

No. 08-964

**IN THE
SUPREME COURT OF THE UNITED STATES**

BERNARD L. BILSKI AND RAND A. WARSAW,
Petitioners,

v.

DAVID J. KAPPOS, UNDER SECRETARY OF COMMERCE FOR
INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED
STATES PATENT AND TRADEMARK OFFICE,
Respondent.

**On Writ Of Certiorari To The United States Court
Of Appeals For The Federal Circuit**

BRIEF OF BLOOMBERG L.P. AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT

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October 2, 2009

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INTEREST OF AMICUS CURIAE¹

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¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief.

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Bloomberg is about information: accessing it, reporting it, analyzing it and distributing it, faster and more accurately than any other organization. Although Bloomberg invests heavily in research and development and has a valuable patent portfolio based on its own innovations, Bloomberg is concerned about the proliferation of “business method” patents that cover broad strategies and methodologies for conducting business and financial transactions. Rather than promoting innovation, these patents have hindered innovation by removing general business concepts from the markets, leading to substantial uncertainty and expensive litigation.

SUMMARY OF ARGUMENT

Business and financial methods are not patentable under Section 101 for two reasons. First, business and financial methods are not “useful arts” as required by the Constitution. Second, business and financial methods do not satisfy the machine-or-transformation test.

The threshold question under Section 101 is whether the claimed process would *promote innovation in the useful arts*. The Constitutional purpose of the patent system is to promote innovation in science, industry, and technology—not economics, finance, or business. Business and financial methods fail this threshold “useful arts” inquiry and therefore are not patentable.

Section 273’s reference to methods of doing business does not demonstrate a Congressional intent that business methods should be patentable. Congress enacted Section 273 of the Patent Act as a response to the Federal Circuit’s ruling in *State Street* that business methods should be patentable. However, Section 273 does not suggest that Congress intended to allow patents on inventions that do not promote the useful arts. Indeed, that would impermissibly contravene the Constitution.

Second, if a process satisfies the threshold inquiry and qualifies as a “useful art,” the next step in the analysis is whether the patent claims *preempt*

the public's use of a fundamental principle. Fundamental principles include laws of nature, natural phenomena—and the types of abstract ideas, mental processes, and mathematical algorithms that underlie many business and financial methods. This Court has consistently held that no one should be able to exercise exclusive rights over fundamental principles.

The machine-or-transformation test remains a valuable clue (although not the exclusive test) to determine whether a patent claim on a process would impermissibly preempt a fundamental principle. The machine-or-transformation test, if applied to subject matter that promotes the useful arts, provides a useful indication of the proper boundaries for patentability.

The test also demonstrates that business and financial methods like *Bilski's* are not patentable under Section 101. Many business and financial methods are based on abstract ideas, mental processes, or mathematical algorithms. The patent system does not permit one person to preempt others from using those types of fundamental principles.

In addition, business and financial methods do not involve a particular machine or transformation simply because they are implemented using a general-purpose computer, or because the computer's hard drive or random access memory is "transformed" when it stores the results of

calculations. To hold that implementation of a business method in a generic computer implicates a “particular machine” or a “transformation of an article” would render those criteria meaningless.

ARGUMENT

I. Business And Financial Methods Are Not Patentable Because They Do Not Promote The Progress Of The Useful Arts.

A. The Constitutional Purpose Of The Patent System Is To Promote Innovation In Technology, Science, And Industry—Not Business Or Finance.

Recitation of a “particular machine” or “transformation” is not enough to make a process patentable—the process must also address subject matter that promotes the progress of the useful arts. Business and financial methods are unpatentable *per se*, regardless of whether they involve a machine or transformation.

The Patent Clause of the U.S. Constitution directs Congress to provide patent protection to “promote the Progress of . . . useful Arts.” U.S. Const., art. I, § 8, cl. 8. This Court has cautioned that “[t]his is the *standard* expressed in the Constitution and it may not be ignored.” *Graham v.*

John Deere Co. of Kan. City, 383 U.S. 1, 6 (1966) (emphasis in original).

As Respondents correctly explain, the “useful arts” relate to technological and industrial processes, not methods of conducting finance and business (which fall under the category of liberal arts). See Resp’t Br. 16-25; see also Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 18 Geo. Wash. L. Rev. 50, 54 (1949) (“The term ‘useful arts,’ as used in the Constitution . . . is best represented in modern language by the word ‘technology.’”).

Business methods are not products of the Information Age—there were “major innovations” in business and finance as far back as 1720. See *Bilski*, 545 F.3d at 973 (Dyk, J., joined by Linn, J., concurring) (citing Malla Pollack, *The Multiple Unconstitutionality of Business Method Patents*, 28 Rutgers Comp. & Tech. L.J. 61, 96 (2002)). As Circuit Judge Dyk explained, the U.S. Patent Act was meant to imitate the patent system of Great Britain. *Bilski*, 545 F.3d at 967 (Dyk, J., joined by Linn, J., concurring). At that time, methods of organizing human activity—like the business method claimed by *Bilski*—were not patentable. See *id.* at 970-74.

Business and financial methods do not promote the progress of the useful arts and thus are not patentable regardless of whether they recite a machine or transformation. As Circuit Judge Mayer explained, “[a]lthough business method applications may use technology--such as computers--to accomplish desired results, the innovative aspect of the claimed method is an entrepreneurial rather than a technological one.” *Id.* at 1002 (Mayer, J., dissenting). As Judge Mayer explained, this Court’s decisions “implicitly tether patentability to technological innovation” because they consistently require patentable processes to apply laws of nature to new and useful ends—and that is the very definition of “technology.” *Id.* at 1002-3 (Mayer, J., dissenting).

Bloomberg agrees with Circuit Judge Mayer that “the patent system is intended to protect and promote advances in science and technology, *not ideas about how to structure commercial transactions.*” *Id.* at 998 (Mayer, J., dissenting) (emphasis added). If the framers of the Constitution had wanted to advance innovations in business and finance through patents, they could have done so.

The goal of the patent system is to promote innovation. But sometimes “*too much* patent protection can impede rather than ‘promote the Progress of Science and useful Arts,’ the constitutional objective of patent and copyright protection.” *Lab. Corp. of Am. Holdings*, 548 U.S. at

126-27 (Breyer, J., joined by Stevens and Souter, JJ., dissenting from dismissal of writ of certiorari) (emphasis in original). That is especially true if patents are granted on processes—such as business and financial methods—that were not endorsed by the framers of the Constitution.

B. Section 273 Does Not Evidence A Congressional Intent That Business And Financial Methods Should Be Patentable.

Petitioners suggest that business methods are necessarily patentable because Congress enacted Section 273 of the Patent Act to provide prior users of such methods a defense to patent infringement suits. *See* Pet'r Br. 29. Petitioners argue that Section 273 defines "method" in that section as "a method of doing or conducting business" and "makes no mention of methods tied to machines or transforming articles." Pet'r Br. 29.

The creation of an infringement defense for prior users of business method patents does not demonstrate a Congressional intent that business methods should be patentable. Congress enacted Section 273 as a response to the Federal Circuit's ruling in *State Street* that business methods could be patentable. Section 273 provides protection to businesses that face unprecedented infringement suits for previously unpatentable inventions. *See* Resp't Br. 47-49. However, Section 273 does not

suggest that Congress wanted to contravene the Constitution by allowing patents on inventions that do not promote the useful arts. Section 273 imposes a limit on enforcement of business method patents; it does not sanction or endorse their validity.

Further, the fact that Congress added Section 273 rather than revising Section 101 or engaging in a more sweeping alteration of the Patent Act, does not prove that Congress endorsed the holding of *State Street*. This Court has cautioned that, “when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments,” in response to a judicial decision “[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court’s statutory interpretation.” *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (citation and internal quotation omitted).

As discussed above, business and financial methods are unpatentable because they do not meet the Constitutional requirement to promote the useful arts. In addition, as explained below, business and financial methods do not satisfy the machine-or-transformation test.

II. The Machine-Or-Transformation Test Also Bars The Patentability Of Business And Financial Methods.

In addition to failing to qualify as “useful arts” under the Constitution, business and financial methods are not patentable for a second reason: because they fail the machine-or-transformation test. For processes that pass the threshold inquiry and qualify as “useful arts,” the analysis should be whether the claimed process would preempt the public’s use of a fundamental principle—including the types of abstract ideas, mental processes, and algorithms that underlie many business and financial methods. If so, the process is unpatentable.

Section 101 of the Patent Act defines patentable subject matter to include “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof” 35 U.S.C. § 101 (2009). The patent claims at issue in this case are business method claims that cover a “method of hedging risk in the field of commodities trading.” *In re Bilski*, 545 F.3d 943, 949 (Fed. Cir. 2008).

Despite the broad language of the Patent Act, not all inventions or discoveries are patentable. This Court has consistently held that patents are not allowed for laws of nature, physical phenomena, or the types of abstract ideas and mathematical algorithms that underlie business or financial

methods. See, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980). Thus, one cannot patent the law of gravity or mathematical formulas because “[s]uch discoveries are ‘manifestations of . . . nature, free to all men and reserved exclusively to none.’” *Id.* at 309 (quoting *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948)); see also *Gottschalk v. Benson*, 409 U.S. 63, 72 (1972) (denying patent protection to a process where “the patent would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself”).

The recurring theme throughout this Court’s Section 101 jurisprudence is that patents should not be granted that would allow one patent holder to preempt the public’s use of fundamental principles. This Court’s decisions demonstrate that the machine-or-transformation test is useful to determine whether patenting a particular process would result in an impermissible preemption. Those decisions also show that the machine-or-transformation test, when properly applied, prevents patents on business and financial methods.

A. The Types Of Abstract Ideas That Underlie Business And Financial Methods Are Not Patentable.

This Court’s decisions in *O’Reilly v. Morse*, 56 U.S. (15 How.) 62 (1854) and *The Telephone Cases*, 126 U.S. 1 (1888), teach that abstract ideas are not

patentable, while practical applications of such ideas are patentable. Business and financial methods that are no more than abstract ideas, including the hedging method at issue in this case, are unpatentable under the dichotomy set forth by those two cases.

Morse upheld the patentability of Samuel Morse's telegraph and "Morse Code" system. *Morse*, 56 U.S. (15 How.) at 112. But when Morse attempted to claim the very idea of using electromagnetism to send a message by any means, this Court invalidated his claim. *Id.* at 113. Allowing such a claim would have given Morse a patent on the principle of using electromagnetism to send messages, regardless of the implementation.

In contrast, in *The Telephone Cases* this Court allowed Alexander Graham Bell to patent the use of electricity in a particular process for transmitting sounds telegraphically. 126 U.S. at 534-35. The Court distinguished Bell's claimed invention from Morse's. The Court explained that Morse's "use of magnetism as a motive power, without regard to the *particular process* with which it was connected in the patent, could not be claimed" *Id.* at 534 (emphasis added). Bell's claim, on the other hand, was valid because he was not trying to claim the use of electricity "distinct from the particular process with which it is connected in his patent." *Id.* at 535.

The analysis followed by this Court to reject Morse's eighth claim could be viewed as an early version of the machine-or-transformation test. Morse's eighth claim was not tied to any particular machine or implementation: "[t]hat is to say--he claims a patent, for an effect produced by the use of electro-magnetism *distinct from the process or machinery necessary to produce it*. . . . [N]o patent can lawfully issue upon such a claim." *Morse*, 56 U.S. (15 How.) at 120 (emphasis added).

Bilski's claimed business method is similar to the unpatentable eighth claim in *Morse*. Bilski's claimed method would cover the idea of hedging risk in the field of commodities trading. As Judge Mayer noted, "Bilski's claimed method consists essentially of two conversations. . . . His claims provide almost no details as to the contents of those conversations." *Bilski*, 545 F.3d at 1008 (Mayer, J., dissenting). As such, Bilski's claims cover the abstract idea of bringing together market participants with countervailing risk positions; the claims provide no guidance for implementing a practical application of that idea and are thus unpatentable. This analysis applies with equal force to all business and financial methods that are based on abstract ideas.

B. The First Prong Of The Machine-Or-Transformation Test Requires A “Particular Apparatus.”

The machine-or-transformation test is also consistent with this Court’s decision in *Tilghman v. Proctor*, 102 U.S. 707 (1881). In *Tilghman*, this Court explained that an inventor must describe *some* particular mode or apparatus for performing the claimed process to ensure that a principle is not being patented. *Id.* at 728-29.

Business or financial methods that do not recite a particular apparatus are unpatentable under the framework set forth in *Tilghman*. The recitation of generic computer hardware, as is common in many business and financial methods, is insufficient.

In *Tilghman*, the Court addressed the distinction between “a mere principle” and “a process by which a principle is applied to effect a useful result.” *Id.* at 724. The Court discussed an earlier case involving a patent granted to Neilson for smelting iron in a furnace: “[t]hat a hot-blast is better than a cold-blast for smelting iron in a furnace was the principle or scientific fact discovered by Neilson; and yet, being nothing but a principle, he could not have a patent for that.” *Id.* (emphasis added). In contrast, the Court noted that Neilson was entitled to a patent for an implementation of that principle because he “pointed out a *particular apparatus* for that purpose, and having thus shown

that the process could be practically and usefully applied.” *Id.* at 25 (emphasis added).

In contrast, Bilski’s claimed method does not recite a particular apparatus, nor any apparatus at all. Bilski’s claim 1 describes steps for “initiating a series of transactions” and “identifying market participants,” but it does not indicate what—if any—apparatus would be used to do those things. *Bilski*, 545 F.3d at 949. His claimed method is thus unpatentable.

The “particular machine” prong of the machine-or-transformation test thus provides a useful criterion for distinguishing between an unpatentable principle and a patentable implementation of that principle. Further, as explained in the following section, generic computer hardware, often recited in claims for business and financial methods, does not qualify as a “particular machine” and accordingly is insufficient for patentability under Section 101.

C. A Patent May Not Wholly Preempt Use Of A Mathematical Formula.

The machine-or-transformation test is also consistent with *Gottschalk v. Benson*, in which this Court rejected the patentability of a computer-implemented process for converting binary coded decimal numbers (“BCD”) into pure binary, because allowing the patent claims would “wholly pre-empt”

the use of a mathematical formula. 409 U.S. at 71. Similarly, business or financial methods that would preempt the use of a mathematical formula or algorithm are unpatentable under *Benson*.

In *Benson*, this Court explained that an algorithm for converting binary coded decimal numbers to pure binary could be carried out mentally. *Id.* at 67. In this case, however, the applicant sought to patent a method for implementing a slightly modified algorithm in a general-purpose digital computer. *Id.* at 67.

Although the patent claims at issue did not cover the algorithm *per se*, but rather a computer implementation of the algorithm, this Court was concerned that allowing the patent claims would allow someone effectively to patent the idea itself. “It is conceded that one may not patent an idea. But in practical effect that would be the result if the formula for converting BCD numerals to pure binary numerals were patented in this case.” *Id.* at 71. Because “[t]he mathematical formula involved here has no substantial practical application except in connection with a digital computer . . . *the patent would wholly preempt the mathematical formula* and in practical effect would be a patent on the algorithm itself.” *Id.* at 71–72 (emphasis added).

Another problem with the claims in *Benson* was that they “were not limited to any particular art or technology, to any particular apparatus or

machinery, or to any particular end use.” *Id.* at 64. The claims were “so abstract and sweeping as to cover both known and unknown uses of the BCD to pure binary conversion,” which could be performed for a variety of end uses and through “existing machinery or future-devised machinery or without any apparatus.” *Id.* at 68.

Bilski’s claims recite an algorithm for hedging risk. Allowing patent protection for those claims would preempt the use of the disclosed algorithm, even if his claims recited the use of a general-purpose computer. Bilski’s algorithm could be practically implemented in many different ways, using different combinations of computer hardware and software. Indeed, like the algorithm in *Benson*, Bilski’s algorithm has “no substantial practical application except in connection with a digital computer.” *Id.* at 71. If Bilski was allowed to patent his hedging algorithm simply by reciting some generic computer hardware in his claims, the “practical effect would be a patent on the algorithm itself,” which would be inappropriate under *Benson*. *Id.* at 71-72.

Thus, proper application of the machine-or-transformation test does not permit a patent applicant to merely recite the use of a generic computer (or another type of generic machinery) to obtain a patent on an algorithm. The use of a “particular machine” must impose a meaningful limitation so the patent does not preempt the public’s

use of a fundamental principle. Accordingly, a business or financial method is not patentable merely because it is claimed in the context of computer hardware.

Similarly, in *Parker v. Flook*, this Court rejected a patent for a method directed to updating alarm limits using a mathematical formula. 437 U.S. 584, 585 (1978). Flook's patent application described a method of updating alarm limits on process variables (*e.g.*, temperature or pressure) in a process for catalytic chemical conversion of hydrocarbons. The Court of Customs and Patent Appeals had allowed Flook's application because the claimed uses were limited to the petrochemical industry and thus did not seek to preempt all uses of a mathematical formula. *Id.* at 587.

This Court agreed that Flook's claims did not cover *every* conceivable application of the formula for calculating alarm limits. However, in this Court's view, the claim recited nothing more than an improved method of calculation, *viz.*, a mathematical formula that is presumed to be well known. *See id.* at 595 n.18. Flook conceded that the only novel feature of his method was the improved algorithm. *Id.* at 588. The question before this Court was whether "the discovery of this feature makes *an otherwise conventional method* eligible for patent protection." *Id.* (emphasis added). The answer was no. This Court found that, "once that algorithm is assumed to be within the prior art, the application,

considered as a whole, contains no patentable invention.” *Id.* at 594.

This Court also emphasized that one may not attempt to patent a mathematical formula through clever claim drafting or field-of-use limitations. “A competent draftsman could attach some form of post-solution activity to almost any mathematical formula; the Pythagorean theorem would not have been patentable, or partially patentable, because a patent application contained a final step indicating that the formula, when solved, could be usefully applied to existing surveying techniques.” *Id.* at 590.

Similarly, *Bilski*’s claims would not be patentable even if they added conventional post-solution activity. For example, even if his claims identified market participants and then entered their names into a computer database, that additional limitation would not suffice to make his claims patentable.

Flook illustrates that the machine-or-transformation test must be applied flexibly to prevent patents on business and financial methods that would preempt the public’s use of abstract ideas or mathematical algorithms. Adding field-of-use limitations or conventional, post-solution activity does not qualify a process for patentability if the resulting patent would nonetheless preempt the public’s use of a fundamental principle.

D. To Satisfy The “Transformation” Prong Of The Test, A Process Must Do More Than Manipulate Data.

The machine-or-transformation test was enunciated most clearly by this Court in *Diamond v. Diehr*, 450 U.S. 175 (1981).

In *Diehr*, this Court addressed the patentability of a computer-implemented process for molding raw, uncured synthetic rubber into cured precision rubber products. *Id.* at 177. The “Arrhenius equation” was commonly used to calculate when to open a molding press and remove the cured product. *Diehr* claimed the improvement of continually measuring the temperature inside the mold, feeding this information into a computer that constantly recalculates the cure time, and signaling a device to open the molding press at the proper time. The Patent Office rejected the claims as steps carried out by a computer under the control of a stored program, which constituted nonstatutory subject matter under *Benson*. The Court of Customs and Patent Appeals reversed and held that a claim drawn to otherwise statutory subject matter does not become nonstatutory merely because a computer is involved. *Id.* at 180.

This Court affirmed that the claims were patentable, explaining that “[t]ransformation and reduction of an article ‘to a different state or thing’ is the clue to the patentability of a process claim that

does not include particular machines.” *Id.* at 184 (citing *Benson*, 409 U.S. at 70). The Court found that Diehr’s claims involved the transformation of an article, *i.e.*, raw, uncured synthetic rubber, into a different state or thing: precision synthetic rubber products. The Court found that the claims “when considered as a whole” did not attempt to patent a mathematical formula, but instead claimed an industrial process for molding rubber products. *Id.* at 192.

In contrast, Bilski’s claims do not involve a particular machine or transformation. Unlike the rubber curing process in *Diehr*, Bilski’s claims do not involve a technological or industrial process, do not recite any particular machinery, and do not transform any materials. At most, they transform legal or financial relationships and data representing those relationships. Such a “transformation” of abstract information does not satisfy the machine-or-transformation test. Bilski’s claims, as do many business and financial methods, thus lack the critical “clue” to patentability that this Court required in *Diehr*. *Id.* at 184.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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October 2, 2009