

Business Method Patents in India
– Or is that a contradiction in terms?

Business methods were historically unpatentable until the late 1990's and then that position changed rather dramatically, most famously with the 1998 US Court of Appeals for the Federal Circuit decision in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* This happened, notably, through judicial interpretation and not by legislative intervention. Whereas this gave way, soon, to a torrent of business method patent filings before the USPTO, the backlash it created was felt far more strongly in other countries. In India, the 1970 Act, as amended up to 1999, had not provided one way or the other - which means that business method patents were, at least in theory, available to be granted. But the amendment of 2002 changed all that and how. Act 38 of 2002, viz. The Patents (Amendment) Act, 2002, with effect from May 20, 2003 specifically declared 'a mathematical or business method or a computer programme per se or algorithms, as not being an 'invention' within the meaning of the patent statute. Since inventiveness, along with novelty and usefulness are the three basic requirements of patentability, this legislative dictat appears clearly in one fell stroke choked any aspirational

tendencies on the part of any Patent Controller or Court to statutorily grant or judicially recognize a business method patent. Or has it?

Had it not been for this newly inserted clause (k) of Section 3, the matter would have been really up for grabs. The statutory definitions of 'invention' and 'inventive step' are pretty general and would, but for Section 3 (k), have covered a suitable business method. Section 2 (j), even as amended by the same amending Act of 2002, defines an invention as meaning a new product or process involving an inventive step and capable of industrial application. Section 2 (ja) also inserted by that very amendment, defines an inventive step as meaning a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.

A large number of business method patents are, in the meanwhile, being filed in India. Most are by way of national phase of PCT applications. Unsurprisingly, they are mostly framed as patents for this or that 'architecture.' It is well known that a good 4-5 years of the patent's 20

year monopoly period could possibly get taken up in the process of sealing and grant. During this period, there is no protection of infringement. Besides, the Doha round and its TRIPS review as also measures for further strengthening IPR's including patents are themselves open questions as of today. Further, as anywhere else in the world, much of the debate on the subject critically turns on the resources and talent of Patent Offices who have to scrutinize novelty claims over what exists as a part of the state of the art. In the area of software type business method patents, 4-5 years in which even filed for patents stay undisclosed and hence not a part of the state of art (assuming novelty), are an entire epoch in which the entire state of the art can get redrawn. What all this entails is that it is anybody's guess as to how these business method patents being filed in India for will actually eventually be decided.

One thing is certain though. The gamut of business method patents including automation patents and software patents are assuming critical importance to the country's burgeoning computer software industry. As a practical matter, there is little enforcement of software programs, algorithms or source codes although there are some instances of courts taking action where this is portrayed as a copyright violation case. For

copyright infringement, of course, it is the particular expression and not the idea that is significant in terms of doctrine. If business method patents were to be granted and brought to courts for enforcement, it will radically alter the structure of the industry. An increasingly large number of internet tools and web enabled and web based business method patents being filed in the US are by businesses that are controlled by or back-ended by Indians. They know only too well the ease back in India of duplication and replication. For them, patent protection must need include India as a designated country and the application be pursued in India for whatever it is worth.

Last month, on March 23, 2005, the Indian Parliament at the last moment cleared the third post TRIPS amendment to its patent statute. This, the Patents (Amendment) Act, 2005 had generated some talk of a possible amendment to create some kind of a window for business method patents – possibly just algorithms or methods having technical applications. Open Source fans had vented much opposition to such a move but, and strikingly, the leading national software industry association, NASSCOM was reported to have supported it. As it happens, this fell through and only time will tell how it goes in the future. Given the enormous flux in

almost all aspects of India's patent laws, it would be unwise to assume that there is no possibility of business method patents being granted, even from amongst current filings.

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