Silly Patents, Common Knowledge and the Elusive Prior Art of Everyday Life

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A stick used as a dog toy. A sandwich with crimped edges. Exercising a cat with a laser pointer. Swinging sideways on a swing. Combing one's hair over a bald spot. These commonplaces of everyday life share one remarkable feature: each was once covered by the claims of an issued United States patent. Patents such as these – so-called "silly" patents – generate chuckles, but the ridicule is generally short-lived. Most, in fact, were revoked by the Patent and Trademark Office shortly after coming to public attention. Defenders of the patent system roll their eyes and shrug, noting that such patents are, at worst, amusing idiosyncrasies, but do no real harm. None of them are ever enforced, and if litigated would likely be invalidated. So, other than providing fodder for late night comics and diehard PTO critics, what's the problem?

In this paper, I argue that though little real harm may arise from silly patents such as these, the fact that such patents were ever issued in the first place reveals deep and troubling flaws in the patent examination system itself. Most significantly, they highlight the inability of patent examiners to identify and bring to bear prior art that lies beyond traditional databases of patents and scientific literature. Their presence also underscores the inability of examiners to rely upon common knowledge when challenging even the most preposterous patent claims.

These deficiencies, far from being harmless, have implications for the patent system well beyond a handful of silly patents. They directly influence the examination and issuance of patents in a host of industries in which the stakes are extremely high, including computer networking, online commerce and software. Such "low quality" patents are especially vulnerable to appropriation by patent assertion entities and can be used in costly and unmeritorious enforcement actions. Thus, it would behoove the PTO to revisit its examination practices to expand the authority of examiners to reject patent claims that are obvious in view of non-patent literature and common knowledge.