PATENT BENDING
by James Surowiecki

The American newspaper business as we know it was born on September 3, 1833, when a twenty-three-year-old publisher named Benjamin Day put out the first edition of the New York *Sun*. Whereas other papers sold for five or six cents, the *Sun* cost just a penny. For revenue, Day relied on advertising rather than on subscriptions. Above all, he revolutionized the way papers were distributed. He sold them to newsboys in lots of a hundred to hawk in the street. Before long, Day was the most important publisher in New York.

One thing that Day did not do was patent any of these innovations. Soon after the *Sun* appeared, penny papers made their début in Boston and Baltimore; in New York, James Gordon Bennett started the *Herald*, mimicking the *Sun*'s price and sales methods. By 1840, the *Sun* and the *Herald* were the country's two most popular dailies.

This is how American business worked until very recently. Innovators came up with new ways of selling products, handling suppliers, running organizations, or managing information. If the ideas were good, the innovators got rich, but they also got imitated, which made them less rich than they might have been. It was great for everyone else, though. The competition lowered prices and increased quality; the new ideas spread and were improved upon. The mail-order catalogue, the moving assembly line, the decentralized corporation, the frequent-flier mile, the category-killer store—none of these radical ideas were patented.

Those were the days. Now the first thing someone with a good notion does is press the government to protect it. Priceline patented its reverse-auction method for selling cut-rate airline tickets. I.B.M. patented a method for keeping track of people waiting in line for the bathroom. Last month, Netflix, a company that runs an online DVD-rental subscription service, got a patent covering, among other things, the way its customers request titles and the way it sends out DVDs. And eBay is now in court appealing a verdict that it infringed on a Virginia man’s patent. The crime? Selling auctioned items at a fixed price. What gall.

For most of American history, it was next to impossible to get a patent on what the U.S. Patent and Trademark Office called “a mere method of doing business.” A business method was considered to be an idea—selling newspapers in the streets, delivering packages overnight—and ideas of this sort were not patentable. But in July, 1998, the U.S. Court of Appeals for the Federal Circuit did away with that principle. The case, State Street v. Signature Financial, involved software that Signature had written to enable it to administer mutual funds more efficiently. But the court’s language was broad enough to embrace any business process (as long as it was new and “nonobvious” and had a “useful, concrete, and tangible result”). The gates opened, and in the past five years thousands of business-method patents have been granted. One inventive soul won a patent for a system of using pictures to train janitors. Another got one for describing a way to cut hair with both hands.

All patents, of course, stifle competition. That’s why inventors like them. But business-method patents have an especially chilling effect, in that novel approaches to commerce can be ruled off-limits to others. What eBay was accused of copying was a concept, not a computer code. As James Boyle, a law professor at Duke, put it, “Under this logic, one could get a patent on the idea of fast food—not a different way to broil the burger but the idea of fast food itself.”

Although intellectual-property experts like Boyle have loudly criticized the State Street decision, Congress has shown little interest in doing anything about it. (In fact, lawmakers have proposed bills that would make things even worse, such as allowing sports “techniques” to be patented. Imagine pitchers paying a royalty every time they threw a forkball.) That has left the matter of business-method patents in the hands of patent judges and the staffers at the Patent Office—people who spend most of their time working with patent-seekers, and who are therefore more sympathetic to their interests than to the public’s. (Economists call this phenomenon “regulatory capture.”) The office says on its Web site that its role is “to grant patents,” but surely its role should be to distinguish between innovations that are worth patenting and those that are not.
Americans have traditionally been chary about intellectual-property rights. Thomas Jefferson, who served on the nation’s first patent board, wrote, “If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea.” Although we have always had a vibrant patent system, we’ve managed to strike a balance between the need to encourage innovation and the need to foster competition. As Benjamin Day, Henry Ford, and Sam Walton might attest, American corporations have thrived on innovative ideas and new business methods, without owning them, for two centuries. In the past decade, the balance has been upset. The scope of patents has been expanded, copyrights have been extended, trademarks have been subjected to bizarre interpretations. Celebrities are even claiming exclusive ownership of their first names (consider Spike Lee’s objection to Viacom’s cable channel Spike TV). The new regime’s defenders insist that in today’s economy such vigilance is necessary: ideas are the source of our competitive strength. Fair enough. But you don’t compete by outlawing your competition.