

India- Business methods and Software Patents

1. How prevalent is filing for business method/software patents in India? What about grants?

Although there is no specific data available as to the number of applications for business method patents being filed in India, or the number of business methods patents being granted, there are indications that, since 2005, a substantial number of such applications have been filed with the Indian Patent Office. The Office's Annual report 2009-2010 indicates that, in the year 2009-2010, around 235 applications were filed in the field of Bioinformatics and 7646 applications in the field of computer science/electronics. In the same year, 1195 patents were granted in the field of computer science/electronics. It is not clear, however, how many of these related to computer programs *per se*, or how many were based on applications that had been examined in earlier years.

The data below from the Annual Report (2010-11) prepared by the Office of the Controller General Of Patents, Designs and Trademarks and Geographical Indications may be useful

**NUMBER OF PATENT APPLICATIONS FILED FROM 2005 -06 TO 2009-2010
UNDER VARIOUS FIELDS OF INVENTIONS**

Year	Chemical	Drug	Food	Electrical	Mechanical	Computer/ Electronic s	Bio- technology	General	Other fields (See App-E1)	Total
2005-2006	5810	2211	101	1274	4734	5700	1525		3150	24505
2006-2007	6354	3239	1223	2371	5536	5822	2774		1621	28940
2007-2008	6375	4267	233	2210	6424	4842	1950		7110	35218
2008-2009	5884	3672	340	2319	6360	7063	1844	2946	6384	36812
2009-2010	6014	3070	276	2376	6775	7646	1303	885	5942	34287

**NUMBER OF PATENTS GRANTED FROM 2005-2006 TO 2009-2010
UNDER VARIOUS FIELDS OF INVENTIONS**

APPENDIX -F

Year	Chemical	Drug	Food	Electrical	Mechanical	Computer / Electronics	Biotechnology	General	Other fields (See App- F-1)	Total
2005- 2006	1140	457	140	451	1448	136	51		497	4320
2006- 2007	1989	798	244	787	2526	237	89		869	7539
2007- 2008	2662	905	154	1067	3503	1357	341		2474	15316
2008- 2009	2376	1207	97	1140	3242	1913	1157	1318	3611	16061
2009- 2010	1420	530	72	404	1024	1195	449	273	801	6168

2. In what industries are business method / software patents being sought?

Generally, business method and software patents are being sought by IT companies, Apps developers, and the proprietors of online market and auction sites. Software firms dealing in web based applications or providing web based support are among the major filers.

Recent trends show Indian software companies such as TCS, Infosys and Wipro, actively applying for patent protection for their innovations in India as well as abroad. Further, India being a hub for business process outsourcing units, there are a number of companies in this sector wishing to seek protection for their innovations. Even MNC, which outsources innovative business models in India, is keen to protect its innovations by seeking patent registration.

3. How important is it that companies are able to obtain patent protection for their business methods/software in India?

Historically, software companies in India began by undertaking procedural tasks and other low value work, relying on the availability of a cheap educated workforce. In the last five years, however, Indian companies have carved a niche for themselves and gradually attained proficiency in developing products and patentable innovations. This has brought a paradigm shift in the way the industry operates: the need to protect these innovations both within the country and abroad is now strongly felt. Further, India has become strategically important for foreign companies which have started establishing their R&D centres there in order to take advantage of the large base of engineering graduates and innovate at a much lower cost.

Indian law practice in relation to the protection of software and business methods is stringent, with the *Patent Act* clearly providing that “ a mathematical or business method or a computer program per se or algorithm” is not patentable unless embedded in hardware. Companies operating in this field, therefore, find it difficult to obtain a patent for their innovations. Software is protected in India under the copyright regime; business methods implemented through computers also come into this category. This protection is not, however, considered very strong as it only protects the expression of the idea and not the idea itself. Thus, by reverse engineering, a third party can arrive at the same result by changing the expression of the idea.

4. What do applicants need to prove to obtain patent protection for their business methods/software?

As mentioned above, pursuant to s.3(k) of the Indian *Patents Act*, neither business methods nor computer programs *per se* are patentable. While business methods *per se* will never be patentable, however, computer programs operating on specific hardware may be. To be patentable, software must be used in relation to specific hardware or, more precisely, a device or apparatus, and the claim must be for the device or apparatus used in conjunction with the software component. Besides novelty, inventive step and industrial applicability, the applicant must prove that the technical effect of the invention is substantial and that it results from the interoperability of the hardware and software components.

In 2008, the Indian Patent Office released a Draft Manual of Patent Practice and Procedure providing guidelines on the types of claim allowed in respect of software-related inventions. As per the guidelines, claims to computer programs *per se*, computer-readable media with programs recorded thereon, methods implemented by software that lack technical effect and methods with a technical effect but lacking hardware support in the specification, are not patentable. The guidelines state that in respect of a method, “the method claim should clearly define the steps involved in carrying out the invention. It should have a technical effect. In other words, it should solve a technical problem...The claim orienting towards a ‘process/method’ should contain a hardware or machine limitation.”

5. Is the patentability bar high or low, and how does it compare with the patentability bars in other jurisdictions?

As mentioned above, inventions related to business methods and computer programs *per se* are not considered appropriate subject matter for patent protection in India. Unlike the USA, Japan and Australia, where pure business methods are patentable, India follows the European practice where rules and methods for performing mental acts and doing business, or a program for a computer, are excluded from patent protection if the claims of the patent relate to that thing '*as such*'. Indian practice, however, differs from European practice when it comes to the examination of claims related to business methods and software.

As we understand it, pursuant to EPO practice, software itself can be the subject of a patent so long as other requirements such as clarity of the claim language and sufficiency of disclosure are met. In India, however, software is not protectable unless integrated with hardware.

Again, pursuant to EPO practice, business methods as such are not patentable. In practice, however, they are not excluded if they are carried out through some apparatus (such as a computer), and solve an "objective technical problem" in order to satisfy the inventive step requirement. In India, a business method will not be patentable, even if it is implemented through an apparatus.

Recently in a pre grant opposition involving Yahoo Inc and Rediff.com, the Intellectual Property Appellate Board (IPAB) held that business method patents are not an appropriate subject matter of patents in India. The case involved a patent application, dated 14 May 2004, filed by Overture Services Inc. for a business method. The application was examined and an examination report was issued on 30 December 2004. The applicant responded by submitting amended claims. A further examination report was issued,

again rejecting claims pursuant to section 3(k). The applicants responded again by submitting amended claims. After submission of the second set of amendments, the applicants were informed, on 9 July 2006 that the application was in order for grant, but only after disposal of any pre-grant opposition. Rediff filed a pre grant opposition on 22 October 2007. Meanwhile, the original applicants had merged with Yahoo Inc. . Yahoo Inc was informed that the application did not pass the novelty and patentability test and was thereby rejected.

Yahoo Inc filed an appeal with the IPAB against the Controller's decision, arguing, among other things, that many such patents had been granted to Google.

The IPAB in its decision dated 8 December 2011 held that although the application satisfied the criteria of inventive step, novelty and industrial applicability, it could not be accepted as the subject matter, being a business method, fell within the ambit of section 3(k). In relation to Yahoo Inc's argument that similar patents had been granted to Google, the IPAB maintained that business methods are not considered appropriate subject matter and refused the application. It noted that it is an undesirable state of affairs if the Office is adopting a different practice for different applicants.

6. To what extent is the difficulty/ease of obtaining patent protection for business methods/software in India due to cultural attitudes towards the patentability of business methods/software?

It is clear from the from Business Software Alliance study 2011, which estimated that 63% of software in India was pirated, that there has, generally, been a cultural attitude against strict laws for the protection of software.

Policy makers and industry experts, however, now feel that strong protection should be granted to software and business methods and that the failure to provide protection for such inventions will lead to India losing out on new investment. Further, companies will be reluctant to introduce new products and technologies. This will definitely not be desirable in the long run. The protection of such innovations is likely to become more important for the policy makers in the near future.

Vatika Towers
10th Floor Block-B
Sector-54
Gurgaon-122002
National Capital Region (Haryana)
India

Tel. +91 124 4655999
Fax +91 124 4045047
Email info@indiaprights.com

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