

2011

# Can the Patent Office be Fixed

Mark Lemley  
*Stanford Law School*

Follow this and additional works at: [http://scholarship.law.marquette.edu/nies\\_lectures](http://scholarship.law.marquette.edu/nies_lectures)

---

## Recommended Citation

Lemley, Mark, "Can the Patent Office be Fixed" (2011). *The Honorable Helen Wilson Nies Memorial Lecture*. 3.  
[http://scholarship.law.marquette.edu/nies\\_lectures/3](http://scholarship.law.marquette.edu/nies_lectures/3)

This Lecture is brought to you for free and open access by the Annual Lectures at Marquette Law Scholarly Commons. It has been accepted for inclusion in The Honorable Helen Wilson Nies Memorial Lecture by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

THE FOURTEENTH ANNUAL  
HONORABLE HELEN WILSON NIES  
MEMORIAL LECTURE IN INTELLECTUAL  
PROPERTY LAW<sup>†</sup>

CAN THE PATENT OFFICE BE FIXED?\*

MARK A. LEMLEY\*\*

I. THE PROBLEM OF BAD PATENTS.....	295
II. CAN THE PROBLEM BE SOLVED? .....	297
A. <i>What Won't Work</i> .....	298
1. Preventing Fee Diversion.....	298
2. Fee-setting Authority.....	298
3. Retaining Patent Examiners. ....	300
4. Outsourcing Search.....	300
B. <i>What Might Work</i> .....	301
1. Second Pair of Eyes. ....	301
2. Changing Examiner Incentives.....	303
3. Tiered Review.....	303
4. Oppositions and Adversarial Evaluations.....	304
C. <i>Living with Imperfection</i> .....	306

I. THE PROBLEM OF BAD PATENTS

The Patent and Trademark Office (PTO) finds itself caught in a vise. On the one hand, it has been issuing a large number of dubious patents over the past twenty years, particularly in the software and electronic commerce space. It issues many more patents than its counterparts in

---

<sup>†</sup> This lecture is delivered each year by a nationally recognized scholar in the field of intellectual property law.

\* © 2011 Mark A. Lemley.

\*\* William H. Neukom Professor, Stanford Law School; partner, Durie Tangri LLP. Thanks to Rose Hagan, Bruce Hayden, and Stu Soffer for comments.

Europe and Japan;<sup>1</sup> roughly three-fourths of applicants ultimately get one or more patents, a higher percentage than in other countries.<sup>2</sup> Complaints about those bad patents are legion,<sup>3</sup> and indeed, when they make it to litigation, they are quite often held invalid.<sup>4</sup> Even the ones that turn out to be valid are often impossible to understand; in the information technology industries, there is no lawsuit filed in which the parties don't fight over the meaning of patent claim terms.<sup>5</sup> The natural reaction is to say that the PTO needs to do more than it does to make sure it is awarding patents only to those who deserve them.

On the other hand, it is not clear that we can or should weed out bad applications at the PTO. The vast majority of patents are never litigated or licensed; spending a lot of money to ensure their validity would be wasted.<sup>6</sup> And the structure of the patent prosecution process makes it very difficult for the PTO to do so. Patent examiners can never finally reject a patent application; applicants dissatisfied with the outcome can come back an unlimited number of times to try again through various mechanisms.<sup>7</sup> Efforts beginning in 2006 to change that rule upset patent lawyers a great deal and were ultimately abandoned.<sup>8</sup> And because of the inability of the PTO to finally reject applications, when the PTO started making it harder to get patents several years ago, the result was to create an enormous backlog of patent applications as examiners would reject applications and applicants would try again (and again, and again) to get a patent. That backlog in turn created its own set of

---

1. Bruno Van Pottelsberghe de la Potterie, *The Quality Factor in Patent Systems* 29 (European Ctr. for Advanced Research in Economics and Statistics, Working Paper No. 2010-027), *available at* <http://www.epip.eu/conferences/epip05/papers/van%20Pottelsberghe.pdf> (last visited Feb. 7, 2011).

2. Mark A. Lemley & Bhaven Sampat, *Is the Patent Office a Rubber Stamp?*, 58 EMORY L.J. 181, 182 (2008).

3. ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT* (2004).

4. John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 194, 208 (1998) (showing that, within a sample of 299 patents litigated in 239 cases, 138 patents were held invalid); John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677 (2011).

5. JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS AND LAWYERS PUT INNOVATION AT RISK* (2008).

6. Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1510-11 (2001).

7. Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B.U. L. REV. 63 (2004).

8. *Tafas v. Kappos*, 586 F.3d 1369, 1371 (Fed. Cir. 2009).

problems, delaying the issuance of good patents and reducing certainty for both applicants and third parties.

Some have suggested that those delays—and the use of continuation applications more generally—are the result of oddities in the system for evaluating and rewarding patent examiners. The so-called “count” system gave credit to examiners for certain acts; patent lawyers often complain that examiners “make” them file continuations in order to boost their counts. Whether or not that was true, however, it doesn’t appear to be behind the growth of continuation applications. The PTO changed the count system in 2009 to try to address this problem. And it has been issuing record numbers of patents in recent months. But preliminary data from Dennis Crouch suggests that the number of continuation applications is still on the rise, up 27 percent from 2009 to 2010,<sup>9</sup> suggesting that the use of continuations is largely applicant-rather than examiner-driven.

The evaluation of patent applications in the PTO is further complicated by recent empirical evidence. One recent study shows that junior patent examiners are a lot more zealous in weeding out bad patents than senior examiners.<sup>10</sup> The longer examiners spend in the PTO, the less searching they do, the more likely they are to grant patents, and the more likely they are to grant patents on applications that their counterparts in other countries have rejected.<sup>11</sup> A second study shows that, whether senior or junior, examiners pay attention almost exclusively to prior art that they find themselves, and not to information submitted by patent applicants, even applicants who are passing on art found by patent examiners in other countries.<sup>12</sup> The implication of this evidence is that we need to pay attention not only to legal rules but also to examiner behavior and reward systems.

## II. CAN THE PROBLEM BE SOLVED?

How, then, can we fix the PTO, allowing examiners to distinguish

---

9. Dennis Crouch, *Requests for Continued Examination Continue to Rise*, PATENTLY-O BLOG (Jul. 8, 2010, 10:56 A.M.), <http://www.patentlyo.com/patent/2010/07/requests-for-continued-examination-continue-to-rise.html>.

10. Mark A. Lemley & Bhaven Sampat, *Examiner Characteristics and Patent Office Outcomes*, 93 REV. ECON. STAT. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1329091](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329091) (last visited Feb. 21, 2011).

11. *Id.*

12. Christopher A. Cotropia et al., *Do Applicant Patent Citations Matter? Implications for the Presumption of Validity* (Stanford Law and Economics Olin Working Paper No. 401, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1656568](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656568).

between patentable and unpatentable inventions effectively, without slowing the process to a crawl or wasting a bunch of money?

### A. What Won't Work

First, some things that likely won't work.

#### 1. Preventing Fee Diversion.

The PTO is funded through user fees imposed on applicants and owners of issued patents. For much of the last twenty years, some of that fee revenue (typically 10 to 20 percent of it) has been diverted by Congress to general federal revenue. It is a commonplace among patent lawyers that the way to solve the PTO's problems is to stop fee diversion, "fully funding" the PTO.

Stopping fee diversion is certainly a good idea. Whatever the merits of government user fees over taxes as a general matter, it seems particularly foolish social policy to tax innovators in particular to raise general revenue. But stopping fee diversion is hardly a panacea. In the last several years, the PTO has been fully funded—that is, Congress didn't divert fees.<sup>13</sup> Nonetheless, the backlog grew. The addition of 10 to 20 percent of operating revenue wasn't enough even to enable the PTO to hold steady.

#### 2. Fee-setting Authority.

In recent years the PTO's efforts have shifted to seeking permission from Congress to set their own fees.<sup>14</sup> This would allow the PTO to raise fees on applicants and patentees, using the money to pay for a more intensive examination. There is some reason to believe that fee-setting authority, if nothing else, may result from the six-year patent reform effort in Congress.<sup>15</sup>

---

13. In 2011, Congress again diverted fees for the first time in several years. John Schmid, *Congress Deals Setback to Patent Office*, MILWAUKEE J. SENTINEL, Apr. 17, 2011, <http://www.jsonline.com/business/120041914.html> (last visited Jun. 6, 2011).

14. Arti K. Rai, *Growing Pains in the Administrative State: The Patent Office's Troubled Quest for Managerial Control*, 157 U. PA. L. REV. 2051, 2067–68 (2009).

15. The issue is bound up with the larger question of the role of the PTO as a full-fledged administrative agency with rulemaking authority. For discussion of that issue, see Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 47 (2008); John R. Thomas, *The Responsibility of the Rulemaker: Comparative Approaches to Patent Administration Reform* 17 BERKELEY TECH. L.J. 727 (2002); Lisa Vertinsky, *Comparing Alternative Institutional Paths to Patent Reform*, 61 ALA. L. REV. 501, 546–49 (2010).

Giving the PTO the authority to set its own fees might or might not be a good idea, depending on the relative incentives the PTO and Congress have to set fees rationally. But as noted above, it is likely not a good idea simply to spend more money to weed out bad patents. Most of that money will be wasted on applications that are of no consequence to anyone. And because of the structure of the examination system, it might not even succeed in weeding out bad patent applications.

Even if it did, however, the current fee structure makes patent quality self-limiting. The PTO is paid by applicants to process their applications at each stage. But those payments are not enough even to sustain the limited examination that now occurs. The difference is made up by patent “maintenance fees”—periodic payments made by the owners of issued patents to keep those patents in force. Because the PTO’s ability to examine new applications is dependent on revenue from previously granted ones, the PTO faces a problem: the more bad applications it rejects, the fewer patents will pay maintenance fees, and the less money it will have to conduct a detailed examination. The PTO ran into this problem in the late 2000s, when—as a result of a lowered grant rate coupled with companies abandoning patents during the recession—it found itself in a financial crisis. The broader lesson should be clear: the current system for funding the PTO works only if the PTO continues to issue patents on a large percentage of the applications it receives.

The PTO might begin to address this problem by changing the way it collects fees. At one extreme, it could abandon maintenance fees altogether, and pay for enhanced examination through higher application fees. That solves the self-limiting problem, but it raises the cost to startups seeking patents at an early stage of development, which may not be ideal. Alternatively, the PTO could simply raise the maintenance fees significantly, to perhaps ten times their current rate. Doing so might make the weeding out of bad patents revenue neutral, though as more bad applications are rejected, the tax on those who actually obtained patents would have to increase further to compensate. And as the PTO raises its maintenance fees, fewer people will choose to maintain their patents. Depending on the elasticity of demand, paying for examination out of higher maintenance fees may or may not work.

Some have suggested raising maintenance fees for a different reason—to prevent patent lawsuits by trolls who buy up patents in order to enforce them. But that is unlikely to work. According to a 2009 American Intellectual Property Law Association (AIPLA) report, the median cost of taking a major patent case to trial is \$5.5 million per side

in attorney's fees.<sup>16</sup> A maintenance fee of \$40,000–\$50,000—ten times the current fee—may weed out more patents that aren't being used, but it is unlikely to deter someone considering spending perhaps 100 times that much to litigate a patent. And the patents that aren't being used aren't really the problem.<sup>17</sup>

### 3. Retaining Patent Examiners.

Another problem commonly cited by patent lawyers is the high rate of turnover at the PTO. Being an examiner is not an easy job, and it doesn't pay all that well. Not surprisingly, examiners often leave relatively quickly for jobs in engineering, law firms, or to go to law school. Indeed, one recent study found the median examiner had been at the PTO for just over three years.<sup>18</sup> The high rate of turnover means that the PTO needs to hire more than 1,000 examiners a year just to keep even with attrition. In recent years the PTO has found it virtually impossible to grow the examining corps. And of course, those new examiners must be trained. Perhaps the solution to the PTO's problems, then, is to find ways to keep those examiners from leaving.

There may well be benefits to reducing examiner attrition. But the evidence suggests that weeding out bad patents is not among them. Empirical research by Lemley and Sampat shows that the longer examiners spend at the PTO, the less searching they do, the less likely they are to issue initial rejections or demand claim amendments, and the more likely they are to ultimately grant a patent.<sup>19</sup> It is the most junior examiners who are most likely to reject applications.<sup>20</sup> The reason is not precisely clear, but may have to do with increased workloads on senior examiners, or with acculturation into a corps whose ethos is to grant rather than deny patents. Either way, keeping examiners around longer may hurt rather than help the cause of weeding out bad patents.

### 4. Outsourcing Search.

Reacting both to workload and to a sense that examiners don't find the most important prior art, a number of initiatives both within and

---

16. AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION (AIPLA), REPORT OF THE ECONOMIC SURVEY 2009 29 (July 2009).

17. Raising maintenance fees would weed out patents that sit on a shelf now but might be sold in the future to a troll that will assert them against product companies. In that limited sense it might reduce the number of troll lawsuits.

18. Lemley & Sampat, *supra* note 10.

19. *Id.*

20. *Id.*

outside the PTO have tried to relieve examiners of the burden of searching for prior art. They have variously proposed to require the applicants to do their own search for prior art,<sup>21</sup> to invite the public to review applications and submit prior art,<sup>22</sup> or to share the burden of searching with patent examiners in other countries. These initiatives seem promising because they outsource a function examiners don't seem particularly good at—finding the most relevant information on the ground—to others who are positioned to do it better.

But recent empirical evidence suggests that it might not work. Cotropia et al. studied the behavior of patent examiners in responding to applications, and found that they rely almost exclusively on art they find for themselves, not art submitted by applicants. And that doesn't appear to reflect either applicants drafting around the art they found or the weakness of that art; U.S. examiners largely ignored even art that was submitted because it was found important by a foreign patent examiner during examination of a counterpart application.<sup>23</sup> If examiners are psychologically primed to rely principally on things they find for themselves, it won't help to have others provide them with the best art. And it might even hurt, causing examiners not to focus on the best prior art.

### *B. What Might Work*

The problems with the PTO are deeply rooted. Increased funding won't solve the problem of bad patents, and a variety of other commonly suggested fixes for the PTO are unlikely to solve the problem, and indeed could even make it worse.

Other proposals have a greater chance of addressing the problem of bad patents, though they come with their own uncertainties.

#### 1. Second Pair of Eyes.

Shortly after the Federal Circuit held business methods patentable in 1998, the PTO was inundated with business method patent applications. Most of those applications went to Class 705, which refers to the collection of patent examiners who focus on business methods. Indeed, by 2001, Class 705 had the largest application volume. In response to this flood, the PTO initiated a specific “quality control” measure in this

---

21. There is currently no such requirement.

22. Beth Simone Noveck, “Peer to Patent”: *Collective Intelligence, Open Review, and Patent Reform*, 20 HARV. J. L. & TECH. 123, 145 (2006).

23. Cotropia et al., *supra* note 12.



class in March 2000: the “second pair of eyes” review (SPER), under which applications are subjected to mandatory assessment by more than one examiner before being allowed.<sup>24</sup> Requiring two examiners to agree seems to have had a dramatic effect: a 2008 study found that class 705 has the lowest grant rate among high volume classes.<sup>25</sup> One possible explanation for the low grant rate in this class is that the second pair of eyes is working, and that the grant rate reflects better rigor during examinations, rather than application volume.

The fact that SPER leads to more rejections in Class 705 doesn’t mean it is an unalloyed success, however. Allison and Hunter demonstrate that its adoption in Class 705 led applicants to try to characterize their business method patents in ways that got them out of Class 705. It is possible that the applications that were not so characterized were systematically weaker (or their lawyers systematically less skilled) than the ones that avoided Class 705. The differences Lemley and Sampat found were so striking, however—a 16.1 percent grant rate in Class 705, compared with 72 percent on average<sup>26</sup>—that it seems unlikely this can explain the full difference.

Allison and Hunter’s objection is significant. But it applies only to a class-specific use of SPER, and wouldn’t condemn a broader application of the policy to all art units. Nonetheless, there are reasons to think carefully before expanding SPER to all patent applications. Doing so would roughly double the cost of patent prosecution across the board. It would also delay the prosecution process further; Class 705 applications are among the slowest to be processed. Further, at least as currently configured, SPER is asymmetric: it requires a second hurdle before allowing patents but not before rejecting applications.<sup>27</sup> As a result, it is likely to weed out bad patents, but also to catch some good ones within the net of rejected applications. Given the PTO’s historic bias in the other direction, perhaps that is a risk worth taking, but it is

---

24. John R. Allison & Starling D. Hunter, *On the Feasibility of Improving Patent Quality One Technology at a Time: The Case of Business Methods*, 21 BERKELEY TECH. L.J. 729, 734 (2006).

25. Lemley & Sampat, *supra* note 2, at 200–01.

26. *Id.* at 198–99.

27. There was a similar problem with the PTO’s quality review mechanism, which reviews a random subset of grants. Examiners can be punished for mistaken grants if caught in the quality control process, but are not punished for mistaken rejections, which are never reviewed. Ron D. Katznelson, *Patent Examination Policy and the Social Costs of Examiner Allowance and Rejection Errors*, Stanford Technology Law Review Symposium on PTO Reform (Feb. 26, 2010). Effective October 1, 2010, the PTO changed its quality evaluation system to be more evenhanded.

still a social cost we should avoid if we can. If SPER or some other review process is to be adopted, it should apply evenhandedly to grants and rejections.

Interestingly, the PTO recently shut down the SPER program in business methods. Too much success, it seems, carries its own risks.

## 2. Changing Examiner Incentives.

Recent empirical evidence suggests that much of the problem with patent examination revolves around examiner incentives and human resource policies. Examiners do less well at policing bad patents the longer they stay at the PTO. The problem could be their distance from the technology, or a tenure effect, or their increased workload. In any case, changes in training, workload, or promotion rules could affect those incentives. Examiners pay attention to their own searches, and not prior art submitted by others. The problem could be overconfidence bias, or simply triage. Either way, human resource policies could be brought to bear, training examiners to search better, giving them more time, or finding other ways to eliminate bias. And it seems obvious—though likely politically infeasible—that the rules should not treat allowances differently from rejections.<sup>28</sup>

These are good ideas, and they are worth exploring further. But implementation may be politically difficult. And some of the possible explanations point in different directions: should we give examiners more time to search, or less, for example?

## 3. Tiered Review.

The problem is not precisely 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. To harness information in the hands of patent applicants, we could give applicants the option of earning a

---

28. Katznelson, *supra* note 27.

presumption of validity by paying for a thorough examination of their inventions. In other words, “applicants should be allowed to ‘gold plate’ their patents by paying for the kind of searching review that would merit a presumption of validity.”<sup>29</sup> By contrast, “[a]n 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.”<sup>30</sup> Predictably, “applicants would pay for serious review with respect to their most important patents but conserve resources on their more speculative entries.”<sup>31</sup> Thus, “the Patent Office may focus its resources” and thereby “benefit from the signal given by the applicant’s own self-interested choice.”<sup>32</sup> The Obama campaign proposed this sort of tiered review, and the PTO has recently taken a step towards implementing a scaled-down version, in which applicants can choose the speed but not the intensity of review.<sup>33</sup>

Tiered review is only as good as the examination process that creates it, however, and if “gold-plated” patents are too easy to obtain, the point of the system will be lost. If they are too hard to obtain or too expensive, no one will use the system. Further, tiered review can at best be only a partial solution, because applicants do not always have accurate information about the future value of their applications. These are real objections, but they do not undermine the value of some sort of targeting in the use of PTO examination resources.

#### 4. Oppositions and Adversarial Evaluations.

Competitors also have useful information about which patents worry them and which do not. A post-grant opposition system would seek to harness that information. Post-grant opposition is 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 tiered review. The core difference is that the post-grant opposition would be triggered by competitors—

---

29. Mark A. Lemley et al., *What To Do About Bad Patents*, 28 REG., no. 4, Winter 2005 at 10, 12, available at <http://www.cato.org/pubs/regulation/regv28n4/v28n4-noted.pdf#page=3>.

30. *Id.*

31. *Id.* For a more detailed working out of the tiered review proposal, see Douglas Lichtman & Mark A. Lemley, *Rethinking Patent Law’s Presumption of Validity*, 60 STAN. L. REV. 45, 61–63 (2007).

32. Lemley et al., *supra* note 29, at 12.

33. Unfortunately, that proposal has been suspended at this writing because of pro fee diversion.

presumably competitors looking to invalidate a patent that threatens their industry.

Like tiered review, “post-grant opposition is attractive because it harnesses private information; this time, information in the hands of competitors.”<sup>34</sup> Armed with this information, the PTO can better “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.”<sup>35</sup> A post-grant opposition system is part of proposed patent reform legislation.

The success of post-grant opposition depends on the willingness of third parties with good information about the validity of a patent to challenge that patent in a public forum rather than settling privately. Some commentators are skeptical, pointing out that invalidating patents is a public good that the challenger would share with every other competitor.<sup>36</sup>

Patent law already has mechanisms that could be used to achieve the same goal. Some issued patents are returned to the PTO after issuance and are reevaluated through an adversarial process known as *inter partes* reexamination. This is an evaluation to which some deference is appropriate, though today the law gives complete deference to that determination. Even traditional *ex parte* reexamination, while not truly adversarial, allows the filer to submit an initial explanation of the reasons for reexamination, and the result has been that in recent years patents fare worse in reexamination than applications do in initial examination.

The biggest risk with post-grant opposition and related systems is that we give challengers too many bites at the apple, allowing them to inundate patentees with an endless set of challenges. To solve that problem, it is appropriate to place some limits on the number and perhaps the timing of challenges, and to imbue patents that survive those challenges with a strong presumption of validity.

---

34. Lemley et al., *supra* note 29, at 13.

35. *Id.*

36. Christopher A. Cotropia, *Modernizing Patent Law's Inequitable Conduct Doctrine*, 24 BERKELEY TECH. L.J. 723, 752–53 (2009); Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won't Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 BERK. TECH. L.J. 943, 952 (2004) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971); Joseph Scott Miller, *Building a Better Bounty: Litigation-Stage Rewards for Defeating Patents*, 19 BERK. TECH. L.J. 667, 687–88 (2004).

### C. Living with Imperfection

The reform proposals identified in the last section are a start. They likely will improve the prosecution process and help to weed out bad patents, and most will do so at an acceptable cost. But none of them will solve the problem of bad patents, or even come especially close to doing so. Part of the process of patent reform must involve acknowledging the inherent imperfections in the patent examination process, and adapting to those imperfections.

In particular, we will continue to rely on litigation for the foreseeable future as a primary means for weeding out bad patents. That is as it should be. Litigating patentees and competitors will uncover information “through the adversarial process, which [is] far superior to even the best-intentioned government bureaucracy as a mechanism for finding truth.”<sup>37</sup> More important, litigation is focused on the very few patents (1 to 2 percent) that turn out to be important and about which parties cannot agree in a business transaction.

Litigation can be abused, and examples of patent litigation abuse have been rampant in the last two decades. But a variety of reforms have started to bring that problem under control, and the courts have the means to continue that process.<sup>38</sup>

Part of the process must include a realistic recognition of the shortcomings of the patent prosecution system. In particular, courts should weaken the presumption of validity for issued patents. A presumption like that embraced by the current “clear and convincing” standard must be earned, and under current rules patent applicants don’t earn it. We should replace that high hurdle with a more appropriate level of deference such as the “preponderance of the evidence” presumption currently given trademarks and copyrights, in recognition of the fact that the scrutiny given patents does not warrant more. And 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 against evidence that the patent examiner never saw, much less considered.”<sup>39</sup> That makes no sense.<sup>40</sup>

---

37. Lichtman & Lemley, *supra* note 31, at 65.

38. DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* 100–02 (2009).

39. Lemley et al., *supra* note 29, at 12.

40. Lichtman & Lemley, *supra* note 31, at 61, n.50 (quoting *KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1745 (2007)). The Supreme Court passed up on an opportunity to bring the presumption in line with reality in *Microsoft Corp. v. i4i Ltd. P’ship and Infrastructures for Info.Inc.*, No. 10-290 (U.S. June 9, 2011).

But the presumption of validity should be dynamic, not static. Improvements to the patent prosecution process might justify a stronger presumption. In particular, surviving more extensive scrutiny, whether by opting into tiered review, being subject to an opposition proceeding, or perhaps even getting approval from two examiners rather than one, should justify a stronger presumption. A dynamic presumption will allow the courts to play their proper role as the guardians of the public interest while encouraging applicants and the PTO to shoulder their burden as well.