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What to Do about Bad Patents

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## BRIEFLY NOTED

### **What to Do about Bad Patents?**

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Congress is currently considering the most significant reform to the patent system in nearly half a century. And no wonder. Bad patents are everywhere: covering obvious inventions like the crustless peanut butter and jelly sandwich, ridiculous ideas like a method of exercising a cat with a laser pointer, and impossible concepts like traveling faster than the speed of light. More troubling, countless patents that seem reasonable to a lay audience overreach in technical fields as blatantly as that peanut butter sandwich overreaches in a familiar one.

**MORE MONEY** What to do? The obvious solution would be to throw money at the problem. After all, additional resources would make it possible for the Patent Office to hire more patent examiners and allocate more time to the evaluation of each patent application, and in that way weed out bad patents more effectively.

Admittedly, that would help. It is shocking how little time patent examiners currently spend evaluating the average patent: approximately 18 hours spread over a three-year period. That is just 18 hours to read the original application, gather information about related inventions, interact with the inventor and his attorney, and ultimately evaluate both the supposed invention and its accompanying legal documentation. Ironically, the average American will spend more time watching television this week than the federal government likely spent reviewing any of the patents that made television possible. No wonder more than three-fourths of all patent applications ultimately result in successfully issued patents. The bigger surprise is that any bad patents get stopped.

Despite its intuitive appeal, however, the “more money” approach has an important flaw: most of any additional resources would be wasted. Why? Think back to the examples we gave in the first paragraph. Yes, there really is a patent on a method of cat exercise and another on a machine that allows for communication at a speed faster than light. But who cares? No one is ever going to be sued for putting Whiskers through her

paces. And it is even less likely that anyone will ever be sued for exceeding the speed of light.

Nor are those isolated examples. Most patents do not matter. They claim technologies that ultimately failed in the marketplace. They protect a firm from competitors who for other reasons failed to materialize. They were acquired merely to signal investors that the relevant firm has intellectual assets. Or they were lottery tickets filed on the speculation that a given industry or invention would take off. Those patents will never be licensed, never be asserted in negotiation or litigation, and thus spending additional resources to examine them would yield few benefits.

Some bad patents, however, are more pernicious. They award legal rights that are far broader than what their relevant inventors actually invented, and they do so with respect to technologies that turn out to be economically significant. Many Internet patents fall into this category. Rarely a month goes by that some unknown patent holder does not surface and claim to be the true inventor of eBay or the first to come up with now-familiar concepts like hyperlinking and e-commerce. (A particularly notorious example along these lines is the previously unknown technology firm Acacia, which as of this writing claims that its patent portfolio covers just about every known technique for transmitting and receiving digital audio and video content.)

While some such Internet patents may be valid—someone did invent those things, after all—more often the people asserting the patents actually invented something much more modest. But they persuaded the Patent Office to give them rights that are broader than what they deserve, imposing an implicit tax on consumers and thwarting truly innovative companies who do or would pioneer those fields.

Compounding the problem, patents are extremely hard to overturn because courts require a defendant to provide “clear and convincing evidence” to invalidate an issued patent. In essence, courts presume that the Patent Office has already done a good job of screening out bad patents. Given what we know about patents in force today, that is almost certainly a bad assumption.

**IDENTIFYING IMPORTANT PATENTS** The problem, then, is not that the Patent Office issues a large number of bad patents. Rather, it is that the Patent Office issues a

small but worrisome number of economically significant bad patents and those patents enjoy a strong, but undeserved, presumption of validity.

Framed this way, the solution naturally follows: The Patent Office should focus its examination resources on important patents and pay little attention to the rest. But it is difficult for the government to know ahead of time which patents are likely to be important.

There are two groups, however, that have better information about the likely technological and commercial value of inventions: patent applicants and competitors. The patent system currently does little to elicit that information. Changing this is the key to reforming the system.

Our proposal therefore comes in three specific parts. First, we would weaken the presumption of validity for issued patents. A presumption like that embraced by the “clear and convincing” standard must be earned, and under current rules patent applicants do not earn it. Why not replace that high hurdle with a more appropriate level of deference such as the “preponderance of the evidence” presumption currently given trademarks and copyrights? (And, while we are at it, we should apply the presumption with some eye toward reality. The current presumption is so wooden that courts today assume a patent is valid even as against evidence that the patent examiner never saw, much less considered. What is the logic there?)

Second, because legitimate inventors need as much certainty as the law can give them, we would give applicants the option of earning a presumption of validity by paying for a thorough examination of their inventions. Put differently, applicants should be allowed to “gold plate” their patents by paying for the kind of searching review that would merit a presumption of validity. An applicant who chooses not to pay could still get a patent. That patent, however, would be subject to serious—maybe even *de novo*—review in the event of litigation. Most likely, applicants would pay for serious review with respect to their most important patents but conserve resources on their more speculative entries. That would allow the Patent Office to focus its resources, thus benefiting from the signal given by the applicant’s own self-interested choice.

Third, because competitors also have useful information about which patents worry them and which do not, we support instituting a post-grant opposition system, a process

by which parties other than the applicant would have the opportunity to request and fund a thorough examination of a recently issued patent. A patent that survives collateral attack would earn a presumption of validity similar to the one available through gold-plating. The core difference is that the post-grant opposition would be triggered by competitors—presumably competitors looking to invalidate a patent that threatens their industry. Like gold-plating, post-grant opposition is attractive because it harnesses private information; this time, information in the hands of competitors. It thus helps the Patent Office to identify patents that warrant serious review, and it also makes that review less expensive by creating a mechanism by which competitors can share critical information directly with the Patent Office.

Admittedly, there are administrative and strategic issues to work out in this proposal. Post-grant opposition, for example, introduces some risk of collusion: If an applicant can get a buddy to raise a straw man challenge to his patent and, through that, walk away with a stronger presumption of validity, the whole process will collapse. But any legal system can be gamed, and thus the question here is not whether a two-tiered patent system is perfect—it is not—but whether it is better than what we have now. By subjecting important patents to greater scrutiny, a two-tiered patent system would dramatically improve the quality of economically significant patents. At the same time, the vast majority of patents would undergo the current level of review, at no additional cost to the Patent Office or to society. Moreover, lowering the presumption of validity for most patents would reduce the volume of purely speculative filings, freeing up Patent Office resources for more important inquiries.

Our approach would not completely eliminate bad patents. No matter how the patent system is configured, the occasional peanut butter and jelly sandwich will slip through. But the two-tiered approach would arm the Patent Office with one key weapon it lacks today: information about which patents matter. That would help the Patent Office focus its resources, giving its most careful review to the economically significant patents that should be its bread and butter.

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