

From: john wu

Sent: Tuesday, January 10, 2017 12:57 PM

To: External Examination Time Study <ExternalExaminationTimeStudy@USPTO.GOV>

Subject: Comments from Jianqing Wu

To Whom It May concern:

I provide a long comment on examination time and quality issues. I hope the Office will take a good look at my comments. I may send this comment to the House, the Senate and President. I will also publish it.

My purpose is to save the patent system which is the national economical foundation.

Thank you,

Jianqing Wu,

Patent attorney and Inventor.

Jianqing Wu's Comments For Questions Concerning Examination Time Goals

(Sent to ExternalExaminationTimeStudy@USPTO.GOV)

I am a patent attorney and an inventor. I read extensively about patent decisions and articles concerning patent law reform. I am an advocate for patent law reform and regard reform as a critical measure to arrest American rapid decline. I provide my comments under each question.

(1) Do you perceive a difference in the quality of examination performed in complex technologies compared to less complex technologies? If yes, which do you perceive as higher quality and why? In what aspect(s) is the quality of examination higher?

The differences, if any, are related to applicant status and examiners' skill levels. In other words, quality are high in some complex technologies cases but are low in other complex technologies cases. Complex technologies are often originated from corporations. I believe that, for similar applicants, examiners experience and their field knowledge can decisively affect examination quality. Poor quality arises when examiners do not have required knowledge and try to apply their old knowledge to new art. If limited examination time does not allow an examiner to fully understand invention so the examiner has to render a very poor office action, it can be reasonably expected that the examiner will give more deference to big law firms and big corporations. He will have no reason to give any deference to natural inventors and small applicants. Time limit is one big factor for creating the bias examination culture.

(2) What factors do you consider when estimating the amount of time needed to take various steps in prosecution, such as preparing responses to Office actions or preparing for interviews? In particular, if you prosecute applications in a variety of technology areas, how do those factors vary among the technologies?

In patent law practice, patent lawyers use billable times. Fixed time is only proper for trivial and simple inventions that do not have large stakes. I spend

whatever time necessary for preparing best responses. From my own experience, biggest factors are (1) the stake of the invention, (2) the density of relevant references in the field of invention, (3) inventive concept (how far it is from the prior art), and (4) technical nature of the art, and (5) unique patentability issues. Those things cannot be measured in real world. This is why the entire patent field still use billable time for serious inventions. Exceptions are simple devices like pencils. It is improper to fix examination time by issues, subjects, page of materials.... That would generate poor work product. I have ample facts to prove that most examiners now are creating junk office actions: copying the same **bulky** text to tens of places in office actions, construing claims by picking up a few words and finding references by finding words, making frivolous issues on repeated actions. Problem pattern can quickly change in response to a change in the Office's performance method and time allocation method. The current examination culture is destroying American innovation culture due to its inability to distinguish between truly patent-illegible inventions and minor improvements over prior art. The culture is bias to natural inventors and small business, but work great for corporations.

(3) Are the applications you prosecute more or less complex than in the past, e.g., 10 years ago? What factors contribute to the increase or decrease in complexity? Do you believe the increase or decrease in complexity has affected the amount of time it takes to prosecute the applications? If so, by how much? Do you believe the increase or decrease in complexity has affected the quality of examination? If so, how?

I have seen an increase in invention complexity in software art due to technological advances. Technological complexity affects examination quality in unpredictable way and does not have definite one-way relationship with prosecution time. Some inventions may be clearly patent-eligible but others are hard to determine. For a given complex case, the decisive factor is the practitioner's knowledge of the technology of the case. One practitioner may be able to see all critical issues quickly, but another practitioner who lacks technical background might need to struggle for weeks even months. If an

attorney lacks training in the field, the attorney has to learn it by spending his own time, or avoid taking it, or handle the application by trail-and-error. This problem should be addressed through (1) assignment of cases, (2) training of practitioner on the technical subject, and (3) quality control process. Not every attorney can learn required technical knowledge in every field of invention.

(4) In order to increase the quality of examination, do you believe that an increase in the time allotted for examination should be designated for specific activities, such as interviews, or left to the discretion of the examiner? What activities would you prioritize and allocate more time to?

In my view, the Office should allocate whatever time examiners need to spend on each special activity including the time for doing reasonable preparation. If they still could do well, it is an issue relating to their training, experience, and motivation. The Office should watch for those things.

Allocation of fixed examination time may be proper only for dealing with procedural issues. For any substantive legal tasks, any attempt to allocate fixed amount of time will fail. The Office has run patent business for more than 200 years, and has changed performance measures back and forth without any luck. By using this junk-science-based policy, the Office will never be able to find a workable time measurement method. All attempts that I know have caused disastrous problems to examination quality, and some past measures are unconstitutional for being bias with an effect to deprive citizen's property right. I kindly ask the Office to respect clearly established scientific principles and stop thinking about allocation of so-called right amount of time. There is no such things like right amount of times. There is no method for measuring it. It has never worked in hundreds years and WILL NOT WORK.

The Office should allow examiners to decide need time by themselves. Sometime, one single core issue written on one page might require more time she would need in writing all junk actions for a year period. One cannot count abstract concepts like paper clips, phone units, and fighter carriers. The Office should develop a smart method to measure examiners' work and adjust time and work credits based upon their quality. The method must encourage examiners to

get issues done correctly in the first action rather endless tries by creating many junk actions making little sense. The quality is now disastrous. People question if examiners are drunk or sane. I have seen a great deal of evidence showing bad quality. It has reached to a point to destroy last ounce of institutional credibility and severely discredit patent validity. It is NOT fault of examiners. All problems are caused by unwise Office policy based upon clear junk science. The officials should understand that examination time cannot be measured like widget production shops, where all widget pieces such as TV parts are identical and production time for any piece is a fixed constant. When the Office count things like pages, issues, cases, actions, and then used them to determine the amount of time, it is like counting total number of items in a mixture of paper clips, phones, planes, or carriers..... Such method would invite workers to produce only paper clips. The flaw is that paper clips, phones, planes, and carriers are treated as same, whereas they do not have comparative basis. Such method will lead to the lowest "paper-clip" production volume and lowest "paper clips" quality. To see what junk science can do to a nation, you can easily found how junk science-based policies destroyed the national economy of Soviet Union and once caused nearly 30 millions deaths in China. Politicians may compare the Sun with a candle, but the Office, the highest Office managing technologies in the nation, should respect the most fundamental scientific principles in formulating its examination policy. I hate to say there is no simple way to deal with examiners work load. Do not do things to satisfy politicians who could not count simple numbers and could not see the differences between any two abstract concepts. Do not turn the patent system into one that is only cable of creating "paper clips"-- boilerplate arguments, frivolous issues, copied statements....

(5) Are there any portions of Office actions which you feel do not add value or quality to the examination? If yes, what are they?

The Office should restrict the use of Section 112 "mean plus function" rejection. The Section 112 defect will result in a patent that cannot be validly enforced. This is different from 103 and 102 defects which make an invention not eligible for patent. For a good number of inventors, enforcement is not what they

care about. Some inventors might want patents for getting reputation, and some businesses might use inventions for defense purpose. This use is not inconsistent with the patent policy to encourage them disclose new art. In addition, many Section 112 defects can be cured in re-examination, waived by court in enforcement actions, or do not exist in the eyes of persons skilled in the art. In years, the Section 112 rejection has been widely abused by examiners for no good purpose except wasting office resources and creating a bias prosecution environment. My proposed solutions are (1) providing a warning that a Section 112 defect may render patent unenforceable, (2) examiners should work with parties to correct as many errors as they can. They should focus on true inventive substances that decide their patent rights on merit.

Another thing to be changed is the restriction practice. It is a bad policy to allow examiners to decide this issue, especially when examiners have incentive to avoid doing work under the improper work credit rating system. When an examiner wants to restrict an invention by two to five ways, it would incur massive prosecution costs, attorney fees, and maintenance fees on the applicant. Such practice also results in more patents which will become subject of nuisance lawsuits and would be a reason for further increasing litigation costs, which once has been used as an excuse to put the patent institution under water. Instead of using one patent, the defenses have to deal with several patents and the plaintiff can sue the same parties by using each of the patents in turn. The restriction is one of the main reasons for increasing litigation costs in the patent field. The Office does not need to concern multiple invention applications. All applicants have an inherent incentive against combining different inventions. One reason is that each invention generally takes some time to complete so they cannot combine. Another reason is that applicants have incentive to avoid all patents being invalidated at once. Therefore, restriction should be used only rarely for applications that claim totally unrelated inventions. This is a balance between examiner's work credit and the performance of the patent institution, public interest, and applicant investment. Examiner's interest is the minimum and must yield to the institutional interest, national interest, and public interest. Besides,

this problem can be protected by work credit adjustment. It is a bad policy to encourage for creating of more nuisance patents even when applicants want to avoid. The massive number of restriction demands in the last a few years reflect that the Office has a policy that allows examiners bargain their trivial personal interest against the institutional interest and the national interest.

(6) What other activities beyond examining, such as research or training, could examiners spend time on that would add value? Why do you believe these activities could add value?

Research and training are ones of keys for improving patent quality. Inventions are all about new things. The Office cannot realistically expect examiners to understand all inventions, especially those inventions that drastically depart from accepted wisdom and current art. The Office should also accept most errors in the first examination due to the very nature of examination tasks. The Office needs to encourage them to take challenging cases, and also give them education credits so that they will have incentives to learn new art and changing technologies.

I can show this time investment is the best investment. If an examiner refuses to learn, the examiner will consume four years of prosecution and render a wrong action, which will be followed by an appeal to Board and then followed by an appeal to Federal Circuit. This may result in massive waste of federal taxes, massive waste of office resources, and may improperly deprive the applicant's property right if the rejection cannot be reversed due to technical issues. Due to limited review, the Board and the Court do not always reverse cases that are required by justice. Failure in reversing dose not prove in any way that examiner's decisions are right or court decisions are right. In this internet age, bad decisions will be reheard in public forums. Indeed, one thing I will do is just for creating such a platform for revisiting bad cases by the public. When there are too many such bad actions amounting to miscarriage of justice, it will raise a serious question whether the Office has fulfilled its constitutional duty. Such actions are harmful to the foundation of the national economy.

If the adverse action is reversed, it is the public and the inventors that

sustain all damages. The inventors have missed time and opportunities to exploit the invention and the public will have to wait for many more years for the patent terms to run. The high frequency of such instances discourage inventors from inventing, and is one of main reasons for rapidly disappearing of the American innovation culture. Now, playing lotteries are better choices for American citizens at the time when technologies development states in other nations are rapidly catching up with America's. The Office, as the highest technological powerhouse, should see the threatening impacts of non-functional patent institution on American future. America together with all common law nations are falling behind rapidly. While many problems can be fixed only by repealing the AIA, the Office should do its part to avoid compounding more damages than necessary to damage American economical foundation. Few people understand how American innovation culture has been hurt by this double-lottery-like patent grants which are nothing more than liability tickets. Notwithstanding the flaw in the AIA, the Office should stand by inventors within the legal bound or soon it will become a patent system without inventors. All bad office actions will strongly discourage citizens from inventing, and reduce job opportunities for examiners. Bad office actions harm inventors, the country, the Office, and also examiners. If the Office policy encourage examiners to deliver only "paper-clip" type of quality, and examiners can deliver perhaps ten times of volume, which will be the precise reason to destroy the patent system together with their own jobs. Therefore, I must conclude that the number of cases and time limit has meaning only if decent examination quality can be maintained.

Many things can be improved if the Office has skillful leaders. One big problem is the overwhelming abuse of the broadest construction rule of claim construction, it is such a problem that it has been on some proposal patent amendment to eliminate it. I strongly oppose amendment to this law because patents need to include clearly equivalent components. The real problem is the wide abuse of the rule. Many examiners actually believe that this rule gives them the power to make any absurd and meaningless construction. The some flaw is rooted in the flawed ancient common law model of adjudication. By using this

rule, examiners would equate an email document to an email-mailing system, a function of changing a negotiation rule to a text of a rule, and creating a database table to writing one single data entry in a database table. They routinely read things that specification has expressly excluded or identified elements by reading one or two words out of tens in claim language or construed claim language to make claimed invention inoperable.... This kind of examination does not further constitutional purpose but waste federal dollars and office resources. It is not much better than drawing a few applications from a pool and grant them by luck. That saves money, and is fairer and yield similar quality.

(7) While the focus of this request for comments and the round tables is to find the appropriate amount of time for examination, cost and pendency are also contributing factors. Do these factors raise a concern that should be considered?

Cost and pendency are important and must be considered by any government agency. Those two factors should not be used to trade for lower quality. Any cost-saving achieved by lower examination quality could make patents meaningless. In other words, cost saving and short pendency should not be realized by allocating less time or using any fixed time. It should be achieved by reducing avoidable errors, better training, and avoiding protracted prosecution history. Any attempt to force examiners to run when they could not even walk will result in worse quality. The result of using fixed time is exactly opposite—resulting in more errors, more wrong actions, more appeals, and more reversals. Any such attempt will become sources of biggest bias and harm the Office reputation. A large number of bad actions, bad board opinions, and bad prosecution histories will further contribute to the destruction of American innovation culture. The net final effects are wasting more time, consuming more resources, causing more damages to the nation, and creating an everyone-loss situation. Based upon my knowledge of junk science and its widespread problem, I can predict that any time scale based upon any fixed criteria will not improve quality. This has been proved in more than 200 hundreds years of patenting history. The Office has tried various solutions in turns and none of them have

worked. That is why it now still seeks for newer method. Such method does not exist. If the Office changes the method now, it will create many new and different problems. Costs and pacency targets can never be achieved by using any number-based measures. I have absolute proof that the massive junk science in common law models are the key cause for the rapid decline of all common law nations including the US, UK, and Italy. I have raised this issue all over the places, but few care about national interest. Those civil code nations now can do things at much higher efficiency and often in much short time scales. While I have discussed junk science in other forums in great detail, I will provide a short analysis below.

Legal issues are not like widgets such as TV sets or machine parts for which the amounts of work time can be measured and production revenue can be accurately computed. If the Office uses office action page number as a measure, examiners will copy and paste meaningless texts to papers; if the Office uses issue number as an criterion, they will make tens of frivolous issues; if the Office just focuses case disposition, they will pick up cases by looking at inventor identities and hand down unnecessary restriction requests. In any widget production line, they cannot pick up favorable items because each piece would require the same amount of work and each piece would produce the same amount of revenue. If workers can make choices from paper clips, cell phones, and cars, they all will choose to make paper clips. In the legal field, they can find ways to defeat quota easily. **The reason is there is no comparative basis for abstract concepts.** However, examiners can find a way to defeat the policy by picking up the easiest one which is obvious in real world. So they will all choose to make “paper clips”. We all know that apples cannot be compared with oranges, and bullets cannot compared with bombs. An application cannot be compared with another application, and an issue cannot be compared with another issue because they are different (even through they share the same name or identity). It is wrong to use abstract concepts to estimate examination time. In the last five years, I have seen a large number of bad office actions. In each case, the Office wastes several years of time on conducting several to tens

of frivolous rejections. Most problems can be identified. The end effect of this practice is destroying American innovation culture, the primary force for creating this super power. The Office should stop using junk science in the name of increasing efficiency, and find smart quality-focused approach to reward true hard work and passion of work. It should avoid using any method for rewarding for fraud, falsified work time, undelivered work, and exaggerated difficult levels. Easy-to-use methods like those used in widget production lines do exist in the legal field, and the Office should use smart methods. I can propose any method that will be better than all non-performing methods the Office has ever used. I will provide my long analysis on other public forums. The Office needs to find leaders who have wisdom to manage human resources.

(8) Examiners lack incentive to correct clear, fatal and absurd errors.

I found that the biggest problem is lack of incentive to correct clear errors. This policy flaw should be fixed before the patent institution can improve efficiency. This is one of major reasons for protracted meaningless prosecution.

When an examiner makes a fatal error unavoidably due to the nature of the examination task. However, when the applicant points out such an error, the examiner must consider the reason and retracts it if the reason is sound. Now, examiners have little incentive to admit errors. One possible reason is that retracting errors do not improve their performance and work credit and so it would be better for them to continue with same errors. They know that only some errors will be reversed in due course and many applications will never reach that point. While the Office cannot penalize them for first errors, the Office should provide strong incentive for them to correct clear errors. If clear errors are not corrected, examiners should suffer MORE penalties for maintaining them. This can help the Office remove many frivolous actions which might injure the Office image and avoid excessive number of avoidable appeals. The Office needs to consider everything in its policies to control prosecution costs and litigation costs (even though the main cause of litigation costs are in the common law model).

Finally, the Office should have a policy to sanction extreme bad conduct

that seriously damages the public confidence in the patent institution. Measures may include reduction of work credit, supervised examination, and things that might slow down their promotional pace.

(9) I urge the Office to do its part to save the patent system.

I could like to point out that poor patent quality was used as an excuse to combat “patent trolls” before the enactment of the AIA, which ironically has a decisive force to destroy American innovation culture. The Office needs to think what it could do improve its institutional performance which is vital to national economy and American future. America will have NO future as long as the patent system continues being under water for a few more years. It is a game-end policy to replace American innovation culture by a business-like “corporate product improvement culture” which is incapable of maintaining American technical leadership. American technological process pace will change from rapid progress to a steady-state, followed by shrinking and final collapsing. America is rapidly falling behind in technological innovation in the world which has been dominated by intensive technological competition. America loses in every technological front including basic research, applied sciences, and social sciences. Now, start-up number quickly falls, research funds are cut off, and funding to new entities quickly fall behind at the time its competing nations increase their similar funding activities by many folds. The harm cannot be reversed in this competitive landscape because its competing nations will not stop their activities and wait for America to come back. It is a matter of urgency.

By using my knowledge to evaluate dynamic system, I can “see” that the total final impacts will be catastrophic to the nation. A losing technological standing will result in dollar being dethroned, loss of American premium charges of its exported goods, loss of imported goods discounts for American, and loss services export attractions in education and tourism. It can cause a loss of more than half of its GDP (potentially 70%)! I confidently predict that the patent problem, without being fixed now, WILL lead to American technological and economical doomsday. It is truly insane that corporations have no interest in protecting the largest national interest and use their patent litigation expenses

as pretext to do things to destroy the nation. The Office should bring the issue to the House, the Senate, and the President.

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