



Internet Association



September 12, 2016

The Honorable Darrell Issa
Chairman
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jerrold Nadler
Ranking Member
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

RE: Statement for the Record on “Oversight of the U.S. Patent and Trademark Office.”

Dear Chairman Issa, Ranking Member Nadler, and Members of the Subcommittee:

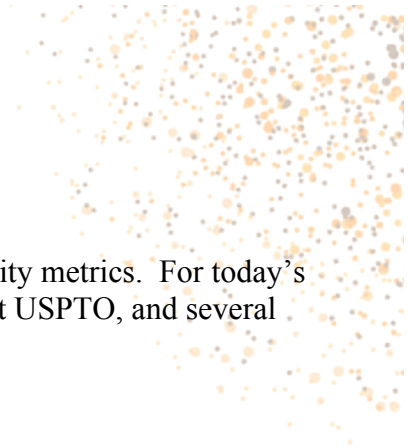
The Internet Association commends you for holding the September 13, 2016 hearing on “Oversight of the U.S. Patent and Trademark Office (USPTO).” Congress has a vital role to play in providing the USPTO with both the resources and guidance necessary to fulfill its mission. This hearing is a timely opportunity to examine the impact of recent administrative and policy changes aimed at improving USPTO functions, as well as future steps that will be essential to high patent quality.

The Internet Association works to advance policies that foster innovation, promote economic growth, and empower people through the free and open internet.¹ The internet creates unprecedented benefits for society, and as the voice of the world’s leading internet companies, we ensure stakeholders understand these benefits. Our members experience the U.S. patent system both as owners of intellectual property and as parties subject to abusive patent troll litigation. Ensuring high quality patents is indispensable to ensuring that the patent troll business model is made less tenable over time.

The damage done by trolls does not start with litigation. Access to a cheap supply of vague, overly broad, low quality patents in our system provides trolls the ammunition they need to engage in abusive litigation against productive businesses.

There is no single action that would eliminate low-quality patents and the harm they bring to our innovation economy. Vigorous post-grant review, patent litigation reform, and continued efforts to seek to increase the efficiency of the patent review system are all key components of fostering a system that produces higher quality patents. Specifically, this includes bringing more clarity to patents and their

¹ The Internet Association’s members include Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snapchat, Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga.



prosecution record, as well as the Office's willingness to reevaluate its patent quality metrics. For today's timely hearing, the Internet Association wishes to highlight the work being done at USPTO, and several key challenges that remain.

The Enhancing Patent Quality Initiative

The USPTO launched the Enhanced Patent Quality Initiative in spring 2015, which focused on identifying policies and processes at the USPTO that would improve patent quality.² Under Director Michelle Lee's leadership, the EPQI marked important milestones in advancing an inclusive and robust dialogue about the state of the patent quality system and potential for improvements.

Moving forward, it will be essential for the USPTO to implement changes that provide better quality assessment from the early stages of prosecution. In particular, the Internet Association urges the USPTO to fully implement the Post Grant Outcome program to ensure that patent examiners are aware of and able to leverage information from any challenges to patents that have related patent applications pending at the USPTO. In addition, it is critical for the USPTO to focus on reforms that encourage clearer patent claims, such as including definitions of patent claim terms in the written record for patent applications so that the public is aware of what the terms mean. Finally, USPTO should vigorously demand algorithms in computer-implemented patent claims, so that software patents don't claim all ways of achieving a result or function and avoid other problems associated with preemption.

The Internet Association is encouraged by the work done by EPQI, and encourages the next Administration to continue the important work started at the USPTO.

Government Accountability Office Reports

As the USPTO works to implement identified areas for quality improvement under the EPQI, two reports recently released by the GAO highlight systemic issues in patent examination that fail to create quality-focused incentives that must also be addressed. In the first report, "Patent Office Should Define Quality, Reassess Incentives, and Improve Clarity," the GAO examined recent patent litigation trends and explored opportunities for further improving patent quality at USPTO.³ The report recognizes the continued problem of patent quality in fueling litigation, observing that "low quality patents are more likely to be asserted in patent infringement lawsuits because, according to some economists, the less clear the claim boundaries are, the more likely that others will infringe the patent or will continue to infringe when confronted by the patent owner."⁴ In order to stem the flow of low quality patents, the GAO examined processes for patent examination at the USPTO, and found numerous challenges to quality enhancement.

The USPTO's current metrics for patent examiners is based on a count system that rewards production over quality, failing to establish incentives for high-quality work that may be more time consuming. For

² See Enhanced Patent Quality Initiative, U.S. Patent and Trademark Office, available at <http://www.uspto.gov/patent/initiatives/enhanced-patent-quality-initiative-0>.

³ U.S. Gov't Accountability Office, GAO-16-490, Patent Office Should Define Quality, Reassess Incentives, and Improve Clarity (2016).

⁴ Id. 11.



complex claims, such as those in software, patent examiners may require additional time to research unclear or broad claims in order to produce a higher quality patent. In its study, the GAO found that 90% of examiners encountered broadly worded patent applications, with the vast majority of examiners struggling to thoroughly examine the claim.⁵ The report notes that 70% of patent examiners faced serious time constraints.⁶ The combination of inadequate time constraints and rigid metrics that fail to incentivize quality work will continue to produce low-quality patents that harm our innovation economy.

The USPTO must consider an alternative approach to the current metrics system that (1) incentivizes high-quality patents and (2) alleviates the rigid time constraints that are contributing to lower quality patent examination. While ensuring that patent backlogs do not stymie inventors nationwide, efficiency must not come at the cost of effective patent review, which is necessary for a world-class patent system that leads to both current and future innovation.

The GAO also notes that USPTO lacks a consistent definition for patent quality. Without goals and indicators for quality measurement, the USPTO will be unable to determine whether policies and procedures aimed at higher quality patents are effective.⁷ Clear, consistent guidance on quality standards are necessary in order to both incentivize and monitor quality measurement at USPTO. While challenges exist in creating and monitoring quality, it is paramount that USPTO begin to explore potential solutions that will lead to long-term improvements in patent quality.

In addition to recommendations for the USPTO's work, the first GAO report also highlights the continued proliferation of opportunistic patent trolls in our courts, notably in the Eastern District of Texas (EDTX). The report notes that while in 2007, only 20% of cases took place in EDTX, by 2015 nearly half of all patent infringement litigation occurred there.⁸ The result is a de facto patent district court – a patent district court established without the express approval of Congress and because of the perceived advantages provided to patent plaintiffs there. Local rules disadvantaging one party, disproportional win rates, unreasonable damage awards, and expansive, inequitable discovery practices attract trolls to East Texas, where their embedded business model is thriving as a form of legalized extortion. Common sense reform that ensures judicial districts have jurisdiction over patent infringement lawsuits are narrowed to only those that have a material connection to the alleged infringement enjoys widespread support amongst stakeholders. The Internet Association commends this Committee for unanimous passage of venue reform language to H.R. 9, the Innovation Act, and strongly supports efforts to curb this abusive practice.

In its second report, “Patent Office Should Strengthen Search Capabilities and Better Monitor Examiners’ Work,” the GAO found that additional tools, training, and resources may be necessary for patent examiners, notably in prior art searches.⁹ In addition to examining the technical capabilities necessary for thorough work, the report recommends strengthening reviews of examiners’ work and establishing identifiable indicators of the quality of the work performed.¹⁰ Combined with the first report, it is critical that the USPTO (1) establish quality indicators that both examiners and supervisors need to perform

⁵ Id. 34.

⁶ Id. 26.

⁷ Id. 37.

⁸ Id. 16.

⁹ U.S. Gov’t Accountability Office, GAO-16-479, Patent Office Should Strengthen Search Capabilities and Better Monitor Examiners’ Work (2016).

¹⁰ Id. 56.



thorough examination of claims (2) regularly monitor and assess the work of patent examiners to ensure that quality controls are working. Better oversight of examiners' work is necessary to assess the work being done and whether quality indicators are being accounted for, and whether spending more time on applications to ensure thorough examinations or conducting appropriate prior art searches is necessary.

Report of the Inspector General

In addition to the recent GAO reports, the Department of Commerce Inspector General (IG) released an August 2016 report focused on time and attendance abuse of patent examiners.¹¹ Specifically, the report found that among over 8,000 surveyed patent examiners, there were over 130,000 unsubstantiated hours resulting in millions of dollars of unaccounted for work¹². The IG notes that this abuse impacts the ability of the USPTO to reduce the backlog of patent applications and account for efficiencies during examination. A number of misaligned incentives and production goals may contribute to the abuse, the IG report notes.¹³ The Internet Association also recognizes that abuse of time and attendance records will have a direct and detrimental effect on patent quality. We must foster a system that rewards the quality of work rather than simply production itself. Better examiner metrics and oversight will contribute to accountability for both time and quality, improving the overall patent system.

Conclusion

Low quality patents can stifle our economy and harm the public by fueling needless litigation and creating uncertainty for inventors and business owners, detracting from opportunities for further innovation. A multifaceted problem such as low quality patents and the trolls they fuel requires a multifaceted solution. Congress and USPTO have made strides to eliminate low quality patents and the harm they produce, yet more work remains to be done. The recent GAO report and the experience of our member companies highlight the continued need to reevaluate the factors contributing to low quality patents and implement and monitor quality-based changes, both through and beyond the EPQI.

The Internet Association looks forward to continuing a working dialogue with both USPTO and Congress to achieve our shared goals of a high quality patent system that encourages innovation.

Respectfully Submitted,

Gina G. Woodworth
Senior Vice President, Public Policy & Government Affairs

CC: The Honorable Bob Goodlatte, Chairman, Committee on the Judiciary
The Honorable John Conyers, Ranking Member, Committee on the Judiciary

¹¹ U.S. Department of Commerce, Office of the Inspector General, Analysis of Patent Examiners' Time and Attendance (2016).

¹² Id. 2.

¹³ Id. 21-23.