

# **Bear Market For Trading Software: Patents Subject To CBM Found To Be Directed To Ineligible Subject Matter**

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Addressing the standard for qualifying as a covered business method (CBM) patent and the procedure for analyzing the claims of such patents under 35 USC § 101, the US Court of Appeals found that the challenged claims were subject to CBM review because they were directed to a financial trading method and not a technological invention. [\*Trading Techs. Int'l, Inc. v. IBG LLC\*](#), Case Nos. 17-2257, -2621, 18-1063 (Fed. Cir. Apr. 18, 2019) (Moore, J); *Trading Techs. Int'l, Inc. v. IBG LLC*, Case No. 17-2323 (Fed. Cir. Apr. 30, 2019) (Moore, J).

Trading Technologies owns four patents relating to graphical user interfaces for electronic trading. The patent claims at issue fell into three groups:

- Trend claims, which allow a remote trader to view trends in trading orders for an item in an easy to see and interpret format
- Market depth claims, which provide for fast and accurate execution of trades by displaying market depth on a vertical or horizontal axis that fluctuates in various up, down, left or right directions as market prices fluctuate
- P&L claims, which are directed to methods for displaying profit and loss calculations alongside an electronic exchange datafeed shown in a trading screen

IBG challenged each of the four patents at the Patent Trial and Appeal Board (PTAB), arguing that the patent claims were subject to CBM review and were directed to patent ineligible subject matter under 35 USC § 101. The PTAB found that each challenged patent qualified as a CBM patent and that each of the challenged claims was invalid under § 101. Trading Technologies appealed.

On appeal, the Federal Circuit first analyzed whether the challenged patents were properly categorized as CBM patents. Under AIA § 18(d)(1), a CBM patent is “a patent that claims a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service, except that the term does not include patents for technological inventions.” The Court found that the requisite analysis required the PTAB (in the context of a financial product or service claim) to determine (1) whether the claimed subject matter as a whole recites a technological feature that is novel and unobvious over the prior art, and (2) whether the claimed subject matter solves a technical problem using a technical solution. Here, the Court found that each challenged patent was CBM eligible because each was directed to the

practice, administration or management of a financial product or service, and the claimed subject matter did not solve a technical problem, but instead “focused on improving the trader, not the functioning of the computer.”

Having found the claims CBM eligible, the Federal Circuit next turned to the *Alice/Mayo* two-step analysis for subject matter eligibility under §101. For the trend and market depth claims, the Court found the claims directed to the abstract idea of collecting and displaying information, relying on admissions in the specification that the information displayed was readily available to “market makers.” The fact that a trader could place an order based on the displayed information did not remedy the claims, as “add[ing] a degree of particularity” does not affect the step one analysis.

The P&L claims were similarly situated, as the specification admitted that there are numerous ways to calculate P&L, all of which “one of ordinary skill in the art would recognize.” The Court reiterated that “mere automation of manual processes . . . does not constitute a patentable improvement in computer technology.” At step two of the analysis, the Court found no additional inventive concept in any of the claimed technologies, elaborating that “receiving market information is simply routine data gathering, and displaying information . . . is well understood, routine, conventional activity that does not add something significantly more to the abstract idea.”

**Practice Note:** These two meetings within the space of a month are not the only time these entities have faced off at the Federal Circuit. The Federal Circuit recently denied IBG’s request for rehearing *en banc* where the Court held that certain of Trading Technologies’ patents were not subject to CBM review. *IBC LLC v. Trading Techs. Int’l, Inc.*, Case Nos. 17-1732, -1766, -1769 (Fed. Cir. Apr. 30, 2019). Trading Technologies was quick to reference these cases, claiming that the patents in dispute describe similar technology that was held patent eligible in the previous appearance before the Court. The Federal Circuit dismissed this argument, reminding appellant that “[e]ligibility depends on what is claimed, not all that is disclosed in the specification.”

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