

Irrational Ignorance at the Patent Office

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There is widespread belief that the Patent Office issues too many “bad” patents that impose significant harms on society. At first glance, the solution to the patent quality crisis seems straightforward: give patent examiners more time to review applications so that they grant patents only to those inventions that deserve them. Yet the answer to the harms of invalid patents may not be that easy. It is possible that the Patent Office is, as Mark Lemley famously wrote, “rationally ignorant.” In *Rational Ignorance at the Patent Office*, Lemley argued that because so few patents are economically significant, it makes sense to rely on litigation to make detailed validity determinations in those rare cases rather than increase the expenses associated with conducting a more thorough review of all patent applications. He supported his thesis with a cost-benefit calculation in which he concluded that the costs of giving examiners more time outweigh the benefits of doing so.

Given the import of the “rational ignorance” concept to the debate on how best to address bad patents, the time is ripe to revisit this discussion. This Article seeks to conduct a similar cost-benefit analysis to the one that Lemley attempted nearly fifteen years ago. In doing so, we employ new and rich sources of data along with sophisticated empirical techniques to form novel, empirically driven estimates of the relationships that Lemley was forced to assume in his own analysis given the dearth of empirical evidence at the time. Armed with these new estimates, this Article demonstrates that the savings in future litigation and prosecution expenses associated with giving examiners additional time per application more than outweigh the costs of increasing examiner time allocations. Thus, we conclude the opposite of Lemley: society would be better off investing more resources in the Patent Office to improve patent quality than relying on ex post litigation to weed out invalid patents. Given its current level of resources, the Patent Office is not being “rationally ignorant” but, instead, irrationally ignorant.