Can you claim a web page without claiming a method or apparatus for making or displaying it? If so, why would you want to do that? If you have not asked these questions, you may be missing out on enormous opportunities.

It is possible to obtain claims that cover a web page itself, resulting in a large expansion of the scope of the patent. Patent drafters must, however, be careful to avoid the "nonfunctional descriptive material" rejection that is becoming increasingly popular among examiners at the PTO.

Article of Manufacture
Claim format is very important for e-commerce patents. Besides the traditional statute-based formats, such as apparatus (machine) and method (process), patent drafters should not ignore the article of manufacture format. Since e-commerce systems normally do not utilize floppy disks, CD-ROMs or other traditional recordable media, many patent drafters ignore the article of manufacture format. It is well settled, however, that an article of manufacture can include a hard drive, or even a carrier wave "signal" carrying the web page data. Consequently, the article of manufacture format can be used to claim the web page itself.

This type of article of manufacture claim is generally directed to particular information embodied in an article of manufacture so that any party who uses (generates, transmits, or receives) signals that include the information will directly infringe the claim. This might be the only claim that certain types of parties will directly infringe, such as telecommunications infrastructure and Internet service providers. While it may be only a matter of time before those parties realize and react to their need for statutory patent immunity for simply storing and forwarding patented content, similar to that established for copyright infringement under Title II of The Digital Millennium Copyright Act of 1998, such immunity does not yet exist.

In addition, signal claims could also assist in preventing competitors from avoiding U.S. patents by locating servers offshore. Under 35 U.S.C. § 271(g), products imported into the U.S. made from patented methods practiced abroad are deemed infringements. Unfortunately, it is not clear that the courts will deem data to be a "product" and that transmission of that data into the U.S. is an "importation" under the statute. (This uncertainty is evidenced by the American Bar Association Intellectual Property Law Section's recent passage of a resolution affirming such an interpretation.) Thus, one should include article of manufacture claims to increase the chances that the data will be considered a product.

Nonfunctional Descriptive Material
Unfortunately, examiners at the PTO have begun broadly applying the "nonfunctional
descriptive material" rejection to these types of claims. According to M.P.E.P. 2106(IV)(B)(1), nonfunctional data on recordable media is not statutory subject matter under 35 U.S.C. § 101. Generally, "nonfunctional descriptive material" is said to include, but is not limited to, music, literary works and a compilation or mere arrangement of data.

While descriptive material is nonstatutory when claimed as descriptive material per se, when functional descriptive material is recorded on some computer-readable medium it becomes structurally and functionally interrelated to the medium and will be statutory in most cases. The MPEP states, however, that "when nonfunctional descriptive material is recorded on some computer-readable medium, it is not structurally and functionally interrelated to the medium but is merely carried by the medium. Merely claiming nonfunctional descriptive material stored in a computer-readable medium does not make it statutory. Such a result would exalt form over substance. ... Thus, nonstatutory music does not become statutory by merely recording it on a compact disk. Protection for this type of work is provided under the copyright law."

Applying this standard to web pages is difficult. Web pages are generally coded according to a hypertext markup language (HTML) that provides for basic document formatting of text and images. While active coding, such as JavaScript, may be included in the web pages, the majority of web page content is marked up text. One difficulty in applying the "nonfunctional descriptive material" standard is determining which types of HTML markings are "functional" under this standard. For example, would a hyperlink be considered functional? Would a "table" or "bold" tag be considered functional? Each of these tags designates different functions to be performed by a web browser interpreting the HTML coding.

The MPEP further states:
Where certain types of descriptive material, such as music, literature, art, photographs and mere arrangements or compilations of facts or data, are merely stored so as to be read or outputted by a computer without creating any functional interrelationship, either as part of the stored data or as part of the computing processes performed by the computer, then such descriptive material alone does not impart functionality either to the data as so structured, or to the computer. Such "descriptive material" is not a process, machine, manufacture or composition of matter. (Data consists of facts, which become information when they are seen in context and convey meaning to people. Computers process data without any understanding of what that data represents. Computer Dictionary 210 (Microsoft Press, 2d ed. 1994).)

The policy that precludes the patenting of nonfunctional descriptive material would be easily frustrated if the same descriptive material could be patented when claimed as an article of manufacture. For example, music is commonly sold to consumers in the format of a compact disc. In such cases, the known compact disc acts as nothing more than a carrier for nonfunctional descriptive material. The purely nonfunctional descriptive material cannot alone provide the practical application for the manufacture.

Some people may argue that some web pages are patentable purely because of the content that they provide. However, according to one interpretation of the above standard, such web pages could not be patentable in and of themselves. This standard, therefore, may unnecessarily exclude certain types of web pages. For example, if a web page provides information that
somehow helps cure clinical depression when merely read by a user, preventing the patenting of the web page itself would be akin to preventing a drug company from patenting a drug itself, which would not make sense.

One approach to avoiding the nonfunctional descriptive material rejection includes incorporating functional nomenclature into the article of manufacture claims. Patent drafters may include phrases that underscore the functional character of the data, such as pointing out that the data "is functionally related to the computer-readable medium such that" the claimed result is accomplished.

In sum, prudent patent drafters should ordinarily draft claims directed to web pages themselves. Not only might this expand the scope of potential direct infringers, it may also deter offshore infringements. But patent drafters should plan for the nonfunctional descriptive material rejection.