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USPTO Battling Perception of Patent System in Crisis

The US patent system has been cited from various quarters as being “broken” or “in crisis”. The general opinion regarding patents is that they are not being granted based on the patentee’s innovative ideas, but that patents are obtained on the ability of the inventor’s attorneys to convince the US Patent and Trademark Office (USPTO) that distinguishing (and sometimes minute) features between the claimed invention and what was known before, the prior art, rise to the level of a patent grant. The public has become jaded also to news media accounts of high profile cases, such as the US Supreme Court ruling in a patent case involving everyone’s favorite electronic gadget, the Blackberry, which threatened to shut down the system by a patent holder who did not manufacture or sell any products, but merely held patents that could have conceivably blocked use of the Blackberry in the US.

Earlier this year, a number of “town hall meetings” were held by John Doll, Commissioner for Patents and James Toupin, the agency’s General Counsel, to alert the patent community of proposed PTO rule changes that were intended to address these and other problems faced by the USPTO, including the large and increasing backlog of patent applications in the USPTO. The presentations were directed to those people most affected by the proposed rule changes, including patent attorneys, patent agents, independent inventors and members of the small business community. In the meeting held in Chicago in February, the local patent community voiced its strong dissatisfaction and dissent with most of the proposed rule changes, which sentiments were mirrored by patent practitioners all over the US. Several organizations have strongly opposed the implementation of the controversial rule changes in public comments to the USPTO regulatory body as to the proposed rules.¹

One goal of the US Patent Office has always been the issuance of timely and valid patents. The USPTO has experienced a patent pendency backlog, especially in certain technologies, that has continued to increase over the years to the extent that in some cases, the technology has become obsolete before the patent issues. However, every year on average for the last ten, 10% more patent applications have been filed than the year before. In some areas, the average period of a patent application from the time it is filed to its being taken up substantively for the first time now exceeds six years.² Patent application pendency for some applications exceeds 10 years from the filing date to grant date.

The USPTO has been actively seeking to address the patent pendency problem by hiring additional patent examiners. Intending to hire 1000 new patent examiners per year for five years the USPTO exceeded that goal by over 200 for fiscal year. The USPTO acknowledges that hiring new examiners will not, by itself, solve the backlog problems.³ The PTO figures are somewhat misleading because the rate of examiner attrition does not allow the USPTO to expand its corps of seasoned examiners to address the noted problems. In fiscal 2005, the USPTO hired 959 new examiners, but in the same period, 425 examiners retired, resigned or were let go (attrited in USPTO parlance).

Other elements of the USPTO strategy to address the perceived problems include changes to internal operations of the USPTO and others set forth in a 2006 fiscal year end report⁴. Training of new examiners is a crucial matter, but the traditional way of providing such training, one-on-one hands on training by seasoned examiners, was found to hinder examination of new applications and thus added to the backlog. To free the examining corps to examine, examiner training has been replaced by a university model. This has led the USPTO to claim that patent quality has increased, using an internal USPTO metric, the patent error rate as determined by USPTO quality control. The error rate of examined applications has been reduced from an average of about 5% in previous years to 3.6%.

Additional USPTO rule changes proposed in January of this year will most likely not be implemented as they were panned by the patent community as drastically changing the way that the USPTO would interact with inventors and their attorneys. Additional legislative input was contemplated in Congress⁵ toward reform of US patent law, but the political landscape has been changed by the November election with as of yet unknown ramifications. The proposed overhaul of patent laws was also intended to address general dissatisfaction within the technology community, and especially the cutting edge Information Technology community, of the patent system and IP enforcement by the US court system. The US patent system has been seen, even among the general public, as being counterproductive to the goals set forth in the US Constitution “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁶ Additional input is expected from the US Supreme Court from a decision expected before June 2007 in a patent case that may change the standard of obviousness, making it more difficult to find a claimed invention patentable, or a patent valid.⁷

Past public opinion of the patent system as providing the economic framework for bringing innovative ideas to market and thereby catapulting the US into the technological supremacy, has been supplanted by the general feeling that the patent system is being gamed by unscrupulous actors to keep innovative technology from reaching the market. This trend has been seen as holding up general technological progress. Abraham Lincoln, the only US President to be awarded a patent⁸, considered that “[t]he patent system . . . secured to the inventor, for a limited time, the exclusive use of his invention; and thereby added the fuel of interest to the fire of genius, in the discovery and production of new and useful things.”⁹ The limited monopoly of a patent granted to a patentee the right to exclusively exploit an invention during the life of the patent, and so provides incentive to inventors to invent and discover “a new and useful process, machine, manufacture, or composition of matter or any new and useful improvement thereof. . .”¹⁰ The next year is expected to provide additional insight in whether the US Congress and USPTO efforts to revamp the patent system will serve these admirable goals.

¹ <http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/focuspp.html>

² <http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/chicagoslides.ppt#965>, p.12

³ Ibid, p. 29.

⁴ Available at <http://www.uspto.gov/web/offices/com/annual/2006/2006annualreport.pdf>.

⁵ Hatch-Leahy Senate bill S 3828, Smith House bill H.R. 2795.

⁶ United States Constitution, Article 1, Section 8.

⁷ *KSR v. Teleflex* — opining on the criteria of what constitutes a “non-obvious” invention.

⁸ <http://showcase.netins.net/web/creative/lincoln/education/patent.htm>

⁹ Abraham Lincoln, Second Lecture on Discoveries and Inventions, Jacksonville, Illinois, February 11, 1859.

¹⁰ 35 U.S.C. §101.