The USPTO as Prime Mover:
Possibilities and Limitations for a Growing Agency
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Abstract

From a relatively modest Jacksonian agency, the U.S. Patent and Trademark Office (USPTO) has emerged as an adjudicatory forum that is increasingly competitive with the courts. Through a proliferation of post-issuance proceedings, the constitution of a new Patent Trial and Appeal Board, and new statutory provisions on court stays and estoppel, the agency has obtained an expanded capacity to have both the first and last word on important questions of patentability and patent validity, including the somewhat controversial capacity effectively to void outstanding district court judgments by canceling underlying patent claims. On the other hand, Article III courts have so far retained their traditional roles as primary fora for patent-infringement disputes and as primary expositors of substantive patent law. Contrary to some commentators' suggestions, this paper contends that congressional authorization for new post-issuance proceedings has not included an implicit delegation of interpretive authority warranting high-level *Chevron* deference for the USPTO's interpretations of substantive patent law. But the USPTO can accomplish much with lower-level *Skidmore* deference and should actively exploit its position as patent law's first mover to help steer the development of substantive patent law and the processes of determining patent scope toward a more stable and pragmatically balanced future.