements for registered marks
- ▶ Cancellation

Avoiding Genericide

- ▶ Once a trademark, not always a trademark.



Proper Use

- Use the TM, SM and ® symbols where appropriate
 - TM = Trademark
 - SM = Service mark
 - ® = Registered trademark or service mark
- Distinguish mark from surrounding
 - Quotation marks – “Mercedes Benz”
 - Larger-sized print – Mercedes Benz
 - All capital letters – MERCEDES BENZ
 - Initial capitals – Mercedes Benz
 - Distinctive print – **Mercedes Benz**
 - Color – Mercedes Benz

Proper Use

- ▶ Use the mark followed by a noun:
 - e.g., KLEENEX tissue, Q-TIP cotton swabs



- ▶ Never plural

Wrong: Two DELLS

Correct: Two DELL computers



- ▶ Never possessive

Wrong: POST-IT's quality

Correct: POST-IT note pads' quality



Proper Use

- ▶ Never a verb
Wrong: Xerox a document
Correct: Photocopy a document
on a XEROX copier
- ▶ Proper spelling
Wrong: COCACOLA
Correct: Coca-Cola



Enforcement

- ▶ First, confirm priority
 - Professional investigation may be required
- ▶ Cease & desist letters
 - Risk: declaratory judgment
- ▶ Opposition/cancellation proceedings
 - Trademark Trial and Appeal Board
- ▶ Lawsuit in federal court

Copyrights

What do we think Copyright is all about?

- ▶ Books and writing
- ▶ Art work and music
- ▶ Mostly, materials created for profit

First Principles

To Promote the Progress of Science and useful Arts,
by securing for limited Times to Authors and
Inventors the exclusive Right to their respective
Writings and Discoveries.

U.S. CONSTITUTION, Art. I, § 8, cl. 8.

Science [*Humanities*]
Authors
Writings

useful Arts [*Science*]
Inventors
Discoveries

U.S. Copyright Statute

- ▶ Copyright = protection exists in original works of authorship fixed in any tangible medium of expression
- ▶ Examples: literature, music, photographs, sculptures, graphic art, choreographic works, dramatic works, architectural works

Copyright Subject Matter – *Originality* in Expression

- ▶ Originality is required
- ▶ Some works are so short, utilitarian or lacking in creativity that they do not qualify for protection
 - Examples:
 - Titles
 - Typefaces
 - Forms
 - Factual Compilations

Copyright Subject Matter – Originality in *Expression*

- ▶ Idea/Expression Distinction
 - Creative expression is copyrightable
 - Ideas are not
- ▶ Other things that are not copyrightable:
 - procedures, processes, systems, methods of operation, concepts, etc.

Copyright subject matter – the Idea/Expression distinction

An idea -- a lemonade stand

SALLY FORTH / By Steve Alaniz & Francesco Marciuliano



No ©

An expression -- a creative comic strip

SALLY FORTH / By Steve Alaniz & Francesco Marciuliano



©

How Copyright Comes into Being – Steps in Obtaining a Copyright

1. Fix your expression in a tangible medium – a copyright “springs” into existence on creation

- ▶ Write down text
- ▶ Draw or shape your design
- ▶ Take your photograph
- ▶ Record your words or actions

Steps in Obtaining a Copyright

2. (Optional) Use a Copyright Notice

- ▶ Copyright © 2014 Kevin M. Kercher
- ▶ “All Rights Reserved” if you wish
- ▶ You can add further instructions, restrictions or permissions.

Copyright Notice

Letter Edged in Black Press, Inc. v. Public Building Commission of Chicago

320 F.Supp.1303 (N.D. Ill.1970).

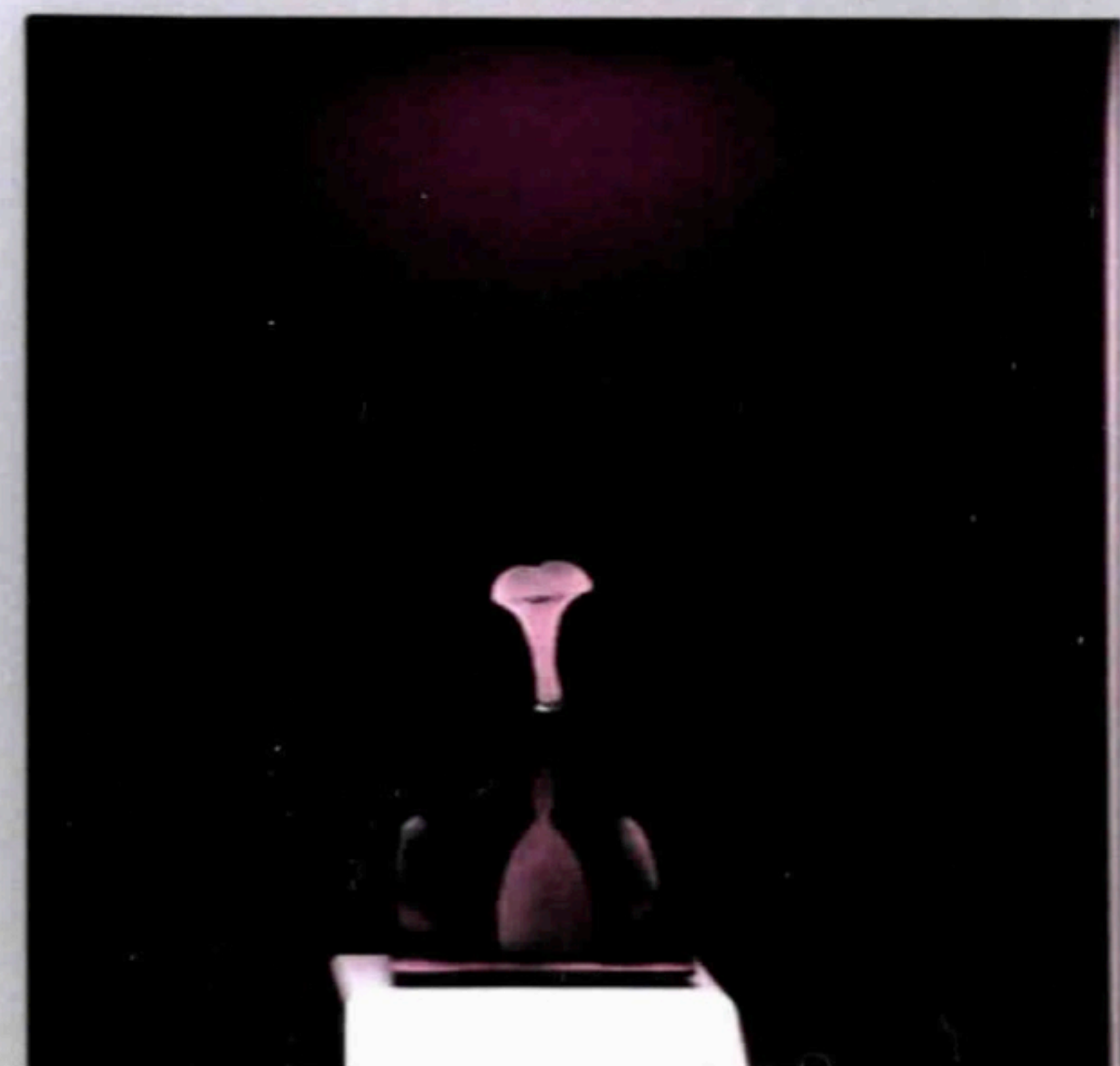
Before
1989 and
especially
before
1978, a
copyright
notice was
more
important

Decided in 1970, this case deals with the copyright status of the monumental sculpture known as the *Chicago Picasso*, which was designed for the Chicago Civic Center by Pablo Picasso, who transferred his rights in the work "to the people of Chicago." A local company challenged the Public Building Commission policy of requiring royalty payments from commercial sales of photographs and miniatures of the sculpture.

Judge Alexander J. Napoli found that although the monumental sculpture bore a copyright notice there was no notice on the original maquette (model), which had been publicly displayed without any restriction on copying it. Further, uncopyrighted pictures of the maquette were made available upon request.


The decision was that these acts resulted in the loss of copyright through the general publication of the work without copyright notice and that the monumental sculpture was a mere copy, although on a grand scale, of the maquette, which was already in the public domain.

It should be noted that the present copyright law, which took effect in 1978, provides that the public display of a work does not of itself constitute publication. (17 U.S.C. 101).



Steps in Obtaining a Copyright

3. (Optional) Register Your Copyright

 eCO Login



- ▶ \$35 fee, online form (copyright.gov)
- ▶ Significant benefits of timely registration
 - Required to sue for infringement
 - May affect recover of statutory damages

What Copyright Ownership Means

-- The Owner's "Rights"

- ▶ To reproduce the work
- ▶ To prepare derivative works based on the work (adaptations)
- ▶ To distribute copies of the work
- ▶ To publicly perform the work
- ▶ To publicly display the work
- ▶ To make digital audio transmissions

Divisibility of Rights

- ▶ Rights may be divided and sold
- ▶ Examples:
 - In a book contract, the author may grant U.S. publication rights, but save foreign, movie or other rights
 - The grant of newspaper print publication rights does not extend to electronic publication rights

Secondary Rights

- ▶ Radio
- ▶ Television
- ▶ Movie rights
- ▶ Foreign rights
- ▶ Paper backs
- ▶ Stage rights
- ▶ Adaptations

Term of Copyright

- ▶ 1998 Act -- Life of author plus 70 years or 95 years for corporate copyrights

Term of Copyright

DATE OF WORK	PROTECTED FROM	TERM
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years (or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation)
Published before 1923	In public domain	None
Published from 1923 - 63	When published with notice³	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain
Published from 1964 - 77	When published with notice	28 years for first term; now automatic extension of 67 years for second term
Created before 1-1-78 but not published	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2002, whichever is greater
Created before 1-1-78 but published between then and 12-31-2002	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2047 whichever is greater

The Public Domain

- ▶ U.S. government works = public domain
- ▶ How other works enter the public domain:
 - Expiration of copyright (if published prior to 1925)
 - Defective or missing copyright notice (if published prior to 1978)
 - Dedication to public domain (e.g., creativecommons.org)

Using Copyrighted Material

- ▶ Obtain permission (“rights”)
- ▶ Infringement
- ▶ Fair Use

Obtaining Permissions

- ▶ Needed when your use is beyond fair use and work is not in the public domain
- ▶ Sometimes not offered at reasonable prices
 - Copyright owner can refuse to grant permission altogether, or can insist on unreasonable prices
- ▶ Often difficult or time-consuming to obtain, particularly for multi-media works

What do you do when you can't get a response? Or when the rights owner is far away?

- ▶ First, do the best you can
- ▶ Reconsider fair use or public domain
 - Arguable fair use or public domain claim, coupled with reasonable efforts to obtain permission, will negate willful infringement
- ▶ Search for alternative sources, from the public domain or sources offering permissions (*e.g.*, picture archives)

Infringement

- ▶ Requires copying of copyrighted expression
 - Access
 - Substantial similarity
- ▶ Independent creation \neq infringement
- ▶ Substantial similarity requires taking of the original author's creative expression (not mere copying of facts, ideas, etc.)
- ▶ Infringement may occur in different words or different media than the original

“Substantial Similarity”

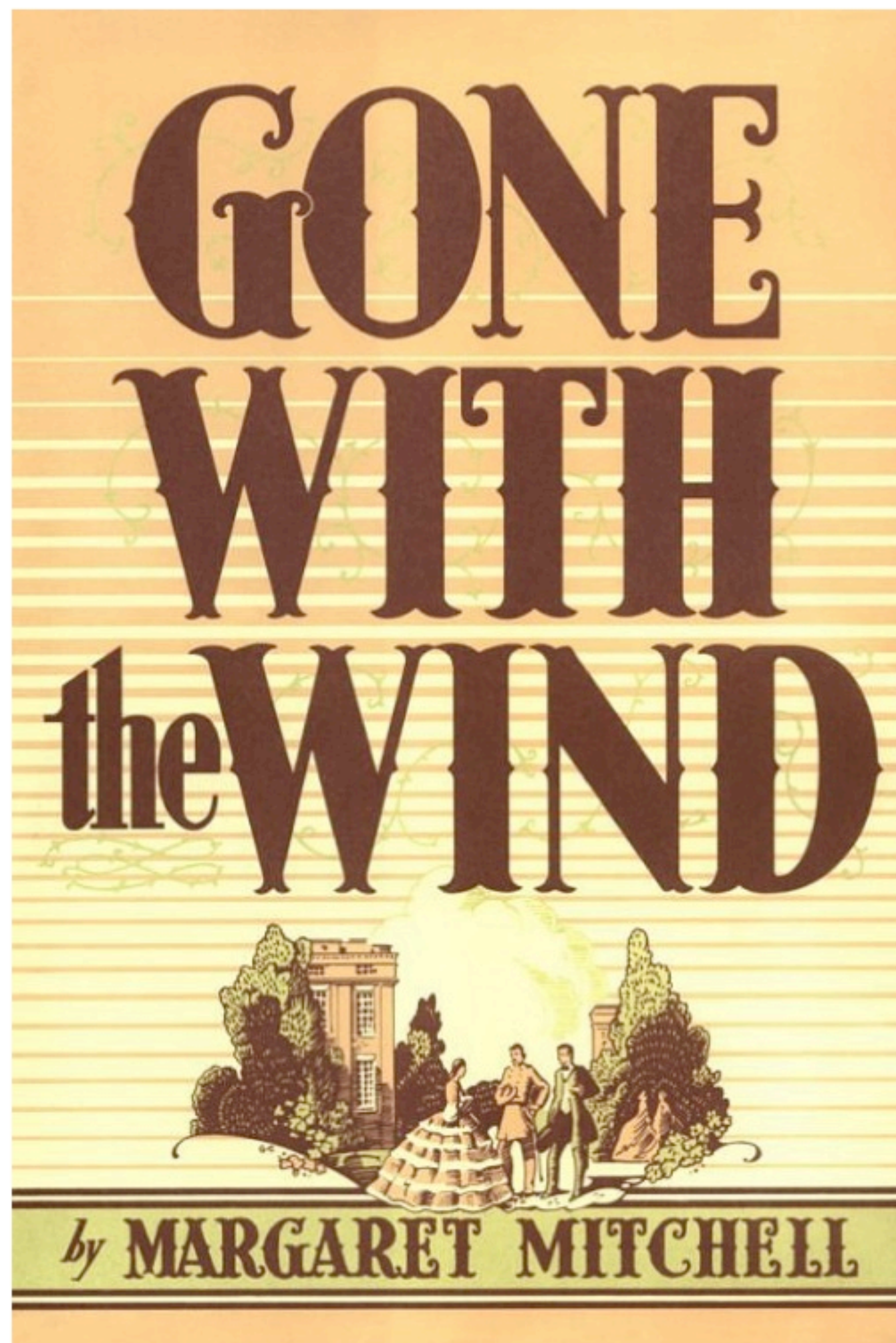
- ▶ The key test for infringement
- ▶ No minimal amount of copying is automatically permissible
- ▶ Copying that does not result in a substantial similarity is permissible
 - In other words, you may copy a work but avoid liability for infringement by making so many changes that the works are not substantially similar

Infringement

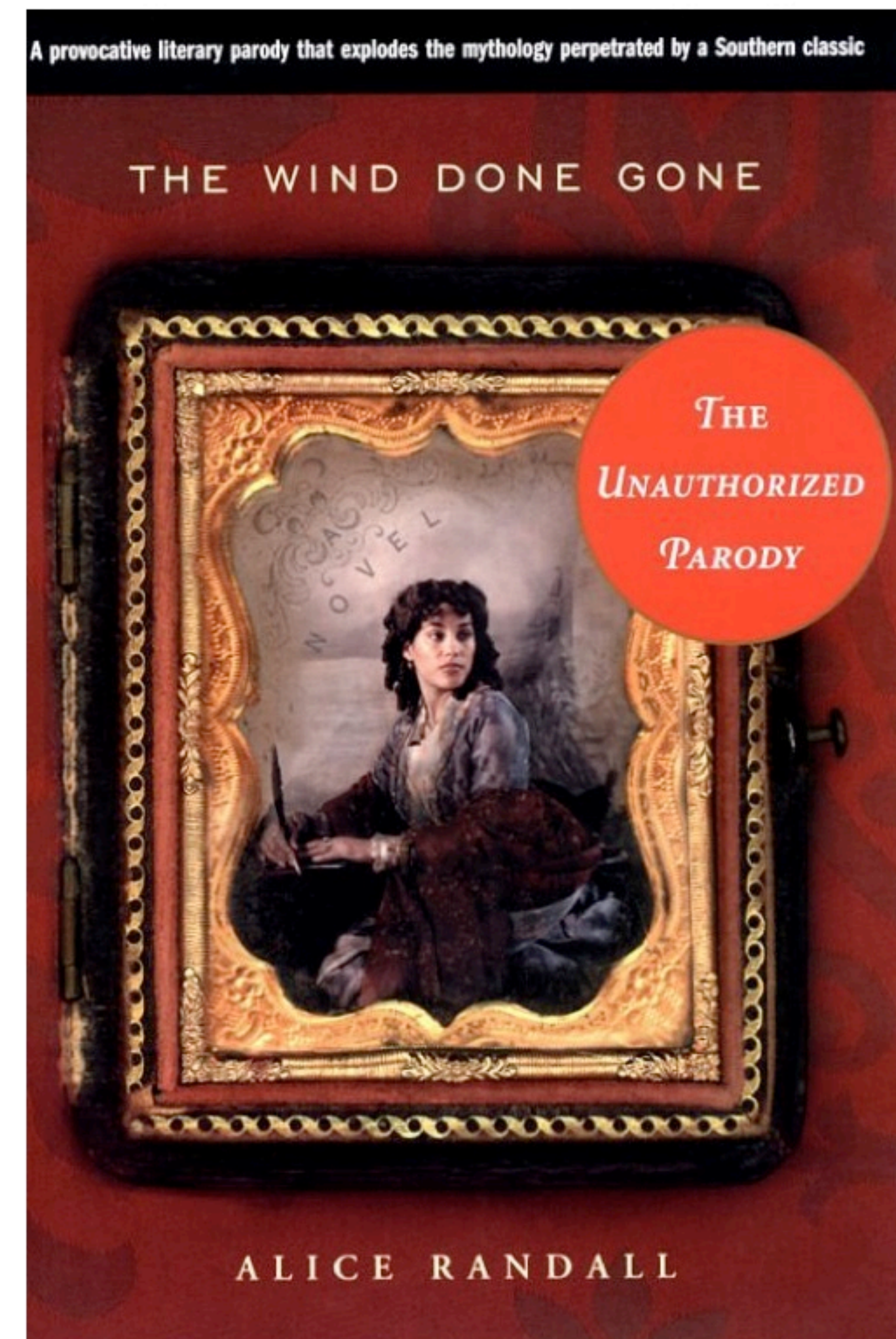
- ▶ Copyright is a strict liability offense
- ▶ Defenses that are ***not*** available:
 - Lack of intent to infringe
 - Non-commercial use
 - Non-use of the copyrighted work

Infringement Injunctions

Courts can order an infringing work removed from the market.



VS.



Infringement



Infringement Injunctions

- ▶ Works found infringing may have to be destroyed.



Infringement Remedies

- ▶ Without timely registration
 - Actual damages (lost profits, royalties)
- ▶ With timely registration
 - Statutory (presumed) damages option
 - \$250 for innocent infringement
 - up to \$30,000 for normal infringement
 - up to *\$150,000* for willful infringement
 - Attorney's fees for the prevailing party

Fair Use

§ 107. Limitations on exclusive rights: Fair use¹

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

What is Fair Use?

- ▶ Copying of copyrighted material for a limited and transformative purpose
- ▶ A defense to copyright infringement
- ▶ Rationale:
 - The public benefits from the use of copyrighted material
 - The absence of fair use stifles creativity

Limitations of Fair Use

- ▶ Most difficult issue in copyright law
- ▶ Subjective
- ▶ No hard and fast rules
- ▶ Fact-specific

Examples of Fair Use

- ▶ Quoting from a book in a book review
- ▶ Summarizing a medical article in a news report
- ▶ Parody: a work that ridicules another work by imitating it in a comic way

Key Fair Use Considerations

- ▶ Research, educational and journalistic purposes
- ▶ Extent to which the commercial market of the original work is affected
 - Especially if your work may be a substitute
- ▶ Transformative value of the second work
- ▶ Spontaneity or regularity of use