Report Q 158

in the name of the Paraguayan Group
by Hugo T. BERKEMEYER, President

Patentability of business methods

I. Introduction

II. The legal situation in the country

1. Indicate exclusion from patentability as provided for by the law, based on the abstract nature of the invention:

Business methods are expressly excluded by law. This means, exclusion arises from law. For our law, business methods do not comply with one of the three main components for an invention to be object of a patent, namely: industrial application.

2. Are business methods patentable or, on the contrary, are they excluded from patentability in the legislation of your country?

As mentioned in the paragraph before, business methods are excluded from patentability. Even the project for new patent law in Paraguay excludes business methods from patentability.

3. If business methods are excluded from patentability does this exclusion concern only the methods in themselves, or does it also apply to any invention applying business methods?

Business methods are excluded from patentability, as well as any invention applying business methods.

4. If business methods are not patentable, are there other means of protection of business methods, particularly copyright?

Business methods are considered to be purely intellectual and abstract operations, they are not patentable. Copyright only protects the self expression of the idea, performed though any printed material, such as books, or materials which are possible to be read by other mean, such as software. Therefore, copyright does not protect concepts or abstract ideas, as far as they are not expressed though any mean.
5. If business methods are patentable, is there a distinction in the grant of protection between business methods used in the context of tradition at business and business methods used in the context of the Internet?

Business methods are not patentable, even traditional methods, or via internet.

6. If business methods are patentable in the country, have the national courts already had the occasion to decide on the extent of the protection conferred by patents concerning such methods? In the affirmative, have the courts applied specific rules or, on the contrary, the normal rules governing the patent system?

In view that business methods are not patentable, there is no jurisprudence about this matter.

III. Opinion of the groups

1. Do the groups consider that business methods, as defined above constitute inventions?

In our opinion, and based on the definition given in this work, we consider that business methods could constitute inventions, since business methods would join certain requirements for them to be considered as inventions.

2. Is the exclusion of patentability for business methods in conformity with the provisions of Article 27 of the TRIPS Agreement?

Article 27 of TRIPS does not expressly state about inclusion or exclusion of business methods as object of patent protection. However, such article establishes the three main and basic requirements for an invention to be subject of patent protection. We believe such requirements do not totally apply for business methods. Therefore, business methods would not be subject of patent protection, in accordance with this article.

3. If national legislation does not currently provide for the possibility of protecting business methods, taken by themselves, by invention patents, do the groups think that their patentability is desirable?

We consider that business methods should be protected as invention patents. Even though the patent law and the project does not allow patent protection for business methods, this possibility could be reviewed in a future instance and concession of protection as a patent for business methods could be introduced therein.

4. If answer to 3. Is affirmative, specify whether patentability should solely cover business methods used on the Internet, that is to say which directly implement technical means present on this network or, on the contrary, whether patentability should be accepted for all business methods without distinction?

We consider that, if patentability of business methods is allowed, patentability should not be restricted only to those methods used in internet, but also to all business methods without distinction.

5. If answer to 3., is in the negative, express your opinion on other means of protection of business methods, such as copyright. In this case, it is requested that the groups
present the respective advantages and disadvantages of patents and other means of protection of business methods. May also refer to the mentioned resolution on computer programs.

No provision, since our response is affirmative.

6. If the business methods are subject of invention patents, the question arises as to the scope of the protection conferred by a patent concerning such methods. Would this be protection limited to the method itself, or would it be necessary following the example of the process patent, to provide for protection in addition for products or services marketed through such methods?

Business methods are not subject of patents in our law. However, if business methods would eventually be object of patent, such protection should only protect the method as such. We consider that protection of goods and services marketed through business methods could constitute trust.

7. Should the rules for assessment of the scope of patent covering business methods be the same as for traditional method or process patent or, on the contrary, should specific rules be applied by the courts, and in this latter case, which rules? For example, if the courts of a country generally apply the theory of equivalents should this theory also apply to business methods patents?

We consider that any new rules for business methods and its protection though patent should be studied at the moment of eventual insertion of this protection on laws. Taking in consideration our system of law, by the moment, the traditional rules should be used.

8. Do the Groups consider that the inventive activity of an invention concerning a business methods may arise as a result of the simple fact of adapting a known method to new means of communication, such as the Internet?

Very well known business methods, traditionally used and applied to business at this moment, would not accomplish with the basic requirement of inventivity when used though a new mean of communication. Therefore, these types of business methods transported to new means of communications such as Internet, would not be object of patent protection. However, inventivity should be studied in every single case.

9. With respect to acts of infringement, should the usual rules in patent law be applied: direct or indirect infringement, infringement by incitement, supply of means, etc or on the contrary should special rules be applied to patents covering business methods?

Any interpretation, judgement or decision made by the Courts should be based on a previous written law. Therefore, any decision regarding patent in this country would be always based on a previous law.

10. Should rules concerning compensation for loss as applied to the infringement of patents covering business methods be the same as are applied to patents covering inventions in traditional fields, or should these rules be modified for the infringement of patents covering business methods, taking into account of the fact that these
methods are not used, in principle for the manufacture of products but solely for the sale of products and services?

In view that there is no experience or legal decisions regarding this issue in Paraguay, it is difficult for us to determine the kind of rules. But if this issue would be patentable, then new rules should be considered concerning compensation. For example, total of products or services not sold caused by infringement, or total of transactions performed with use of the method object of infringement.

11. Should the rules of evidence concerning the infringement of a patent covering business methods be the same as those concerning process patents or patents of traditional methods? In particular, do the groups consider that the provisions of Article 34 of the TRIPS Agreement concerning the burden of proof should apply to the patents covering business methods?

We believe that both rules of evidence could be used: those mentioned in article 34 of TRIPS agreement, and those of traditional methods, depending on each case.