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Washington, DC
thomas.stoll@americanbar.org

AMERICAN BAR ASSOCIATION

May 24, 2016

The Honorable Michelle Lee
Under Secretary of Commerce for Intellectual Property
and Director, United States Patent & Trademark Office
Mail Stop: Comments—Patents, Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Via electronic mail: QualityMetrics2017@uspto.gov

Attention: Michael Cygan, Senior Legal Advisor, Office of Patent Legal
Administration, and Office of the Deputy Commissioner for Patent
Examination Policy

Re: Comments of the ABA Section of Intellectual Property in Response to
the USPTO's Patent Quality Metrics for Fiscal Year 2017 and
Request for Comments on Improving Patent Quality Measurement
[Docket No. PTO-P-2016-0006; Fed. Reg. Vol. 81, No. 58, pages
16142-16145 on March 25, 2016]

Dear Director Lee:

The American Bar Association Section of Intellectual Property Law ("ABA-IPL
Section") thanks the U.S. Patent and Trademark Office ("USPTO") for the
opportunity to comment on the Patent Quality Metrics for Fiscal Year 2017 and
Request for Comments on Improving Patent Quality Measurement. The views
expressed herein are presented on behalf of the ABA-IPL Section. The views have
not been approved by the House of Delegates or the Board of Governors of the ABA
and, accordingly, should not be construed as representing the position of the ABA.

The ABA-IPL Section appreciates the USPTO's efforts to further improve
measurement of patent quality. The ABA-IPL Section agrees with many reforms in
the Patent Quality Metrics for Fiscal Year 2017, specifically:

- Abandoning the Composite Quality Metric in favor of identifying areas for
concern so that remedial efforts may be focused with use of the Master
Review Form (MRF).
- Recognizing that problem areas in examination are often masked, when the
focus of the investigation is not on the quality of examination, but instead
against the achievement of certain arbitrary measurement goals in the
Composite Quality Metric.



- Mining data on transactions to identify troubling trends for particular technology centers, art units and examiners.
- Continued use of surveys for internal/external stakeholder opinions measured separately from a composite measurement.

The ABA-IPL Section supports quality metrics that holistically measure the performance of the patenting process and thus the reforms proposed are sincerely appreciated.

The ABA-IPL Section recommends evaluation of overall examination quality and examiner accessibility

In addition to the reforms proposed by the USPTO, the ABA-IPL Section believes it is important that the examination quality metrics focus holistically on total examination. The Master Review Form (MRF) is very detailed and will undoubtedly serve to record the many things done correctly in a typical patent prosecution file wrapper. This granularity of measurement may, however, not accentuate small mistakes and bureaucratic delay that can in the aggregate derail or hamper prosecution. It is important for those evaluating the file wrapper to ask whether mistakes were substantial enough, in toto, to cause an unproductive or poor quality examination. For these reasons, the ABA-IPL Section encourages the USPTO to include in its quality metrics a mechanism for evaluating the overall quality of the examination.

The ABA-IPL Section also encourages the USPTO to include in its quality metrics a measurement of the accessibility to the examiner during prosecution. Excessive and unproductive patent prosecution is often an artifact of misunderstanding or miscommunication between applicant and examiner. Interviews, and in particular in-person interviews, can be productive in quickly identifying and resolving these issues during prosecution. Unfortunately, in the experience of our constituents, full engagement with customers has fallen away for some examiners as hoteling programs have allowed less direct supervision of the examination corps. Teleworking has many cost advantages and is indeed helpful for productivity in some circumstances, but can also result in decreased quality in other circumstances. For these reasons, the ABA-IPL Section encourages the USPTO to measure examiner willingness to engage and interact meaningfully with applicants. The USPTO may want to consider the implementation of prerequisites for examiners who wish to work from home, such as meeting baseline criteria for engagement with applicants and showing a willingness to participate in in-person interviews.

The ABA- IPL section recommends quantification and publication of objective measures of quality and survey data

The USPTO proposal to unbundle the Composite Quality Metric to measure clarity and work quality with the MRF is welcome if other measures of quality are also exposed to the public. Specifically, the ABA-IPL section suggests that certain objective measures of quality be quantified along with applicant survey results.

The USPTO has the best access to empirical data regarding:

- rework,
- excessive examination, and
- delay tracked to the tech center, art unit and examiner.

This data should be exposed as part of the quality measurement process. Exposing this information in a way that does not identify confidences of the patent applicants will encourage normative behavior at all levels. Only the USPTO has real time access to all unpublished applications, making it best equipped to provide this empirical measure of quality as compared to many third party vendors that are now doing so using only published information.

Surveys are increasingly part of normal interaction with any enterprise. Encouraging completion of surveys through licensure requirements, incentives or other means will ensure that applicant opinions on quality are accurately measured. Often customers are the best measure of an enterprises' performance and the USPTO is no exception. There are many ways to administer surveys that are not overly obtrusive and will provide the necessary data to remediate at the technology center, art unit and examiner levels. The ABA-IPL Section encourages the USPTO to continue and expand the use of surveys as part of its quality measurement process, but also encourages the USPTO to publish the results of these surveys (without revealing applicant confidences) so as to increase transparency and encourage normative behavior.

Conclusion

The ABA-IPL Section applauds the USPTO for moving away from the Composite Quality Metric and its scoring against an arbitrary goal. As explained above, the IPL Section encourages the USPTO to include a mechanism for evaluating the overall quality of the examination, as well as accessibility to the examiner. The ABA-IPL Section also encourages the USPTO to quantify and publicize certain objective measures of quality, as well as survey data.

Very truly yours,



Theodore H. Davis, Jr.
Section Chair
American Bar Association
Section of Intellectual Property Law