

From:
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To: patent_quality_comments
Subject: Comments on Patent Quality

To the Commissioner for Patents:

Patent quality begins with the applicant. The Constitution guarantees exclusive rights to inventors, not to assignees. It is unconstitutional to collect royalties from inventors in the form of maintenance fees and income taxes. Independent inventors account for 50% of the most significant advancements in technology, but only 8% of the applications for utility patent. In contrast, the Office has to go through 11.5 times as many applications (92% divided by 8%) from assignee applicants to patent the same number of significant advancements as from independent inventors. This means independent inventors have a much higher quality ratio than assignee applicants. In order to improve patent quality, the Office needs to address this embarrassing disparity.

One of the problems is that academic and corporate assignees have been filing a slew of applications that follow all-but-trivially on advancements of prior significance. Another problem is that the Office has been "multiplying the loaves" with excessive use of divisional, continuation, and continuation-in-part applications. This diffuses the ability of Examiners to focus on applications presenting significant advancements.

A number of alarming trends are being exhibited by assignee applicants trying to cloak the limited significance of the advancements being produced by their non-independent inventors.

One is that academic and corporate applicants have been omitting prior art references and obtaining patents on old ideas finding new enthusiasm. For example, Pamula et al. (US 6,911,132) obtained a patent for digital microfluidics by omitting references to Le Pesant (US 4,636,785) and Le Pesant et al. (US 4,569,575); to give another example, Berge et al. (US 6,369,954) and Feenstra et al. (US 7,126,903) obtained patents for liquid lens technology by omitting a reference to Matz (US 2,062,468). Although these fields have indeed found new commercial enthusiasm, it is unfair to the public and to true inventors to allow patents to issue based on novel corporate and academic enthusiasm in areas where the technologies themselves are already anticipated. Newfound commercial and academic enthusiasm for old inventions is not to be confused with new inventions.

Another is that the Office allows applications that make use of "fishing net" claims and catch-all terminology. Fishing net claims are claims that are worded generally or abstractly enough in hopes that future inventions will be mistakenly treated in retrospect as being obvious or anticipated, simply because the same general terms, in retrospect, could be used to describe the new invention. This reduces the claims to a fiction of poetry. It also reduces the credibility and legibility of the disclosure. The Office should clarify that an invention cannot claim what it neither anticipates nor renders obvious. Also, the Office should prohibit obscurity and a lack of straightforwardness in disclosures. Although there is a skill to being thorough, disclosure should not be a game of showing how "catch-all" we can be, especially when it is rendered with the obscurity of abstractions or guessing-game terms.

There have also been alarming trends of abuse directed at independent inventors who, due to their exceptionally higher quality ratio, present a threat to the academic and corporate world. For example, when betraying the tradition of disclosure protection established by Jefferson at the inception of our patent system, the American Inventors Protection Act masqueraded on the outside as a form of protection from those who bilk inventors and disclose their ideas without obtaining patents. But on the inside, now the Office itself is bilking inventors and disclosing their ideas with "opt-out" pre-grant publication requirements. This allows others to glean from the ideas of inventors without giving them due credit for their work.

Independent inventors pursuing their own applications have been hard hit by trends of abuse. For example, most can no longer have their applications advanced out of turn, as with the Application to Make Special program, because the new Accelerated Examination program requires searches to be conducted using the EAST system, which is not available online, thereby limiting access to those living nearby the Office. Also for example, the Office continues to salami-slice applications into divisionals, resulting in multiplied costs (and making it harder to research the prior art quickly). To give another example, technical requirements for the wording of the claims, designed mainly to unionize employment for patent attorneys, are resulting in claim rejections that in some cases cannot be overcome without adding new matter.

Another big problem is that the Office is allowing "circle-of-friend" databases to be used in obviousness rejections. Although an invention can be anticipated based on discovery of a document hidden in an old jar, the Office should not consider an invention to be rendered obvious by disclosures available only to a circle of friends. But this is precisely what is happening as corporations are cleverly turning to private companies to deposit disclosures that can then only be accessed for a fee. For if an applicant does not know in advance what the prior art is, he or she will have a much harder time avoiding an obviousness rejection by wording the specification carefully in advance. This prejudices the applicant in favor of corporations making use of such "circle-of-friend" databases for their disclosures. The Office should clarify that one skilled in the art is someone who has access to what the public has GENERAL access to, and not merely circle-of-friend access. However, applicants still retain the burden of disclosing what they know of the prior art, whether it is found in an old jar or among a circle of friends.

Another problem is that the Office has been trying to reinstitute a 'first inventor to file' system in place of the 'first to conceive' system. Independent inventors can have much longer design cycles than corporate inventors, especially now that technologies are growing more complex. A first to conceive system protects the diligent snail-of-an-inventor from being upstaged by corporate resources. It also encourages patent quality by ensuring that inventors are given the TIME needed to perfect their inventions before disclosure.

The Office should take blame for renegeing on the document disclosure program. This is abusive to independent inventors. The program itself was meant to depreciate acceptance of the traditional method of keeping a copy sealed in a certified letter mailed to oneself, which unlike the document disclosure program was permanent. Although the Office cited limited reliance on disclosure documents in non-provisional applications as an excuse for discontinuing the program, two factors may have been at play. One is that

the design cycle for independent inventors may average LONGER than the mere two year period over which the documents were retained. Thus, many inventors may not have been ready to file until after the two year period was up. Second is that a 'letter' was required in order to refer to the disclosure documents, unlike provisional applications which are provided with numbers and a place to enter the number on non-provisional filing forms. The Office should reinstitute the program, with a 100 year depository period, providing a document number, with places for entering it on both provisional and non-provisional applications.

Above all, since inventors, not assignees, have a constitutional distinction, the Office should group applications from independent inventors differently than assignees. Thus, small entities that are not independent inventors should not be treated as if assignees have the constitutional rights of inventors. Independent inventors should not have to pay high fees as they do now. The Office should also stop the disreputable practice of letting assignees simply "claim" the inventions of their employees. Employment is not a pretext of assignment. The Office should stop participating in schemes to aid corporations and academic institutions at the expense of actual inventors. A non-inventor applicant should not be allowed to prosecute a patent application if an inventor refuses to assign his or her invention to the applicant, unless the applicant can prove beyond a reasonable doubt that a clear and convincing obligation exists to assign the invention and that the obligation is no longer negotiable. Perhaps even then it should not be allowed. At any rate, standards should be tightened to protect actual inventors.

Finally, to speed the processing of applications, new matter should be allowed with a new matter filing date, with reduced fees for amendments that result in allowance. Examiners should get credit for new matter amendments that result in allowance. This way Examiners will not have to wait several years before recalling the ideas of the same invention, and inventors will get speedier processing of applications. New matter is often needed only because of failure to clearly distinguish from the prior art with proper wording. There is no reason to go back to the bottom of the pile and create a whole new application every time this happens. Instead, since new matter will be allowed one way or the other, it makes sense to streamline the inclusion of new matter. Applicants should therefore be allowed to petition the Office for a streamlined introduction of new matter, which will then be allowed if the Examiner believes it will result in immediate allowance, or allowance in view of minor formalities to be corrected in good faith.

Sincerely,

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