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Why Do We Assume Patents Are Valid When Patent Office's Own Numbers Show They Get Things Wrong All The Time?

Mike Masnick Mon, Aug 20th, 2012 3:07 am

One of the bizarre things about the patent system is the "presumption of validity," in which a patent officially has to be presumed valid. Conceptually, this makes very little sense. Patents grant a pretty broad monopoly on "inventions" for an extended period of time... based entirely on approximately 18 hours that a patent examiner has to spend looking over the thing. Do we really think that a patent examiner gets things right most of the time? It seems that even the US Patent Office's *own data* shows that's simply not true. A friend pointed me to the USPTO's recently released data concerning re-exams (https://www.techdirt.com/articles/20120816/01045920068/why-do-we-assume-patents-are-valid-when-patent-offices-own-numbers-show-they-get-things-wrong-all-time.shtml#comments pdf and embedded below), which demonstrates in great detail why patents shouldn't be presumed valid. Basically, the data suggests that an awful lot of patents were handled poorly.

The document notes that 92% of re-exam requests are granted -- meaning that nearly all re-examination requests lead to a re-examination by the Patent Office. So, if most patents were well constructed in the first place, you would imagine that most of them would come through the re-examination process unscathed with no changes, right? Only if patent examiners were really bad at their jobs would a large percentage of patents need to be changed or rejected completely on re-exam. Given the "presumption of validity" that grants a monopoly, and the massive dollar amounts that patents sell for and are able to extract in settlements, you'd think that re-examined patents must normally confirm the original diagnosis. Hell, given that information, I'd hope that *at least* around 95% of patents, having passed the approval process, would be solid enough to survive the re-exam process untouched.

If the number was below 90%, I'd think the system was in trouble and needed some fixing. If it was below 70%, I'd think that we should be declaring the system a failure. If it was below 50%, I'd be questioning the entire basis of the patent system. So what is it?

Would you believe that only **22% of re-examined patents have all claims confirmed?** 22%! That means that 78% of all patents that are granted a re-exam had **serious problems** with their original claims -- and remember, 92% of re-exam requests are granted. All these patents were initially approved and enjoyed the presumption of validity, which *would may have cost companies millions (or more)*. This isn't just a failing grade. This is an **epic disaster**. It's true that

67% of the re-examined patents still are allowed with "claim changes", and only 11% are completely rejected, but those numbers are little comfort when we're told that we need to presume all of the claims in all patents are perfectly valid.

Now, some might claim that this number is perfectly fine, because only bad patents get re-exam requests. In fact, you could argue that perhaps these numbers show the system is working in that bad patents get re-exam requests and good patents remain valid. But there's little to no evidence to support that. Already, those who dislike patent re-exams are claiming that patent re-exams are abused [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554061] with too many good patents getting re-examined. So it certainly appears that all sorts of patents get re-examined... and a very large percentage of them appear to turn out to have been mistakenly granted.

This highlights, in pretty stark contrast, just how broken *and completely arbitrary* the system is. For a system like this to be valid, it should be *formalized and repeatable*. It needs to be based on objective information, not the random subjective opinions of a particular examiner. Yet the data suggests that's exactly what's happening, meaning that we're handing out hundreds of thousands of monopolies based on the mere whims of patent examiners, who haven't been shown to be even remotely consistent, and who have very little time to actually examine what it is they're granting monopolies over.

How does *anyone* consider that to be a reasonable system?

Reader Comments (selected)

11. Re:

abc gum, *Aug 20th, 2012 @ 4:28am*

Bogus patents are real my friend. And they cost you a lot.
No matter how hard you wish them to be good, overall they are indeed bad for us - the people.
Here are just a few of many references:

Business Costs Quadruple on Patent-Owner Claims
http://www.bloomberg.com/news/2012-06-26/business-costs-quadruple-on-patent-owner-claims-bgo v-barometer.html

Why There Are Too Many Patents in America
http://www.theatlantic.com/business/archive/2012/07/why-there-are-too-many-patents-in-america/259725/

13. A Bit of Reality

arleenzank, *Aug 20th, 2012 @ 4:32am*

There are other things going on here that might change your opinion on the reexamination process.

First, of the 12,258 reexam requests 32% were initiated by the owner of the patent. The reexamination process is a precursor to many licensing agreements as well as enforcement activities. If a patent holder has a patent that is for technology viewed as really seminal or that is essential to the a standard, it is not uncommon to require a reexamination as part of that process to minimize risk.

Reexaminations are not the random subjective opinions of a particular examiner. A reexamination is handled by a team of three senior examiners including a supervisory examiners. Generally these are the best examiners on the subject matter.

The reexaminations initiated by third parties - other members of the public - are a by product of patent litigations. One of the tactics used during litigation is to request a reexamination. Since there are often multiple patents that are part of a suit you are going to see lots of reexam requests. While the report shows that 32% of the reexams were associated with litigations it doesn't reflect reexaminations requested as a precursor to litigation that may be settled outside of the purview of USPTO. Patents involved in law suits are generally the ones someone thinks are high value. Successfully reexamined patents are more valuable.

4.1 million patents issued from 1981-2011. There have probably been over 100,000 issued

already this year. In the same period there were 12,258 reexaminations. This means that **.002% of all patents being reexamined**.

The average US patent has 20 claims that means that last year there were 4.9 million claims. Even if you use 10 claims per patent as the average since 1981 that means that the reexamination impacted roughly 82,000 claims out of 41 million claims.

And finally, every application must include a substantial new question of patentability. It's not like you send a patent number and a check and the examiners are off to the races. the SNQ has to document the justification for a reexamination.

While I'm not always a fan of USPTO, I am missing your point.

51. Anonymous Coward, *Aug 20th, 2012 @ 11:56am*

"when we're told that we need to presume all of the claims in all patents are perfectly valid."

Nobody ever told you this Mike. You are merely told that the claims will enjoy, in a legal setting, a presumption of validity. That presumption can be overcome by clear and convincing evidence under 102/103 or good reasoning (and evidence sometimes) under 101/112.

50. bikey, *Aug 21st, 2012 @ 6:06am*

Patents have only been 'presumed valid' since 1982 when the Court of Appeals for the Federal Circuit was established to give the final rubber stamp to any and all patents. Prior to that, they were usually found to violate anti-trust law. This legislative presumption can be reversed with a flick of the wrist if only there were halfway intelligent and independent legislators.

65. Re:

> **Anonymous Coward**, *Aug 21st, 2012 @ 9:31am*

The "presumption of validity" first appeared in statutory form in the Patent Act of 1952 at 35 USC 282. This provision of the 1952 act codified federal common law that was articulated by the Supreme Court at least as early as 1934 when it issued its opinion in the matter of Radio Corporation of America v. Radio Engineering.