

## Statistical Monitoring to Improve Consistency across the USPTO

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In order to provide high quality examination, the USPTO must ensure that examiners and art units are examining applications in a **consistent, reasonable** manner. More specifically, should a same application be examined by multiple examiners, applicants should expect that the examiners will identify art of comparable quality, cooperatively engage with applicants to a similar degree, and will interpret patent law in a similar manner.

Statistics provide an ideal and objective starting point to evaluate examination characteristics. For example, let us (naively) assume that each of a set of examiners and/or art units were to receive comparable applications from similarly behaving applicants. We should then be able to calculate statistics such as a percentage of the applications allowed by the examiner, a number of office actions issued per patent, an average number of interviews per application, and so on. With respect to each statistic, ideally, a distribution across the set of examiners would be a tight, narrow distribution. This would indicate that examination is **consistent** across the examining corps. To determine whether the examination is **reasonable**, the center of the distribution could then be assessed based on appeal results and reviews by quality specialists.

Admittedly, life at the USPTO is not so simple, and a sizable degree of examination variability is unavoidable. For example, examination of multiple applications cannot be entirely consistent when they vary in inventions, drafting quality, and technology-specific case law. Further, applicants differ in terms of how willing or able they are to amend the claims, participate in interviews, or submit strong arguments on a particular point.

However, each examiner and each art unit examines multiple applications. For example, in fiscal year 2013, examiners were reported to have issued an average of 73 final determinations per year.<sup>1</sup> Therefore – assuming no large application-assignment bias – a high-level statistic for each examiner should converge towards a same value if examination is consistent across examiners.

Yet applicants are becoming increasingly aware that examination is not at all consistent across art units or examiners. For example, the table below shows the approximate number of patents that issued and applications that were abandoned during the last two years that were assigned to an art unit in technology center 1700 and to the examiner identified in the table.<sup>2</sup> The allowance rate, *in a single art unit*, varies from 7% to 86%.

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<sup>1</sup> Office of Inspector General, “USPTO’s other backlog: past problems and risks ahead for the Board of Patent Appeals and Interference,” Aug. 2012, *available at*: <http://www.oig.doc.gov/oigpublications/oig-12-032-a.pdf>.

<sup>2</sup> Data was collected using Reed Tech Patent Advisor.

## TC-1700 ART UNIT

Examiner	Allowance Rate (from Last 2 Years)
Examiner A	7.1%
Examiner B	8.9%
Examiner C	9.5%
Examiner D	25.0%
Examiner E	28.6%
Examiner F	30.3%
Examiner G	36.4%
Examiner H	38.2%
Examiner I	38.4%
Examiner J	39.1%
Examiner K	46.2%
Examiner L	47.9%
Examiner M	70.6%
Examiner N	86.3%

This data is very frustrating. The signors have unfortunately had too many conversations with clients, indicating that we felt as though there was no hope of the examiner allowing the claims, absent an appeal. These conversations would entirely lack discussion on the merits of any rejection and would often occur prior to any office-action analysis. They were merely because we could see that an examiner's allowance rate was below 10%.

For many of our clients, appeals are not practical. In fiscal year 2013, the average time between filing a Notice of Appeal and receiving a decision was three years. This is on top of the time expired due to pre-Appeal examination, indicating that an average time between application filing and a PTAB decision is likely around five years or longer. In the software space, many technologies will be outdated within this time period.

Therefore, we have conversations with our client about whether the client should quickly abandon an application that was unfortunately assigned to a low-allowance rate examiner or art unit. This can avoid investing money and time in an application that is unlikely to be allowed, and – if it is allowed – may have claims so narrow so as not to be useful. We discuss whether it would be strategic to use the money and time that would have been invested in the particular application to instead draft a new application on other client technology and hope for a more favorable examiner or art-unit assignment.

We do not like having these conversations. However, we feel as though it is our duty to look at and consider examiner and art-unit statistics so as to truly inform our clients of the status and likely prospects of their applications.

Similarly, we feel as though it the USPTO's duty to review statistics. We propose that all levels of the Office (e.g., examiners, supervisors, quality specialists and leadership) should have access to, and should be encouraged to review, examination data. Examiners should have access to their own statistics and some indication of how their statistics compare to data corresponding to other

examiners, at least within their own art unit. Supervisors, quality specialists and leadership should look at data at each of an examiner-specific, art-unit-specific and technology-center-specific basis. We propose that this data include statistics pertaining to allowance rates, average office-action counts (e.g., per patent and/or abandonment), restriction requirement prevalence, use of particular programs or practices (e.g., interviewing or the After-Final Consideration Program) and appeal statistics (e.g., a prevalence of appeal, a frequency of prosecution being reopened, and decisions following a Pre-Appeal Brief Conference or PTAB review).

We propose that the USPTO identify outlier examination statistics. We recognize that valid circumstances may underlie particular outlier data and do not support initiating any hardline rule to respond to outlier data. Rather, we favor initiating an investigation to assess lower level data for an outlier examiner or art unit and/or discussing the data with a supervisor and/or examiner.

We further propose that the USPTO concurrently evaluate what are the statistical indicators of unreasonable examination and begin monitoring for such indicators. For example, reopening of prosecution during the appeal cycle is likely indicative of poor-quality rejections, as is multiple, sequential non-final office actions. PTAB reversals are likely another metric that should be considered.

In sum, it is critically important to applicants and the public that the patent statutes be interpreted in a consistent and reasonable way by all examiners at the USPTO. Widely variable examiner and art-unit statistics suggests the interpretation, however, is not even across the Office. Representatives, inventors and assignees are frustrated to learn that, in reality, a probability of receiving a reasonable examination of an application depends largely on the application's art-unit and examiner assignment. We would greatly appreciate if the USPTO utilized a statistical approach to begin addressing this injustice.

Thank you for your consideration.

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