Opinion

Should India and Other Countries Adopt the American ‘Business Methods’ Class of Patents?

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Decidedly NO!

America itself, indeed, would be better off dropping ‘business methods’ as a so-called class of patentable ‘invention.’

Let us first examine how the United States suddenly in 1998 enlarged its classes of patentable ‘invention’ to include methods of doing business. It was not an enactment by the Congress amending the 200-year-old patent statute in order specifically to add this class of patentable ‘invention.’ The United States Constitution had empowered the Congress to define patentable invention so as to promote the ‘progress of… useful arts.’ It was, rather, judge-made law—indeed an out-of-the blue fiat of the United States Court of Appeals for the Federal Circuit, which is the US Patent Appeals Court—in a patent infringement appeal known as the State Street case. It was apparently a deliberate effort to respond to the comment of the United States Supreme Court in an earlier case that anything ‘under the sun’ that man created and that was not in nature, was at least theoretically patentable. The Appeals Court judges took it upon themselves to be avant garde and show their personal perspicacity as to twenty-first century foresight. After all, was not the ‘dot.com’ era engulfing us, and should not our laws be now interpreted to keep pace?

This, however, appears to have a flimsy basis in both American history and American law. Just the fiat that ‘business methods’ are patentable, because the Supreme Court has, in theory, expanded our world to the ‘sun’ seems highly tenuous at best. Particularly, because when every one of the judges of the Patent Court attended law school (and their predecessors on the Court of Customs and Patent Appeals as well), it was universally well accepted that methods of doing business were not a patentable class of invention – and for very good reason.

The authoritative textbook ‘Walker on Patents’ and its updates, used by all law schools since the late 1980’s and consistently through the last century, made very plain that ‘business’ and ‘finance’ were not a ‘useful art’ – as the word ‘art’ was defined in Colonial times and earlier in Europe (we call it ‘technology’ today). That is, before State Street rewrote the accepted dictionary and historical definition of the words ‘useful arts’.

The implication in State Street, moreover, that ‘business methods’ were always a patentable class – the rationale for that decision – just simply is not true, as Walker and a century or more of Court decisions discussed therein attest.

With this windfall of prospective new law business, however, the American bar was not disposed to look a ‘gift horse in the mouth.’ Rather, the bar has readily and hungrily accepted this newly invented ‘fiction’ – as if centuries of their forebears and prior legal scholars and judges over the past two centuries have all been ignorant – that is, up until the great ‘insights’ of State Street.

I wonder whether James Madison--the author of the Constitutional provision for patents--is laughing at us in disbelief, or more likely, turning over in his grave. It is a preposterous pretense that ‘monopoly’ incentives to do business and to do finance and accounting were even remotely what he and all the other founders of the Constitution had in mind for encouragement and early-year entrepreneurial protection with their quite specific words ‘useful arts,’ ‘inventors’ and ‘discoveries’ in their carefully drafted constitutional patent clause!

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The past two centuries have, indeed, well proven that neither the United States nor any other country of the world needed in the slightest any business method ‘monopolies’ for incentivizing, establishing, encouraging or nurturing businesses and financing.

And what about India and the other countries of Asia and Europe and of the rest of the world? Not one of them currently extends their patentable classes to embrace methods of doing business – so the United States has thus now deliberately placed itself strikingly further out of ‘harmony’ with the rest of the world.

In fact, the 1623 Statute of Monopolies in English law was deliberately drafted to prevent such abuses with ‘patents’ on anything other than the arts of new technology – and so the Statute uses words to express this exception for a patent grant as embracing only ‘working or making of any manner of new manufacture…to the true and first inventor and inventors of such manufactures…’

It has been well accepted that both the Indian and American laws of patents come directly from this special limited exception. In the US patent law, we continued from the very start in using this very word ‘manufacture,’ and added a process, a machine, a composition of matter or a material. How any of these can be seriously now re-interpreted to mean business and finances and accounting, almost defies credibility. And as late as the US Patent Act of 1952, there was added to the meaning of ‘process,’ a ‘new use of a known process, machine, manufacture, a composition of matter or material.’

There is not the slightest historical basis for patenting just a method of doing business or financial accounting or the like; and it is this flood of applications in this area that is now helping swamp the US Patent and Trademark Office (USPTO).

In the public policy interest, and in the light of our proven record of over two centuries that patent ‘monopolies’ are just not needed to incentivize the risk-taking of doing business or accounting (indeed there were none), I am urging that Congress promptly delete these classes of activity from any ‘monopoly’ eligibility under American patent law.

America can then come closer to a feature of ‘harmonization’ with the rest of the world; and, with the very same stone eliminate an estimated almost hundred thousand applications that are part of the current USPTO backlog.

I further urge India and the rest of the world to continue with their excellent good judgment in rejecting any such new class of so-called ‘invention’.

References
1 Article I, Section 8, United States Constitution.
2 State Street Bank & Trust Company v Signature Financial Group Inc, 149 F 3d 1368 (Fed Cir 1998).
5 Statute of Monopolies, 21 Jac, I, C 3 (1623).