

Questions for the Record
"The Patent System: Today and Tomorrow."
Senate Judiciary Committee
April 21, 2005

Question 1. If patents are of such poor quality as to require a post grant procedure, what do you suggest we do to improve patents at the front end? Some have suggested that it makes more sense for Congress to ensure that there are an adequate number of patent examiners and resources to review patent applications and ensure patent quality at the front end, before establishing a new post-grant administrative procedure - - what do you think of that argument?

The quality of patents is a high priority for the USPTO. We are working diligently to address quality on the "front-end" to ensure the best results possible in our patent application review process.

A new post-grant review procedure is intended to improve upon existing administrative reexamination alternatives. It would serve as a quicker, lower cost alternative to expensive litigation in reviewing patent validity questions. Such a procedure would complement rather than displace ongoing quality-focused initiatives at USPTO, which include measures to address the hiring, training, certification and retention of an adequate number of examiners and review of work product throughout the examination process.

We currently have two levels of review for a sample of applications for each examiner. Allowed applications are reviewed as an end-check. Applications are also reviewed at various stages of prosecution. Further, individual technology centers review a sample of allowed and in-process applications.

USPTO has determined that providing end-check reviews only is not the most accurate and efficient way of assessing quality. We are working this year to place more of our resources into building quality into examiner work product, by enhancing the review during the various stages of prosecution. We are exploring ways to leverage the expertise of our quality reviewers so as to use their expertise up-front in the examination process rather than using them primarily as end-checkers. Our concept is to team our current technology center quality reviewers with the Office of Patent Quality Review (OPQA - an office independent from the patent examination Corps) reviewers to do an in-depth assessment of the work product within all art units of a technology center. On a biweekly basis, this team would review sample cases from a particular art unit (a limited group of examiners: 15-20), assess the results, and develop/deliver specific training using examples from the reviews from the unit. This will more specifically tailor the development of training to effectively treat issues at the art unit level, as opposed to a one-size-fits-all training model. Also, we will make better use of the OPQA reviewer experience through the sharing of best practices with the technology centers in an effort to improve the quality of examiners work product.

Additionally, this year our patent organization will begin a new university-style training program for half of the 1,000 new hires expected this year. This training program is intended to not only provide more intensive technology-based training following an aggressive curriculum, but also free supervisors from this responsibility so they can focus more of their time to mentor and train the junior employees already in their units. This training program will last for 8 months or more, and is intended to return new hires to the examining corps who are capable of writing complete office actions for supervisory review. It is our intention to increase this training program to cover all incoming employees in FY 2007. We believe that this new training model will create a higher quality, better-trained new hire who will be able to examine applications more accurately and thoroughly than our traditional one-on-one training model allows.

USPTO has implemented a thorough certification process for any employee seeking to be promoted from the GS-12 level to the GS-13 level. This process includes both case review and aptitude testing. This promotion represents a level of independence in which the supervisor is no longer responsible for intensive review of the examiner's work product. In order for the examiner to achieve this level of independence, we are ensuring that they have the skills required to perform their job requirements with a

high level of quality. In addition to the certification process, we are also currently recertifying our Primary Examiners. Currently, every three years, our most senior employees undergo a thorough review whereby we assess their quality levels. Only those who pass this process to become recertified may retain their independent status. These two programs ensure that only our best employees are promoted, while others who may require additional coaching and training are provided that opportunity.

Question 2. What percentage of patents do you think are of poor quality and would need to be reviewed in a post grant procedure? Do you think the PTO could effectively process all of them within 12-18 months?

Any new post-grant review procedure would likely enable any party to challenge the validity of any particular patent based on their own interpretation of quality. That party would have the burden to prove invalidity by a preponderance of the evidence.

The potential number of patents that may be subject to post-grant review would likely range from 400 (similar to our reexamination caseload) to 4000 (similar to the workload of the European Patent Office's (EPO) opposition process). We believe that the eventual post-grant review process would trend toward the low side of this range. Unlike the EPO, which allows anonymous oppositions, the current post-grant review proposal would require disclosure of the real party in interest. This would reduce possible harassment and excessive filings by unidentified parties and would reduce USPTO's case load below that of the EPO.

It would be our intention to have the Board of Patent Appeals and Interferences (BPAI) decide all post-grant review cases within 12 months (extendable by applicant to 18 months). Such expedited processing could occur with an electronic filing system that allows Administrative Patent Judges (APJs) to text-search documents, parties to directly submit information for posting and automatic generation of receipts for every filing.