ISSN: 2582-6433

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed6th Edition

VOLUME 2 ISSUE 7

 ISSN: 2582-6433

DISCLAIMER

ISSN: 2582-6433

EDITORIAL TEAM

EDITORS

Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

ISSN: 2582-6433

Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC - NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.

Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international

ISSN: 2582-6433

seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

ISSN: 2582-6433

TRACKING THE TRAJECTORY OF BUSINESS METHOD PATENTS

Authored By- *Rupal Nayal*

ABSTRACT:

Business Methods belong to a category of patents whose inclusion in the patentable subject matter has been a focus for a long time, with a divided verdict. Varying statutory provisions and judicial pronouncements evolving newer criteria each time has fueled the debate further. Since it is often considered to be a Siamese twin of software method, this article endeavors to discuss different aspects related to pure business methods in isolation of software patents as a combined discourse more often than not tends to focus entirely on the perspective of the latter.

Keywords: business methods; patents; software; innovation; incentive; technical

INTRODUCTION

Intellectual Property Rights (IPR) refer to the bundle of rights that are conferred on an entity for the protection of its creations that are intangible since they are a product of the human mind. Possession of these tends to give businesses an edge over others. They receive encouragement from governments since they're considered to be of public interest. However, their utility has been an intensely debated topic.

It has been advocated by the likes of utilitarians as they are believed to give rise to innovation which is a parameter for the progress of society. The only qualification is that they are subjected to a temporal limitation in order to balance out the deadweight loss suffered during the period of monopoly. Thus, the protection of intellectual assets is seen as an incentive to drive advancement.

ISSN: 2582-6433

One of the quintessential varieties of intellectual properties is patents. Patent protection is extended to certain products and processes which fulfill three preliminary conditions. The first is that it must be novel and not simply a modification of something that already exists. Therefore, it is essential for the invention to advance from the existing "prior art". In addition to this, the invention should be such so as not be to perceived as obvious to a person skilled and possessing knowledge in that field.[1] Lastly, it needs to have a utility for industrial application that can be commercialized on a large scale for public benefit at large.[2]

A patent holder is granted the rights of exclusivity, with respect to using, manufacturing, or selling the technology. In most jurisdictions, the protection period is for 20 years after which the invention is free to be used by the public, thereby eliminating the capacity of the patent holder from charging monopolistic prices as well as gate-keeping the technology. Even though the monopoly granted by patents is for a shorter time than for copyrights, but the area that it encompasses is much broader. Unlike copyrights, in case of patents, the protection is extended not merely to how a certain idea is manifested but that specific idea as well.[3]

It seeks to be a solution to the "appropriation problem". If a firm that creates the product is unable to recover the costs that were utilized during its creation by the reason of its value being appropriated by the rival competitors, then this would be a blow to such innovations in the future reducing the level to sub-optimal.[4] Thus, it seems like that under the IPR regime, it is not only the necessity but even the patent protection system which is the mother of invention.

A significant idea of protection in the patent system is that it is the society that mainly benefits from new inventions by not only bringing in new products but also giving impetus to future innovations that can be derived from the research which builds on the information that is publicly disclosed by the creators as a part of this system.

[1] The Patents Act, 1970 (Act 39 of 1970) s. 2 (ja)

[2] Richard A. Spinello, "Intellectual property rights", Vol. 25 Issue 1, Library Hi Tech, 12 – 22, (2007)

[3] S Vaidhyanathan, Intellectual Property: A Very Short Introduction 41, Oxford University Press, (2017)
[4] K W. Dam, "The economic underpinnings of patent law", Vol. 23, Journal of Legal Studies, 247 (1994)

ISSN: 2582-6433

PATENTABILITY EXCLUSION

There are some classes of subject matter which have been kept out of the ambit of being patented, irrespective of them satisfying the basic 3-criteria test. Such a mechanism seeks to prevent the patent system from cornering all aspects of human life thereby increasing non-quantifiable costs. It could lead to the practice of commodification of almost anything and everything with the aim of creating economic growth but in the process almost failing to serve the public welfare.[5]

In the USA, the legislation related to Patent Act does not make an explicit mention but the jurisprudence surrounding the patentability of subject matter developed by the courts over the years has foreclosed the following areas: "Laws of nature or Scientific principles, Abstract idea, Natural processes, and Natural products."[6]

Indian Patents Act 1970, delineates such inventions in Sections 3 and 4 of the act. Although these sections show considerable overlap with the American tradition, however, it is certainly more expansive. The statute goes ahead and specifically excludes business methods patent (BMP) (2002 amendment) from the subject matter to be patented under "Section 3 **What are not inventions**-The following are not inventions within the meaning of this Act- (k) a mathematical or **business method** or a computer programme per se or algorithms"[7] "Business Method" has been defined under the Business Method Patent Improvement Act[8] of the U.S "as a method of:

1) Administering, managing, or operating an enterprise or organization or processing financial data;

2) Any technique used in athletics, instruction or personal skills; and

[5] Dana Remus Irwin, "Paradise Lost in the Patent Law - Changing Visions of Technology in the Subject Matter Inquiry", Vol. 60 Florida Law Review, 775 (2008)

[6] Tun J Chiang, "The Rules and Standards of Patentable Subject-Matter", Vol. 6 Wisconsin Law Review, 1353-1414 (2010)

[7] Supra note 1

[8] **Business Method Patent Improvement Act of 2000, H.R 5364 106th Congress Available at https://www.govtrack.us/congress/bills/106/hr5364 Retrieved 10 November 2021.**

ISSN: 2582-6433

3) Any computer-assisted implementation of 1) or 2) above"[9]

Thus, the Business Methods Patent usually belongs to that category of patents that allow a company or economic enterprise to monopolize a "way of doing business", classified as a process patent.

Although it can't really say to be an emerging category of IPR but its relevance has been increasing with the increasing progression in technology that the world is witnessing every day and especially since a major portion of commerce shifted to the internet. But it is still one of those IPR categories that are not only lesser-known but also difficult to grasp in the first brush which can most likely be attributed to the lack of a universally agreed definition. Amazon.com, Inc. v. Barnesandnoble.com, Inc. is an oft-cited case that sufficiently captures the expression. In this case, Amazon sought to provide the users the ability to purchase the products with a "single mouse click", thus claiming the patent for "1 click Buy button".[10]

Another striking example would be the case where Priceline.com claimed a patent for its "reverse auction" service which involved an mechanism for conducting commercial transactions electronically that let the customers to set their own amount for the goods and services.[11]

In order to arrive at an understanding of which side of patentability do business methods ought to be, it is imperative to have a look at how they have fared in this regard in various jurisdictions such as the U.S.A and Europe followed by the concerns that they may raise.
Since India is standing at a threshold of a booming E-Commerce revolution and aspires to reflect values inherent in an information society based on a knowledge economy, it is necessary to revisit the need for recognizing Business Method Patents.

[9] Ibid.

[10] Amazon.com, Inc. v. Barnesandnoble.com, Inc., 239 F.3d 1343 (Fed. Cir. 2001)

[11] J A. Berkowitz, "Business Method Patents: Everybody Wants to Be a Millionaire", Vol.609 Practicing Law Institute 36 (2000).

ISSN: 2582-6433

THE LAND WHERE "ANYTHING UNDER THE SUN MADE BY MAN"[12] IS PATENTABLE

The United States of America has gained this recognition since its widely worded Section 101 of the US Patent Act, according to which "Whoever invents or discovers any new and useful process, the machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."[13] Business Methods have gone through a checkered path with regard to being patented.

One of the earliest cases that can be traced to in this domain is **Hotel Security Checking Co. v. Lorraine Co.**[14] where a patent was granted for Method and Means for Cash Registering and Account checking. The method sought to prevent theft committed by the waiters of the restaurants. But the patent was later invalidated since, in view of the court, it lacked patentability[15] since transacting business was not considered to be constituting an art. The court stated that a mere abstract idea cannot be subject to patent no matter the means. Thus, it has to be noted that this patent was not expressly struck based because of the fact that it involved a business method.

State Street Bank and Trust Company v. Signature Financial Group, Inc.[16]

This was the case that is often considered as the cradle of business method patents since it made a significant breakthrough in putting the exclusion of business method patentability to rest. In this case, the lower court had given the ruling against the validity of the patent since it claimed

[12] Diamond V. Chakrabarty, 1980 U.S Lexis 112

[13] United States Code Title 35 – Patents, Article 101

[14] **155 F. 298 (S.D.N.Y 1907)**

[15] Pol S, Janodia MD, Jagadeesh PC, Bhat KM, Udupa NJ, "Business Method Patents: A Primer", Vol.1 Journal of Young Pharmacists, 379-384 (2009)

[16] 525 U.S. 1093 (1999)

ISSN: 2582-6433

a mathematical algorithm and business method which exceptions were creation of the Judiciary. The subject involved a computer-based system which was meant to keep track of and document the flow of financial information by the administrator enabling them to calculate in order to sustain the configuration of a financial service called the "Hub & Spoke" system. This decision was reversed when appealed to Federal Circuit. The reasoning was that the enduring business method exception would amount to operating outside the legislative intent laid in the statute. The court called for throwing out the exception for being outdated. Thus, this decision opened a way forward to future business method patents, giving them the status of statutory subject matter. This ruling gave rise to a number of patent applications filed for claiming computer-based business methods.[17]

Bilski

It started with **In re Bilski**[18] which was concerned with a method that sought to hedge risks during trading commodities and options but it was rejected by the Patent examiner and later by the Board of Appeals. The Federal Circuit upheld this rejection and in the process introduced a "machine or transformation test". The Court stated that "an inventive process would be considered the patentable subject matter only if it fulfilled two conditions:

1) It is tied to a machine or apparatus
2) It transforms a particular article into a different state"[19]

This decision was appealed in **Bilski v. Kappos**[20] where the Supreme Court while upholding the rejection (patent refused on the ground of it being an 'abstract idea') stated that although the above test might be useful as an instrument for investigative analysis it could under no condition be held as the only criteria for determining patentability. Further, the Court refused to put 'Business Methods' per se under the scope of patent protection since that would be in conflict with the intent of Congress when they enacted a provision in Section 273 of the act for

[17] Jason Taketa, "The Future of Business Method Software Patents in the International Intellectual Property System", Vol.75 Southern California Law Review, 943 (2002)

[18] 88 U.S.P.Q.2d 1385 (Fed. Cir. 2008)

[19] R. David Donoghue & Michael A. Grill, "In Re Bilski: A Midpoint in the Evolution of Business Method Patents," Vol.7, Northwestern Journal of Technology and Intellectual Property 316 (2009).

[20] 130 S. Ct. 3018 (2010)

ISSN: 2582-6433

the defense of infringement of claims regarding "methods of doing or conducting business."

Alice Corp. v. CLS Bank International[21]

This case involved a patent for a scheme that sought to diminish "settlement risk i.e., the risk that only one party to an agreed-upon financial exchange will satisfy its obligation."[22] In the process, a computer system was to be used in order to enable financial commitments between two parties. The Court refused to grant the patent on the ground that "intermediated-settlement" was a long-known economic practice and was thus an abstract idea while facilitation of a transaction through a third-party was a "building block of the modern economy". Additionally, there was nothing in it which served to convert an abstract idea into something eligible to be patented. However, there is still a degree of uncertainty since the consistent application of such principles is still farfetched and in the instances where the Courts have decided to follow the above framework, those decisions have reflected inadequate reasoning.[23]

NAVIGATING THE EUROPEAN PARADIGM

Much like the Indian law, Europe makes a specific exclusion with regard to business methods under Article 52(2)(c) of the European Patent Convention, according to which, "schemes, rules, and methods for performing mental acts, playing games or doing business, and programs for computers" shall not be considered inventions in view of being new, involving an inventive step and having an industrial application.[24] However, there is no restriction on claiming patents for new and inventive computer-implemented systems for the performance of business processes as long as they meet the standard patentability criteria which include "technical

[21] 2014 U.S Lexis 4303

[22] Ibid.

[23] Michelle M. Umberger, Danielle N. Scott, "Chasing the white rabbit: Business method patents and the continued search for clarity under Alice", Perkins Coie LLP. Available at https://www.perkinscoie.com/en/news-insights/chasing-the-white-rabbit-business-method-patents-and-the.html, Retrieved November 11, 2021

[24] Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973

ISSN: 2582-6433

effect" and providing "technical contribution" to the art.[25]

Hitachi, Auction Method

This case was an appeal against denial of a patent which involved a method claim for automated auction, an apparatus claim that enabled the auction to run through a network along with a claim for a computer program.[26] The Board of Appeal was of the opinion that the method claim constituted alterations to an existing business practice whereby seeking to evade a technical problem instead of solving it by "technical means", thus could not said to be having a "technical character".

However, the decision worked to establish that a business method could be taken out of the purview of Article 52 if it is shown to be attached to a "hardware" as long as it also passes the criteria under Article 56 regarding inventive step. The test of "problem-solution" is followed under this criterion. Under this approach, firstly the prior art is considered after which a technical character having a technical effect is determined. The patent examiners then formulate the objective technical problem and ascertain the ability of the patent claim to resolve the former.

(Estimating Sales Activity / Duns Licensing Associates)

A research method was sought to be claimed that could estimate sales activity as per a specific standard with the help of reporting outlets where sales activities were correlated along with an apparatus which was that maintained inventory which was founded on the results flowing from the aforementioned method. The Board refused the method claim on the ground of it being devoid of a technical character since it did not have features of a technical system. It was of the view that merely processing information belonging to the physical world was an established business practice and an attempt to consider that as "technical" would make the exception extended to business methods under Article 52 futile.[27]

[25] Robert J. Hart, Vol.7 "Business Method Patents: Europe", International Intellectual Property Law & Policy, 12 (2002)

[26] ECLI: EP: BA: 2004: T025803.20040421

[27] ECLI: EP:BA:2006: T015404.20061115

ISSN: 2582-6433

The European system heavily relies on the technical requirement, however, the line while deciding these matters is often than not blurred. One of the primary reasons for this is rooted in the lack of a definition of what really constitutes "technical".[28]

EXAMINING THE SCENARIO IN INDIA

Even though there is an explicit bar on patenting business methods in India, there has been a steady trend whereby it is seen that inventions that are essentially business methods in substance have been successful in getting patented.

Yahoo v. Controller and Rediff is considered a landmark case in the Indian jurisprudence on Business Methods where Yahoo intended to claim a patent for a service providing users a method of selecting the most preferable space on the webpage to place the advertisement through the process of auction. The Intellectual Property Appellate Board refused to hold this invention to be patentable since they were of the view that it constituted nothing more than conducting the business of advertising via electronic means. Justice Prabha voiced the sentiment regarding the patentability of business methods in the following words: "We must place ourselves in 1998, to decide the patentability and what appears so easy and familiar today was new then. Even if we go back in time to 1998 the nature of the invention is still a method of doing business. That does not change. There are huge innovations in the computers themselves, but the invention claimed is not for the machine but for the method. From whichever point of time we look at it, it still looks to be a business method."[29]

In an empirical study[30] conducted for inspecting the business method patents, it was found that Patent No. 252951 was granted for a process which sought to govern and control the financial obligations that often occur in the domain of post-paid facilities offered by phone companies

[28] Susan J. Marsnik & Robert E. Thomas, "Drawing a Line in the Patent Subject-Matter Sands: Does Europe Provide a Solution to the Software and Business Method Patent Problem", Vol.34 Boston College International & Comparative Law Review 227 (2011).

[29] Yahoo Inc v. Assistant Controller of Patent & Design and Rediff, 2011 SCC OnLine IPAB 106

[30] A Lath and S Bhardwaj, "Business Method Patents: An Oxymoron?", 6 NUJS Law Review 121 (2013)

ISSN: 2582-6433

by the creditworthiness of the customer is determined before-hand.[31]

Another patent worth mentioning was granted to Punjab National Bank where the method related to analyzing the previous financial records of the consumer which aids in calculating the credit risk rating in order to provide an estimate about the impending projections for the client.[32]

These were pure business methods where they capitalized on well-known business practices since their primary aim was to gain business efficiency and maximize profits. Apart from this, in the context of globalization and the need for attracting FDI, there has been much clamor for India to direct its IPR policy in favor of granting patents of business methods.[33]

APPREHENSIONS SURROUNDING THE RISE OF BUSINESS METHODS

In the era preceding the period when business methods began to be recognized as a plausible category to be patented, the business methods were flourishing without any protection.[34] Another concern springs from the fact that since the patent applications are shrouded in secrecy before being actually granted, the entrepreneurs who invest money and sincere endeavors to start a business to be restricted from using the business methods they might have developed after someone else gets a patent for it rendering them subject to the requirement of getting into a licensing agreement.[35] Further, there is a possibility that the protection extended to particular business methods might lengthen the monopolistic effects by the virtue of network effects, beyond the statutory patent period.[36]

[31] Ibid. Id at 139
[32] Ibid.

[33] Paras Khurana. *India: Business Method Patents*. Intellectual Available at https://www.mondaq.com/india/patent/366752/business-method-patents Retrieved 10 November 2021
[34] Robert Patrick Merges, John Fitzgerald Duffy, Patent Law and Policy: Cases and Materials 14 Carolina Academic Press 2nd edition (1997).
[35] William Krause, "Sweeping the E-Commerce Patent Minefield: The Need for a Workable Business Method Exception", Vol.24 Seattle University Law Review 79 (2000).
[36] Anatoli Kalpakidou, "Business Method Patents - Should They Survive in Europe", Vol.13 International Journal of Law and International Technology 243 (2005).

ISSN: 2582-6433

Lack of sufficient "prior art" makes it hard for the examiners to test business methods against the established triple patentable test. This can be best expressed in the words of Tim Berner Lee who was of the view that, "Some just take a well-known process (like an interlibrary loan or betting on a race) and do it in software. Others combine well-known techniques in apparently arbitrary ways to no added effect- like patenting going shopping in a striped automobile on a Thursday. They pass the test of apparent novelty because there is no existing document describing exactly such a process."[37]

A sharp critique in the direction of recognizing BMP comes from the commentators who believe that they have the potential of creating an impediment in the path of innovation advancement thereby rendering small and medium businesses to substantial financial and legal challenges.[38] Limiting access to business methods would put the information and knowledge under a box, which would in effect stifle the free flow of the former among researchers, endangering innovation.[39]

The proponents of competition laws have also raised concerns regarding the anti-competitive effects that BMP are likely to have which would amount to the abuse of IPR.[40] This is because most of the small businessmen will would find themselves in a precarious position, unable to compete, given the money, time, and expertise that they may lack.[41]

When it comes to the domain of cyberspace, Professor Lessig is even warier of BMP since almost every method of conducting business on the internet is essentially embodied in technology, thereby putting every internet method at the altar of patentability.[42]

[37] Tim Berners-Lee with Mark Fischetti, Weaving the Web: The original design and ultimate destiny of the World Wide Web, by its inventor", New York Harper Collins Publishers 1st edition, (1999)
[38] Supra note 36 at 253

[39] Rochelle Dreyfuss, "Are Business Method Patents Bad for Business?" Vol.16(2) Santa Clara Computer & High Technology Law Journal, 263-280 (2000)

[40] CD Freedman, "Software And Computer-Related Business Method Inventions: Must Europe Adopt American Patent Culture?", Vol. 8(3) International Journal Of Law And Information Technology, (2000)
[41] Supra Note 29

[42] Lawrence Lessig, "Patent Poblems" *The Standard*, Jan. 21, 2000, Available at http:/Avww.thestandard.com/articledisplay/0,1151,8999,00.html. Retrieved 10 November 2021

ISSN: 2582-6433

Given the plethora of anxieties that BMP raises it is indispensable to examine whether it fits into the very idea of patents.

JUXTAPOSING PRO-PATENT ARGUMENTS ONTO BUSINESS METHODS

While an "idea" is envisaged to be expressed in a material form, business methods are usually inclined towards utilizing information or data into producing a beneficial process of undertaking financial transactions. Thus, it can be seen as being linked to a process of decision-making. When seen in comparison to mechanical inventions or even a process that ultimately leads to the production of a tangible result, the business method is devoid of physical conclusiveness.[43]

One of the observers contends that business methods contrast from the traditional idea of patents in the sense that they are developed under the context of competitive concerns and the need to be ahead rather than in a technical workshop.[44]

Irrespective of the above divergences, for the sake of argument, even if we take BMPs to be a part of the patent framework the next corollary would be to check if they can be justified under the defenses offered to the critiques of the patent regime itself.

As far as providing an incentive to innovate is concerned, it is crucial to be cognizant of the fact that many other dynamics are likely to push the firms to develop new methods, the most significant of them being the prospect of getting a competitive edge.[45]

[43] V Chiappetta, "E-Commerce and Equivalence: Defining the Proper Scope of Internet Patents Symposium: Defining the Proper Scope of Internet Patents: If We Don 't Know Where We Want to Go, We're Unlikely to Get There", Vol.7 Michigan Telecommunications &Technology Law Review 289 (2001)
[44] Leo J. Raskind, "The State Street Bank Deision: The Bad Business of Unlimited Patent Protection for Methods of Doing Business," Vol.10 Fordham Intellectual Property, Media and Entertainment Law Journal 61, 70-71 (1999).
[45] Roger D. Blair, Thomas F Cotter Intellectual Property Economic And Legal Dimensions Of Rights And Remedies, Cambridge University Press (2005)

ISSN: 2582-6433

The incentive theory may stand true for patents in the field of pharmaceuticals since there are huge research and development costs involved. When they make an endeavor to create a new drug, they not only employ researchers for long periods of time but also research laboratories as testing grounds for the experiments. Even the process of applying to Food and Drug trials and waiting for the medicines to get an approval to prove to be costly.

However, business methods are mostly produced in the course of conducting business in order to enhance efficiency. It does not need a separate block of labor dedicated to creating them. A firm can effectively modify the newly created methods to its organization. The imitating firms will require time to tailor the methods as per their needs, thus giving the former a considerably larger period to enjoy its benefits.

The next proposed justification is that BMP can serve to protect the work of small entrepreneurs from being appropriated by bigger firms harming their market share.[46] However, it has been observed that what really happens is quite the contrary. If a small firm produces an invention the cost of not only obtaining but even maintaining the patent would be coupled with the litigation costs that they will incur in order to protect it from being appropriated by bigger companies. And in a Business method protective regime, choosing not to patent the method would make the method open to be patented by the latter which can afford all the costs and thus ultimately depriving the smaller firms of accessing them.[47]

It needs to be recognized that the business methods by their very nature defy the free-rider quandary since an efficient business method being implemented by more number of firms will subsequently lead to consumer welfare at large by maintaining adequate levels of competition. The foundation of an effectual market is its capability to convert a profitable commercial prospect into a vehicle that creates an environment which takes care of not only the economic profit but adequately addresses the deadweight loss as well thereby maximizing the surplus for producer and consumer in the larger picture."[48]

[46] Andrew McKinney, "Business Methodology Patents & E-Commerce Business Planning" Available at http://Nsww.cafezine.com/printable template.aspldeptid-=19&articleid=529, Retrieved 10 November 2021
[47] Supra note 34

[48] David S. Olson, "Taking the Utilitarian Basis for Patent Law Seriously: The Case for Restricting Patentable Subject Matter", Vol.82 Temple Law Review 181 (2009)

ISSN: 2582-6433

CONCLUSION

Taking into account the disquieting consequences that business methods patentability could lead to especially in the context of a developing country like India, the costs that would be incurred seem far more than the benefits envisaged. However, the trend of patents being granted in this domain points to the direction that the statutorily carved exception is not being adhered to in practice and there are ways to circumvent it by well-drafted claims.

Even the absence of a concise definition has often led to the buck being inevitability passed to either the Patent examiners or ultimately the Judiciary to interpret it in the face of emerging innovations and newer technologies. As a result, the provision of exclusion is found to be vulnerable to misuse and more importantly causes the distress of falling to disuse. Any attempt to define a business method has to be conscious of the fact that it cannot afford to be exhaustive because a business method is inherently rooted in a mental process & human mind and a definition that seems too rigid to be interpreted in the face of judicial decisions and administrative guidelines would not only be impractical but also counterproductive.[49]

However, given the exigencies of the present times and the urge to harmonize the patent system with the U.S as is often visualized, there is a need for an empirical research that should demonstrate that removing business methods from public access into the exclusive monopoly would be beneficial.[50]

Another alternative to be considered in the event of being succumbed to the undeniable pressure of giving in the patentability of business methods would be a sui generis approach[51] as suggested by Larry A. DiMatteo and Robert E. Thomas. This would be a category of patents with a reduced period of protection and offered to only those where an extensive amount of investment has been sustained for its development.

[49] Nari Lee, "Patent Eligible Subject Matter Reconfiguration and the Emergence of Proprietarian Norms - The Patent Eligibility of Business Methods", Vol.45 IDEA: The Intellectual Property Law Review, 321 (2005)

[50] Brian P Biddenger, "Limiting the Business Method Patent: A Comparison and Proposed Alignment of European, Japanese and United States Patent Law", Vol.69 Fordham Law Review 2523 (2001).

[51] Robert C. Bird and Subhash C. Jain, et.al (eds.) The Global Challenge of Intellectual Property Rights, Edward Elgar Publishing Limited (2008)