

## *Is the Use of Patents Promoting the Creation of New Types of Securities?*

**Stefania Fusco**

Has there been a change in the level of innovation of financial methods subsequent to the State Street decision that allowed the adoption of patents to protect them? For most of the 20<sup>th</sup> century, financial methods as well as business methods have been considered to be unpatentable *per se*.<sup>1</sup> The “result of the United States Patent Office opening its door to financial innovations”<sup>2</sup> is that now financial institutions as well as financial and legal departments in almost every industry, “have to be mindful of [patent protection].”<sup>3</sup>

This consideration might appear to be inconsequential, but, if the fact that for many years the financial industry survived based on its own creative processes and its own equilibrium among the market participants is taken into account, it is possible to understand why the changed situation is more problematic than it originally seems. Indeed, the adoption of patents to protect financial methods has created mixed feelings in the financial industry; as a result, many observers have questioned the subsistence of any benefits that the patent system would confer to this industry.

Since the goal of the patent system is to promote innovation by creating proprietary rights for new inventions to reward the creator for his investment in producing new knowledge, it can be said that, if an increase in the level of innovation of financial methods is not present, the adoption of this form of IP to protect creativity in this industry is pointless and potentially even harmful. Indeed, the pursuance of the aforementioned goal has the social cost of excluding society from certain knowledge with a consequent reduction in the public domain or the “common pool of information,” from which individuals can derive inspiration to produce new ideas and inventions. Therefore, it is possible to say that, as in a perverse circle, the patent system can both foster and limit innovation, depending on the type of rights provided to the patentee and the scope of protection established by the overall patent system.

In this context, it is important to ascertain the correct balance between encouraging innovation on the one hand and leaving enough “raw material” upon which individuals can build new ideas on the other. This is certainly not an easy task. A first step in accomplishing this objective is understanding whether the patent system is “doing its job” or, in other words, whether the provided protection is actually inducing innovation in a specific industry. If so, if individuals are motivated by the chance to obtain a patent in their creative process or, at least, if patent protection is one of the factors that, combined with others, produces innovation, then the creation of proprietary rights is justified because society benefits from the advancement in knowledge that otherwise might not occur. If, however, innovation is produced no matter what the patent

---

<sup>1</sup> Charles Holoubeck and Timothy M. Shaughnessy, *Market Reaction to Business Method Patents: An Empirical Analysis*, 9 Comp. L. Rev. & Tech. J. 279, (2005).

<sup>2</sup> Paul E. Schaafsma, *A Gathering Storm in the Financial Industry*, 9 Stan. J.L. Bus. & Fin. 176, (2004).

<sup>3</sup> *Id.*

system provides, then the creation of proprietary rights is not only useless, but also reduces the extent of the public domain and, thus, damages the society.

In this article the author presents an empirical study of innovative types of securities that have emerged over the past 25 years. The author also investigates the patent practice of this industry and identifies the patent applications submitted and the patents issued on different types of securities. Finally, the author discusses her findings and concludes that, recently, creators of new types of securities have shown less interest in the patent system. Nevertheless, the rate of innovation in this field has remained constant. At this time, the available data are not sufficient to determine whether the patent system has affected the design of new types of securities. Indeed, more investigation, including interviews with market participants, seem to be required to ultimately shed some light on whether in the last ten years patent protection has, in fact, been able to foster innovation in the financial industry in general and in the world of securities in particular.