



## COMMENTS OF THE ELECTRONIC FRONTIER FOUNDATION REGARDING CROWDSOURCING AND THIRD-PARTY PREISSUANCE SUBMISSIONS

**Docket No. PTO-P-2014-05996**

The Electronic Frontier Foundation (“EFF”) is grateful for this opportunity to respond to the request by the United States Patent and Trademark Office (“PTO”) for comments regarding use of crowdsourcing and third-party preissuance submissions, FR Doc. 2014-05996, published March 19, 2014.

EFF is a nonprofit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 29,000 dues-paying members have a strong interest in helping the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest. As an established advocate for consumers and innovators, EFF has a perspective to share that might not be represented by other persons and entities who submit comments in this matter, where such other commentators do not speak directly for the interests of consumers or the public interest generally.

### **I. Introduction**

EFF welcomes the PTO’s interest in working to improve patent quality through crowdsourcing and third party submissions. As a relatively small cadre of examiners deals with the huge backlog in patent applications, third party submissions, especially those generated by crowdsourcing, could be essential to ensuring patent quality. Given the large quantity of applications, third-party submissions will have a significant impact on patent quality only if the public is able to harness automated search and other computer tools to generate prior art leads. Our suggestions are therefore directed to helping the PTO leverage the crowd, powered by automated tools.

## **II. The PTO should make patent application information available as easily accessible structured data.**

Currently, patent application information is too difficult to access. While the PTO makes file wrappers available through Public Pair, this information is restricted by CAPTCHAs. This information is very important for crowdsourcing as prosecution history is crucial to understanding claim breadth.<sup>1</sup> The PTO should make file wrappers available as bulk data accessible to automated data analysis tools.

By making file wrappers more available, the PTO would also improve the notice function of patents. If implemented well, it would create a text-searchable, structured database. A database with a user-friendly interface would be especially useful for those trying to navigate the system without expensive professional help. To maximize the benefit to the public, PTO should avoid using proprietary software. Instead, data should be available in an open format (such as MySQL, XML, or JSON).<sup>2</sup> The PTO should also offer an application programming interface that lets developers query the database. In this way, application data would be easily accessible and downloadable in an open standard format. This will allow the public to easily search application information, making it more affordable to determine their freedom to operate, locate prior art, and take advantage of disclosures that have passed into the public domain. It will also allow comprehensive analysis, enabling better fact-based policymaking.

## **III. The PTO should create an optional web form for third-party preissuance submissions.**

The PTO should create a streamlined submission process that includes a public application programming interface (API). This could be a basic web form paired with an API that enables the automatic submission of data. The use of a standardized template will help both third-party submitters and patent examiners.

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<sup>1</sup> Public Knowledge explains this in more detail in its submission. *See* Comments of Public Knowledge at 2-3, at <http://www.publicknowledge.org/assets/uploads/blog/pto-crowdsourcing.pdf>

<sup>2</sup> The World Wide Web Consortium (W3C) has published a helpful guide on publishing open government data at <http://www.w3.org/TR/gov-data/>.

A standardized template will permit filers of preissuance submissions to strike a delicate balance by being helpful to the examiner without including prohibited attorney argument. The PTO recommends that a submission should “point[] out relevant pages or lines of the respective document and provid[e] a focused description to draw the examiner’s attention to the relevant issues.”<sup>3</sup> At the same time, submissions are limited to factual information and cannot include arguments against patentability.<sup>4</sup> This fact-focused format is well-suited to a structured web form. For example, a form could include fields for particular claims and/or claim limitations. These could be paired with fields where the submitter identifies the most relevant passages or pages from the prior art, optionally with quotations from the prior art’s relevant language. In this way, the form would deliver highly relevant information to the examiner while avoiding prohibited argument. By pairing passages of the prior art with claim limitations, the resulting data would be very easy for an examiner to analyze.

A public API would allow developers to build tools that allow third-parties to quickly create and upload submissions. In combination with more open application data, this would be a massive boost for the crowdsourcing of prior art.

#### **IV. The PTO should not charge fees for pre-issuance submissions.**

It is crucial that preissuance submissions remain affordable. Even better, they should be free in all cases. Preissuance prior art submissions are public assistance to the PTO and should be encouraged. For a web form to be effective, it needs to be easy, and affordable, to access. At the very least, the PTO should retain the policy of waiving fees for submissions with up to three references.

#### **V. Conclusion**

EFF again thanks the PTO for the opportunity to comment regarding crowdsourcing and preissuance submissions. Crowdsourcing requires a crowd. Therefore, EFF urges the PTO to adopt the technological changes suggested above to enable large-scale preissuance submissions.

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<sup>3</sup> See USPTO Preissuance Submissions, Response to Question PS4100, at [http://www.uspto.gov/aia\\_implementation/faqs-preissuance-submissions.jsp](http://www.uspto.gov/aia_implementation/faqs-preissuance-submissions.jsp).

<sup>4</sup> See *id.*

Respectfully submitted,

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