

It's Not Just Competitors: Acknowledging and Accommodating "Interfering Busybodies" and their Challenges to Patent Validity*

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In patent, institutional design matters, and goals matter to institutional design. This article concerns the institutional design of mechanisms that can be used by third parties to challenge the validity of proposed or granted patents in the patent office—oppositions, revocations and similar processes. This article traces the various goals of these mechanisms, and how those goals have changed over time. It argues that recent economic and legal literature, which has influenced proposals for reforming these systems, is altogether too neat and tidy, treating public interest participants as interfering busybodies. It is better to acknowledge and embrace groups like Peer to Patent and the Public Patent Foundation, and think about how, in the long term, we can adjust aspects of the patent system to incorporate public input without too much sacrifice to politics and uncertainty.

Keywords administrative procedures; dispute settlement; patents; law and economics

A conventional picture of the patent system portrays patents as a two-way bargain negotiated between the inventor-patentee, on the one hand, and the local patent office, representing the public interest, on the other. This picture treats the public interest in patents as a unitary concept and tends to obscure the many people and groups with an interest in the outcomes of patent grants—competitors, customers, suppliers, members of the general public, rival inventors, joint inventors and non-governmental organizations (NGOs). It also diverts attention from the various ways that patent systems accommodate these third parties: oppositions, invalidity appeals, revocation, re-examinations and others. Over the course of the last 100 years and more, policymakers, academics and practitioners have worried over these processes: fine-tuning, reforming, criticizing and trying to balance a patent applicant's need for certainty, efficiency and speed, and the desire to get the maximum benefits from third party participation. The mechanisms differ in nature and details but have two things in common: first, they provide ways for third parties to have input into the otherwise bilateral patent grant, and, second, they have historically not been much used.

Two reasons have been given for wanting outsiders involved in the patent grant. First, it can provide a second pair of eyes: having a motivated interested party do their own search can improve the quality of patent office decision making, by