III. U.S. Patent Quality Today

A. Introduction

Fast-forwarding to the early 21st century it is remarkable that many of the issues the Framers dealt with are still being grappled with today. In 1790 there were only two or three individuals performing all patent examination whereas now the U.S. Patent and Trademark Office (USPTO) employs thousands of examiners.[46] Yet the patent office is still so overwhelmed with processing applications that turn-times are on the order of years and even then, patent grants are often questionable. A recent exposure on this state of affairs is found in a government assessment report from 2016.

B. Congressional Review of USPTO Performance

Dramatic increases in patent litigation have recently prompted U.S. Congress to investigate practices of the USPTO. A Government Accounting Office (GAO) report released June 2016 confirmed long-standing issues concerning patent quality control; describing that overwhelming volumes of patent applications have led to prioritization of turn-time over examination diligence. This trend has resulted in frequent grant of questionable or weak patents, fueling the excess litigation problem seen today:

> "GAO, which conducted its audit from 2014 to 2016, focused on how poor patents are contributing to the recent rise in litigation. Lawsuits in federal district courts over the illegal use of inventions have exploded in recent years, with 5,000 filed in 2015, up from 2,000 in 2007, the audit said..".
> "Just the threat of litigation can deter innovators from coming up with new products, GAO found." [47]

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46 Dennis Crouch, USPTO's *Swelling Examiner Rolls*, Patent Lyo (2014), https://patentlyo.com/patent/2014/11/usptos-swelling-examiner.html (accessed Sep 5, 2017)

47 *Intellectual Property: Patent Office Should Define Quality, Reassess Incentives, and Improve Clarity*, Government Accountability Office (GAO), Report to Chairman, Committee on Judiciary, House of Representatives 1 (June 2016)

Firms attempting to innovate new products, particularly in computer technology, are facing interference from associated right holders; often leading to delays or abandonment of effort to avoid patent wars. De-incentivizing new product development in this manner runs counter to the fundamental objectives of the patent system and naturally carries negative economic and social implications.[48]

Another observation from the GAO report is that there are no clear criteria for even defining patent quality at the USPTO or otherwise. There has only been limited interpretation of language from the US Constitution and Patent Act:

> "The patent office 'does not have a consistent definition of patent quality that is clearly articulated… or fully developed measurable goals and performance indicators to guide and evaluate work towards the agency's quality goals,' GAO.." [49]

The USPTO largely concurred with findings of the GAO report in a formal response letter that expressed they continue to pursue improvement efforts.

C. 2016 GAO Report Findings

A chief concern expressed by GAO is that without a "consistent definition" for patent quality it is difficult to measure and monitor agency performance..as a result, it is hard for USPTO to define, measure, and work toward quality goals." [50] Furthermore, the USPTO describes a dilemma in which patent litigation attorneys prefer clearly defined claims, whereas rights holders tend to pursue more open-ended claims to widen applicability of their concept.[51]

Feedback from industry sources describe they feel that "time pressure" on examiners is a major contributor to compromised patent quality. This observation was verified from GAO's survey where an estimated 70% of examiners stated they have insufficient time to complete a proper examination with current volume demands.

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48 *Id.*at 2
49 *Id* at 0
50 *Id* at 23
51 *Id* at 21

The report goes on to describe that determining prior art takes up most of the time required for examination. It does not help that applications are not required to show evidence of prior art search but only disclosure of any incidental knowledge of relevant art the applicant may have become aware of. GAO also notes that there is no limitation to the number of continuation requests that can be made by applicants. Therefore the only practical ends to an entered exchange are either a grant by the patent office or cessation by the applicant. [52]

Another concern is that examiners are graded based on the number of examinations they can complete each month. GAO estimates that 70% of examiners are pressured to circumvent lengthy formal exchanges with applicants. Examiners sense that the system prefers for them to approve a grant rather than engage in prolonged application reviews.[53]

D. Analysis and Summary

Criticisms of the USPTO contained in the GAO report are alarmingly comprehensive in that they describe fundamental flaws in both theoretical as well as operational aspects of the agency. Regarding the former, GAO highlights that the USPTO has not formulated a concept for patent quality itself never mind try to uphold it. Longstanding struggles with determining boundaries in exclusive rights ownership have become only more difficult with increased sophistication of technological development. Novelty and non-obviousness are becoming more subjective measures. And it hasn't helped that industry and political pressures have pushed the USPTO to sacrifice diligence for the sake of increased output.

It is also disconcerting to realize that these are not new problems. Another GAO industry survey report appearing twenty-three years prior paints a strikingly similar picture:

> "One company patent attorney said that the quality of examination has deteriorated significantly in recent years due to 'pendency pressures' and the lack of experience and knowledge of examiners in some technology fields. Another attorney, .. said that among the U.S., Japanese, and European patent systems, USPTO examination results are the 'most inconsistent.' .. one attorney said it is too easy to obtain patents on trivial or obvious inventions… Another

52 *Id* at 8
53 *Id* at 27

> patent attorney noted that some patents are found to be valid even though they contribute minimally to the technology."[54]

Respondents reiterated that it was too easy to obtain patents for trivial concepts and that the patent office needs to better define "obvious" and return to a "no invention-no patent" policy. They also describe secondary undesirable consequences such as examiners manipulating lengthy procedures to compensate for lack of knowledge. For example, it was common for an examiner with insufficient understanding in a given subject matter to frivolously file an interference (pre-AIA, first to invent), sparking a dispute in order to indirectly derive explanation from ensuing exchanges between opposing parties. Lack of knowledgeable examination and excessive turn-times were similarly criticized for holding up product development due to apprehensions with conflicting matters being invisibly stuck in the "pipeline" at the patent office. [55]

The above list of significant problems reflect the technical challenges surrounding proper examination and granting of patent rights. Data from GAO suggests two fundamental vulnerabilities of patent quality that contribute to this situation. First is the technical challenge of assessing the patentability of proposed concepts where a) subjective criteria of "novelty" and "non-obviousness" are becoming increasingly difficult to interpret and b) a backdrop of growing and complex prior art adds to an already difficult search exercise.

Without more specific guidelines the task of assessing patent quality itself may become too subjective. This lack of measure has allowed the USPTO to escape full accountability for some time now, even in cases where there have been extensive error in patent examination and grant. Properly assessing patent quality without the establishment of more definite examination criteria has become increasingly unworkable. As will be illustrated with the *Apple* and *Wright* case studies, such shortcomings result in uncertainties that contribute to the size and frequency of patent litigation.

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54 *Intellectual Property Rights: U.S. Companies' Patent Experiences in Japan*, Government Accounting Office, GGD-93-126, 14 (July 1993)

55 *Id.* at 15-16