

From: Tom Franklin [email redacted]

Sent: Wednesday, May 06, 2015 11:46 PM

To: WorldClassPatentQuality

Cc: Gaudry, Kate; Kitces, Matt; Gianola, Adam; Almon, Rich; Lezak, Angel

Subject: Patent-Quality Comment: Quality Metrics

To Whom It May Concern:

Thank you for accepting comments as part of your Quality Initiative. Please see the attached comment.

This particular comment specifically corresponds Proposal 4 Under Pillar 2: Quality Metrics.

Please let me know if you have any questions.

Yours,

Thomas D Franklin

United States Patent and Trademark Office Enhanced Patent Quality Initiative: **Proposal 4 Under Pillar 2: Quality Metrics**

Submitted to: WorldClassPatentQuality[at]uspto.gov

May 6, 2015

Quality is measured at the patent office, but it avoids substantive evaluation of examiner performance. The present quality metrics are over focused on following process rather than the actual results. Improperly allowing cases that should not have been issued taxes the innovation system by causing companies to worry or even work to invalidate a patent. Conversely, withholding the patent incentive to a deserving applicant might postpone or even cancel commercial exploitation of the invention to cheat the public from those improvements. Indeed, the role of quality examination in setting the balance between patent incentive and improper monopoly cannot be overstated.

Quality and Consequences Tied to Production and Inaccurate Quality Measurement

The much-criticized production system is the true measure of quality today. It determines bonus incentive and measures work ethic. Like any regimented system, production can be manipulated and gamed to achieve the rewards of a good employee without actually being one. Public service is a high calling and those serving should be held to the highest standards. But, poor and uninspired examination is treated the same as superior examination, so long as the production metrics are met. A system that does not try to find true quality and allows professional success without great examination is doomed to fail.

The author believes quality metrics currently are inflated and inaccurate. Measuring an extent to which “target” metrics were achieved makes the score largely fabricated. This allows the PTO to report quality metrics in the high 95-100% despite identifying substantial quality problems. Reporting an “A+” on quality may be optically desirable for the patent office, but lacks credibility to anyone who interacts with the examining corps on a regular basis. Indeed, would there be any need for a quality initiative if the Office were operating at the purported 90+% (for the Final Disposition and In-Process Compliance Rates, FAOM Search Review and Complete FAOM Review metrics)?

Further, the examiner quality formula is believed to be the wrong formula as detailed in the recent OIG report. It is understood that the quality formula is: number of actions issued by the examiner minus the number of actions reviewed and found to include errors divided by the number of actions issued by examiner. Examiner quality measures should be a ratio of those found done properly over those reviewed as would seemingly be the meaning of quality. To presume that the unreviewed actions are accurate and of high quality misleads the public.

If the USPTO aims to increase the transparency and robustness of quality review, those formulas and procedures should be documented for the stakeholders. To the extent this

or any quality measure is relied upon, it should not be opaque and subject to stakeholder feedback.

Balanced Quality Metrics

Quality metrics must be balanced and consider not only the quality of allowances, but also the quality of office actions (OAs) and other interactions with the applicant. Quality of OAs should include both quality/clarity of written rejections and quality/relevance of cited references. Too often, the OA does not properly explain the basis of the rejections with precision for the applicant to respond productively. For example, it is common to see obviousness rejections with little or no logic for combining and references that are non-analogous.

Applicants are routinely denied the ability to meet or video conference with their examiner, but there is no tracking to memorialize that mis-match in expectations. The ability to meet with your decision maker to discuss the allowance of a property right (i.e., patent application) is fundamental to procedural due process under the Constitution. The author has found varying quality of engagement between the applicant and Examiners, who routinely impede or deny in-person interviews. To the extent that the Examiner is unavailable or only virtually by phone/video, the author believes quality suffers. Yet, the office has no ability to track the type of interview requested versus what was actually granted or not.

Precise Determination of Quality

Quality measures should be determined at more precise levels, where there is scoring for each examiner that could be averaged to produce statistics for each art unit. We are not asking that these quality measures be exposed to the public in any identifiable way, but they should become part of the internal process in identifying over-/under-performing art units (AUs) and examiners. Remedial action should be taken to address examiners and AUs that lack requisite quality. Conversely, bonuses should be given to those performing at the highest level of substantive quality, not simply as a function of production. As mentioned below, substantive quality can be gathered through empirical analysis, review of decisions on pre-appeal conference, decisions upon appeal, stakeholder survey, and supervisor review.

Empirical Statistics on Examiners

Examiner/AU reports are readily available to practitioners. To not arm Examiners with the same data leaves the potential of them being blindsided. For examiners/AUs with aberrant statistics, there should be follow-up by the Office. To have AUs with allowance rates a dozen times different than other AUs handling similar technology means that assignment to one AU over another will largely dictate the outcome of examination. Any business with that wide of a variation in statistics would be shut down, unless the variance was by design.

Data mining can be done by the Office before it becomes an issue. The Office has access to better statics than third-party vendors and can remediate issues before they embarrass in the press. Part of the evolution of data mining process should uncover additional data

to track. For example, there is no recordation of the type of interview requested by a practitioner, only what was granted. To memorialize the missing data, the Examiner could record that request or the practitioner be required to indicate that on the request form so that miss-matches in expectation could be tracked and empirically studied.

Seek Applicant Feedback on Examiners

Applicants know which Examiners do their job the best. Yet, there is little opportunity to provide feedback that is critical or laudatory. We propose surveys be given after each interaction until each examiner has enough data to base conclusions. This could include surveys after each interview, OA or allowance. The surveys could be by e-mail or using professional pollsters to get the requisite response rates. Making the feedback request specific to a case and mandatory for licensed patent prosecutors will assure practitioner participation.

Substantive Feedback Measures from Decisions

Substantive review of examination is already performed, but not tracked to evaluate performance. Appeal decisions, pre-appeal conference decisions, examiner-initiated reopening of prosecution during appeal are all excellent data points that are largely ignored by the Office. To have each appeal decision graded as examiner win, applicant win or new grounds of reasoning after each appeal would provide valuable feedback to the Office in evaluating examination quality. Successful pre-appeal conference should be analyzed by those involved with a post-mortem meeting and where the examiner was wrong, it should be noted to allow teaching opportunities. Additionally, the Office should note to applicant which rejections were withdrawn in the decision on the pre-appeal conference or subsequent action (e.g., Notice of Allowance or further Office Action).

Reopening of prosecution can be used to deny applicant a second opinion on their claims, especially where done often or repeatedly on the same case. Recording those happenings and asking the examiner to state a reason will help stem any abuses. For cases with abuses, applicant should be able to request a new examiner. Indeed, any bureaucratic abuse or objectively-poor quality should provide applicant ability to seek a new examiner.

Hoteling Available to Only Those Examiners with Excellent Quality

Only the best employees are typically allowed to work from home in the private sector. Those that have less than impeccable quality or work ethic are not good candidates. Should quality fall below certain thresholds, increasing onsite requirements should be required at one of the USPTO offices of the Examiner's choice. Some employees do not thrive in the isolation of hoteling. Finding those that let their work-at-home perk affect patent quality should be in one of the offices for closer supervision until substantive quality consistently reaches the highest levels.

Supervisors Accountable for Examination Quality

Where an AU has poor quality, the chain of supervision should be held accountable. If examiners continue to rate poorly on substantive quality, for example, the SPE should not receive bonuses or other recognition. Specific burden placed on SPEs will encourage

remedial action to help raise levels of examination quality.

Conclusion

Substantive quality has to become the new figure of merit at the Office. Any opportunity to have an Examiner's work evaluated and to seek feedback is crucial. Reliance on production as the true measure of quality and incentive for examiners is unworkable. There are already evaluations of examiner quality available such as empirical statistics and results from appeal and pre-appeal conference. To avoid using these substantive measures and rely on a production system that is prone to manipulation, will assure continued spotty quality.

Thank you for your consideration.

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Proposal also supported by: Matthew Kitces
Richard Almon
Angel Lezak
Adam J. Gianola
Kate S. Gaudry

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