

*Does the U.S. Patent & Trademark Office Grant Too Many Bad Patents?:
Evidence from a Quasi-Experiment*

Michael Frakes

Associate Professor of Law, Northwestern University School of Law
Chicago, IL

Co-author: Melissa Wasserman, Associate Professor of Law, University of Illinois College of Law

Many believe the root cause of the patent system's dysfunction is that the U.S. Patent & Trademark Office (PTO or Agency) is issuing too many invalid patents that unnecessarily drain consumer welfare. Concerns regarding the Agency's over-granting tendencies have recently spurred the Supreme Court to take a renewed interest in substantive patent law and have driven Congress to enact the first major patent reform act in over sixty years. Policymakers, however, have been modifying the system in an effort to increase patent quality in the dark. As there exists little to no compelling empirical evidence the PTO is actually over-granting patents, lawmakers are left trying to fix the patent system without even understanding the root causes of the system's shortcomings. This Article begins to rectify this deficiency, advancing the conversation along two dimensions. First, it provides a novel theoretical source for a granting bias on the part of the Agency, positing that the inability of the PTO to finally reject a patent application may create an incentive for a resource-constrained Agency to allow additional patents. Second, this Article attempts to explore, through a sophisticated natural-experiment framework, whether the Agency is in fact acting on this incentive and over-granting patents. Our findings suggest that the PTO is biased towards allowing patents. Moreover, our results suggest the PTO is targeting its over-granting tendencies towards those patents from which it stands to benefit the most through allowing. Our findings not only provide policymakers with much needed evidence that the PTO is indeed granting too many invalid patents but also provide policymakers with the first empirical evidence that the Agency's workload woes are biasing the PTO towards allowing patents. Our results also suggest that the literature has overlooked a substantial source of Agency bias and hence recent fixes to improve patent quality will not achieve their desired outcome of extinguishing the PTO's over-granting proclivities.

Email: mdfrakes@gmail.com

Frakes