

# WHO IS KILLING INNOVATION IN AMERICA

Revision 2.2

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# E-Commerce Art Units: Where Patent Applications Go to Die

By [Gene Quinn](#)



Recently the United States Patent and Trademark Office (USPTO) [announced an initiative to streamline patent prosecution](#) by adding an opportunity for patent applicants to work with an examiner panel after a final rejection and before needing to file an appeal or request for continued examination (RCE). Any new tool for patent applicants to get to “yes” more quickly and without being required to needlessly wait for years for additional consideration is welcome. However, new tools such as the post-prosecution pilot program will do nothing to help applicants who are forced to deal with examiners who simply refuse to issue patents. Unfortunately, there are pockets of these recalcitrant examiners at the Patent Office.

Several days ago I [wrote about the extraordinarily low allowance rates of Art Units 3689 and 3622](#). I've received feedback suggesting that the allowance rates I reported, 7.1% and 9.5% respectively, seem too high based on the common experience of what patent practitioners witness in those Art Units, at least since the Supreme Court's ruling in [Alice v. CLS Bank](#). I also received a tip recommending that I specifically take a closer look at Art Unit 3683 because the allowance rate I reported — 64.6% — is certainly not correct, at least not correct for 2016.

Upon closer review things are much, much worse than I previously reported. The problem is also far more widespread. Using [LexisNexis Patent Advisor®](#), I looked at the E-commerce Art Units, this time focusing on what has happened only over the past 18 months. Focusing on this segment of post-Alice prosecution the allowance picture is utterly atrocious. [1]

The chart that appears below shows the number of patents issued, the number of patent applications abandoned and the corresponding allowance rate for E-commerce Art Units at the Patent Office during 2015 and so far during 2016.

Art Units	Patents Issued 2015	Abandoned 2015	2015 Allowance %	Patents Issued 2016	Abandoned 2016	2016 Allowance %
3622	42	597	6.6%	23	388	5.6%
3623	95	672	12.4%	15	406	3.6%
3624	48	286	14.4%	18	184	8.9%
3625	160	421	27.5%	52	211	19.8%
3626	92	573	13.8%	21	298	6.6%
3627	220	242	47.6%	69	146	32.1%
3628	60	353	14.5%	18	194	8.5%
3629	48	365	11.6%	23	198	10.4%
3682	49	275	15.1%	16	168	8.7%
3683	12	294	3.9%	7	211	3.2%
3684	84	251	25.1%	48	150	24.2%
3685	224	339	39.8%	72	230	23.8%
3686	93	309	23.1%	17	215	7.3%
3687	220	342	39.1%	58	179	24.5%
3688	121	382	24.1%	20	186	9.7%
3689	12	365	3.2%	3	232	1.3%
3691	64	258	19.9%	29	182	13.7%
3692	24	276	8.0%	11	145	7.1%
3693	23	297	7.2%	12	160	7.0%
3694	28	310	8.3%	9	169	5.1%
3695	28	301	8.5%	13	139	8.6%
3696	72	255	22.0%	16	144	10.0%
<b>TOTALS</b>	<b>1819</b>	<b>7763</b>	<b>19.0%</b>	<b>570</b>	<b>4535</b>	<b>11.2%</b>

E-commerce Art Units at the USPTO. 2015-2016 Allowance rates.

Clearly, things are getting worse, not better, in E-commerce Art Units at the Patent Office.

As you can see, only 12 patents were issued by Art Unit 3689 in 2015, while 365 applications went abandoned, which corresponds to an allowance rate of 3.2%. So far in 2016 there have been only 3 patents issued by Art Unit 3689, while 232 patent applications have gone abandoned, which corresponds to an allowance rate of 1.3%. Of the three patents that were issued one was issued because the Patent Trial and Appeal Board overruled the examiner's final rejection and ordered the patent issued. See [Ex parte Jacob A. Shipon](#). The PTAB found that the examiner erred with respect to the 101, 103 and 112 rejections, or in other words pretty much erred across the board.

In my previous article I compared Art Unit 3689 with Art Unit 3628 because both Art Units handle cases that patent applications that relate to business processing, cost/price and reservations. While the recent allowance rate for Art Unit 3628 is very low, it remains over 5 times the allowance rate of Art Unit 3689, which is extremely difficult to reconcile given that they examine the same type of application. As the chart below shows, in 2015 Art Unit 3628 allowed 60 patents while 353 applications went abandoned, which corresponds to an allowance rate of 14.5%. So far in 2016 there have been 18 patents granted by Art Unit 3628, while 192 patent applications have gone abandoned, which corresponds to an allowance rate of 8.5%.

While we see a notable difference in allowance rates between similarly situated Art Units examining the same type of patent applications, what is most alarming is that allowance rates in almost all of these Art Units are down rather dramatically in 2016 compared with 2015.

While we can hypothesize (and perhaps disagree) why allowance rates have dropped dramatically in 2016, everyone should be able to agree that the 1.3% allowance rate in 2016 for Art Unit 3689 is wholly unacceptable. An allowance rate of 1.3% demands investigation by the Patent Office, or by the Commerce Department Inspector General.

Obviously, the stories about patent examiners simply not issuing patents are very real.

## Conclusion

Given the devastation brought on the patent community by certain patent examiners and the indifference of the Patent Office, patent applicants and their representatives absolutely need to seek every advantage possible. If patent examiners in certain Art Units, like Art Unit 3689, are not going to issue patents then applicants must do whatever possible to stay out of those Art Units. While that may not always be possible, creative drafting techniques could help steer you from one Art Unit with an utter disdain for patents to an Art Unit where you at least have a chance. Thus, until such time as the Patent Office decides to solve the problem of recalcitrant patent examiners tools like [LexisNexis PathWays<sup>TM</sup>](#), which allow applicants to know which art units a patent application is likely to be assigned to even before it is filed, are absolutely essential.

Writing patent applications so you won't be sucked into the black hole that is Art Unit 3689 can help, but let's face it, the statistics for all E-commerce Art Units are pitiful and getting worse even a full two

years post-*Alice*. To call this depressing is an understatement. How is it possible that a patent examiner, who is supposed to be hired to issue patents, can actually keep their job when they refuse to issue patents?

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[1] My previous article reported allowance rates based on all allowances since 2000. Focusing on a post *Alice* time frame of all of 2015 and 2016 to date reveals starkly different numbers that show the magnitude of the problem facing applicants innovating in the e-commerce space.



The banner features the PLI logo on the left, which consists of the letters 'PLI' in a bold, sans-serif font with a dotted circle to the right, and the text 'PRACTISING LAW INSTITUTE' below it. To the right of the logo, the words 'Patent Bar Review' are written in a large, serif font. Below this, in a smaller, sans-serif font, it says 'Taught by John White & Gene Quinn' followed by 'Call 888.296.5973 & Mention IPWatchdog to Save 10%'.

### The Author



[Gene Quinn](#) is a Patent Attorney and Editor and founder of [IPWatchdog.com](#). Gene is also a principal lecturer in the [PLI Patent Bar Review Course](#) and an attorney with [Widerman Malek](#). Gene's specialty is in the area of strategic patent consulting, patent application drafting and patent prosecution. He consults with attorneys facing peculiar procedural issues at the Patent Office, advises investors and executives on patent law changes and pending litigation matters, and works with start-up businesses throughout the United States and around the world, primarily dealing with software and computer related innovations. [Gene](#) is admitted to practice law in New Hampshire, is a Registered Patent Attorney and is also admitted to practice before the United States Court of Appeals for the Federal Circuit. [CLICK HERE](#) to send Gene a message.

**Tags:** [Art Unit 3621](#), [Art Unit 3622](#), [Art Unit 3623](#), [Art Unit 3624](#), [Art Unit 3625](#), [Art Unit 3626](#), [Art Unit 3627](#), [Art Unit 3628](#), [Art Unit 3629](#), [Art Unit 3682](#), [art unit 3683](#), [Art Unit 3684](#), [Art Unit 3685](#), [Art Unit 3686](#), [Art Unit 3687](#), [Art Unit 3688](#), [Art Unit 3689](#), [Art Unit 3691](#), [Art Unit 3692](#), [Art Unit 3693](#), [Art Unit 3694](#), [Art Unit 3695](#), [Art Unit 3696](#), [business method](#), [business method patent](#), [business method patents](#), [e-commerce](#), [ecommerce](#), [Internet](#), [patent](#), [patent examiner](#), [patent examiners](#), [patent office](#), [patents](#), [post-prosecution pilot program](#), [software patent](#), [software patents](#), [TC 3600](#), [Technology Center 3600](#), [USPTO](#)

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# The Most Difficult Examiners at the USPTO

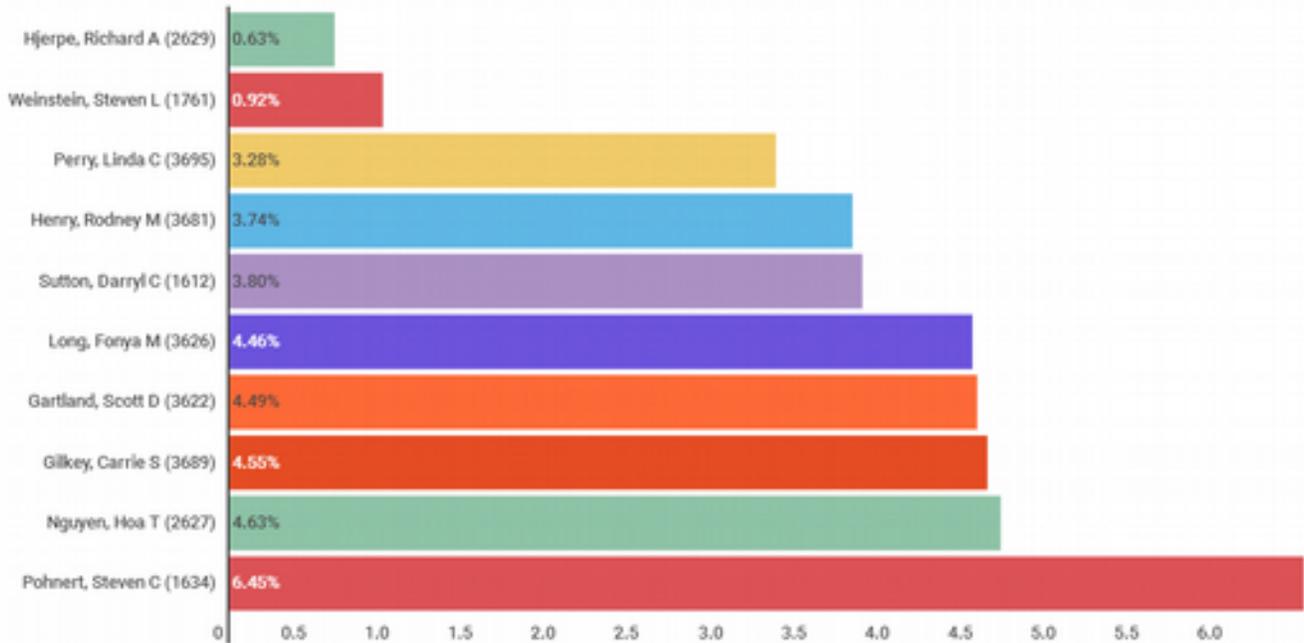
by [James Cosgrove](#)

For most patent prosecutors, getting to an allowance is usually the one overarching concern of every prosecution. Of course, prosecutors are also concerned about preserving as much of their claim language as possible to get the broadest protection for their clients. But a patent is better than no patent at all, and, for most, an allowance is a win. Thus, a particular examiner's allowance rate is a critical measurement of the difficulty of patent prosecution in front of that examiner.

The average combined allowance rate for all examiners at the USPTO is about 72%. When looking at individual tech centers, the average allowance rate varies from 56% in TC 1600 to over 84% in TC 2800. The allowance rates start to differ even more significantly at the art unit level, and especially at the individual examiner level. It is not uncommon to find two examiners in the same art unit who have wildly differing allowance rates, presumably because every examiner has his or her own unique opinions and interpretations of patent law.

Below, we've ranked the ten most difficult examiners (measured by allowance rate) in the entire USPTO. We limited our pool of eligible examiners to those with at least 100 disposed applications in utility art units since 2004.

## Most Difficult Examiners (Allowance Rate)



As shown above, some interesting patterns begin to develop when looking at where these examiners are working within the USPTO. Fully half of them are in TC 3600. Looking even closer, we see that every examiner on this list in TC 3600 is in one of the e-commerce art units (the 3620s, 3680s, and 3690s), which were hit hard by the 2014 *Alice* decision. Most of the evidence available suggests that the chances of receiving an allowance in the e-commerce art units plunged after *Alice*, and our data seems to confirm that evidence. For a visual breakdown of where these examiners are working, see Figure 2 below. Hover over the graph for detail.

# What the Patent Office Refuses to Understand

By [Gene Quinn](#)



**“I suppose I’ll be the one  
to mention the elephant in the room.”**

*EDITORIAL NOTE: After publishing this article I received quite a bit of feedback suggesting the allowance rates reported below seem inflated. Upon closer review, and when you focus on a post-Alice timeframe, the allowance rates are much lower. For more on that follow-up to this article please see: [Where Patent Applications Go to Die](#).*

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Yesterday the United States Patent and Trademark Office announced a [new pilot program dubbed the Post-Prosecution Pilot Program](#). The goal for this Post-Prosecution Pilot Program is twofold: (1) reduce the number of appeals (or at least number of issues on appeal); and (2) reduce the number of Requests for Continued Examination (RCEs).

I have absolutely no problem with the Patent Office trying to streamline patent prosecution. I think whatever can be done to make the patent prosecution process less complicated should be done. It is certainly proper for the Patent Office to attempt to make the patent process more efficient, less cumbersome and faster. Having said that, this new pilot program feels a lot like rearranging the chairs on the *Titanic*. There is an elephant in the room, which the Patent Office has ignored for years. It might feel good to try and bring applicants and patent examiners together to make appeals and RCEs necessary, but unless and until the Patent Office does something about recalcitrant patent examiners this effort may wind up being much ado about nothing.

As I always do when I broach this topic, let me state the obvious: The overwhelming majority of patent examiners are dedicated, hard working, highly educated, and motivated professionals. But even a small

percentage of bad eggs can cause real pain within certain sectors of the patent community, particularly when there is a cluster of recalcitrant examiners, which seems to be the case.

As of the end of May 2016, there were [8,092 patent examiners employed at the Patent Office](#). As you might expect with any group that large, however, there are some that are not any of those things. Indeed, some patent examiners openly brag to patent attorneys and applicants that they have not issued a patent in years. Nothing is ever done about those small minority of recalcitrant patent examiners, which is one reason it is hard to take Patent Office initiatives to streamline patent prosecution seriously.

Let's stop talking in hypotheticals. On Monday, July 11, 2016, using [LexisNexis Patent Advisor®](#), I created the table below, which lists twenty-two Art Units within [Patent Technology Center 3600](#). These Art Units are all assigned to examine applications that relate in one way or another to the general topic of Electronic Commerce.

Art Unit	Allowance	Art Unit Description
3689	7.1%	Electronic Commerce: Business Processing, Cost/Price, Reservations
3622	9.5%	Electronic Commerce: Incentive Programs, Coupons
3629	25.2%	Electronic Commerce: Business Processing and Modeling, Workflow Management, Customer Service, Education Administration, HR, Social Networking, Personal Safety/Security, Product Rating/Recommendation
3623	27.0%	Electronic Commerce: Operations Research
3626	27.2%	Electronic Commerce: Health Care, Insurance
3688	29.2%	Electronic Commerce: Incentive Programs, Coupons
3685	34.2%	Electronic Commerce: Business Crypto
3696	34.5%	Electronic Commerce: Finance & Banking, Accounting*
3628	35.7%	Electronic Commerce: Cost/Price, Transportation, Reservations
3624	39.9%	Electronic Commerce: Operations Research
3621	40.2%	Electronic Commerce: Business Crypto
3627	41.1%	Electronic Commerce: Point of Sale, Inventory, Accounting
3686	41.4%	Electronic Commerce: Health Care, Insurance
3695	45.1%	Electronic Commerce: Finance & Banking, Accounting
3684	48.1%	Electronic Commerce: Operations Research, Voting
3625	49.3%	Electronic Commerce: E-Shopping
3694	49.8%	Electronic Commerce: Finance & Banking, Accounting
3691	50.4%	Electronic Commerce: Finance & Banking, Accounting
3693	50.6%	Electronic Commerce: Finance & Banking, Accounting
3687	53.4%	Electronic Commerce: Point of Sale, Inventory, Accounting
3682	63.2%	Electronic Commerce: Incentive Programs, Coupons
3683	64.6%	Electronic Commerce: Operations Research, Voting

E-commerce Art Units at the USPTO.

You will notice that there are two Art Units, Art Unit 3689 and 3622, each having an overall allowance rate of under 10%. Meanwhile, the Art Unit with the highest allowance rate on the list allows 64.6% of patent applications.

This is not a blip on the radar screen for either 3689 or 3622. I've written about these Art Units (and others) for at least the last 5 years. Each time I've reviewed the allowance rates from 3689 and 3622 the allowance rate has been under 10%. Still, by all outward appearance it seems the Patent Office does nothing.

That these two Art Units, year after year, have the lowest allowance rates in TC 3600, and the lowest allowance rates throughout the entire Patent Office, is particularly alarming for a number of reasons. First, Art Unit 3689 handles applications that relate to business processing, cost/price and reservations. Now look at Art Unit 3628, which has a comparable description for the technologies it examines, but has an allowance rate that is 35.7%. Thus, Art Unit 3628 has an allowance rate that is more than 5 times that of Art Unit 3689 despite the fact that they handle similar patent applications.

Similarly, if you look at Art Unit 3622, which handles applications dealing with incentive programs and coupons, and compare it with Art Unit 3688 and Art Unit 3682, both of which also handle patent applications relating to incentive programs and coupons, you see the same alarming trend. These three Art Units that handle the same type of patent application yet have allowance rates of 9.5%, 29.2% and 63.2%. Something seems seriously wrong and is screaming for investigation.

These widely divergent allowance rates are difficult to understand when you realize that Art Units 3689 and 3622 are dominated by major corporations. For example, according to [LexisNexis Patent Advisor®](#), the most frequent owners/assignees in Art Unit 3622 are Google, Microsoft, Yahoo, Bank of America, IBM, Facebook, PayPal, Mastercard, eBay and Fujitsu. Similarly, the most frequent owners/assignees in Art Unit 3689 are IBM, SAP, Microsoft, Bank of America, Hewlett Packard, Fujitsu, Hitachi, Oracle and General Motors. We are not talking about small entities or independent inventors who are representing themselves. We are talking about multi-national corporations that hire the best patent attorneys at the best firms and the allowance rates are under 10% while similar Art Units are 5 or 6 times that?

Look, I don't mean to rain on anyone's parade. I'm all in favor of streamlining the patent prosecution process. Giving applicants more opportunity to explain why they are entitled to claims in a way that doesn't require years waiting for either an RCE or appeal is wonderful. But let's not lose sight of the fact that this additional procedural tool will do absolutely nothing to persuade recalcitrant patent examiners that simply collect a pay check and have little or no intention of ever allowing patent claims.

Not that my advice is being solicited, but I think it is well past time for the Patent Office to close down Art Units 3689 and 3622. Patent examiners in those Art Units should be reassigned to Art Units throughout the Office (preferably exemplary Art Units with higher allowance rates) so they can learn how the Office is supposed to operate.

\* I could not find a definition for Art Unit 3696. It is not listed on the Patent Office page for Technology Center 3600, but it does exist. Art Units 3691 through 3695 all related to *Electronic Commerce: Finance & Banking, Accounting*, which is why 3696 is characterized in that way.



### Discuss this

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1. **mike** July 12, 2016 10:24 am

Proceeding from the same facts, I'm more hopeful about the effect of P3 than you appear to be. The biggest advantage seems to be that the final rejection will be reviewed by a panel of experienced examiners rather than just a single recalcitrant examiner, with input from both the applicant and the examiner – sort of an interview after final examination with less opportunity for a single examiner or supervisor to refuse to budge. After seeing some of the statistics for individual examiners for allowance rates with and without appeal or with and without interviews, I can't see a quick multi-examiner review of a final rejection as anything but good.

If the panel contains one or more examiners outside the art unit, it might even help adjust some of the disparities you point out.

2. **step back** July 12, 2016 10:25 am

Hi Gene, I think you are missing a “less” in front of one of your necessities.

3. **step back** July 12, 2016 10:31 am

Speaking of elephants, there is one in the name of the program. Post? prosecution.

Just because the examiner has stamped his/her action “final” does not mean that prosecution is over.

Somebody at the USPTO needs to bone up on their understanding of law.

(Maybe one of those “recalcitrant” examiners or SPEs thereof?)

((Or Director thereof?))

4. **Curious** July 12, 2016 10:47 am

Gene:

Since you have access to the technology whereas I do not, let me suggest a search for your to perform. Specifically, identify how many patents have been issued by art unit 3689 in the past 12 months.

I had to do it the hard way by searching the USPTO's search engine using classes associated with the art unit — very inefficient. The result I obtained, which I would be very grateful if you could confirm, is that the last patent issued by 3689 was sometime in May of 2015.

I've browsed other art units (the process takes too long for me to do them all), and I've seen similar results. I know of some 3600 (business method) art units that are still issuing patents, but it has been drastically reduced.

Regardless, I think your numbers paint too rosy of a picture as I believe your allowance numbers also reflect pre-Alice numbers.

5. **Night Writer** July 12, 2016 12:39 pm

@4 Curious: it is ugly. I would like to know that too as I prosecute applications in that unit and the examiners say they haven't issued a patent in two years.

6. **American Cowboy** July 12, 2016 1:53 pm

Gene, I usually agree with you unqualifiedly. But, I have to question the criticism of Art Units 3689 and 3622. When you look at the subject matter of the patent applications sent to them for examination (Business processing, cost/price reservations & Incentive Programs/Coupons) you have to wonder how they allow anything in light of Scotus's Bilski and Alice scorching of the earth of those technologies.

7. **Curious** July 12, 2016 2:26 pm

*you have to wonder how they allow anything in light of Scotus's Bilski and Alice scorching of the earth of those technologies*

I again invite people to read both Bilski and Alice. The SCOTUS was not advocating a scorched earth policy regarding "Business processing, cost/price reservations & Incentive Programs/Coupons"). In Bilski, they found that the claims were directed to a fundamental economic processes. In Alice, they stated that the claims were very similar to Bilski and relied upon the same rationale. I doubt that many of the applications in 3689 are "directed to" fundamental economic processes.

While SCOTUS opened up the door a little bit when it comes to 101 rejections of computer-implemented inventions, it has been the lower courts and the USPTO that have flung it wide open.

8. **step back** July 12, 2016 2:47 pm

American @6

I think the problems with some 3600 art units is an intractable one because some clients have to maintain long term good relations with the examiners of these units no matter what and thus counsel is restricted to polite platitudes no matter how egregiously the PTO steps beyond the bounds of lawful action (i.e. engaging in arbitrary and capricious decision making) .

9. **Gene Quinn** July 12, 2016 3:13 pm

AC-

Let's not forget that one of the few bright line rules that we have after the quartet of patent eligibility cases from the Supreme Court is that business methods are patent eligible. I know that many examiners in the Patent Office are of the belief that business methods are not patent eligible, but that is because they are ignoring the Supreme Court and doing so without any negative consequence or blowback.

-Gene

10. **Gene Quinn** July 12, 2016 3:14 pm

Step-

I'm not going to disagree with you that attorneys and applicants want to preserve working relationships with examiners and Art Units, but at some point in time, when the allowance rates are under 10%, there is NO relationship... unless you call a hammer to a nail a "relationship."

-Gene

11. **Gene Quinn** July 12, 2016 3:17 pm

Curious-

I'll have to do some more digging. Years ago when I looked at these Art Units what I found was the only time they issued patents was when they were ordered to do so by the Board. So it is not at all surprising that there are patent examiners, perhaps numerous patent examiners, that haven't issued patents for many years in these Art Units.

Truthfully, if you are assigned to one of these two Art Units you either need to figure out a strategy to get out with a continuation or to get to appeal as soon as possible. Getting a patent from examiners in 3689 and 3622 is not a realistic goal.

-Gene

12. **Curious** July 12, 2016 4:13 pm

*Years ago when I looked at these Art Units what I found was the only time they issued patents was when they were ordered to do so by the Board.*

Actually, what has happened recently, is that in 3689 (from what I've been able to discern from my research) is that Board has reversed rejections (including 101 rejections). However, in

reversing the 101 rejections, the Board states that the Examiner employed the wrong test (i.e., machine or transformation), which has given the Examiner an out to apply Alice. Consequently, the Examiner reopens within a 101 rejection based upon Alice. This is consistent with my experience as well.

13. **Anon** July 12, 2016 4:15 pm

Curious @7,

I will disagree with you as to where exactly to lay the blame for the actions of the lower courts.

**As written**, the Supreme Court “t001” of the “Gist/Abstract” sword simply came with NO limitations.

While Gene is technically correct in that the Court did not “outlaw” business methods (and in truth, could not, as that would have required an **explicit** re-writing of the words of Congress); the Court very much “green-lighted” a completely arbitrary and “whatever” approach to Gisting (or “directed to”) and then applying the *undefined* Abstracting.

Those who do not want to hold the Supreme Court accountable – in my view – are very much part of the problem!

As I mentioned when *Alice* was released, we may want to stomp on the gas pedal and crash this thing sooner rather than later in order to draw attention to what exactly the Supreme Court has done. “Playing nice” is not a viable answer. Instead, let the country see the consequences, and then, maybe then, our Congress will wake up and see that their role has been purloined by the judicial branch and maybe then we will have a more forceful redo of what led to the Act of 1952.

14. **Night Writer** July 12, 2016 5:56 pm

The question whether these rejections are an application of the law or are they PTO policy to not allow any claims in these art units.

15. **Edward Heller** July 12, 2016 6:15 pm

Gene, I think a fair reading of *Bilski* is that there is no accepted definition of business methods, and primarily, for that reason, they could not be categorically excluded from eligibility. Still, the claims in *Bilski* itself, which were directed to a method of balancing risk, which everyone in that case accepted to be a business method, were found to be “abstract.” But, as we all know, the reasoning of the majority as to why the claims were abstract was less than scrutable, if there was any reasoning at all.

I think the claims in *Versata* were eligible because they were related to an improved data processing method, as opposed to an improvement in a business method, even though the output

of the claimed method was price. Therefore, I believe that Versata was wrongly decided by the Federal Circuit. This was issue 3 presented in Versata's petition to the Supreme Court:

“(3) whether a software-related invention that improves the performance of computer operations is patent-eligible subject matter;”

However, on June 27, its petition to the Supremes was denied.

Ugh.

Still, the law in the area of business methods/software remains in flux and uncertainty. I am not surprised that the PTO might be taking a hard line, forcing applicants to appeal just to clarify the law.

16. **step back** July 12, 2016 6:34 pm

Anon @13,

Not only did the Supremes bring back the outlawed “gisting” through their new “directed to” contrivance, but they also encouraged lower courts and the PTO to violate that part of 35 USC 112 which says it is the inventor and not the judge/examiner who determines what the invention is.

17. **Gene Quinn** July 12, 2016 7:19 pm

Curious-

I'm 99.9% sure that the allowance rates would not include any applications still pending, so they would certainly not capture the ridiculous games that examiners in those Art Units are playing. For the life of me I can't understand why the Patent Office doesn't do something about those examiners. You simply cannot have examiners that arrogantly tell applicants and attorneys that there is nothing they can ever do that they just don't issue patents period, but that is what happens.

-Gene

18. **Gene Quinn** July 12, 2016 7:25 pm

Edward-

You say: “Gene, I think a fair reading of Bilski is that there is no accepted definition of business methods, and primarily, for that reason, they could not be categorically excluded from eligibility.”

That isn't correct. If you read Bilski you will see that the Supreme Court went to great lengths to explain that the Patent Act uses the term “business method patents” in a variety of different places. In fact, one of the primary reasons for saying business methods remain patent eligible is because Congress explicitly mentions them in the statute so they must have known that they

existed and intended for them to be patent eligible. Furthermore, CBM is intended to strip certain business method patents. Had all business method patents been ineligible there would be no need for the cumbersome administrative trial proceeding of CBM.

The Patent Act also makes reference to software patents and the patenting of computer programs, so we know that software is patent eligible despite what some examiners believe to the contrary.

As far as a hard line, it is difficult to reconcile the allowance rates of similarly situated Art Units. The treatment you get at the Patent Office is Art Unit dependent and examiner dependent, which is the luck of the draw. That is obviously on its face an equal protection violation in application.

-Gene

19. **Stu Soffer** July 12, 2016 7:28 pm

Some time ago I did a study of the patent litigation rate of examiners. It was interesting, but faulty since it didn't differentiate the length of examiner experience. It wasn't fair, so I trashed it. I never showed it to anyone (well, maybe Mark). But it still leaves a valid question: are there some examiners whose reviews and allowances are subsequently litigated or challenged, exceed are out-of-band for the norm?

20. **Anon** July 12, 2016 7:57 pm

Gene,

I was going to pen a response to Mr. Heller, noting his "soft stance" here (he really is on a crusade against business method patents *per se*), and **one of\*\*** the items that **I know that he knows** is the very point you mention about Congress already explicitly allowing business method patents as a category (as opposed to his "spin" of "categorically").

This has been an active conversation with Mr. Heller for a number of years now. What he advocates with religious fervor and reckless abandon is barely presented in his single post here.

\*\* I have seen a list as long as five distinct points put to Mr. Heller, for which he has never directly and with any sense of intellectual honesty attempted to answer a single point.

For example, he attempts to use a logical fallacy here that since *Bilski* was not allowed, and *everyone knows Bilski was a business method patent*, that somehow must mean that ALL business method patents are not eligible (I will note that it took literally almost a full year to have Mr. Heller understand that the holding of *Bilski* was NOT "business methods" but was rather "abstract" – and THAT has no effect whatsoever on his attempts to mischaracterize things so as to pursue his Jihad against business method patents. This deceptive ploy of Mr. Heller to attempt to insert the many for the one (treating business methods categorically) was long ago

revealed when medical method patents were thrown out by the Supreme Court. Asked if the **same parallel logic** applied, and that ALL medical method patents were to be deemed not eligible, Mr. Heller took the path he so often takes when confronted with his deceptions: he pretended not to understand, he took umbrage, and basically, he just ran away.

As I mention, this is just not a new thing with Mr. Heller. And rest assured, tomorrow (if not today), he will again post as if what you (or anyone else) have ever informed him of simply was never mentioned.

21. **Edward Heller** July 12, 2016 8:34 pm

Gene, If you are right that business methods are not categorically excluded for reasons other than that there is no good definition, then you might be right that the only business methods excluded are of the type in Bilski, those that claim fundamental business practices.

But clearly, the Federal Circuit does not believe only fundamental business practices are excluded. The proof is in Versata where the claimed invention was directed to an improved data processing method. The fact that the Supreme Court did not take certiorari should be viewed as an endorsement of the Federal Circuit's view.

As of now, I think the Federal Circuit is not finding eligible any claim that includes price, or risk or the like even if the invention is directed to improved data processing. So the problem we have to at least get those kinds of inventions (the Versata kind) to be considered eligible is to get the Supreme Court to take the right case and reverse.

The bottom line, the debate about the scope of Bilski is somewhat academic unless the Federal Circuit effectively reverses Versata.

22. **Night Writer** July 12, 2016 9:11 pm

You know, I actually prosecute and write some business method cases (I also do lots of other types of cases). But what disturbs me is that so many examiners try not to apply the law. Look—find art and reject on the art. I have a case where the examiner rejected it under 101 and told me if he wanted to he could find art. I challenged him to find the art. He couldn't find the art despite him telling me that he worked in this area for 15 years and saying he knew all the art out there. He also told me there was no way that the "committee" would allow him to allow the case. So, we are appealing the 101 with a bogus 103 rejection.

It is just not law. I also prosecute mechanical, bio-tech, electrical, and software. I don't see much difference in any of the cases. All of them are about the same when it come down to it. Some invention with a bunch of elements and a bunch of possibilities for each element.

Anyway, it is not the law that is keeping us from allowances, but the "committee."

23. **Anon** July 12, 2016 9:42 pm

Mr. Heller @ 20,

Your bias towards a common law approach is showing.

Patent law is statutory, not common law.

Sadly, as I have remarked on other threads, it is you that may have the possibility of arguing a separation of powers case before the Court. If you cannot even grasp what separation of powers means when it comes to statutory versus common law, how is anyone going to expect you to be able to argue separation of powers when it comes between the executive and the judiciary?

24. **Curious** July 12, 2016 9:45 pm

*You simply cannot have examiners that arrogantly tell applicants and attorneys that there is nothing they can ever do that they just don't issue patents period, but that is what happens. This isn't a bottom-up problem. These examiners aren't just going rogue and doing this on their own. This MUST be coming from above. Additionally, this is not just a recent occurrence. This blatant disregard of the law has been going on in TC3600 (business methods) for over a decade.*

I have long counseled clients that the WORSE examination, BY FAR, comes out of 3600 (business methods). It is difficult to tell whether they just don't understand the law or that they are just blatantly misrepresenting the law. My guess (from dealing with freshly-minted examiner who consistently understand the law much better) is that they are blatantly misrepresenting the law — or that the person(s) training these examiners is/are (knowingly) training them incorrectly.

This post is from February of 2012: <http://www.ipwatchdog.com/2012/02/26/is-there-a-systematic-denial-of-due-process-at-the-uspto/id=22403/>

In it you wrote:

*Then we have Art Unit 3689, with an allowance rate of 4.5% and 64% of the patents they issue only being issued after the filing of an appeal brief. Combine this with a 76.5% reversal rate and there seems to be a real problem here. How can one business method Art Unit have a 70.2% allowance rate and another have a 4.5% allowance rate? Something is seriously wrong.*

This was 4 f'ing years ago and was based upon data that is 5 years old. It is hard to imagine that it could be worse after 4 years, but it is worse. You suggested closing down 3689 and reassigning the examiners elsewhere. My alternative suggestion is to close down 3689 and fire every examiner in 3689 as well as every supervisor (all the way up the chain of command) that supervises 3689. This is beyond ridiculous.

25. **Curious** July 12, 2016 9:58 pm

*But clearly, the Federal Circuit does not believe only fundamental business practices are excluded. The proof is in Versata where the claimed invention was directed to an improved data*

*processing method. The fact that the Supreme Court did not take certiorari should be viewed as an endorsement of the Federal Circuit's view.*

The Federal Circuit is chock full of an anti-patent crowd. SCOTUS invited the Federal Circuit to fill in the gaps as to what trees need to be felled in the forest of patentable subject matter. However, many at the Federal Circuit took this as an invitation to take out the flamethrowers and napalm to burn down the whole forest.

As for SCOTUS, I wouldn't take lack of cert as an endorsement of the Federal Circuit's position. There are only so many cases SCOTUS is going to take.

*Had all business method patents been ineligible there would be no need for the cumbersome administrative trial proceeding of CBM.*

Gene raises an excellent point. If Congress had wanted all CBMs to be invalidated, there would be no need for a trial after a CBM (covered business method) proceeding has been instituted. Congress could have easily said, "if it is a CBM, then it is not statutory subject matter." They did not. Therefore, there must be some subset of CBMs that Congress deems patentable.

26. **step back** July 13, 2016 12:00 am

Just like the rest of the general public, we quickly forget the last act of terrorism committed by the PTO against inventors.

What was that incident again? Where the PTO was rushing through some unconstitutional set of new rules and some Greek guy (named started with T?) sued them and shut down their whole ultra vires, anti-inventor project?

This is war. We are myopic if we don't see it as that and instead think these are isolated incidents.

For some partial rather than "Total Recall", see this:  
[http://www.jsslaw.com/newsletter\\_details.aspx?id=16](http://www.jsslaw.com/newsletter_details.aspx?id=16)

27. **step back** July 13, 2016 12:08 am

Oh yeah, now I found it, *Tafas v. Dudas* (the 5/25 rules):  
<https://www.scribd.com/document/2738194/Tafas-v-Dudas-et-al-Document-No-246>

28. **Edward Heller** July 13, 2016 5:59 am

Curious, the way forward though, given *EnFish* in contrast with *Versata*, is to emphasize the improved data processing aspects. If *EnFish* had been decided before *Versata*, I believe there would have been a good possibility that the result in *Versata* would have been different.

But that is just me thinking such. It all could also be that the Federal Circuit will simply hold it any claim that includes things like "price" is a claim directed to ineligible subject matter regardless that it also recites improved data processing methods.

29. **Ely Erlich** July 13, 2016 7:50 am

Gene,

Thanks for the interesting article.

In a different article (I think it was a linkedin post unrelated to you) an examiner commented that until an examiner authorized with signatory rights he is completely subordinate to his unit (manager?). Accordingly, this examiner said his rejection/approval approach simple changed from unit to unit.

Perhaps instead of a few bad apples, it is just an even smaller number of misguided bosses...

Cheers

30. **Marjorie Scariati** July 13, 2016 9:12 am

“We are not talking about small entities or independent inventors who are representing themselves. We are talking about multi-national corporations that hire the best patent attorneys at the best firms and the allowance rates are under 10% while similar Art Units are 5 or 6 times that”. Another factor may be that these multi-national corporations have unlimited funding compared to independent inventors and small entities, and they are therefore able to apply for patent applications that they know have a slim chance of being allowed, perhaps with the hope that by the time the applications are examined the prevailing law or Examiner interpretation may have changed, and as a business strategy to block competitors, etc. If even a small percentage of their applications fell into these technology areas, it may represent a large percentage of the total applications in these art units, leading to such low allowance rates. I’d be curious to know who the applicants are in the related art units with better allowance rates – is there a higher percentage of small and micro entities by comparison?

31. **Gene Quinn** July 13, 2016 9:17 am

Ely-

I believe you are 100% correct. I’ve been told to ask about Quality Assurance and get the names of those assigned to various Art Units. I’ve been told it will be extremely eye-opening. I’ve asked repeatedly for this information, which should be public record, and the Patent Office never provides it. I have been told there are as few as several Quality Assurance Supervisors that hate patents and then everyone in the Art Units they review are giving them what they demand. With the USPTO refusing to provide the information that would confirm or deny what I’ve been told the silence seems telling.

-Gene

32. **Night Writer** July 13, 2016 9:53 am

@31 Gene: Yes find out about these committees. It is not the examiners.

@28 Edward: Your ideas are right out of 1920. Please tell us about the ROM again and quote Ginsburg and Benson some.

33. **John Darling** July 13, 2016 11:12 am

“I’m 99.9% sure that the allowance rates would not include any applications still pending, so they would certainly not capture the ridiculous games that examiners in those Art Units are playing. For the life of me I can’t understand why the Patent Office doesn’t do something about those examiners. You simply cannot have examiners that arrogantly tell applicants and attorneys that there is nothing they can ever do that they just don’t issue patents period, but that is what happens.”

Gene, Ely is correct. The PTO doesn’t “do something about those examiners” because “those examiners” are doing exactly what they are told to do. By the PTO. By the unaccountable squadrons of know-nothing, do-nothing GS-15 QAS’s, and “subject matter experts” and “business process specialists” and “appeal specialists” that the PTO has put in place in those TC’s to do exactly what the PTO wants done: frustrate the applicants of those cases into abandonment. Anybody who denies that that is exactly what is going on is either not paying attention, or lying. Simple as that.

34. **ItCouldBeWorse** July 13, 2016 11:13 am

I agree with Marjorie Scariati: “I’d be curious to know who the applicants are in the related art units with better allowance rates – is there a higher percentage of small and micro entities by comparison?”

IT makes complete sense that the wealthiest companies would have by far the most applications, whether worthy or not.

Perhaps there’s even an unwritten understanding at the USPTO that the applications of Google, Microsoft, Yahoo, Bank of America, IBM, Facebook, PayPal, Mastercard, eBay, Fujitsu, IBM, SAP, Bank of America, Hewlett Packard, Hitachi, Oracle and General Motors should be extra carefully scrutinized to prevent these companies from gaining control of everything in their path.

35. **Night Writer** July 13, 2016 12:59 pm

@34: or it could be worse in that the big companies could be getting better treatment. Or the big companies can afford the best representation.

36. **Gene Quinn** July 13, 2016 1:28 pm

All-

It is worse, much worse. Working on finalizing another article that takes the next steps to show just how bad the problem is. The plan is to publish the article tomorrow morning. Stay tuned!

-Gene

37. **Rick** July 13, 2016 1:50 pm

What's the implication, then? That there are some art units made up of only examiners that at best happen to have anti-allowance bents or at worst have somehow conspired against applicants to allow as little as possible? From the general tone of the article, it seems like the implied explanation has to be one of these.

38. **ExamLwFrmCorp** July 13, 2016 2:06 pm

@31: – This is public information – <http://www.uspto.gov/patent/contact-patents/patent-technology-centers-management#3600>. Interestingly it looks like the quality assurance organizations are structured differently in the different tech centers. 3600 apparently uses Training Quality Assurance Specialists (TQAS) whereas 2600 has Quality Assurance Specialists (QAS) and some tech centers don't appear to have any quality assurance organization.

39. **Curious** July 13, 2016 2:07 pm

*It is worse, much worse.*

LOL ... if I wasn't laughing, I would be crying.

*The plan is to publish the article tomorrow morning.*

Make it a good one. We need to find a way to get the article before influential members of Congress (e.g., those that head up the committees that involve intellectual property and/or oversee the USPTO).

BTW — I've been meaning to mention this to you, and this is as good a time as any, but you need to find a way to keep your more popular (e.g., most heavily commented on and/or read) articles on the front page of your website longer. Oftentimes, because of the substantial number of articles that get published on your site on any given day, the article I'm looking for is buried after just a day or two after being published. While I'll eventually be able to find it, that is because I'm familiar with the structure of your website. Others (with less experience with your website), however, lose out on reading the more important articles. Just a suggestion ...

40. **Curious** July 13, 2016 2:34 pm

Not knowing what direction you'll be taking your article, I thought the following is interesting.

The USPTO's numbers, by month for the last 2 years, for the number of patent examiners can be found here <http://www.uspto.gov/corda/dashboards/patents/kpis/kpiExaminers.kpixonl>.

While the numbers fluctuate somewhat, last months number of 8185 (or 8200 to round it off) is a good number to work with.

The following lists patents issued by year at the USPTO.

[http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us\\_stat.htm](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm)

For FY2015, that number was 589,410 (just counting utility applications).

A little bit of math yields that each patent examiner, on average, issues about 72 utility patents a year. That number is likely higher as the number of examiners used in our calculation (8200) includes supervisory examiners as well as examiners that handle design and plant patents.

41. **Anon** July 13, 2016 2:35 pm

Along the lines of what Curious suggests, I would not mind a subset window off to the side of (perhaps voter indicated) “important” or “widely discussed” threads. Would only need the title of the thread (as a hyperlink) and an indicator of why it was on the preferred list.

Perhaps in the current real estate of “other contributors” (although I do recognize the nice shout out to others contributing to this site, the feature does seem to take up a lot of room).

42. **Curious** July 13, 2016 2:41 pm

I messed up my numbers. Looked in the wrong column. The number (589,410) was for applications filed. Issued patents are 298,407. This leaves examiner production at about 36 patents/year.

43. **step back** July 13, 2016 2:44 pm

Anon @38: There are different versions of the IPWatchdog website. Depends which hyperlink you use. Some articles that appear in the /blog website disappear off the main watchdog page for reasons not entirely clear.

44. **step back** July 13, 2016 2:48 pm

As for making Congress (or anyone else in power) pay attention to what the PTO is doing that is a joke.

Congress couldn't care less.

The President (and Presidential candidates) couldn't care less.

It's not a voting issue.

The general public is clueless.

They go to the Big Box store and the magic (new inventions) just appear all on their own.

(Even SCOTUS understands that “innovation” is the natural phenomenon outcome of “market forces.” Re-read KSR v. Teleflex.)

45. **LLDC** July 13, 2016 2:55 pm

#1 – Train the Examiners.

#2 – Fire Examiners who show up to interviews not prepared or who bail on interviews. Dealing with recalcitrant examiners costs time and money.

#3 – Abolish this ridiculous Post-Prosecution Program. They should do their job right the first time.

#4 – Get rid of the Union/POPA that protects these Examiners.

Enough!

46. **Mike E** July 13, 2016 3:00 pm

How about a mechanism that allows for reassignment to a new examiner that allows them to give a fresh look at the application, independent of the first examiner?

47. **Curious** July 13, 2016 4:12 pm

*As for making Congress (or anyone else in power) pay attention to what the PTO is doing that is a joke.*

If no one cares (or will care), we are all wasting our time here. I add my voice to the chorus of voices that this forum provides because I believe that there is someone(s) in power who is/are naturally inclined towards inventions and inventors and is/are looking for a cause to take up. I add my voice in the hope that the inane and/or counterproductive actions of the USPTO and the Courts will be revealed for what they are and we will be part of that revealing.

I have too much to do to b'tch and moan about something that I cannot impact.

BTW ... (some) innovation is a natural result of market forces. However, one gets much more innovation when that innovation is also incentivized via a strong patent system. This is a point that many of the anti-patent crowd don't appreciate.

48. **Night Writer** July 13, 2016 6:07 pm

@42 the way forward is to show that innovation is being hurt by the weakening of the patent system. There are some studies that are saying that –real ones from economist not the unethical type from a Lemley type.

49. **step back** July 13, 2016 6:37 pm

Global innovation isn't being hurt by the destruction of the US patent system.

There are numerous “frenemies” out there (perhaps same as them who fund “friends” of the Court?) who would be all too happy to see America self-destruct in this way.

It will be decades before someone in power wakes up and startles with a “Hey what happened? Why aren't we great again?”

By then it will be too late. The rest of the world (ROTW) will have passed us by.

Neil Sidaka was wrong. Breaking up isn't hard to do.

<http://patentu.blogspot.com/2016/06/broxit-great-unraveling.html>

50. **step back** July 13, 2016 6:41 pm

For you yunggin's out there who never heard of Neil Sedeka:

<http://www.metrolyrics.com/breaking-up-is-hard-to-do-lyrics-neil-sedaka.html>

51. **Gene Quinn** July 13, 2016 8:39 pm

ExamLawFrmCorp-

I think the information on the USPTO page is outdated. Some of the information about Tech Center 3600 doesn't even mention all of the Art Units that are known to exist. It is also my understanding that QAS are specifically assigned to certain Art Units, so knowing that there are several QAS assigned to TC 3600 doesn't necessarily help. Some Art Units in TC 3600 have very high allowance rates. Others have extremely low allowance rates. The USPTO has not been willing to tell me who is assigned to which Art Units.

-Gene

52. **Harsh** July 13, 2016 11:12 pm

Gene:

Here is an old link to the USPTO website that lists AU 3696.

<http://www.uspto.gov/web/menu/pbmethod//contact.htm>

Hope this is useful.

Harsh.

## How Google Took Over The U.S. Patent Office

Google has been charged with stealing much of it's technology from small inventors. In fact, The New York Times Article: [How Larry Page's Obsessions Became Google's Business](#) details the Google founders tactics for spying on inventors.

<http://www.nytimes.com/2016/01/24/technology/larry-page-google-founder-is-still-innovator-in-chief.html? r=0>

### [USPTO Teams with Google to Provide Bulk Patent and Trademark ...](#)

Jun 2, 2010 ... Washington - Under Secretary of Commerce and Director of the United States Patent and Trademark Office (USPTO) David Kappos announced ...

[http://www.uspto.gov/about-us/news-upd\[...\]-bulk-patent-and-trademark-data-public](http://www.uspto.gov/about-us/news-upd[...]-bulk-patent-and-trademark-data-public)

### **[Michelle K. Lee - Wikipedia, the free encyclopedia](#)**

Michelle Kwok Lee (born 1965, Santa Clara, California) is Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (USPTO). .... "Obama nominates former Google exec to lead U.S. Patent Office". Washington Post. Retrieved October 17, 2014. Jump up ^ " President ...

[https://en.wikipedia.org/wiki/Michelle\\_K.\\_Lee](https://en.wikipedia.org/wiki/Michelle_K._Lee)

### **[does google's michelle lee work for both google and the us patent ...](#)**

Apr 6, 2016 ... Michelle Lee is Google's lawyer. She runs the U.S. Patent Office. Google hates other people's patents because, according to many inventors, ...

[https://politicalhitjobs.wordpress.com\[...\].he-u-s-patent-office-at-the-same-time/](https://politicalhitjobs.wordpress.com[...].he-u-s-patent-office-at-the-same-time/)

### **[Google Launches Google Patents, Full-Text US Patent Searching](#)**

Dec 13, 2006 ... provided by the US Patent & Trademark Office. So why bother with a new service from Google? "We've really applied the Google experience to ...

[http://searchengineland.com/google-lau\[...\].ts-full-text-us-patent-searching-10046](http://searchengineland.com/google-lau[...].ts-full-text-us-patent-searching-10046)

### **[Obama nominates former Google exec to lead U.S. Patent Office ...](#)**

Oct 16, 2014 ... The White House announced Thursday that it will nominate former Google lawyer Michelle K. Lee to lead the U.S. Patent and Trademark Office, ...

[https://www.washingtonpost.com/news/th\[...\].google-exec-to-lead-u-s-patent-office/](https://www.washingtonpost.com/news/th[...].google-exec-to-lead-u-s-patent-office/)

### **[Investigation Reveals That USPTO is Corrupt, Time to Abolish It or ...](#)**

Aug 13, 2014 ... Corruption is found at the heart of the USPTO and the USPTO works hard to hide it, ... complaints, the U.S. Patent and Trademark Office began an internal ... co. mments; DZone; email; Google Bookmarks; LinkedIn; NewsVine ...

<http://techrighs.org/2014/08/13/uspto-is-corrupt/>

### **[Google's Girl in the Patent Office – Anti-Corruption Club Magazine](#)**

Apr 7, 2016 ... DOES GOOGLE'S MICHELLE LEE WORK FOR BOTH GOOGLE AND THE U.S. PATENT OFFICE AT THE SAME TIME? CORRUPTION?

[https://anticorruptionguy.wordpress.co\[...\].tag/googles-girl-in-the-patent-office/](https://anticorruptionguy.wordpress.co[...].tag/googles-girl-in-the-patent-office/)

### **[Google, once disdainful of lobbying, now a master of Washington ...](#)**

Apr 12, 2014 ... This summer, Google will move to a new Capitol Hill office, doubling its ..... with Google, which agreed to give its rivals more access to patents ...

[https://www.washingtonpost.com/politic\[...\]b4d3-11e3-8cb6-284052554d74\\_story.html](https://www.washingtonpost.com/politic[...]b4d3-11e3-8cb6-284052554d74_story.html)

### [Obama on Patents: The One-sided USPTO Patent Litigation Beta ...](#)

Feb 26, 2014 ... It is almost incomprehensible that the Patent Office would put together a .... We have the earmarkings of corruption all over the patent office.

[http://www.ipwatchdog.com/2014/02/26/o\[...\].uspto-patent-litigation-beta/id=48273/](http://www.ipwatchdog.com/2014/02/26/o[...].uspto-patent-litigation-beta/id=48273/)

### [Former Google Exec Takes Over U.S. Patent Office | WIRED](#)

Dec 12, 2013 ... Former Google corporate attorney Michelle Lee is the new deputy director of the U.S. Patent and Trademark Office, Reuters reports.

<http://www.wired.com/wiredenterprise/2013/12/michelle-lee/>

### [Google's patent chief slammed the US patent office – now she's the ...](#)

Dec 12, 2013 ... Google's former head of patents and patent strategy Michelle Lee has been appointed as deputy director of the US Patent and Trademark ...

[http://www.theregister.co.uk/2013/12/11\[...\].tor\\_of\\_us\\_patent\\_and\\_trademark\\_office/](http://www.theregister.co.uk/2013/12/11[...].tor_of_us_patent_and_trademark_office/)

# Do As I Say, Not As I Do: Google's Patent Transparency Hypocrisy

[Devlin Hartline](#)



It is common today to hear that it's simply impossible to search a field of technology to determine whether patents are valid or if there's even freedom to operate at all. We hear this complaint about the lack of transparency in finding "prior art" in both the patent application process and about existing patents.

The voices have grown so loud that Michelle K. Lee, Director of the Patent Office, has made it a cornerstone of her administration to bring greater transparency to the operations of the USPTO. She [laments](#) the "simple fact" that "a lot of material that could help examiners is not readily available, because the organizations retaining that material haven't realized that making it public would be

beneficial.” And she’s been implementing new programs to provide “easy access by patent examiners to prior art” as a “tool to help build a better IP system.”

We hear this complaint about transparency most often from certain segments of the high-tech industry as part of their policy message that the “patent system is broken.” One such prominent tech company is search giant Google. In formal comments submitted to the USPTO, for instance, Google [asserts](#) that a fundamental problem undermining the quality of software patents is that a “significant amount of software-related prior art does not exist in common databases of issued patents and published academic literature.” To remedy the situation, Google has encouraged the Patent Office to make use of “third party search tools,” including its own powerful search engines, to locate this prior art.

Google is not shy about *why* it wants more transparency with prior art. In a 2013 [blog post](#), Google Senior Patent Counsel Suzanne Michel condemned so-called “patent trolls” and argued that the “PTO should improve patent quality” in order to “end the growing troll problem.” In [comments](#) from 2014, three Google lawyers told the Patent Office that “poor quality software patents have driven a litigation boom that harms innovation” and that making “software-related prior art accessible” will “make examination in the Office more robust to ensure that valid claims issue.” In [comments](#) submitted last May, Michel even proposed that the Patent Office use Google’s own patent search engines for “streamlining searches for relevant prior art” in order to enhance patent quality.

Given Google’s stance on the importance of broadly available prior art to help weed out vague patents and neuter the “trolls” that wield them, you’d think that Google would share the same devotion to transparency when it comes to its own patent applications. But it does not. Google has not mentioned in its formal comments and in its public statements that even using its own search engine would fail to disclose a substantial majority of its own patent applications. Unlike the other top-ten patent recipients in the U.S., including many other tech companies, Google keeps most of its own patent applications secret. It does this while at the same time publicly decrying the lack of transparency in the patent system.

The reality is that Google has a patent transparency problem. Not only does Google *not* allow many of its patent applications to be published early or even after eighteen months, which is the default rule, Google specifically requests that many of its patent applications never be published at all. So while Google says it wants patent applications from around the world to be searchable at the click of a mouse, this apparently does not include its own applications. The numbers here are startling and thus deserve to be made public—in the name of true transparency—for the first time.

### **Public Disclosure of Patent Applications**

Beginning with the American Inventors Protection Act of 1999 ([AIPA](#)), the [default rule](#) has been that a patent application is published eighteen months after its filing date. The eighteen-month disclosure of the patent application will occur unless an applicant files a formal request that the application not be published at all. An applicant also has the option to obtain *early* publication in exchange for a fee.

Before the AIPA, an application would only be made public if and when the patent was eventually granted. This allowed an applicant to keep her invention a trade secret in case the application was later abandoned or rejected.

The publication of patent applications provides two benefits to the innovation industries, especially given that the [waiting time](#) between filing of an application and issuance of the patent or a final rejection by an examiner can take years. First, earlier publication of applications provides notice to third parties that a patent may cover a technology they are considering adopting in their own commercial activities. Second, publication of patent applications expands the field of publicly-available prior art, which can be used to invalidate either other patent applications or already-issued patents themselves. Both of these goals produce better-quality patents and an efficiently-functioning innovation economy.

Separate from the legal mandate to publish patent applications, Google has devoted its own resources to creating greater public access to patents and patent applications. From its [Google Patent Search](#) in 2006 and its [Prior Art Finder](#) in 2012 to its current [Google Patents](#), Google has parlayed its search expertise into making it simple to find prior art from around the world. Google Patents [now includes](#) patent applications “from the USPTO, EPO, JPO, SIPO, WIPO, DPMA, and CIPO,” even translating them into English. It’s this search capability that Google has been encouraging the Patent Office to utilize in the quest to make relevant prior art more accessible.

Given Google’s commitment to patent transparency, one might expect that Google would at least be content to allow default publication of its own applications under the AIPA’s eighteen-month default rule. Perhaps, one might think, Google would even opt for early publication. However, neither appears to be the case; Google instead is a frequent user of the nonpublication option.

### **Google’s Secrecy vs. Other Top-Ten Patent Recipients**

After hearing anecdotal reports indicating that Google was frequently using its option under the AIPA to avoid publishing its patent applications, we decided to investigate further. We looked at the patents Google received in 2014 to see what proportion of its applications was subject to nonpublication requests. To provide context, we also looked at how Google compared to the other top-ten patent recipients in this regard. The results are startling.

Unfortunately, there’s no simple way to tell if a nonpublication request was made when a patent application was filed using the USPTO’s online databases—nonpublication requests are not an available search field. The same appears to be true of subscription databases. The searches therefore have to be done manually, digging through the USPTO’s [Public PAIR](#) database to find the application (known in patent parlance as the “file wrapper”) for each individual patent that includes the individual application documents. Those interested in doing this will find startling numbers of patent applications kept secret by Google, both in terms of absolute numbers but also as compared to the other top-ten recipients of U.S. patents.

By way of example as to what one needs to look for, take the [last three patents](#) issued to Google in 2014: D720,389; 8,925,106; and 8,924,993.

For the [first patent](#), the application was filed on December 13, 2013, and according to the application data sheet, no request was made to either publish it early or not publish it at all:

**Publication Information:**

<input type="checkbox"/> Request Early Publication (Fee required at time of Request 37 CFR 1.219)
<b>Request Not to Publish.</b> I hereby request that the attached application not be published under 35 U.S.C. 122(b) and certify that the invention disclosed in the attached application has not and will not be the subject of an application filed in another country, or under a multilateral international agreement, that requires publication at eighteen months after filing.
<input type="checkbox"/> 35 U.S.C. 122(b) and certify that the invention disclosed in the attached application has not and will not be the subject of an application filed in another country, or under a multilateral international agreement, that requires publication at eighteen months after filing.

Since no such request was made, the application would normally be published eighteen months later or upon issuance of the patent. Indeed, that is what happened in due course—this patent issued just over one year after the application was filed, as it was concurrently published and issued in December of 2014.

For the [second patent](#) in our small set of examples, the application was filed on April 20, 2012. In this case, Google requested nonpublication by including a letter requesting that the application not be published:

Applicants hereby certify that the invention disclosed in the attached application has not and will not be the subject of an application filed in another country, or under a multilateral agreement, that requires publication at eighteen months after filing. Applicants hereby request that the attached application not be published under 35 U.S.C. 122(b).

Google thus opted out of the default eighteen-month publication rule, and the application was not published until the patent issued in December of 2014, some twenty months later.

Finally, for the [third patent](#), the application was filed on November 10, 2011, and the application data sheet shows that Google requested the application not be published:

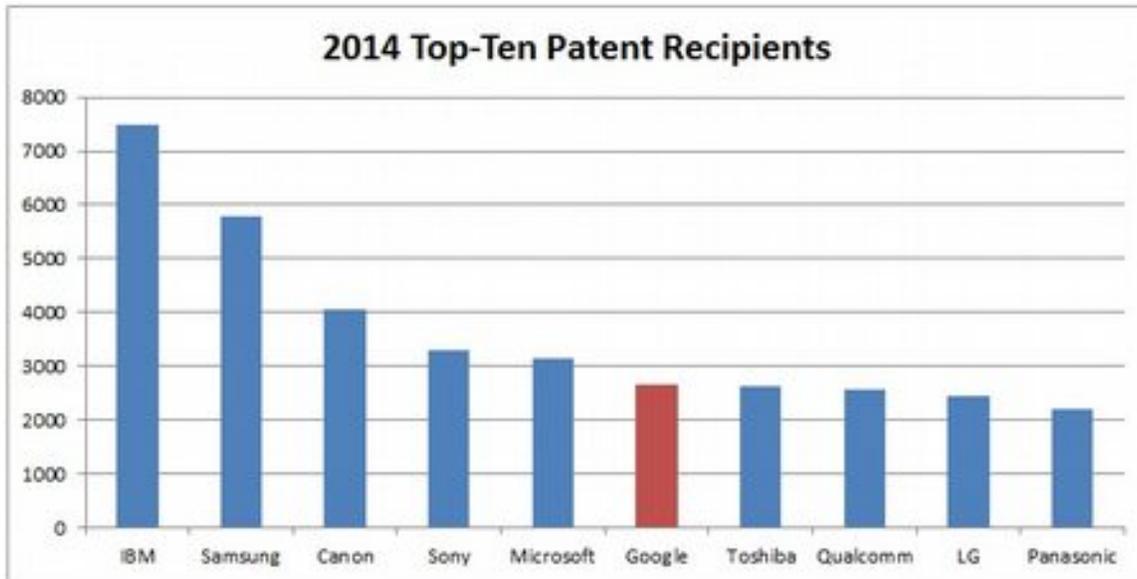
**Publication Information:**

<input type="checkbox"/> Request Early Publication (Fee required at time of Request 37 CFR 1.219)
<b>Request Not to Publish.</b> I hereby request that the attached application not be published under 35 U.S.C. 122(b) and certify that the invention disclosed in the attached application has not and will not be the subject of an application filed in another country, or under a multilateral international agreement, that requires publication at eighteen months after filing.
<input checked="" type="checkbox"/> 35 U.S.C. 122(b) and certify that the invention disclosed in the attached application has not and will not be the subject of an application filed in another country, or under a multilateral international agreement, that requires publication at eighteen months after filing.

Google here again opted out of the default publication rule, and the application was not published until the patent issued in December of 2014—more than *three years* after the application was filed.

We applied this methodology to a random sample of 100 patents granted to each of the top-ten patent recipients in 2014.

In 2014, Google was one of the top-ten patent recipients, coming in sixth place with [2,649](#) issued patents:

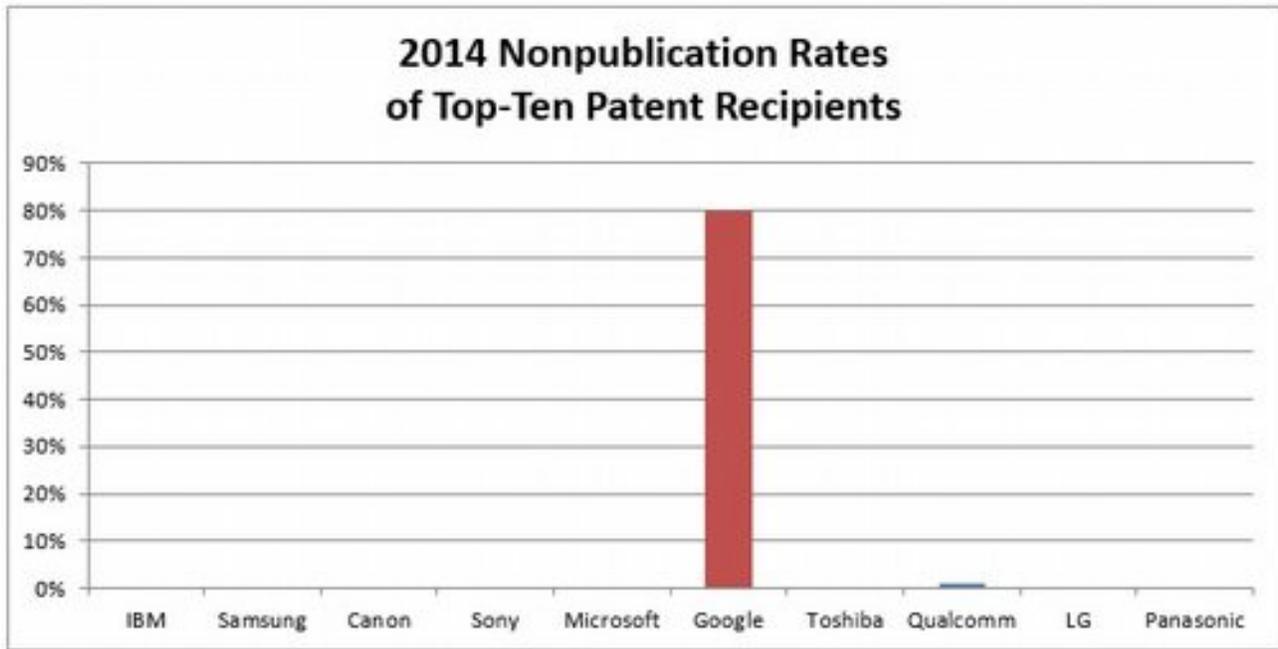


SOURCES: USPTO PatentsView Database & USPTO Patent Full-Text and Image Database

We randomly sampled 100 patents for each of the top-ten patent recipients for 2014. We reviewed the file wrapper for each to determine the proportion of nonpublication requests in each sample.

Our results revealed that Google is an extreme outlier among top-ten patent recipients with respect to nonpublication requests. Eight of the top-ten patent recipients made zero requests for nonpublication, permitting their patent applications to be published at the eighteen-month deadline. The eighth-ranking patent recipient, Qualcomm, requested that *one* application not be published. By contrast, Google formally requested that 80 out of 100—a full 80%—of its applications not be published.

The following chart shows these results:



SOURCE: USPTO Public PAIR Database

### Conclusion

Based on this result, Google deliberately chooses to keep a vast majority of its patent applications secret (at least it did so in 2014). This secrecy policy for its own patent applications is startling given both Google’s public declarations of the importance of publication of all prior art and its policy advocacy based on this position. It is even more startling when seen in stark contrast to the entirely different policies of the other nine top patent recipients for 2014.

It is possible that 2014 was merely an anomaly, and that patent application data from other years would show a different result. We plan to investigate further. So, stay tuned. But for whatever reason, it appears that Google doesn’t want the majority of its patent applications to be published unless and until its patents finally issue. This preference for secrecy stands in contrast to Google’s own words and official actions.

As one of the top patent recipients in the U.S., you’d think Google would want its applications to be published as quickly as possible. The other top recipients of U.S. patents in 2014 certainly adopt this policy, furthering the goal of the patent system in publicly disclosing new technological innovation as quickly as possible. The fact that Google does otherwise speaks volumes.

# CONCLUSION:

Who is killing innovation in America? Silicon Valley's outright bribery of government officials, to try to stop inventors from getting paid, for things that Silicon Valley billionaires stole with impunity along with a group of devastatingly compromised Art Units at the USPTO

What needs to be done? A public congressional investigation needs to bring the discussion of these ills to the public forum.