Towards a working definition of patent quality

Interested in making good patents the rule rather than the exception? Let us start with a more reliable definition of 'quality'

There is considerable agreement that patent quality is lacking, even if there is frequent disagreement about what the term actually means. Good patents signify different things to different people. Most stakeholders — operating companies that must defend against questionable patents, non-practising entities (NPEs) trying to license their rights and legislators that wish to protect small businesses and encourage innovation — are in favour of more reliable patents.

Patent quality is important because, among other things, a lack of it can impede businesses and require some to engage in unnecessary licensing or lawsuits. Bad patents are unreliable and undermine the integrity of the patent system, including the institutions and professionals that sustain it. However, given the multitude of ways that standards are applied in specific cases, coming up with a universal definition of 'patent quality' is no easy feat. The best patents are often in the eye of the beholder.

Many issued patents that are presumed valid under the law are not in practice. Under scrutiny, many are found invalid. In areas such as software and high-tech methods, the number is easily 50% or higher. There are a host of reasons why these bad rights (really, non-rights) get issued, including lack of examination time and examiner inexperience, as well as irresponsible applicants which are accepting of grants that they do not deserve or that fail to meet the appropriate tests. In theory, patents that are likely to be found invalid upon further investigation should have no value. But all too often, they do. The cost of litigation makes invalidating even obviously bad patents arduous and expensive, resulting in a softly issued right to sue — a financial asset quite apart from the invention it describes. Yes, there are many permutations of IP success.

The US Patent and Trademark Office wants to improve reliability, as do legislators and the courts. Investors and most rights holders are also broadly in favour of increased reliability. But what are we really talking about? Is patent quality simply a binary legal definition, where a patent either meets or fails the appropriate tests of novelty? Or does quality require a more complex analysis, which incorporates elements of risk and demand?

Putting it into words
I asked four people with deep patent experience and notable success to provide me with a two-sentence definition of 'patent quality'. Their responses — thoughtful and startlingly precise — are a good indication of the work that still needs to be done. The respondents were an economist and valuation expert, a patent attorney, a former chief patent counsel and a successful NPE..

- "'Patent quality' refers to value of the innovation described by the patent. A patent of high quality allows one of ordinary skill to perform an action that is valuable that could not be performed without the teaching of the patent."
- "From a US Patent and Trademark Office (USPTO) perspective, it is a patent issued based on 'proper' quality standards for patentability (patentable subject, novel, non-obvious, etc). From a patent owner perspective, it's a patent issued based on proper PTO quality standards that others want to use or are using: strong validity vis-à-vis prior art (102, 103); enabling disclosure (112a); etc. Beyond patent quality, there are many drivers of economic 'value,' particularly in the context of an acquisition or sale, including need, encumbrances and the likelihood of design-around."
- "A quality patent is one where the value of the expected protection (monopoly right) exceeds the cost to maintain and realise in the market. This measure is linear: the greater the expected net value, the higher the quality."
- "A quality assessment occurs every time a sophisticated owner makes a decision to file or renew and by necessity takes into account current business conditions as well as demand for the invention, available alternatives and contemporaneous USPTO and judicial practice."

Validity and value
Patents with questionable validity can have value, especially when there is a cost to neutralise them. Today, with higher bars for validity in court and tribunals such as the Patent Trial and Appeal Board reviewing dubious patents, there are less costly alternatives to taking a licence. After validity, what a patent reads on and who requires it will often play a major role in determining its importance, if not its quality. Who owns the patent? How great are the infringement damages? How difficult will it be to prove? All of these are factors that are difficult to separate from quality, even when they can be distinguished from validity.

"Defining Patent Quality", an article that appeared recently in the *Fordham Law Review*, nobly elevates the dialogue. Author Christi Guerinni writes: "This article represents the first scholarly attempt to deconstruct the meaning of patent quality. It does so by using a methodology applied in the business literature of quality management. The implications of this work include a new appreciation for the multidimensional nature of the concept, a fundamental reorientation of policymaking efforts to focus on patent quality as defined by quality dimensions rather than validity standards."

Patent validity and value are not mutually exclusive. In instances when they align like distant planets coming into cosmological focus, the result can be highly rewarding. But what some parties fear, others embrace. Degrees of value and need constitute a marketplace; degrees of certainty promote confusion and are inefficient. Holders must be careful not to confuse the legal and market criteria of patent quality, while at the same time recognising that in practice it is often difficult to establish one without the other.

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