Is the Patent Office a Rubber Stamp?

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A growing chorus of voices is sounding a common refrain – the U.S. Patent and Trademark Office (PTO) is issuing far too many bad patents. Look almost anywhere and you can find entertaining examples of silly patents that surely shouldn't have issued. More importantly, critics complain, the PTO is so overworked, and the incentives for examiners to grant patents so great, that the PTO gives patents to the vast majority of applicants. Compounding the problem, PTO rules permit applicants who do get their applications rejected to try again an unlimited number of times to get a patent using a "continuation" application. As a result, some have claimed that the PTO grants patents to as many as 97% of those who seek them. In this view, far from serving as an effective gatekeeper, the PTO is effectively rubber-stamping private efforts to seek immunity from competition.

These criticisms are complicated by the rather surprising fact that we don't actually know what percentage of patent applications actually issue as patents. Patent applications have historically been kept secret unless and until they issued as patents, meaning that applications that are abandoned and applications or continuations that are still pending were never disclosed. The result has been significant controversy over both the nature and use of continuation applications and the underlying question of what percentage of applications actually issue as patents.

Because of recent changes in the law regarding publication and PTO administrative procedure, we are now able for the first time to track what happens to the vast majority of patent applications during prosecution. Significantly, we also have access for the first time to patent applications that are abandoned without a continuation – those applications that the PTO has effectively rejected. This allows us to determine the actual grant rate in the PTO. It also allows us to learn some significant things about how issued patents differ from rejected patents – by examiner, by industry area, and by prosecution behavior. We also evaluate the use of continuation applications.

We find that the PTO rejects a surprisingly high percentage of patents. While more than two-thirds of all applications result in at least one patent, a significant number of applications are rejected and then finally abandoned by the applicant. We also find that the likelihood of obtaining a patent varies significantly by industry in surprising ways. For example, patents are much more likely to be granted in the chemical and pharmaceutical industries than in software and computer fields, despite the fact that most of the complaints about bad patents show up in the IT industries.

Finally, despite a variety of reforms that might be thought to reduce the use and abuse of continuation applications, we find a high use of continuation applications of various types. The extent and nature of the use casts significant light on the purposes of continuation applications, suggesting that different industries use continuations for different purposes. Even given the existence of a new and quicker procedure for continuing to fight with the examiner, many applicants persist in using the older continuation procedure in order to delay issuance of their patens or because they are seeking to construct a multi-patent fence.

In Part I, we describe existing uncertainty about various aspects of patent practice and grant rates and explain the data we have collected. Part II presents our findings about grant rates and a variety of facts about patent practice. In Part III, we examine the extensive use of continuation applications in modern patent practice, and shed some light on the motivations for engaging in continuation practice. In Part IV, we explore the significant industry-specific differences in patent numbers, patent prosecution process, and grant rates. Finally, in Part V we discuss the implications of our findings, both for patent policy disputes over the value of the work the PTO does and for efforts to reform and rationalize patent prosecution.