

metamedia

if the medium is the message, what is the metamedium?

FEBRUARY 26, 2008

Blackboard's Possibly Pyrrhic Victory

Word has spread around the Higher Education world in the last day or two that Blackboard "won" its patent infringement lawsuit against competitor Desire2Learn (D2L) (1, 2, 3, 4, 5).

But did they? When the score is 35-9 and the team with the nine is called the "Winner" by the corporate media, I question that. And the score is 35-9 because originally there were 44 infringement claims, 35 of which were dismissed by the court on August 4th, 2007, the so-called Markman decision.

What is the difference between the 35 and the 9? What exactly do those nine claims cover? I asked that question this morning of some colleagues and no one was really sure. So this post is some quick afternoon research about the issue.

The Claims

Here are two sites that give a "plain English" translation of the original claims.

- [Michael Feldstein's The Bb Patent Claims](#)
- [No Education Patents wiki site](#)

Clearly the first 35 claims are all based on one basic claim, the first, that Blackboard's patent covered access control of files by role. These claims were dismissed as too general and vague. Or according to D2L's (August 4th, 2007 entry) description:

The more significant, immediate result is that the Court found the "Means for assigning a level of access to and control of each data file based on a user of the system's predetermined role in a course," a "means-plus-function" term, to be indefinite.

The Second Set of Claims

Claims 36 to 44 however are a much more specific version of that general claim. Claim 36 is the key one, the others being elaborations of it. The summary from claim 36 is that:

The system makes it possible to (a) check to see that a user has a valid login, (b) generate an appropriate course shell on the server, including the ability to set access privileges on the pages in the course, (c) assign the role of "student" to some users and have predetermined access privileges go along with that role, and (d) assign some role other than "student" (e.g., "instructor") to some users and have different pre-determined access privileges go along with that role.

In other words, they are claiming that the patent they hold currently covers a system that does all these four things:

- a. Check to see there is a valid login
 - it is not open or anonymous like web pages
- b. Generate a course shell on the server
 - It is for courses specifically, not other types of groups
 - It generates a standard interface structure for a specific course, the shell
 - this shell contains objects called pages which can have access controls on them
 - this happens not on the desktop, local computer but on a server over a network
- c. Assigns a specific role called "Student" with specific access privileges
- d. Likewise for an Instructor role

As you can see from this list, every CMS/LMS system is going to have these features: they are essential to it.

Part a: Authentication

Without authentication, you cannot reliably match class enrollments with CMS/LMS access, which among other issues, will invalidate the use of any materials under fair use. Courses are closed on a CMS/LMS for many of the same reasons the physical classroom is limited to enrollees.

Part b: The Shell

This section of the claim is interesting because it is not about "look and feel" or interface, except to the degree that there is an interface which provides a "shell" for a course. It is a claim about CMS/LMS organizational function rather than what particular content functions are available. Inherent in the claim is that any type of pre-existing standardized look/feel/functionality that is given is the shell for the course: what functions and features it has may vary.

The only specific function the shell must provide in this definition is some sort of access privileges to content.

To give a comparison, in a blog, the equivalent would be "the post." Imagine that someone had patented the notion of "the post," a system of reverse chronological entries online, where the roles of "Reader" and "Author" have different privileges.

Parts c and d: Student and Instructor Roles

These two parts of the claim are specific versions of the invalidated claim to general roles with permission privileges. The patent says Blackboard invented the specific roles of Student and Instructor in an online course and that they have predefined, differing privilege roles. Once again, as in part b, the claim is foundational - it does not matter what specific privileges such roles might have in any particular version of a CMS/LMS, but just that those two roles do have distinct privileges.

Conclusion?

I find it rather hard to imagine a CMS/LMS that does not have those four components. Take away authentication, a predefined shell, and reduce student and teacher privileges to the same role, and you have... what? A web page?

The definition is so generic, that, except for the fact that it's connected to an analog classroom course and the specific words "Student" and "Instructor" occur, it would apply to most online multi user software: Usenet, BBS systems, forums, blogs, wikis, and practically all social software, as well as document management software, all of which have authentication, a shell, and named roles with predefined privileges.

And that is why Blackboard is so happy -- though the score was 35-9, they won the key point.

"We won on every count," he said. "Yes we could have won more money, but we're perfectly happy with the verdict.

So, the short answer is yes, Blackboard did win, for the law is not a sport of equal point accumulation like baseball or cricket, but is rather more like Quidditch: though distinctly behind on Quaffle points, Blackboard captured the Snitch and won the match.

Of course, all this only preliminary, based on the claims and reading the charge to the jury. When the detailed ruling comes out, we will know more.

Slinging FUD

So far the legal issues, but many in higher education have decried Blackboard's behavior as more than normal intellectual property protection, but as predatory and detrimental to education. There are some important moral issues here, but Blackboard is clearly not interested in those, though it did attempt to appease critics with its "Pledge" not to enforce its patent claims against Open Source providers or end users, though that has been criticized too.

The question is: will this translate into a business issue ? Will customers abandon Blackboard over this issue ? So far the answer is 'not yet,' or at least, 'not for this alone.'

The Next Move

A good summation of the situation is that provided in the Sakai Foundation response:

This jury verdict is not a judgment that Blackboard holds a valid patent. It is an initial verdict that D2L infringed on the Blackboard patent. As such, the verdict is not that surprising. The Sakai Foundation continues to believe that the Blackboard patent should not have been awarded in the first place.

In fact, I would go farther and say that the jury made the correct legal decision. Given the patent, and the description of claim 36 and following above, Desire2Learn did clearly infringe. And so does almost every other CMS/LMS under the sun.

And that is why the real issue is yet to be decided: is the Blackboard patent valid?

And that will depend on the pending re-examination of the patent by the US Patent and Trademark Office.

If the Blackboard patent is invalidated, then the interim result will be that the Blackboard business strategy to sling marketing FUD and litigate will have caused D2L to have wasted time and money having to litigate and maybe recode, but that's all: CMS/LMS products will go on substantially as they are.

But if the Blackboard patent is upheld as valid, then it would mean that Blackboard would own the CMS/LMS as we know it.

It would mean that it will have completed its business strategy of eliminating its closest commercial competitors with a one-two punch: the buyout of WebCT (1, 2, 3, 4) and the patent litigation against D2L.

It would move from dominant to sole provider of CMS/LMS systems in the United States, with a legally enforceable commercial monopoly. It could impose licensing fees on competitors or even halt the use of all other CMS/LMS products in use in the United States today, including Open Source products. For only the naive would expect the so-called Blackboard pledge to hold or even retain any relevance in such a situation. (For more on Blackboard's business strategy, read Jim Farmer's analysis.)

The legally conservative American universities that founded the Sakai project will surely not contest Blackboard openly, but rather reach some accommodation with it.

And Blackboard's next move for a monopoly position, now that it has tamed its major commercial competitor (not incidentally a Canadian company) is the just announced major expansion into the Australian market, the homeland of the other major Open Source competitor, Moodle.

So, a lot depends on the fate of the pending patent re-examination.

The future of Learning Management Systems software in the United States will be decided not by educators or learners, not by the commercial market or school administrators, not even by a jury of our peers.

It will be decided by a single patent examiner.

Sources:

- [Desire2Learn Patent Info Blog \(Um, D2L, real blogs have permalinks.\)](#)
- [Blackboard Patent Site](#)
- [Michael Feldstein's Bb Patent Claims in Plain English](#)
- [And his continuing excellent coverage of the whole affair](#)
- [No Education Patents wiki site](#)
- [Stephen Downes accumulated BB Patent page](#)
- [Alfred Essa at The Nose](#)
- [Sakai Project response](#)
- [Google Financials for Blackboard](#)

Posted on February 26, 2008 in LMS | [Permalink](#) | [Comments \(2\)](#) | [TrackBack \(0\)](#)

Technorati Tags: [axisofevil](#), [blackboard](#), [CMS](#), [copyright](#), [D2L](#), [LMS](#)

Comments

Just wanted to thank you for an awesome breakdown of the issues, and a great list of resources. It is nice to have a clearer sense of the issues, especially given how germane it is to edtech more generally, even if we don't want to acknowledge it as such.

Posted by: Jim | February 27, 2008 at 10:29 AM

Jim,

Thanks for the positive comment. Glad the post is useful -- thank Bryan Alexander for spurring me on to blog it !

Randy

Posted by: Randy Thornton | February 27, 2008 at 01:57 PM