

Patent examiners more likely to approve marginal inventions when pressed for time

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The less time patent examiners are given to review an application, the more likely they are to grant patent protection to inventions 'on the margin,' says a study co-authored by Melissa Wasserman, the Richard and Anne Stockton Faculty Scholar and Richard W. and Marie L. Corman Scholar at the University of Illinois College of Law. Credit: University of Illinois College of Law

Haste makes waste, as the old saying goes. And according to research

from a University of Illinois expert in patent law, the same adage could be applied to the U.S. Patent and Trademark Office, where high-ranking examiners have a tendency to rubber-stamp patents of questionable merit due to time constraints.

The less time patent examiners are given to review an application, the more likely they are to grant patent protection to inventions "on the margin," says a study co-authored by Melissa Wasserman, the Richard and Anne Stockton Faculty Scholar and Richard W. and Marie L. Corman Scholar at the College of Law.

"Patent quality is at the heart of patent reform debate," Wasserman said. "It is generally agreed that the [patent office](#) is allowing too many invalid patents, which is bad for society for a number of reasons, including that these patents may actually impede rather than promote innovation. Congress and the courts have recognized this, and have been trying to tweak the patent system in an effort to increase patent quality. Essentially, they've been trying to help the patent office do a better job.

"But until now, there's been very little compelling empirical evidence that any particular feature of the patent office has been causing them to over-grant and thereby allow invalid patents."

With the help of the National Center for Supercomputing Applications, Wasserman and co-author Michael D. Frakes of the Northwestern University School of Law performed a data analysis on 1.4 million patent applications considered by the office from 2002 to 2012. They cross-referenced their analysis with examiner roster data obtained through a series of Freedom of Information Act requests from the U.S. Patent and Trademark Office.

"For a lot of the information we gathered, the only source is the patent and [trademark office](#), which has become a lot more open to researchers

and academics in recent years," Wasserman said.

The researchers found that an examiner's promotion to each subsequent step-up in pay equated to a 10- to 15-percent decrease in the number of hours allocated to review a patent application. Examiners operating at the highest level were expected to review an application in about half the time allocated to examiners at the lowest level, according to the paper.

Under the assumption that patent examiners who are given sufficient time to review applications will, on average, make the correct patentability determinations, the results suggest that the time allotments are inducing higher ranked patent examiners to grant invalid patents, the researchers say.

"Our findings suggest that the process of promoting patent examiners, which is meant to reward admirable behavior on the part of examiners, may, in part, be responsible for the agency issuing patents of marginal quality," Wasserman said. "It also sheds some light on the widely held belief that decreasing patent examiner attrition or intensifying the monitoring of newly hired examiners is vital to increasing patent quality."

According to the paper, as an examiner is given less time to review an application, they become less inclined to search for prior art, which, in turn, makes it less likely that the examiner makes a prior art-based rejection. In particular, "obviousness" rejections, which are especially time-intensive, decrease, Wasserman said.

"Our findings provide empirical evidence for policymakers to utilize to increase patent quality," she said. "That is, we find how the patent office decreases the time allocated to review applications as patent examiners are promoted may be partially responsible for the agency granting too many invalid patents. If patent examiners are already pressed for time

and the time allocated to review an application is further decreased, it is likely that examiners will spend less time searching the prior art, and that's going to make it harder for them to figure out which patents are really new, and which ones represent just a trivial advancement over current scientific understanding.

"And this is how they're going to end up granting more. They're just not given enough time to look through everything that has already been created and invented to determine whether or not the claimed invention is really new or non-obvious."

Wasserman, whose research focuses on the institutional design of innovation policy, with a particular emphasis on patent law and administrative law, said not having enough time is the common denominator.

"In general, I think the office is right: As you get better at your job, you will likely be able to do it faster," she said. "It's just that our results suggest that the scaling of time allocations may be too aggressive. There may be just some set amount of time that's needed to search the prior art, and once you decrease time allocations below this number, patent examiners are not going to be able to do a good job, no matter how good of an examiner they are."

The research has implications for "patent assertion entities," otherwise known (and pejoratively referred to) in the media as "patent trolls," Wasserman said.

"To the extent so-called patent trolls are asserting invalid patents, our results suggest one reason as to why the office is issuing these marginal patents," she said.

The research also points to another potentially troubling conclusion:

Similar patent applications are sometimes treated in dissimilar ways.

"In an ideal world, a patent should be granted or rejected solely on the merits of the application," Wasserman said. "But it turns out that the decision to allow a patent may be more happenstance based on which examiner gets assigned your application. If you have two individuals, you and a competitor, and your competitor gets assigned a high-ranked examiner, and you get a low-ranked examiner, it's more likely that your competitor is going to get their [patent](#) approved than you, which creates an unfair advantage."

More information: The paper, "Is the Time Allocated to Review Patent Applications Inducing Examiners To Grant Invalid Patents?: Evidence From Micro-Level Application Data," is available [online](#).

Provided by University of Illinois at Urbana-Champaign

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