

Quit Your Griping: The USPTO Is Doing Pretty Well These Days

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The USPTO is getting it from all sides lately. It's become too easy, some say, to get a patent—examiners are in the pockets of large corporations. Others argue that no, it's at best a crap shoot, with the outcome depending on whom you happen to draw as your examiner. Passionate as all sides may be, these are not really new complaints — they're just louder than usual at the moment. In perspective, however, the agency is doing a pretty good job.

First, some context. The USPTO is the second-busiest patent office in the world (after China), and filings are growing at the second-fastest rate in the world (again, after China). And, while annual filings are up (8% in the U.S. in 2012 alone), the USPTO's backlog is down 20%, from 764,000 unexamined applications in 2009 to 615,000 at the end of August 2014. On average, the waiting time from filing of an application to a first action by an examiner is about 16 months, and average time to grant is about 38 months. All of these performance metrics represent dramatic improvements over the past decade, and are the result of a combination of public scrutiny, infrastructure improvements, and strong leadership.

The dotcom boom at the turn of the century resulted in a large uptick in patent filings, some of which were perhaps not quite stellar examples of inventiveness. While questionable patents are not new (see, for example, U.S. Patent 5,443,036, which claims a method for exercising a cat by teasing it with a laser pointer; and U.S. Patent 6,368,227, "Method of swinging on a swing"), some dubious filings by the hot companies of the day brought negative attention to the USPTO in the mainstream media and popular culture. Sudden publicity, occurring coincidentally with a change in leadership at the agency after the 2000 election, precipitated a drop in allowance rates and examiner morale.

As the bubble burst and attention died down, the

agency was able to concentrate on significant infrastructure improvements including, in particular, conversion from paper files to all-electronic records. It was not unusual prior to that time that applicants' paper responses would be lost, files would be incomplete or misplaced, and every action item took weeks or months. Indeed, the Office would periodically send letters to patent attorneys asking for copies of documents from their files, so that the Office could rebuild its internal files. The agency's conversion from papers stored in shoes to electronic files stored in "image file wrappers" predated the "paperless office" projects of many, if not most, law firms, and went largely unheralded.

With an all-electronic standard, the USPTO was then able to provide web-based access to its files, and to enable electronic filing of patent applications and other documents. The time and cost savings to applicants and law firms resulting from electronic filing was enormous. While there may be the odd patent attorney who waxes nostalgic over midnight dashes to the airport post office in a desperate effort to receive a needed filing date, the rest of us need only take a depth breath and hit "send."

What is interesting about these advances is that they were successfully achieved by a government agency that was able to operate at the forefront, even by private standards. This was not always so. Innovation, responsiveness and morale have fluctuated over the years, in large part influenced by the organization's senior leadership of the day. During the first several years of this century, the agency was headed by directors with primarily political pedigrees and limited IP experience. Quality and morale suffered. The result was high turnover, low allowance rates, and frequent examiner errors as measured by reversals on appeal. A low point was reached in 2007 when the USPTO proposed a series of restrictive rules for patent prosecution that were viewed by the patent

community as draconian (and were ultimately never implemented).

A corner was turned, however, beginning with the appointment of IBM's former IP counsel David Kappos in 2009, and continuing now under Acting Director Michelle Lee, formerly in charge of IP at Google. Search and examination quality has improved, infrastructure investments have been given a higher priority, and the directive to examiners has been to work with applicants to identify and allow patentable material. Following the passage of the America Invents Act in 2011, it fell to the USPTO to draft and implement a vast number of significant rule changes. To their credit, the Office literally took their show on the road, bringing its senior leadership to meet with small and large inventors and patent holders alike throughout the country. Eventually, rules were proposed. When the inevitable cacophony ensued, the USPTO considered the public's comments and made some significant revisions to its rules package. There was a clear sense that they didn't want to just get it done—they wanted to get it done right.

There are, of course, challenges and opportunities for the organization. Most recently, allegations have surfaced of abuse by some employees of the agency's telework program. Congress has launched an investigation focused on the apparent watering down of an internal USPTO review prior to its release to outside overseers. More fundamentally, the agency has not had a confirmed director in nearly 20 months. While Ms. Lee has received widespread praise for her stewardship as acting director, commentators have rightly pointed out that a permanent director is needed to set long-term goals and to achieve a certain measure of independence that comes from Senate confirmation. In addition, the Supreme Court is increasingly active in deciding question of patent law, and it falls on the USPTO to adopt examination guidelines that take those decisions into account, and the Office has been somewhat slow to do so. This week marks the two-year anniversary of the America Invents Act's first implementation phase and, while few things are more enjoyable than complaining about the government, occasionally a tip of the hat is called

for. Now is one of those times, and we should pause for a moment to congratulate the USPTO. But not for too long—they have 615,000 applications that need their attention.

Originally published in The Recorder, September 19, 2014.

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