

IS LEGISLATION THE ANSWER? AN ANALYSIS  
OF THE PROPOSED LEGISLATION  
FOR BUSINESS METHOD PATENTS

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I. INTRODUCTION

In today’s ever-changing market, institutional corporations and hot new start-up companies are all attempting to secure their interests through intellectual property protection. Companies carry extensive intellectual property portfolios consisting primarily of patents, trademarks, and copyrights. The increase in technological advances has fueled the desire for patent protection on their inventions. Furthermore, due diligence of patent portfolios is increasingly useful in mergers and acquisitions of technical and nontechnical companies. A strong patent portfolio can greatly drive up the price of a target entity.

Patent portfolios do not only consist of hard science technologies. Many business-oriented companies rely on methods of implementing certain procedures or actions on a computer. These methods of doing business were historically not patentable.<sup>1</sup> Recently, the door to patentability has opened for business methods.<sup>2</sup> However, the business method patent’s fifteen minutes of fame may be over. It is arguable whether business method patents are a cancer to innovation or a useful tool in protecting and promoting innovative ideas.

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1. See *Hotel Sec. Checking Co. v. Lorraine Co.*, 160 F. 467 (2d Cir. 1908); see also Robert E. Lyon & Christopher A. Vanderlaan, *Method Madness*, 23 L.A. LAW. 28, 30 (2000).

2. See *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

This Comment discusses the proposal of a new bill to the United States House of Representatives to increase the requirements of patentability for business method patent applications.<sup>3</sup> The bill has supporters but also a significant number of opponents.<sup>4</sup> It is arguable whether the bill is necessary or counterproductive. Due to the disension, the United States Patent and Trademark Office (USPTO) has made efforts to increase the quality of the examination procedures for business method patents.<sup>5</sup> Debate continues on whether the USPTO initiative and judicial adaptations are sufficient or whether legislation amending the patent laws is necessary to ensure the validity of business method patents.

Part II of this Comment analyzes the development of business method patent rulings. It briefly outlines the constitutional protections and its evolution into the business method world. Part III delves into the issuance of business method patents and its relationship to novelty and nonobviousness requirements. Part IV discusses the new procedures implemented by the USPTO to ensure the validity of issued business method patents, and Part V analyzes the proposed litigation to limit the issuance of business method patents. Part VI discusses the pros and cons of new legislation versus implementation of existing laws and concludes that Congress should increase its support of the USPTO before resorting to legislation.

## II. HISTORY OF THE BUSINESS METHOD PATENT

Patent protection is granted pursuant to Article I, Section 8, Clause 8 of the United States Constitution.<sup>6</sup> The Constitution grants Congress the power to create a patent system to promote the progress of science and the useful arts.<sup>7</sup> A patent is an exception to this nation's attempts to prevent monopolies. It is a limited monopoly that typically exists for twenty years from the application date.<sup>8</sup>

The quid pro quo for patent protection is the public disclosure of the invention.<sup>9</sup> To obtain patent protection, the applicant must dis-

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3. See H.R. 1332, 107th Cong. (2001).

4. See *Oversight Hearing on Business Method Patents: Hearings on H.R. 1332 Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *Hearings*] (statements of Rep. Howard L. Berman, Rep. John Conyers, Nicholas P. Godici, Michael K. Kirk, Ronald E. Myrick, and Andrew B. Steinberg), at <http://www.house.gov/judiciary/courts.htm> (last visited Feb. 27, 2002).

5. See United States Patent and Trademark Office, *White Paper: Automated Financial or Management Data Processing Methods (Business Methods), Executive Summary* [hereinafter *White Paper*], at <http://www.uspto.gov/web/menu/busmethp/index.html> (last visited June 26, 2001).

6. U.S. CONST. art. I, § 8, cl. 8.

7. *Id.*

8. See 35 U.S.C. § 154(a)(2) (2000).

9. See *Brenner v. Mason*, 383 U.S. 519, 534 (1966).

close the entire invention claimed in the patent.<sup>10</sup> The public disclosure stimulates innovation in society. From the public disclosure, others can learn and develop the disclosed technology. Furthermore, others can design around the patent to create further advances in society.<sup>11</sup> Section 101 sets forth five basic requirements for patentability: (1) patentable subject matter; (2) usefulness; (3) novelty; (4) nonobviousness; and (5) enablement and disclosure.<sup>12</sup> All patent applications must meet these requirements to qualify for the issuance of a patent by the examiner.

In the early twentieth century, the courts' opinions resulted in the so-called "business method exception."<sup>13</sup> In *Hotel Security Checking Co. v. Lorraine Co.*, the court found a paper form that aided in the operation of a hotel was unpatentable subject matter.<sup>14</sup> *Hotel Security* and its progeny generally rejected applications due to their lack of tangible and physical procedures.<sup>15</sup> Further appellate court cases rejected similar claims under novel or nonobvious reasoning.<sup>16</sup> These rejections formed the basis of what is now commonly known as the business method exception.<sup>17</sup>

However, section 101 generally allows patentable subject matter to "include anything under the sun that is made by man."<sup>18</sup> The Supreme Court has three specific areas of nonpatentable subject matter: (1) laws of nature, (2) physical phenomena, and (3) abstract ideas.<sup>19</sup> Mathematical algorithms standing on their own are also unpatentable.<sup>20</sup>

With the advent of computers, courts began to liberalize the requirements for patentable subject matter. Initially, courts found mathematical algorithms to be completely unpatentable.<sup>21</sup> The Supreme Court then relaxed the algorithm rule in *Diamond v. Diehr*.<sup>22</sup> In *Diamond*, the Court held that the invention as a whole claimed a physical process and not merely an algorithm; the invention, includ-

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10. See 35 U.S.C. § 112.

11. See Lyon & Vanderlaan, *supra* note 1, at 30.

12. See 35 U.S.C. § 101.

13. See *Hotel Sec. Checking Co. v. Lorraine Co.*, 160 F. 467 (2d Cir. 1908).

14. *Id.*

15. See Leo J. Raskind, *The State Street Bank Decision: The Bad Business of Unlimited Patent Protection for Methods of Doing Business*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 61 (1999).

16. *Id.*; see 35 U.S.C. §§ 102-03.

17. See *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

18. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

19. *Id.*

20. See *Parker v. Flook*, 437 U.S. 584 (1978).

21. See *id.*

22. 450 U.S. 175 (1981).

ing the algorithm, was a patentable process.<sup>23</sup> The invention must claim “a useful, concrete, and tangible result” to be patentable.<sup>24</sup> Therefore, the mere existence of an algorithm does not make the invention *per se* unpatentable.<sup>25</sup> *In re Beauregard* further expanded the scope of patentable subject matter, holding the software embedded on a tangible medium patentable.<sup>26</sup>

In *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, the U.S. Court of Appeals for the Federal Circuit took the next step and dismissed the so-called business method exception altogether.<sup>27</sup> *State Street Bank* involved the patentability of a Hub and Spoke data processing system for use in a software-implemented investment scheme.<sup>28</sup> The court found the system patentable because the software algorithm created a useful, concrete, and tangible result.<sup>29</sup> The transformation of the data into a final share price for mutual funds was a result sufficiently tangible for patentability.<sup>30</sup> Therefore, the Federal Circuit decided the case under *Diamond*'s understanding of the mathematical algorithm theory.<sup>31</sup>

The Federal Circuit then directly addressed the issue of the so-called business method exception.<sup>32</sup> The court found the business method exception to be an illusory legal principle,<sup>33</sup> and that business methods should be examined under the same procedures as any other process or technology.<sup>34</sup> Hence, software implementations of business methods merely have to pass the same patentability requirements to become an issued patent as any other invention.<sup>35</sup>

### III. CONSEQUENCES OF THE *STATE STREET BANK* DECISION

After the watershed *State Street Bank* decision, the proverbial floodgates opened for business method patent applications. In fiscal year 1998, prior to *State Street Bank*, approximately 1,300 business method applications were sent to the USPTO.<sup>36</sup> After the *State Street Bank* decision, 2,820 business method patent applications were filed

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23. *Id.*; see also *In re Alappat*, 33 F.3d 1526 (Fed. Cir. 1994).

24. *In re Alappat*, 33 F.3d at 1544.

25. *Id.*

26. 53 F.3d 1583 (Fed. Cir. 1995).

27. 149 F.3d 1368 (Fed. Cir. 1998).

28. *Id.* at 1370.

29. *Id.* at 1375.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See *id.*; 35 U.S.C. §§ 101-03 (2000).

36. *Hearings*, *supra* note 4 (statement of Godici).

in fiscal year 1999 and 7,800 business method patent applications were filed in fiscal year 2000.<sup>37</sup>

The drastic increase in applications filed and subsequent allowances of those applications logically resulted from previously nonpatentable methods now becoming patentable. The increase in patent applications concerned certain sectors of the business and academic worlds.<sup>38</sup> The dot-com boom fostered the increased implementation of standard business practices into web-based software systems.<sup>39</sup>

Critics of *State Street Bank* believe that limited monopolies can now be obtained on standard and traditional methods of doing business.<sup>40</sup> The concern revolves around one's ability to implement a traditional business method on a computer or the Internet and then exclude others from its use.<sup>41</sup> Such beliefs seemed to come to fruition in the famous, or infamous, Amazon.com "one-click" dispute.

One of the most well-known, highly publicized business method patent disputes resulted in *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*<sup>42</sup> The dispute involved patent infringement of Amazon.com's "one-click" purchasing method,<sup>43</sup> which allows a purchaser to place an order via the Internet while the server system stores identifying information related to the purchaser. This allows the server system to generate orders for subsequent purchases by the same purchaser. Ultimately, the method taught in the patent compresses a two-step process into a single step, that is, "one click."<sup>44</sup>

Varying sectors of the public were outraged by the issuance of the "one-click" patent.<sup>45</sup> Their argument stressed the existence of non-software versions of this business method.<sup>46</sup> In the business world, critics contended that the method of recording information about a particular customer and then using that information to generate subsequent purchase orders had always been used.<sup>47</sup> They felt that the patenting of such obvious and nonnovel methods would stifle competition.<sup>48</sup> They presumed it was unfair for the first corporation to reduce a business method to software to then gain a monopoly over that method.

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37. *Id.*

38. *See id.* (statements of Rep. Berman, Rep. Conyers, and Steinberg).

39. *See id.* (statement of Steinberg).

40. *See id.* (statement of Rep. Berman).

41. *Id.*

42. *See* 73 F. Supp. 2d 1228 (W.D. Wash. 1999), *vacated*, 239 F.3d 1343 (Fed. Cir. Wash. 2001).

43. *Id.* at 1231.

44. *Id.*

45. *See Hearings, supra* note 4 (statement of Steinberg).

46. *See id.*

47. *See Lyon & Vanderlaan, supra* note 1, at 31.

48. *Id.*

The outrage intensified when Amazon.com began to assert its patent rights on other members of the business community.<sup>49</sup> Amazon.com initially sought an injunction preventing Barnesandnoble.com from practicing their one-click process.<sup>50</sup> The Western District Court of Washington granted the injunction against Barnesandnoble.com.<sup>51</sup> During the hearings, Barnesandnoble.com put forth prior art references to invalidate the Amazon.com patent.<sup>52</sup>

Generally, courts presume the validity of an issued patent.<sup>53</sup> The courts give great weight to the judgment of the examiners. When prior art not discovered and analyzed by the examiner in the prosecution history is put forth, however, the presumption of validity is easier to overcome.<sup>54</sup> Furthermore, to avoid an injunction, the alleged infringer must show a likelihood of the patent being invalid.<sup>55</sup> Barnesandnoble.com put forth several prior art references attempting to demonstrate that the invention was anticipated and obvious over the prior art references. The district court judge did not find a likelihood of invalidity and granted the injunction.<sup>56</sup>

While the Federal Circuit later vacated the injunction, the district court case demonstrates the difficulty in determining novel and nonobvious methods from those that are not patentable.<sup>57</sup> It was not so “patently” obvious to the district court judge as to not force an injunction. In light of Barnesandnoble.com putting forth the many prior art references to the district court judge and the judge not finding a likelihood of invalidity, the difficulties faced by USPTO examiners becomes even more apparent.

For the patent to be issued under the *State Street Bank* decision, the “one-click” process had to be novel and nonobvious.<sup>58</sup> Business methods are not treated differently than any other technology class.<sup>59</sup> If the invention is patentable subject matter that is useful, novel, and nonobvious, it can be patented.<sup>60</sup> Many problems can arise in making this determination. Business methods are unique in a sense. Many of

49. See *id.*; *Amazon.com, Inc.*, 73 F. Supp. 2d at 1239-42.

50. See *Amazon.com, Inc.*, 73 F. Supp. 2d at 1239-42.

51. *Id.*

52. See Lyon & Vanderlaan, *supra* note 1, at 31.

53. 35 U.S.C. § 282 (2000); see *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1555 (Fed. Cir. 1985).

54. *EWP Corp. v. Reliance Universal Inc.*, 755 F.2d 898, 905 (Fed. Cir. 1985) (finding patent invalid when the examiner did not cite the two most pertinent prior arts making the burden more easily met).

55. See Lyon & Vanderlaan, *supra* note 1, at 31.

56. See *Amazon.com, Inc.*, 73 F. Supp. 2d at 1239-42.

57. *Id.*

58. See *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

59. See *id.* at 1375.

60. *Id.*

the prior art methods are not documented or published in a journal. Many have been run by businesses for countless years—some by large national and international corporations and others by mom-and-pop stores on the local street corner. The examiners were not equipped to find the references to all of the prior business activities in determining whether a filed application was patentable.<sup>61</sup> In an attempt to improve the quality of the examination process, the USPTO put forth an initiative relating to Class 705 of business method patents.

#### IV. USPTO INITIATIVE LIMITING BUSINESS METHOD PATENTS

Largely in response to the intense public pressure, on March 29, 2000, the USPTO implemented a Business Method Patent Initiative created to limit the issuance of business method patents.<sup>62</sup> USPTO narrowly designed the initiative to improve the examination procedures for business method applications. The USPTO initiated several changes to help ensure that only useful, novel, and nonobvious business method patents are issued.<sup>63</sup> All of the changes affected only Class 705. The changes included increasing the number of examiners, increasing the training provided for the examiners, expanding search criteria, and creating a second round of reviews.<sup>64</sup>

Business method patents fall within the USPTO's Class 705, which is defined as follows:

[a] generic class for apparatus and corresponding methods for performing data processing operations, in which there is a significant change in the data or for performing calculation operations wherein the apparatus or method is uniquely designed for or utilized in the practice, administration, or management of an enterprise, or in the processing of financial data. This class also provides for apparatus and corresponding methods for performing data processing or calculating operations in which a charge for goods or services is determined.<sup>65</sup>

The Class is designed to encompass varying business methods. It includes a collection of more than twenty financial and management data processing areas. The four major areas are market analysis, advertising, exchanges in business transactions, and accounting.<sup>66</sup>

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61. See *White Paper*, *supra* note 5, at Improving Quality: Mar. 2000 Initiatives on Searching.

62. See *id.* at Executive Summary.

63. *Id.*

64. See *generally id.*

65. See United States Patent and Trademark Office, *Class 705, Data Processing: Financial, Business Practice, Management, or Cost/Price Determination*, at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/def/705.htm> (last visited June 26, 2001).

66. *White Paper*, *supra* note 5, at Class 705.

Despite the strong business processes involved in Class 705, the underlying software and computer technologies remain prevalent.<sup>67</sup> The examiners must still be specialized in engineering or computer science to examine these patents effectively, creating an obvious paradox. Historically, examiners were mostly sophisticated in the hard sciences, including all areas of engineering, biology, chemistry, etc.; examiners were not necessarily well versed in the business world. Today, however, examiners must be technically qualified as well as knowledgeable about the business world.

Under the initiative, the USPTO endeavored to expand the examiners in Class 705. To do so, individual examiners laterally moved into Class 705.<sup>68</sup> The transferees included electrical engineers with graduate degrees in Business Administration, an examiner with banking management experience, and an examiner with a doctorate degree in Information Science and thirty years of experience in the development of business information systems.<sup>69</sup>

The USPTO also began expanding the Class through newly hired examiners.<sup>70</sup> Many new examiners now have a strong business background and understand the breadth of the new business method patent applications. In light of the *State Street Bank* decision, applicants began to focus their claims on the business side of the technology.<sup>71</sup> The new examiners are better equipped to handle such applications.

Overall, the number of examiners in Class 705 has expanded from seventeen in late 1997 to seventy-seven in April 2001.<sup>72</sup> The growth of the examiners was necessary to handle the increase in filings that resulted from the *State Street Bank* decision.

The initiative also served to implement enhanced training regimes for the examiners in Class 705.<sup>73</sup> In addition to the thorough training given to examiners prior to the March initiative, the examiners are presently required to continue training efforts with industry associations and corporate sponsors.<sup>74</sup> The corporate contacts allow the examiners to stay abreast of old and new business methods and developments. Furthermore, business specialists serve as resource specialists to the examiners on common business processes.<sup>75</sup>

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67. *Id.* at Patent Examiners.

68. *Id.* at Internal Transfers.

69. *Id.*

70. *Id.* at 2000 Hiring—Preparation for Transition.

71. See Lyon & Vanderlaan, *supra* note 1, at 31.

72. *Hearings*, *supra* note 4 (statement of Godici).

73. See *White Paper*, *supra* note 5, at Improving Quality: Training.

74. *Id.*

75. *Id.*

Additionally, the initiative called for enhanced search criteria.<sup>76</sup> One of the major problems with examining business method applications was the discovery and retrieval of prior art. Prior art in the business method context is not conveniently documented in journals or other bound resources.<sup>77</sup> It is difficult to run a search equivalent to the search of a mechanical or electrical device. Business methods often are undocumented or are documented in databases not easily searched by examiners.<sup>78</sup>

The initiative enhanced the search criteria and resources to increase the potential for finding prior art. Searches in Class 705 now include mandatory U.S. Patent document searches, foreign patent searches, and nonpatent literature (NPL) searches.<sup>79</sup> The USPTO has established "Electronic Information Centers" that provide examiners access to over 900 databases, many of which consist of business and financial information.<sup>80</sup> Novelty and obviousness rejections increase with greater access to prior art references.

The final substantial change to Class 705 was a second-level review of the application.<sup>81</sup> The second-level review considers compliance with the search procedures, clarity of reasons for allowance, and determination of the appropriate scope of the claims allowed. The more eyes that see an application, the more accurate the examination process will become.

The USPTO is confident that its initiative has gotten a handle on the business method filing outbreak. Since the implementation of the initiative in March 2000, the percentage of applications issued has decreased. In the quarter prior to March 31, 2000, fifty-six percent of the business method patent applications were issued.<sup>82</sup> The USPTO granted only thirty-six percent of the business method patent applications in the quarter after March 31, 2000.<sup>83</sup>

The increased scrutiny implemented by the USPTO obviously limited the amount of applications approved as patents. "This dramatic decrease in the percentage of business method applications in which patents are granted likely comes from a more careful application of the novelty and nonobviousness requirements of the patent statute and from the PTO program for obtaining more prior art documents

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76. *Id.* at Improving Quality: Mar. 2000 Initiatives on Searching.

77. *See* Lyon & Vanderlaan, *supra* note 1, at 52.

78. *See White Paper*, *supra* note 5, at Improving Quality: Mar. 2000 Initiatives on Searching.

79. *Id.* at Improving Quality: Commercial and NPL Databases.

80. *Hearings*, *supra* note 4 (statement of Godici).

81. *White Paper*, *supra* note 5, at Improving Quality: Mar. 2000 Initiatives for Additional Review.

82. *Hearings*, *supra* note 4 (statement of Myrick).

83. *Id.*

relating to business method patents.”<sup>84</sup> Yet, two members of the United States House of Representatives feel that more intrusive measures need to be taken to ensure the validity of business method patents.<sup>85</sup>

#### V. PROPOSED LEGISLATION LIMITING BUSINESS METHOD PATENTS

Representatives Howard L. Berman and Frederick C. Boucher co-sponsored a bill proposal, the Business Method Patent Improvement Act of 2001 (“Act”),<sup>86</sup> which was proposed to the Subcommittee on Courts, the Internet and Intellectual Property of the Committee on the Judiciary on April 3, 2001.<sup>87</sup>

Representative Berman proposed the bill over concern that the patenting of abstract business ideas and “weak” patent applications were crippling innovation.<sup>88</sup> He stated that his concerns were “shared by many others, including academics, many members of the patent bar, and companies in the technology, Internet, software, financial services, and insurance industries.”<sup>89</sup> Therefore, this area of the law greatly affects many facets of society. Representative Berman introduced the bill as a starting point for discussing methods of legislating patent reform to “bolster strong protection of intellectual property.”<sup>90</sup>

The proposed bill includes many changes to the existing patent laws. However, the changes to the laws apply only to the patentability of so-called business method patents. The starting point for the proposed legislation on business method patents is the codification of a working definition of a business method. Defining the term “business method” and “business method invention” is imperative to the Business Method Patent Improvement Act because the Act applies different laws to business method patents.

H.R. 1332 defines the term “business method” as:

- (1) a method of processing data; or performing calculation operations; and which is uniquely designed for or utilized in the practice, administration, or management of an enterprise;
- (2) any technique used in athletics, instruction, or personal skills; and
- (3) any computer-assisted implementation of a method described in paragraph (1) or a technique described in paragraph (2).<sup>91</sup>

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84. *Id.*

85. *Id.* (statements of Rep. Berman and Rep. Conyers).

86. *See* H.R. 1332, 107th Cong. (2001).

87. To date, the Business Method Patent Improvement Act of 2001 has neither been adopted nor rejected by Congress.

88. *See Hearings, supra* note 4 (statement of Rep. Berman).

89. *Id.*

90. *Id.*

91. *See* H.R. 1332, 107th Cong. § 2(f) (2001).

A “business method invention” is defined as follows:

any invention which is a business method (including any software or other apparatus); and any invention which is comprised of any claim that is a business method.<sup>92</sup>

Representative Berman’s proposal attempts to prevent abstract ideas for conducting or organizing business operations from being patented and defines business methods broadly in an attempt to encompass a wide scope of business practice.

After defining “business method” and “business method invention,” the Act alters the section 103 nonobvious legislation. Representative Berman was concerned that patentees are merely embodying age-old business methods into software applications.<sup>93</sup> Section 103 currently presumes the application is valid and then combines prior arts to determine if the invention is obvious in light of the prior arts.<sup>94</sup> The Act endeavors to change the presumption of invalidity and proposes to alter section 103 by adding, among other things, the following provisions:

(d)(1) A business method invention shall be presumed obvious under this section if the only significant difference between the combined teachings of the prior art and the claimed invention is that the claimed invention is appropriate for use with a computer technology, unless the application of the computer technology is novel; or the computer technology is novel and not the subject of another patent or patent application;

(2)(A) An applicant or patentee may rebut the presumption under paragraph (1) upon a showing by a preponderance of the evidence that the invention is not obvious to persons of ordinary skill in all relevant arts.<sup>95</sup>

Paraphrasing, this Act would create a presumption of obviousness for any invention in which the significant difference from the prior art is the implementation of the method in software. The presumption of obviousness is essentially a presumption of invalidity. A presumption of invalidity would force the applicant to prove nonobviousness by a preponderance of the evidence.<sup>96</sup>

The existing patent laws do not create such a presumption of invalidity. The proposed provision of the Act would single out business method invention applications from other applications. Therefore, classification of the invention would become more crucial to patentability.

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92. See *id.* § 2(g).

93. See *Hearings*, *supra* note 4 (statement of Rep. Berman).

94. See 35 U.S.C. § 103 (2000).

95. See H.R. 1332, 107th Cong. § 4.

96. See *id.* § 3.

Additional proposed changes to the patent laws include amended publication and opposition procedures. In November 1999, Congress passed the American Inventors Protection Act of 1999 ("AIPA").<sup>97</sup> The AIPA implemented an eighteen-month publication procedure that required an application to be published eighteen months from the earliest sought filing date, unless it was a design patent, a national security patent, or will only be filed as a domestic patent.<sup>98</sup>

The Business Method Patent Improvement Act proposes to make publication after eighteen months mandatory for both foreign and domestic patents.<sup>99</sup> An applicant seeking only domestic protection would not be able to avoid publication of the application. Furthermore, twelve months after the earliest sought filing date of the application, the Director of the USPTO must decide if the application is a business method.<sup>100</sup> At that time, the applicant would have the opportunity to respond through argument or amendment.<sup>101</sup>

The publication proposal is a mechanism for allowing early opposition to business method patent applications. Section 322 of the proposed Act would set up opposition procedures for business method patent applications.<sup>102</sup> The Director would set up an opposition panel:

comprised of not less than 18 administrative opposition judges, each of whom shall be an individual of competent legal knowledge and scientific ability. . . . Any person may file a request for an opposition to a patent on a business method invention on the basis of section 101, 102, 103, or 112 of this title.<sup>103</sup>

The proposal requires the opposition request to be made within nine months of the date of issuance of the patent.<sup>104</sup>

The Opposition Panel would then make a determination of patentability within eighteen months from the request for opposition.<sup>105</sup> The challenger would have the burden of proving by a preponderance of the evidence that an invention is not patentable, as opposed to the "clear and convincing" standard currently enacted in court proceedings.<sup>106</sup> The proposal requires the Opposition Panel to render a patentability opinion and create a record of its finding. The decision of

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97. American Inventors Protection Act of 1999, Pub. L. No. 106-113 (codified as amended in scattered sections of 35 U.S.C.).

98. *Id.*

99. See H.R. 1332, 107th Cong. § 3.

100. *See id.*

101. *Id.*

102. *See id.*

103. *See id.*

104. See 65 Fed. Reg. 57024 (Sept. 20, 2000).

105. H.R. 1332, 107th Cong. § 3.

106. *See id.*

the Opposition Panel could be appealed directly to a court for review.<sup>107</sup> Furthermore, the opposition proceeding:

shall not alter or prejudice any party's right to pursue remedies under provisions of law other than this section. In the case of court proceedings, other than an appeal of a decision in an opposition proceeding under this section, the court may consider any matter independently of any opposition proceeding under this section.<sup>108</sup>

#### VI. ARE THESE PROPOSED CHANGES A GOOD IDEA OR EVEN NECESSARY?

The Business Method Patent Improvement Act of 2001 was submitted to the Subcommittee on Courts, the Internet, and Intellectual Property on April 3, 2001. The next day, the Subcommittee held an oversight hearing on business method patents. The individuals participating in the hearing weighed in on the need for legislation that would change the patent laws as opposed to allowing the USPTO initiative to ensure the quality of issuing business method patents.

Statements were made by six individuals, three supporting the legislation and three opposing the legislation.<sup>109</sup> Representative Howard L. Berman, Representative John Conyers Jr., and Mr. Andrew B. Steinberg, Executive Vice President and General Counsel of Travelocity.com, supported the legislation. Mr. Nicholas P. Godici, Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the U.S. Patent and Trademark Office, Mr. Michael K. Kirk, Executive Director of the American Intellectual Property Law Association, and Mr. Ronald E. Myrick, President of the Intellectual Property Owners Association, opposed the legislation.

##### A. *Support for the Legislation*

Proponents of the legislation all shared the same or similar sentiment on the present condition and future of business method patents—patents are “grant[ing] monopolies on methods of doing business that were already being used or simply do not seem worthy of patent protection.”<sup>110</sup> The legislation was written to preserve the integrity of the patent system. Only deserving patents should get protection.<sup>111</sup> The patent system is a tool to promote innovation and

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107. *See id.*

108. *Id.*

109. *See Hearings, supra* note 4.

110. *Id.* (statement of Rep. Conyers); *see also id.* (statements of Rep. Berman and Steinberg).

111. *See id.* (statement of Rep. Berman).

technology, “not simply [to] reward them for putting old wine in new bottles.”<sup>112</sup>

Representative Berman stated that many of the patents granted for business methods give protection over age-old business practices now conducted in software or the Internet.<sup>113</sup> Berman gave several examples of his “old wine in new bottles” dilemma. His examples included a patent for a method of purchasing automobiles over the Internet—even though automobile showrooms have been performing these methods for decades—a patent for conducting fantasy football over the Internet, and a system for previewing music samples over the Internet.<sup>114</sup> The underlying methods, absent the use of the Internet or software, have been used for years.

Mr. Steinberg further expounded on the problem of business method patents and the need for legislation.<sup>115</sup> Steinberg is the Executive Vice President and General Counsel of Travelocity.com,<sup>116</sup> an e-commerce enterprise that sells airline tickets over the Internet. It is essentially an on-line travel agency and is the third largest e-commerce retailer on the Internet. Steinberg stated that issuance of such patents would discourage innovation and threaten the growth of the economy and that Congress needs to step in and control the growth of business method patents.

The viability and success of Travelocity.com and other e-commerce companies has resulted from their ability to transform and adapt to today’s ever-changing marketplace.<sup>117</sup> These changes generally have included changes in the methods of doing business so customers can be given exactly what they need and want. Steinberg expressed fear that the proliferation of business method patents will become an obstacle to this practice and ultimately hurt consumers as well as e-commerce companies.<sup>118</sup> If a single company owns a patent on a business method, it will prevent all other companies from practicing such a method. If the business method patent protects an “old wine in a new bottle,” consumers and other companies will be irreparably harmed.

Patents issued by the USPTO can be invalidated in the courtroom, but the presumption is for validity of issued patents.<sup>119</sup> Therefore, even if a company such as Travelocity.com felt a patent is or should be invalid, they are often deterred from practicing the patented

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112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.* (statement of Steinberg).

116. *Id.*

117. *Id.*

118. *Id.*

119. 35 U.S.C. § 282 (2000).

method for fear of litigation. Patent litigation is an extremely expensive process.<sup>120</sup> Thus, an apparently invalid patent that is issued by the USPTO effectively discourages competition and innovation in that area. Many companies cannot afford the threat of litigation and subsequently stay out of the market.<sup>121</sup>

Furthermore, Steinberg stated that “the relative ease with which business method patents can now be obtained has spawned thousands of such applications. No prudent business would allow its competitors to patent key business processes without attempting to obtain some patents of their own.”<sup>122</sup> Thus, application for such patents is perpetuated. Competition becomes stymied because each company holds a piece of the puzzle and no company holds all of the pieces. Arguably, consumers are injured.

According to proponents of the legislation, Congress and the USPTO must institute some basic changes to the procedure for examining business method patents. Supporters of the legislation “do not accept the contention that business method patents are no different than any other patent.”<sup>123</sup> Thus, they support the notion that specific changes in the patent law targeted at business method patents is not only acceptable, but necessary.

Furthermore, pursuant to the USPTO initiative, the USPTO has already singled out business method patent applications from other applications. The USPTO created a separate class, separate searching requirements, and second-level review for only Class 705 business method applications. Therefore, it could also be argued that singling out business methods in the patent laws is not as problematic as the opposition may lead observers to believe.

### *B. Opposition to the Legislation*

Opposition to the legislation typically falls under two interrelated theories: (1) it is problematic to have different patent laws for business method patents, and (2) other laws, the USPTO initiative, and subsequent evolutions of the initiative are sufficient to ensure the quality of business method patents.<sup>124</sup>

Michael K. Kirk, the Executive Director of the American Intellectual Property Law Association (AIPLA), agreed with the problems in the history of business method patents but disagreed that changing the laws is the appropriate remedy.<sup>125</sup> Kirk agreed that a patent on

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120. See *Hearings*, *supra* note 4 (statement of Steinberg).

121. *Id.*

122. *Id.*

123. *Id.*

124. See *id.* (statements of Godici, Kirk, and Myrick).

125. See *id.* (statement of Kirk).

an invention that merely implements a known business method onto a computer should not be issued.<sup>126</sup> However, the requirements of novelty and nonobviousness should be sufficient for the determination of patentability.<sup>127</sup> Kirk disagreed with changing section 103 to create a presumption of invalidity for business methods implemented in software. He argued that the change is unnecessary and problematic.<sup>128</sup>

Instead of changing laws, Congress should look to the root of the problem, according to Kirk.<sup>129</sup> The USPTO needs access to prior art references to determine the patentability of a business method application more effectively.<sup>130</sup> Presently, the prior art databases for business method patents are relatively thin. The USPTO is attempting to corroborate with the private sector to aid in the discovery of pertinent prior art.<sup>131</sup>

Funding for the USPTO is another factor that affects the quality of examination. The USPTO needs more funding to examine the business method patent applications adequately.<sup>132</sup> More examiners need to be hired and more prior art search resources need to be developed. Furthermore, additional money needs to be budgeted to train the new and existing examiners to ensure the high standard of examination. Unfortunately, in the eyes of the White House and Congress, higher national interests help to divert funding from the USPTO budget.<sup>133</sup>

Ronald E. Myrick agreed generally with Kirk's statements. Myrick, the president of the Intellectual Property Owners Association (IPO), essentially stated that the USPTO and the courts are dealing effectively with the recent developments in business method patents.<sup>134</sup> A similar onslaught of patent applications occurred in the early 1980s for biotechnology patents in light of *Diamond v. Chakrabarty*.<sup>135</sup> Congress did not legislate changes at that time and the USPTO and the courts adapted.<sup>136</sup> Biotechnology patent practice is now stable and noncontroversial.

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126. *Id.*

127. *See id.*; see 35 U.S.C. §§ 102-03 (2000).

128. *See Hearings, supra* note 4 (statement of Kirk).

129. *Id.*

130. *Id.*

131. *See White Paper, supra* note 5, at Improving Quality: Mar. 2000 Initiatives on Searching.

132. *See Hearings, supra* note 4 (statement of Kirk).

133. *Id.*

134. *See id.* (statement of Myrick).

135. *Id.*; see also *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (allowing patentable subject matter to "include anything under the sun that is made by man").

136. *See Hearings, supra* note 4 (statement of Myrick).

Years ago, critics of software patents also expressed interest in changing the patent laws for software applications.<sup>137</sup> Congress did not legislate at that time, and the software industry became a major factor in the economic growth of the United States. Ultimately, Congress should not target individual groups for patent reform.<sup>138</sup> The examiners should rely on the fundamental principles of novelty and nonobviousness in determining patentability of any invention.<sup>139</sup>

Finally, Nicholas P. Godici, Acting Director of the USPTO, stated that the USPTO initiative ensures the validity of business method patents issued. The USPTO believes that their initiative is working effectively.<sup>140</sup> The percentage of business method patent applications issued has dropped approximately twenty percent due to the Business Method Patent Initiative.<sup>141</sup> Furthermore, Godici stated that the USPTO is flexible and can adapt to changes set forth in the court system. Changes in the law, however, are not so flexible, and arbitrary changes targeted at specific technology groups may be counterproductive. Denying protection to deserving inventions may stifle innovation in our society. Godici asserted that patent protection, in general, stimulates innovation—the purpose of patent laws.<sup>142</sup> The USPTO is confident that they will continue to operate at the highest level of quality to ensure only valid patents receive protection.<sup>143</sup>

The statements to the Subcommittee set forth quality concerns from both sides of the table. The concerns of Representatives Berman and Conyers, and Steinberg are well founded and understood. The question is whether congressional action is the answer. First, targeting a single group for patent reform is problematic. The federal courts already have full dockets. Such legislation could open a Pandora's Box of litigation to decide which technology group should examine an invention. Different treatment for business method patent applications would “lead to endless litigation over whether inventions were inside or outside the law.”<sup>144</sup> The proposed bill defines business method broadly. A broad definition allows a wide range of applications to fall inside the definition, but it also includes vagueness that opens the door to arguments and litigation.<sup>145</sup> Currently, the determination of the class for examination is not crucial because the patent laws are uniform across all examination classes. If the bill

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137. *Id.*

138. *Id.*

139. *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1375 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

140. *See Hearings, supra* note 4 (statement of Godici).

141. *See id.* (statement of Myrick).

142. *See id.* (statement of Godici).

143. *Id.*

144. *See id.* (statement of Myrick).

145. *See H.R. 1332*, 107th Cong. § 2(f) (2001).

is passed as proposed, however, applicants will have great incentive to make certain their invention is not classified as a business method; that is, Class 705. The incentives will invariably lead to creative patent prosecuting followed by litigation to avoid examination in Class 705.

Additionally, the presumption of obviousness is not necessarily a good idea. The presumption of obviousness in business methods implemented in software would create great incentive for applicants to avoid falling into the business method classification. The presumption would obviously lessen the amount of business methods that do in fact get patent protection. However, lessening the number of patents is not the goal of the legislation.<sup>146</sup> The goal is to ensure that only valid patents are issued.<sup>147</sup> Therefore, the crucial question is whether it is better to allow a few applicants to get protection who arguably should not have protection, or to deny an applicant who rightfully deserves protection through the issuance of a patent.

The USPTO Business Method Patent Initiative has already decreased the percentage of applications issued.<sup>148</sup> The initiative does not presume obviousness. How many more rejections would occur if obviousness were presumed? That is hard to answer, but it would obviously be more. Congress needs to be aware of the repercussions of presuming obviousness. The Constitution allows protection “[t]o promote the Progress of Science and useful Arts by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.”<sup>149</sup> Denying protection to those who deserve protection potentially could be seen as against the intention of the Constitution. Congress should resist actions that may counter the intention of the Constitution. While resistance to the legislation does exist, the individuals giving statements to the Subcommittee did not admonish the opposition proceedings proposed in the bill. They did disagree, however, with discriminating among examination groups. Therefore, existence of an opposition panel has some potential.<sup>150</sup> Unfortunately, the cost of such proceedings would greatly increase the cost of prosecution. Do the benefits of the opposition proceedings outweigh the cost/benefit of the second-level review set forth in the Business Method Patent Initiative? Godici is confident that the Initiative, including the second-

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146. See *Hearings*, *supra* note 4 (statement of Rep. Berman).

147. *Id.*

148. See *id.* (statement of Myrick) (stating that the percentage of issued patents has dropped approximately twenty percent after the implementation of the Business Method Patent Initiative).

149. U.S. CONST. art. I, § 8, cl. 8.

150. See *Hearings*, *supra* note 4 (statement of Godici).

level review, ensures a quality examination of the patent application.<sup>151</sup>

Although the discussion of patentability and opposition proceedings can become spirited, the problem related to the quality of issued patents will not be solved until the prior art references are more easily accessible. The USPTO is attempting to remedy this by its initiative. Whether the bill gets passed or Congress decides to leave examination changes to the USPTO, the quality of examination will not improve until the examiners have access to pertinent prior art references. The definition of business method and the presumption of obviousness are hot topics in the legislation. Unfortunately, without improved prior art searching capabilities, patent protection will only shift from overinclusive to underinclusive protection. It is arguable which is an improvement over the other.

The USPTO is applauded for its actions to improve the prior art search capabilities in the USPTO, but more needs to be done. This will inevitably require increased funding. Congress might better serve the nation's interest by focusing on ways to fund the USPTO as opposed to ways to arbitrarily change the patent laws that have served us for many years. The USPTO and the courts have proven that they can adapt the implementation of the laws to varying circumstances presented in changing marketplaces.<sup>152</sup> Thus, Congress should investigate the option of increased funding to the USPTO and should allow the courts to adapt to the new challenges that business method patents present. A case that has been granted certiorari by the Supreme Court may effectively limit the breadth of business method patents.<sup>153</sup>

### C. Application of *Festo* to the Proposed Legislation Debate

The opposition to new legislation limiting business method patents may further be supported by the Supreme Court's pending ruling in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*<sup>154</sup> *Festo* will not affect the issuance of a patent but will affect the future determination of infringement of a patent.

The Federal Circuit's holding in *Festo* greatly restricts the use of the Doctrine of Equivalents for patents that had their claims

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151. *Id.*

152. *See id.* (statement of Myrick) (discussing the concerns over Biotechnology and Software patents that ultimately worked themselves out through the court and the USPTO).

153. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 234 F.3d 558 (Fed. Cir. 2000), *cert. granted*, 533 U.S. 915 (2001).

154. *Id.*

amended during prosecution.<sup>155</sup> If a business method patent is written to “corner the market,” it is likely to be written extremely broadly. Inventors will often be forced by the examiners to amend extremely broad claims because the claims read on prior art. Due to the potential of amended claims in business method patents, the outcome of the Supreme Court’s decision will directly affect the breadth of infringement of business method patents in patent infringement cases.

More particularly, patent infringement generally occurs in two forms: literal infringement and nonliteral infringement. Literal infringement occurs when the non-patentholder precisely practices every claim of a patent.<sup>156</sup> On the other hand, nonliteral infringement does not require exact or precise practicing of the claims.<sup>157</sup> The courts created nonliteral infringement through the Doctrine of Equivalents. The Doctrine of Equivalents finds infringement when the patented device and the accused infringing device perform substantially the same function in substantially the same way to obtain substantially the same result.<sup>158</sup> The Doctrine of Equivalents must be applied to each individually claimed element, not the invention as a whole.<sup>159</sup>

Prosecution History Estoppel limits the Doctrine of Equivalents.<sup>160</sup> “A rebuttable presumption exists that a claim amendment was made for a substantial reason relating to patentability (thus invoking Prosecution History Estoppel).”<sup>161</sup> The presumption is overcome if the patentee can demonstrate that the amendment was not for patentability.<sup>162</sup>

For example, in *Hilton Davis Chemical Co. v. Warner-Jenkinson Co., Inc.*, the patentee added a lower pH limitation to the claims during prosecution.<sup>163</sup> The court was required to determine if amending the claim from a pH of 9.0 to 6.0 was for allowance of the claim.<sup>164</sup> If the amendment was for patentability, Prosecution History Estoppel would block the Doctrine of Equivalents from applying.<sup>165</sup>

155. The Doctrine of Equivalents and the holding in *Festo* is discussed *infra* notes 158-173 and accompanying text.

156. 35 U.S.C. § 271(a) (2000); *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376, 1384 (Fed. Cir. 1998).

157. See *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 339 U.S. 605 (1950).

158. *Id.*

159. See *Hilton Davis Chemical Co. v. Warner-Jenkinson Co., Inc.*, 62 F.3d 1512 (Fed. Cir. 1995), *rev’d and remanded*, 520 U.S. 17 (1997), *remanded*, 114 F.3d 1161 (Fed. Cir. 1997).

160. *Id.*; see also Louis S. Sorell, *The Application of the Doctrine of Equivalents to Chemical Inventions: A Primer*, 11 ALB. L.J. SCI. & TECH. 225 (2001).

161. Sorell, *supra* note 160, at 232-33.

162. *Id.*

163. 114 F.3d at 1164.

164. *Id.*

165. *Id.*

The controversial ruling in *Festo* took the Prosecution History Estoppel/Doctrine of Equivalents debate one step further.<sup>166</sup> The Federal Circuit held that any narrowing amendment made to a claim made because of the statutory requirements of 35 U.S.C. sections 101, 102, 103, or 112 gives rise to Prosecution History Estoppel.<sup>167</sup> “[N]o range of equivalents is available for the claim element. Application of the [Doctrine of Equivalents] to the claim element is completely barred . . . .”<sup>168</sup> In other words, the rebuttable presumption from *Hilton-Davis* is no longer rebuttable.<sup>169</sup>

After *Festo*, amended claims only have very narrow protection.<sup>170</sup> When Prosecution History Estoppel bars the Doctrine of Equivalents, the recourse a patent holder has is a claim for literal infringement. Literal infringement can be avoided, however, by not practicing only one of the elements of the patented claims.<sup>171</sup> Therefore, design-arounds are greatly simplified and much more effective.

The ramifications of *Festo* could potentially reach the scope of business method patent protection. If a patentee of a business method is attempting to “corner the market” by patenting a software implementation of an old business process, the patentee is likely to write broad claims. The USPTO initiative now highly scrutinizes business method patents.<sup>172</sup> Therefore, it is likely that the examiner will reject some of the claims as being obvious or not novel over the prior art. The rejection would force the applicant to amend the claims.

Once the claims are amended due to rejections under sections 101, 102, 103, or 112, the Doctrine of Equivalents is barred.<sup>173</sup> At that point, the patentee has very narrow protections over his business method. Without concerns over the Doctrine of Equivalents, competitors could easily avoid infringement by not literally infringing a patent; that is, not practicing every one of the claimed elements in precisely the claimed manner of the business method.

The United States Supreme Court granted certiorari.<sup>174</sup> It is uncertain how the Supreme Court will rule on the *Festo* case. If it upholds the Federal Circuit’s decision, many of the worries of the proponents of the legislation may be lessened. The protection that companies such as Amazon.com have due to their business method pat-

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166. 234 F.3d 558 (Fed. Cir. 2000), *cert. granted*, 121 S. Ct. 2519 (2001).

167. Sorell, *supra* note 160, at 234.

168. *Festo*, 234 F.3d at 578.

169. Sorell, *supra* note 160, at 234.

170. *Festo*, 234 F.3d at 578.

171. 35 U.S.C. § 271(a) (2000); *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376, 1384 (Fed. Cir. 1998).

172. See *White Paper*, *supra* note 5.

173. *Festo*, 234 F.3d at 564-65.

174. See *id.*

ents could potentially be decreased. If amendments were made to the claims, the competitors could much more easily avoid infringement by only concerning themselves with avoiding literal infringement. Therefore, the issuance and effectiveness of business method patents can be substantially altered by the practices of the courts and the USPTO.

## VII. CONCLUSION

Proponents of legislative amendments to the patent laws have valid concerns. They are concerned about giving limited monopolies to patentees who merely implement well-known business methods in software or on the Internet. They are concerned that “weak” patents that should not be patentable are getting constitutional protection. Proponents of the legislation feel that legislation is necessary to subvert the issuance of “weak” business method patents.

Opponents to the proposed legislation do not believe that legislation is necessary. They do not believe that different classes of inventions should be treated differently in the patent laws. The patent laws do not discriminate against biotechnology or software inventions, so why should the laws discriminate toward business method patents? Opponents believe that the existing statutory laws on patentability are sufficient to ensure that only valid business method patents are issued.

The USPTO has made further strides in ensuring the quality of the examination of business method patent applications. The USPTO initiative has already resulted in a decreased percentage of issuance in the Class 705 business methods area.

At this point, it is not clear whether legislation will be passed restricting business method patent prosecution and examination. However, the improvements resulting from the implementation of the USPTO Business Method Patent Initiative are promising. Congress should be reluctant to discriminate against business method patents in light of the improvements in the examination process. The problem is not necessarily the laws, but the application of those laws.

Perhaps instead of changing the laws, more funding to the USPTO would be the best step toward remedying the business method patent problem. Increased funding would allow the USPTO to hire more examiners, increase their training, and improve the ability to search for prior art. Before arbitrarily changing the patent laws, Congress should thoroughly investigate better ways to apply the existing law and give the USPTO the support it needs to reach the goal of ensuring issuance of only valid business method patents.