

## The Future of Business Method and Software Patents

Under current U.S. laws, both software and business methods can be patented. However, the subject of patentability of these key business technologies is currently pending before the United States Supreme Court. The U.S. Supreme court is set to hear oral arguments in the case *Bilski v. Kappos* on November 9, 2009. The case revolves around the patentability of software and business methods. As the law stands right now, in order to be patentable software must be tied to a machine or must involve a tangible state change (i.e. data must be impacted in some tangible manner). This was the decision of the Federal Circuit Courts from last October (2008), which was a limitation over what was previously allowed. Prior to the Federal Circuit's holding that's now under review by the Supreme Court, the standard was less restrictive (i.e. more could be patented).

There are three likely outcomes of the Supreme Court hearing this case. They may:

- 1) affirm the Federal Circuit court's ruling and the law will stay the same (unlikely)
- 2) further restrict what is allowable subject matter for software and business methods, likely restricting or altogether eliminating business method patents; or
- 3) revert to the earlier standard for software/business method patentability, thus making software/business method patents more patentable than they are currently.

The opinion of a good percentage of practitioners is that option two (further restriction) is the likely outcome. This predicted outcome is understandable because the United States is currently trying to harmonize its patent laws with other nations' patent laws.

Currently there are great differences between U.S. law and the laws of the major players in patent law (Europe, China, Australia, Japan, etc.). For example, in Europe business methods are unpatentable and software has some restrictions on patentability that are different from the current standard for patentability under U.S. law.

My belief is that the Supreme Court will bow to political pressure to harmonize patent laws and will all but eliminate business method patents and adopt a patentability standard for software that is at least somewhat consistent with Europe's standard. However, given that the membership of the Supreme Court is about to change (with the addition of Justice Sotomayor and the departure of Justice Souter), it really is speculation until they issue their ruling which will likely be in around February 2010. Our monthly newsletter immediately following the issuance of the ruling will include all the relevant details.