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Patent Fake News

Jack M. Beermann
Boston University School of Law

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Author : Jack Beermann

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Janet Freilich, *Ignoring Information Quality*, __ **Fordham L.R.** __ (forthcoming 2021), *available at* SSRN.

Complaints about the patent system are legion. Critics complain that it is too easy to get a patent, that it is too easy to challenge an existing patent, that many patent denials are rationally inexplicable, that aggressive enforcement of patents stifles innovation, that patent trolls abuse the system to extort money from innocent users of widespread technology, and that inventors leverage modest modifications of existing patents to extend the patent period beyond intended legislative limits. While Janet Freilich's forthcoming article, *Ignoring Information Quality*, may not reveal the root of all patent evil, it illuminates an important problem in the U.S. patent system, namely that patent examiners rely on low quality information to make their ever-important decisions on patentability. This, according to Professor Freilich, leads examiners to grant patents based on dubious claims that undercut, rather than further, patent law's purpose of encouraging useful innovation and to reject deserving patents based on an incorrect understanding of background information.

The attentive reader may wonder why this is an administrative law jot rather than an intellectual property one. The answer is simple—the Patent and Trademark Office (PTO), the agency that grants patents, is an administrative agency, and thus Professor Freilich's article is a case study in the importance of high quality information across the spectrum of administrative law. Information quality problems like those that plague the patent system exist in many corners of administrative law where sensible policy decisions and predictions are possible only in light of high quality information. Professor Freilich's paper shines a light on a problem in the patent system that is similar to problems that have been noticed in administrative rulemaking, where mountains of comments may overwhelm the capacity of agencies to separate the wheat from the chaff and in adjudications where subjects of administrative action in areas such as immigration enforcement may lack the capacity or knowledge to gather and present the facts relevant to their cases.

Through careful examination of numerous patent files and caselaw on patent validity, Professor Freilich illustrates that patent examiners are not "digging" (her word) into the quality of evidence that is key to whether an invention is patentable. This is because, as courts have acknowledged, examiners lack the capacity to do the scientific work that would be necessary to evaluate the information. Patents may be granted or denied based on a cursory look at information that, with appropriate inquiry, would be revealed to support the opposite conclusion. Freilich contends, quite persuasively, that examiners' "failure to evaluate evidence . . . permeates every aspect of examiner behavior." If true, and Freilich's article seems to establish that it is true, what we have is an unreliable administrative system for making highly consequential determinations, something administrative law should not tolerate.

Even more startling, in my view, is Professor Freilich's analysis of the PTO's policies which seem to guarantee that patent awards will be based on low quality, biased information. One key element of patentability is that an invention must be "useful." PTO rules tell examiners that ordinarily they should accept an applicant's assertion that their invention is useful and should only "rarely" request additional evidence. Even further, the PTO's rules specify that the claim that an invention is useful should be rejected mainly only when the claim violates a scientific principle. Professor Freilich summarizes this as a requirement that examiners "accept the applicant's stated utility unless it is utterly impossible." This extreme standard does not inspire confidence in the accuracy of patent determinations.

Professor Freilich supports her claim that examiners rarely inquire into the quality of the information contained in the patent application with research that indicates that when examiners reject patent applications, it is always because a required piece of information is absent, not because the information provided is of insufficient quality. This is a

disturbing finding because patentability depends on the accuracy of the information provided by the applicant, not merely whether the applicant has completed all of the required sections of the application.

Professor Freilich proposes to address the pervasive problem of low quality information in the patent system in a number of ways, all of which could be applied across a wide spectrum of information-dependent administrative proceedings. Professor Freilich's first, quite simple, proposal is to require applicants to provide scientific corroboration for their conclusory statements on the elements of patentability, such as lab notebooks, copies of scientific analyses and physical models, or detailed drawings. She also suggests that all parties to patent applications, including inventors and their attorneys, should be held rigorously to a duty of disclosure to the PTO, with penalties such as additional scrutiny applied to applicants and their agents who do not disclose all relevant information in a useful format. Finally, she observes briefly that automation in the form of artificial intelligence may be useful tools for improving PTO performance.

Another of Professor Freilich's proposals raises a central issue in administrative law—deference. In light of the generally low quality of information underlying many patents, she proposes that courts should no longer presume that patents are valid, at least not with regard to those elements that are fact-dependent. In her view, the patent process should be viewed more like a registration system than an examination system. In this light, courts would presume only that the PTO's formal requirements have been satisfied, while leaving the substantive question of patentability open to non-deferential judicial determination. Professor Freilich recognizes that post hoc judicial determination is far from ideal, preferring her proposed internal reforms, but she recognizes that until the PTO starts performing more reliably, it may be the only alternative.

Professor Freilich's article should be of interest to two groups of scholars, most obviously patent scholars but more broadly administrative law scholars looking to broaden their perspective into agencies that are rarely considered in the general study of administrative law. We have seen in recent decades a judicial broadening of the scope of general principles of administrative law to agencies that previously seemed to function in their own, isolated, spheres. Perhaps the PTO will be next.

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