

Patent Law

Prof. Roger Ford
Wednesday, April 8, 2015
Class 21 – Remedies: Injunctive Relief

Recap

Recap

- Infringement by equivalents
- Secondary liability



Today's agenda

Today's agenda

- Unrelated announcement!
- Remedies background
- Permanent injunctions
- Temporary injunctions



**Unrelated
announcement!**

Unrelated announcement!

- Patent No. 9,000,000 issued yesterday!
- "Windshield washer conditioner"

US009000000B2

(12) **United States Patent**
Carroll

(10) **Patent No.:** **US 9,000,000 B2**
(45) **Date of Patent:** **Apr. 7, 2015**

(54) **WINDSHIELD WASHER CONDITIONER**

(71) Applicant: **WiperFill Holdings, LLC**, Jupiter, FL (US)

(72) Inventor: **Matthew Carroll**, Jupiter, FL (US)

(73) Assignee: **WiperFill Holdings, LLC**, Jupiter, FL (US)

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 163 days.

(21) Appl. No.: **13/797,259**

(22) Filed: **Mar. 12, 2013**

(65) **Prior Publication Data**
US 2013/0240419 A1 Sep. 19, 2013

Related U.S. Application Data

(60) Provisional application No. 61/610,275, filed on Mar. 13, 2012.

(51) **Int. Cl.**
B60S 1/48 (2006.01)
B60S 1/50 (2006.01)
C02F 1/42 (2006.01)
C02F 103/00 (2006.01)

(52) **U.S. Cl.**
CPC **B60S 1/48** (2013.01); **B60S 1/50** (2013.01);
C02F 1/42 (2013.01); **C02F 2307/00** (2013.01);
C02F 2103/001 (2013.01); **C02F 2303/24** (2013.01)

(58) **Field of Classification Search**
CPC **B60S 1/48**; **B60S 1/50**; **C02F 1/42**;
C02F 2001/425; **C02F 2001/427**
USPC 15/250.01; 134/109; 222/187; 210/95;
210/171; 172.1; 198.1; 202; 232; 251; 266;
210/282; 289; 502.1
See application file for complete search history.

(56) **References Cited**

U.S. PATENT DOCUMENTS

2,701,897 A * 2/1955 Learning 383/41
2,703,127 A * 3/1955 Webb
2,770,017 A 11/1956 Oshel et al.
3,738,575 A 6/1973 Sener
5,261,254 A 11/1993 Cattane
5,347,661 A * 9/1994 Fly et al. 4/225.1
5,669,986 A 9/1997 Buchanan, Jr. et al.
6,024,903 A * 2/2000 Buchanan, Jr. et al.
6,080,620 A * 7/2000 Mota Lopez et al. 285/222
6,266,842 B1 7/2001 Muller
2004/0112411 A1 * 6/2004 Boykin et al. 134/28

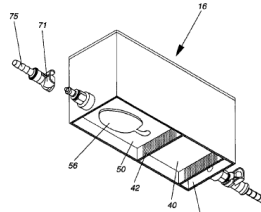
FOREIGN PATENT DOCUMENTS

DE 4101820 A1 * 7/1992 B60S 1/46
DE 4436023 A1 * 4/1995 B60S 1/48
DE EP1053922 11/2000
DE 20022285 7/2001
DE 10138466 4/2003
DE 10200505714 3/2007
* cited by examiner

Primary Examiner — Matthew O Savage
(74) **Attorney, Agent, or Firm** — McHale & Slavin, P.A.

(57) **ABSTRACT**
A system and method of collecting and conditioning rainwater and other moisture, such as dew, from a windshield of a vehicle and utilizing the collected fluid to replenish the fluids in the windshield washer reservoir. A collection funnel is positioned on a vehicle in order to collect rainwater and other moisture. Rainwater and other fluids from the collection funnel are directed to a conditioning cartridge where the water is de-ionized and windshield washer fluid is added. The cartridges are designed to be single replaceable units. The mixed fluid from the mixing cartridge is directed to the pre-existing windshield washer reservoir.

10 Claims, 8 Drawing Sheets



U.S. Patent No. 9,000,000

→ "Windshield washer conditioner"



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(71) Applicant: **WiperFill Holdings, LLC, Jupiter, FL**

U.S. PATENT DOCUMENTS

(US)

(72) Inventor: **Ma**

(73) Assignee: **Wip**

(*) Notice: **Sub**

pat

U.S.

(21) Appl. No.: **13/**

(22) Filed: **Ma**

(65) **I**

US 2013/02404

Related

(60) Provisional app

13, 2012.

(51) **Int. CL**

B60S 1/48

B60S 1/50

C02F 1/42

C02F 103/00

(52) **U.S. CL**

CPC

B60S

C02F 1/42

C02

(58) **Field of Classi**

CPC

USPC

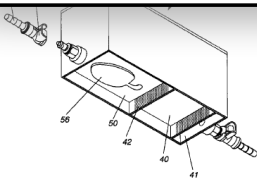
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See application

(57)

ABSTRACT

A system and method of collecting and conditioning rainwater and other moisture, such as dew, from a windshield of a vehicle and utilizing the collected fluid to replenish the fluids in the windshield washer reservoir. A collection funnel is positioned on a vehicle in order to collect rainwater and other moisture. Rainwater and other fluids from the collection funnel are directed to a conditioning cartridge where the water is de-ionized and windshield washer fluid is added. The cartridges are designed to be single replaceable units. The mixed fluid from the mixing cartridge is directed to the pre-existing windshield washer reservoir.



U.S. Patent No. 9,000,000



US09000000B2

(12) **United States Patent**
Carroll

(54) **WINDSHIELD WASHER**

(71) Applicant: **Wip**

(US)

(72) Inventor: **Ma**

(73) Assignee: **Wip**

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C02

(58) **Field of Classi**

CPC

USPC

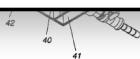
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See application

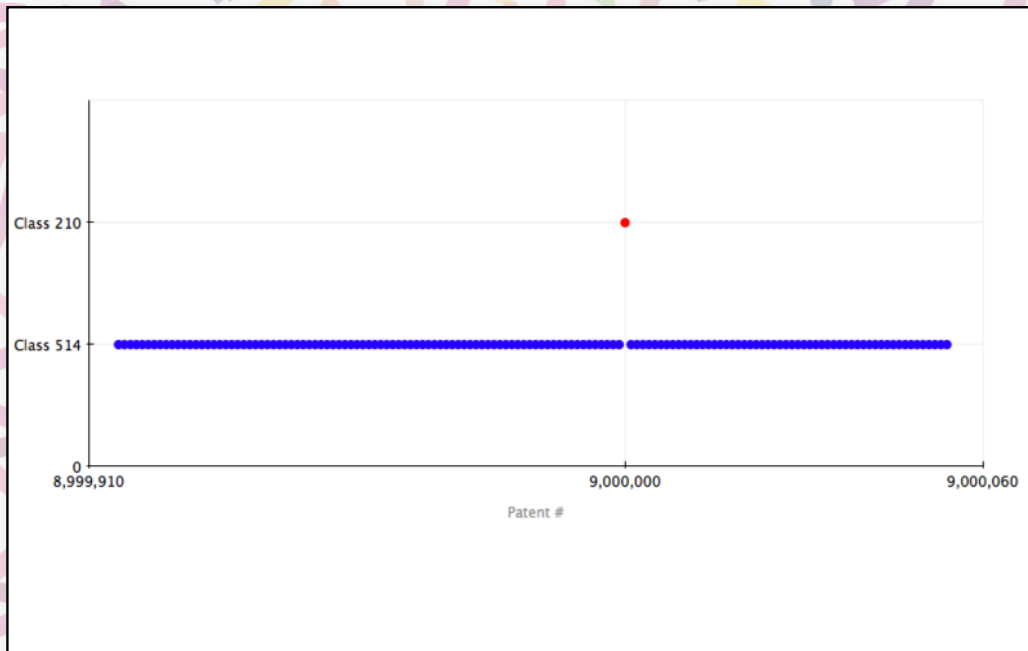
The claims are clearly directed to the ancient abstract idea of collecting rain water and using it to wash things. The use of funnels to collect rain water is notoriously old and carrying water in tubes or pipes goes back at least to ancient Rome. Filtering water and mixing water with concentrates is also notoriously old as is re-purposing water generally. I believe there was a Nazarene that repurposed water into wine some 2000 years ago, so repurposing water into washer fluid is an obvious variation. More recently, I believe it was the Kool-aidians and the Minute-Maidians who raised the process to high art.

Combining an abstract idea with known plastic hardware does not convert an abstract idea into patentable subject matter.

Boom! Aliced.



U.S. Patent No. 9,000,000



Patent No.	Date Issued	Years Between "Million Milestones"
1 *	July 13, 1836	
1,000,000	August 8, 1911	75 years
2,000,000	April 30, 1935	24 years
3,000,000	September 12, 1961	26 years
4,000,000	December 28, 1976	15 years
5,000,000	March 19, 1991	15 years
6,000,000	December 7, 1999	8 years
7,000,000	February 14, 2006	7 years
8,000,000	August 16, 2011	5 years
9,000,000	April 7, 2015	< 4 years

Remedies background

Remedies background

- Two basic remedies:
 - Damages
 - Injunctions
- And added remedies for special cases:
 - Increased damages
 - Attorney fees

35 U.S.C. § 281 — Remedy for infringement of patent (post-AIA)

A patentee shall have remedy by civil action for infringement of his patent.

35 U.S.C. § 283 — Injunction (post-AIA)

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.

35 U.S.C. § 284 — Damages (post-AIA)

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154 (d).

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

Remedies background

→ Damages

- Reasonable royalty
- Lost profits

→ Injunctive relief

- Preliminary
- Permanent

Remedies background

- Increased damages
 - Willfulness
- Attorney fees
 - Litigation misconduct
 - Bad-faith litigation
 - Baselessness
 - Other reasons in the district court's discretion

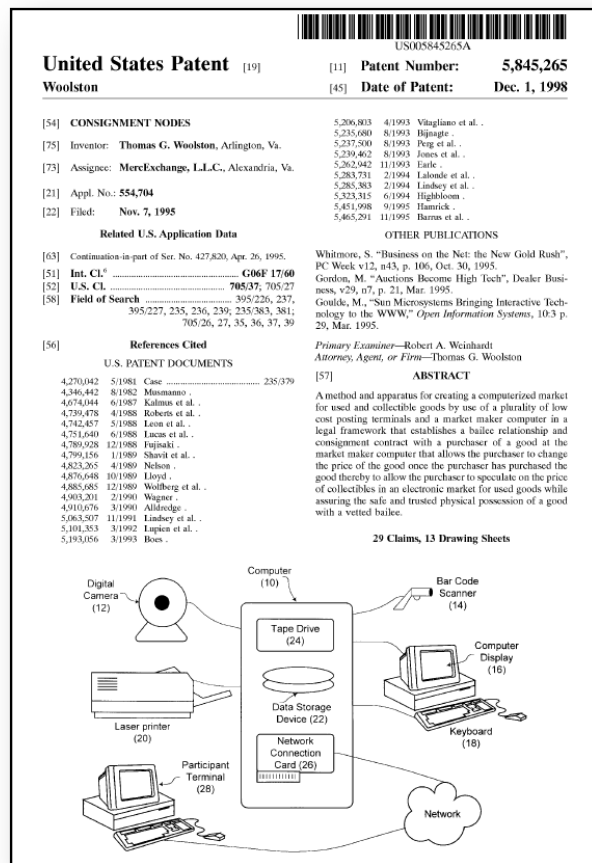
Remedies background

- Permanent injunctions
 - Historically, almost automatic
 - Not just a Federal Circuit innovation
 - that was the rule almost from the beginning of the patent system
 - Patents are a type of property: the right to exclude

Permanent injunctions

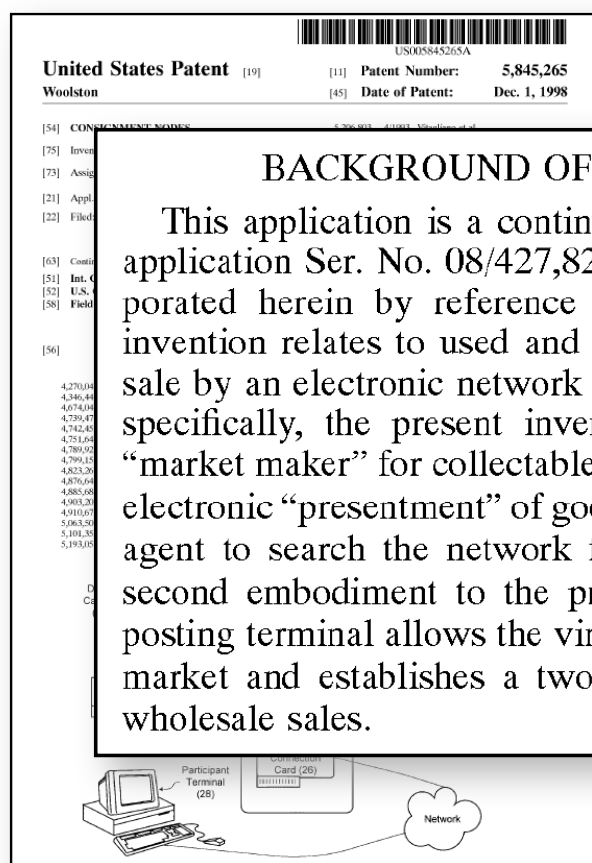
eBay v. MercExchange

- eBay: online auctions
- MercExchange: online consignment system



U.S. Patent No. 5,845,265

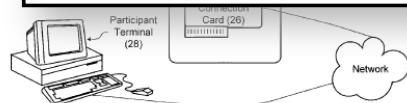
→ "Consignment nodes"



U.S. Patent No. 5,845,265

BACKGROUND OF THE INVENTION

This application is a continuation in part of U.S. patent application Ser. No. 08/427,820 filed Apr. 26, 1995, incorporated herein by reference in its entirety. The present invention relates to used and collectible goods offered for sale by an electronic network of consignment stores. More specifically, the present invention may be an electronic "market maker" for collectable and used goods, a means for electronic "presentment" of goods for sale, and an electronic agent to search the network for hard to find goods. In a second embodiment to the present invention, a low cost posting terminal allows the virtual presentment of goods to market and establishes a two tiered market of retail and wholesale sales.

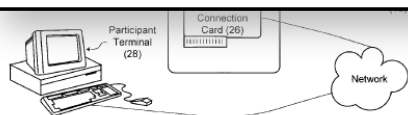


[57]

ABSTRACT

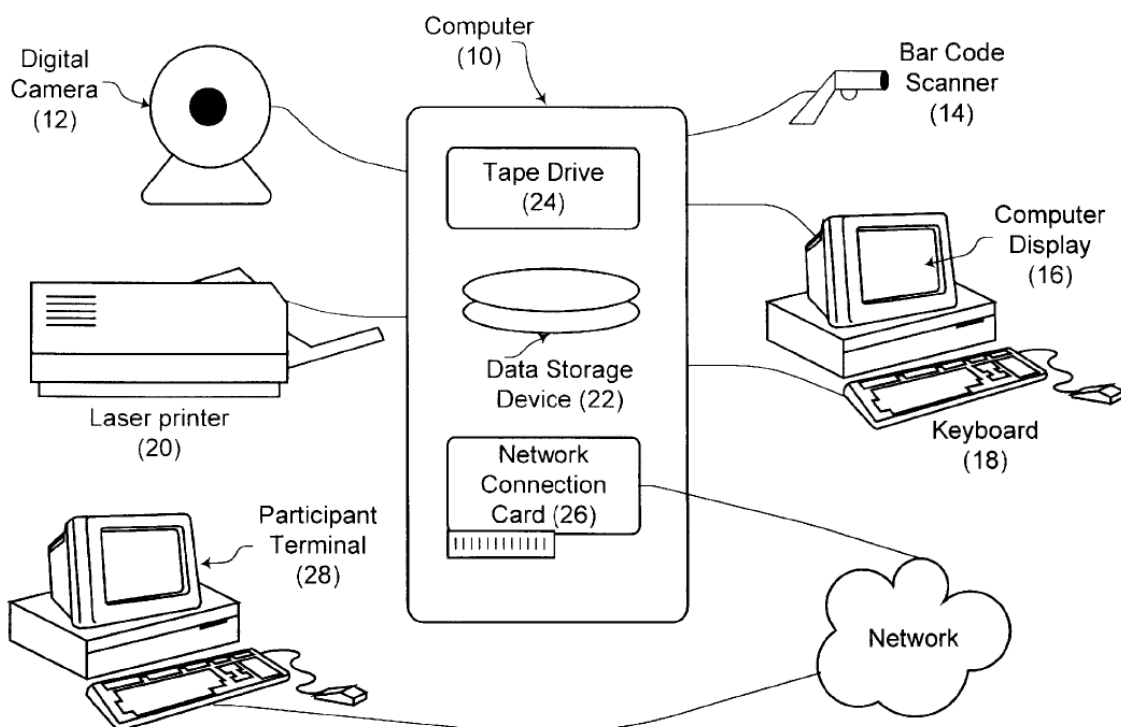
[51]
[52]
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[56]

A method and apparatus for creating a computerized market for used and collectible goods by use of a plurality of low cost posting terminals and a market maker computer in a legal framework that establishes a bailee relationship and consignment contract with a purchaser of a good at the market maker computer that allows the purchaser to change the price of the good once the purchaser has purchased the good thereby to allow the purchaser to speculate on the price of collectibles in an electronic market for used goods while assuring the safe and trusted physical possession of a good with a vetted bailee.



US005845265A

U.S. Patent



United States Patent
Woolston

[19]

[11]

Patent Number: **5,845,265**

[45]

Date of Patent: **Dec. 1, 1998**



US005845265A

[54] **CONSIGNMENT NODES**

[75] Inventor: **Thomas G. Woolston, Arlington, Va.**
[73] Assignee: **MercExchange, L.L.C., Alexandria, Va.**

5,200,803 4/1993 Vitagliano et al.
5,235,680 8/1993 Bijnagte
5,237,500 8/1993 Pegg et al.
5,239,462 8/1993 Jones et al.
5,262,942 11/1993 Earle
6,284,234 3/2000 Lohndorf et al.

U.S. Patent **No. 5,845,265**

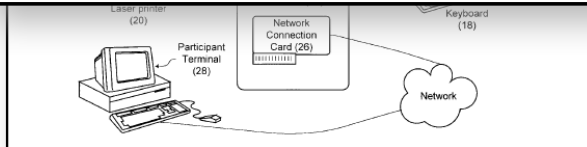
Therefore, I claim:

1. A system for presenting a data record of a good for sale to a market for goods, said market for goods having an interface to a wide area communication network for presenting and offering goods for sale to a purchaser, a payment clearing means for processing a purchase request from said purchaser, a database means for storing and tracking said data record of said good for sale, a communications means for communicating with said system to accept said data record of said good and a payment means for transferring funds to a user of said system, said system comprising:

- a digital image means for creating a digital image of a good for sale;
- a user interface for receiving textual information from a user;
- a bar code scanner;
- a bar code printer;
- a storage device;

a communications means for communicating with the market; and

a computer locally connected to said digital image means, said user interface, said bar code scanner, said bar code printer, said storage device and said communications means, said computer adapted to receive said digital image of said good for sale from said digital image means, generate a data record of said good for sale, incorporate said digital image of said good for sale into said data record, receive a textual description of said good for sale from said user interface, store said data record on said storage device, transfer said data record to the market for goods via said communications means and receive a tracking number for said good for sale from the market for goods via said communications means, store said tracking number from the market for goods in said data record on said storage device and printing a bar code from said tracking number on said bar code printer.



eBay v. MercExchange

→ Is this patentable subject matter?

eBay v. MercExchange

→ Is this patentable subject matter?

- Abstract idea (?): “an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants”
- Other elements: computer; scanner; &c
- Under *Bilski* and *Alice*, MercExchange has problems

eBay v. MercExchange

→ A bit of history

- Historically, there were courts of equity and courts of law
- Courts of law applied statutes and could award damages
- Courts of equity applied principles of substantial justice and could order non-money forms of relief

eBay v. MercExchange

→ A bit of history

- The difference was abolished in the federal courts in 1938
- Vestiges persist
- One big difference: the decisions judges and juries can make

eBay v. MercExchange

→ Injunctions: the general rule of equity balances four factors

- Irreparable harm
- Inadequacy of money damages
- Balance of the hardships
- Public interest

eBay v. MercExchange

→ So how does this apply to [patent law](#)?

eBay v. MercExchange

→ So how does this apply to [patent law](#)?

- Court: the normal rules of equity apply
- Even though patents are property

eBay v. MercExchange

→ So how does this apply to patent law?

- Court: the normal rules of equity apply
- Even though patents are property
- The existence of a right does not necessarily correlate to the remedy
- Note: copyright is also a property right, and the four-factor test applies

eBay v. MercExchange

- Dueling concurrences!
- Roberts/Scalia/Ginsburg?

eBay v. MercExchange

- Dueling concurrences!
- Roberts/Scalia/Ginsburg?
 - Don't want to disrupt the patent system
 - First factor: Irreparable harm is likely given the difficulty of protecting a right to exclude through money damages
 - Fourth factor: Strong public interest in patent incentives

eBay v. MercExchange

- Dueling concurrences!
- Kennedy/Stevens/Souter/Breyer?

eBay v. MercExchange

- Dueling concurrences!
- Kennedy/Stevens/Souter/Breyer?
 - History is useful, but only to a point; patents are economically different now
 - Patent trolls exploit asymmetric bargaining power
 - Royalties may be perfectly adequate to compensate non-practicing entities

eBay v. MercExchange

- Dueling concurrences!
- Kennedy/Stevens/Souter/Breyer?
 - This was relatively early in the concern about patent trolls/the patent system
 - The opinion presaged arguments about anticommons and patent thickets
 - “When the patented invention is but a small component of the product...”

eBay v. MercExchange

→ Why have injunctive relief at all?

eBay v. MercExchange

→ Why have injunctive relief at all?

- Property is property
- It's hard to value patent rights
- Injunctions force the parties to come to a market value
- This is the debate between property rules and liability rules

eBay v. MercExchange

- Injunction: property rule
 - Best when valuation is hard
- Damages: liability rule
 - Best when transaction costs are high
 - Many parties
 - Sunk costs
 - Holdup problem

eBay v. MercExchange

- Injunctions after eBay
 - The most important factor: irreparable harm
 - Whether plaintiff and defendant are competitors
 - Whether plaintiff has lost sales
 - How many competitors there are
 - How important a component of the defendant's product the patented component is
 - Whether plaintiff has licensed other companies
 - Whether plaintiff has delayed bringing suit

eBay v. MercExchange

→ What counts toward the public interest?

eBay v. MercExchange

- What counts toward the public interest?
- Harm to the sanctity of property rights?
 - Harm to the American consumer?
 - Harm to the infringing firm and its workers?
 - Harm to the incentives created by the patent system?
 - Harm to the government / national security?
 - Harm to the public health?
 - Harm to Congress's access to Blackberries?

eBay v. MercExchange

→ Private responses to injunctions

- Cross-licensing
- Patent pools
- Standards-setting organizations
- RAND (reasonable and non-discriminatory) licensing

Tech versus pharma

→ The technology industry has largely supported patent reform and narrower patent rights

- Ethos of open innovation
- Hundreds of patents covering any given product
- High degree of holdup
- Low ratio of innovation costs to copying costs

→ The pharmaceutical industry has largely supported strong patent rights

- Small number of very valuable patents
- Low degree of holdup
- Very high ratio of innovation costs to copying costs

Preliminary injunctions

Preliminary injunctions

- Patent litigation takes a long time
- Patents give a right to exclude
- So sometimes the court will enforce that right to exclude while the litigation is still pending

→ “Method and system for placing a purchase order via a communications network”

[illegible]

→ "Method and

Amazon.com v. Barnesandnoble.com

→ Equitable factors for preliminary injunctions:

- Likelihood of success on the merits
- Possibility of irreparable harm absent an injunction
- Balance of hardships on both sides
- Public interest

Same as with
permanent injunctions

Amazon.com v. Barnesandnoble.com

→ Equitable factors for preliminary injunctions:

Unique to
preliminary injunctions

- Likelihood of success on the merits
- Possibility of irreparable harm absent an injunction
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Same as with
permanent injunctions

Amazon.com v. Barnesandnoble.com

- Equitable factors for preliminary injunctions:
- Most important factors**
- Likelihood of success on the merits
 - Possibility of irreparable harm absent an injunction
 - Balance of hardships on both sides
 - Public interest

Amazon.com v. Barnesandnoble.com

- What's necessary to succeed on the merits?

Amazon.com v. Barnesandnoble.com

→ What's necessary to succeed on the merits?

- A valid patent
- That is infringed
- (Also, lack of inequitable conduct)
- (Also, lack of license)
- (&c)

Amazon.com v. Barnesandnoble.com

→ So a patent holder must show that it is likely to succeed on both

- Validity and
- Infringement

→ "Likely" implies flexibility

- Certainty of proof required
- Degree of evidence required

Amazon.com v. Barnesandnoble.com

→ Was Amazon likely to succeed on infringement?

Amazon.com v. Barnesandnoble.com

→ Was Amazon likely to succeed on infringement?

- Yup
- The bn.com system worked essentially the same way

Amazon.com v. Barnesandnoble.com

→ Was Amazon likely to succeed on invalidity?

Amazon.com v. Barnesandnoble.com

→ Was Amazon likely to succeed on invalidity?

- Nope
- CompuServe prior art was strong prior art, even if not every element was clearly disclosed

Amazon.com v. Barnesandnoble.com

- Would Amazon have been likely to succeed on § 101 (assuming current law)?

Amazon.com v. Barnesandnoble.com

- Would Amazon have been likely to succeed on § 101 (assuming current law)?
- Probably not – bn.com has a strong *Alice* argument
 - *But*, no need to decide that on a preliminary injunction – it doesn't require discovery



Next time

Next time

→ Remedies: damages