Patent Inflation

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The shape of patent law is defined in large degree by the interaction between its two main expositors: the Federal Circuit and the Patent and Trademark Office (PTO). Yet this structural accord has not well served the patent system or the private parties who rely on it. In recent years both the Patent and Trademark Office and the Federal Circuit have received trenchant criticism for their handling (and mishandling) of patent applications and patent cases. Critics have leveled two particular charges: first, that the PTO grants too many invalid patents; and second, that the Federal Circuit has presided over a dramatic (and unwarranted) expansion of what can be patented. These failures have been chalked up to a number of potential causes: funding shortfalls at the PTO; internal management problems at the PTO; a lack of expertise at the PTO or the Federal Circuit; capture by private interests; and, perhaps most importantly, a simple ideological preference for greater numbers of patents over a broader range of technologies.

It is entirely possible that these various factors, singly and in combination, have contributed to the granting of significant numbers of invalid patents granted and the expansion in patentability. Yet this article intends to suggest another possibility. These two phenomena—an overly permissive PTO, and an overly expansive Federal Circuit—may simply be the results of the contorted institutional relationship between the two organizations. Because of the manner in which patent cases make their way from the PTO to the Federal Circuit, the PTO may have a decided institutional interest in granting more patents than it should. And because of this same interaction, the Federal Circuit may be engaged in an unwitting expansion of the boundaries of patent law.

The key lies with the asymmetric nature of appeals from the PTO to the Federal Circuit. When the PTO denies a patent application, the aggrieved private party may appeal immediately to the Federal Circuit. When the PTO grants a patent, however, there is no losing party to appeal—the victorious applicant merely walks away with its patent. That patent is unlikely ever to see the inside of a courtroom, given how few infringement lawsuits are litigated, and at minimum it will be many years before it does. If the PTO wishes to avoid lawsuits, it need only err on the side of allowing more patents. And if the Federal Circuit is fed a steady diet of boundary-stretching patent cases, it will tend to inflate the boundaries of patentability purely through error and happenstance. The patent law will thus be subject to a natural inflationary pressure generated entirely by the types of cases that the PTO sends to the Federal Circuit.