

# Michelle Lee's views on patent quality out of touch with reality facing patent applicants



By **Gene Quinn** & **Steve Brachmann**  
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**"[I]f Lee was referring to the PTAB and post grant challenges the most honest assessment is that the Office has utterly and completely failed patent owners and the patent system."**



Michelle Lee

An opinion piece written by Michelle K. Lee, who may or may not still be Director of the United States Patent and Trademark Office, was published by *Law360* in December. The op-ed, entitled *Patent Quality is Here to Stay*, reached a wider audience on January 13th when it was reprinted by *The Huffington Post* in its entirety. In the piece, Lee tries her best to assure readers that positive developments have been made at the USPTO in recent years, but at multiple points she seems blind to major issues that have plagued U.S. patent system stakeholders during her tenure.

Lee sets up her own stage by saying: "When I stepped into the role as head of the [USPTO] a couple of years ago, one of the frequent things I told audiences of stakeholders around the country was that I looked forward to working together to further strengthen our patent system. And that effort had to include a harder look at the issue of patent quality."

Lee's ideas on the kind of system that enables the issue of high quality patents, however, could probably use some critiquing. First of all, she lauds the America Invents Act (AIA) of 2011 as a piece of legislation that puts the USPTO in "a unique position" to take that harder look at patent quality.

Save for a minute the fact that most inventors loathe the AIA, exactly how the AIA allows the Office to take a harder look at patent quality is something of a mystery. Of course, those unfamiliar with patent law and practice will likely find this line appealing. For the rest of us, we know the biggest changes ushered in by the AIA were: (1) first to file rules that apply only to applications containing claims with a priority date on or after March 16, 2013; and (2) the creation of three new post grant challenge procedures. Let's examine each specifically.

Clearly, the first to file provisions of the AIA could not have given the Office any opportunity whatsoever to take a hard, or even a soft look at patent quality. Until recently the Office was still examining only applications where patent examiners were applying pre-AIA first to invent law. This is true because any application filed on or before March 15, 2013, would be entitled to treatment under pre-AIA law for examination purposes, as well as any challenges once the patent issues. Furthermore, it is absolutely possible to file a patent application on or after March 15, 2013, which will still provoke examination under pre-AIA first to invent law. So there isn't anything within the first to file provisions, which make up the bulk of the AIA and the USPTO administrative interpretations of the law, that would give the Office any particular or peculiar opportunity to take a look at patent quality.

Lee also writes that the AIA gave the USPTO the ability to focus, "in an unprecedented manner, on new ways of improving patent quality... before, during, and after examination." An informed observer could absolutely question what Lee means by this, especially the idea of improving patent quality "after examination." Of course, she must obviously be referring to the Patent Trial and Appeal Board (PTAB), which was created in the AIA for the express purpose of offering an administrative opportunity to challenge so-called bad patents. Lee insists that the post-grant proceedings enacted by the AIA, including *inter partes* review (IPR) and covered business method (CBM) review, are working as Congress intended, providing "a faster, more cost-effective quality check on the patents in the system." She even goes so far to say that her office has "worked hard to implement and conduct these proceedings as fairly and efficiently as possible."

I suppose these post grant challenges are cheaper than fighting in district court, but they are certainly not cheap. \$500,000 to \$1 million (or more) in legal fees is the norm. And to characterize the proceedings as being as fair and efficient as possible? We can all probably agree that PTAB proceedings are efficient, but once upon a time so too were trials in small frontier towns in the West. You know the type. Crowd yells: "Hang 'em!" Sheriff says: "No, first we are going to give him a fair trial and then we're gonna hang 'em!" That's the PTAB, or at least was for

much of Lee's term as Director. Insofar as being fair, Lee is simply wrong. PTAB proceedings are unfair and against the patent owner at every procedural turn.

Two examples explain just how thoroughly unfair the PTAB processes have become. First, perhaps nothing exemplifies the unfairness as clearly as the statute giving patent owners the right to amend claims and the PTAB nearly universally denying every motion to amend. The Federal Circuit is currently reconsidering this brazen misreading of the statute *en banc* (see [here](#) and [here](#)). Second, the PTAB has stated (which acquiescence from the Federal Circuit) that timely submitted evidence a party has a right to submit under the regulations can simply be ignored.

Indeed, the PTAB has been so thoroughly criticized and demonstrated to be a procedural train-wreck from a due process standpoint that it is amazing that anyone would want to try and lay claim to credit for what they have done. The PTAB has been so hopelessly one-sided in terms of process that at every turn procedure cuts against the patent owner and in favor of the challenger who is attempting to strip a vested property right away. The Office will tell you they have to cut corners because they have only 12 months to conclude proceedings, but that is simply not true. The statute gives the Office up to 18 months to conclude proceedings (see [35 U.S.C. 316\(a\)\(11\)](#)), specifically envisioning greater than 12 months in the case of joinder. To my knowledge the Office has never even tried to explain why they have yet to take advantage of that extra six months in any case. Instead, the rules rush the proceedings to the detriment of procedural fairness for the property owner, which absolutely should call into question the due process the Office is affording patent owners (i.e., property owners). For a property right of constitutional magnitude proceedings designed to be a rush to judgment seem hardly appropriate and terribly ill-conceived.

The AIA also allows the Director discretion to stop harassment of patent owners, but Lee has never once used that power despite the fact that at least several patent owners have had seven or eight *inter partes* review challenges filed against the same patent. The PTAB itself has finally started to consider harassment as grounds to refuse to institute. So bad and lopsided are the PTAB proceedings, that the Federal Circuit has found PTAB decisions to be arbitrary and capricious, and with respect to covered business method (CBM) challenges, the Federal Circuit has slammed the PTAB for creating its own definition and standard while ignoring the statute and regulations. So if Lee was referring to the PTAB and post grant challenges the most honest assessment is that the Office has utterly and completely failed patent owners and the patent system.

Whether or not the AIA has helped the USPTO achieve a 30 percent reduction in the Office's backlog of unexamined patent applications, as seems to be suggested, is also open for debate. So many patent applicants giving up hope of ever receiving a patent because certain Art Units have a 1% allowance rate probably has a lot more to do with the Office clearing the backlog than anything else. Furthermore, nothing in the AIA, and nothing in any patent quality initiative does anything to fix the time and attendance abuse issues swirling through the USPTO in recent years. It seems fair to question whether Lee is *honestly* addressing the issue of patent quality given that her Office has been unable to address the issue of work quantity and quality among her patent examiners. An examiner submitting fraudulent time sheets and the Office not knowing is unacceptable. Having patent examiners who haven't issued patents in years — yes years — is equally unacceptable. Oddly, Lee doesn't mention these examiner abuses, ridiculously low allowance rates, that examiners tell applicants that they will never issue a patent regardless of what is said or how the claims are amended, nor that some patent examiners haven't issue patents for many years. She obviously has access to all of this information, but did nothing. Until the Office addresses these significant examiner irregularities any patent quality initiative is nothing more than the patent equivalent of an emperor with no clothes rearranging the chairs on the deck of the Titanic.

"Of course, patent quality also means applying the law accurately and clearly even in areas of the law that are evolving, including, for example, the 101 jurisprudence on what is patent eligible subject matter," Lee writes. Jurisprudence on patent-eligible subject matter has been evolving — you could say I suppose — thanks to major court cases like the U.S. Supreme Court's 2014 decision in *Alice Corp. v. CLS Bank International*. But an "evolution" isn't exactly how most would characterize *Alice*, or *Mayo*, or *Myriad*. These cases and what has followed have been a monumental shift in patent law that has resulted in better patent protection being available for many cutting edge innovations in China than in the U.S., which is ridiculous. The law of patent eligibility is only "evolving" if your view is decidedly anti-patent and you are OK with China, Canada, Australia and Europe have more progressive and inventor friendly patent laws. For most innovators the word catastrophe better exemplifies the state of patent eligibility law than does "evolving."

Lee also notes that one of the measures introduced by the USPTO to adapt to such judicial developments is training "focused on clearly drafting 101 rejections and subsequent responses." However, examiners have been issuing Alice rejections based on circular and flawed logic regarding what constitutes an abstract idea, and it's done in such a way that it doesn't seem to take into account *Enfish v. Microsoft Corp.*, *BASCOM* or any of the other pro-patent eligibility decisions of the Federal Circuit, or any of the guidance issued by the Office itself (see [here](#) and [here](#)) explaining to examiners what they are supposed to be doing. Worse than not following these cases, patent examiners routinely tell patent practitioners that they simply ignore Federal Circuit cases finding claims to be patent eligible because they disagree with them or believe them to be an anomaly. Examiners doing their own thing, ignoring USPTO memorandum, refusing to follow Federal Circuit precedent, and never issuing patents under any circumstances isn't exactly "applying the law accurately and clearly", is it?

Perhaps the most abrasive thing Lee stated in her editorial was this: "Our stakeholders share my belief, and that of my USPTO colleagues, that there is a cost to society when this agency issues a patent that should not issue..." No, Ms. Lee, a great many stakeholders do NOT share your belief. They don't share your belief primarily because by making this statement you shine light on a largely fictitious problem while

simultaneously ignoring the *real* problem facing the Office, which is that patent examiners refuse to issue any patents at all on good, high quality innovations that deserve patent protection. The problem isn't that patent examiners are issuing bad patents or patents that should never have issued, rather many of your patent examiners haven't issued a patent for years and nothing was ever done to put an end to that.

Lee can talk all she wants about all stakeholders sharing her beliefs, but that is simply not the case. Indeed, it is exactly that type of presumptuous attitude that understandably rubs those who disagree with her the wrong way; like fingers on a chalkboard.

Anyone who is paying attention knows that there are a great many stakeholders that share few, if any, of her beliefs. While many may be willing to otherwise acknowledge that egregiously broad patents shouldn't issue, how can they? Why should they? Lee hides the real problem with the fantasy of bad patents promulgated by the infringer lobby and a popular press that is preoccupied with trolls. But even President Obama's [FTC said calling patent owners patent trolls was unhelpful and misleading!](#) Not acknowledging the problems of those who seek patents and still suggesting she speaks on behalf of all stakeholders is a bridge too far and alienates those who the law and system have cheated. What about the egregious rejections and patent applications that examiners bury by refusing to issue? If issuing egregiously broad patents is bad why can't Lee acknowledge the obvious – that bogus rejections that prevent patents from ever issuing are a real problem? Indeed, they are a much larger problem than egregiously broad patents, and everyone in the industry knows that to be true.

Like so many times, Lee here takes one side while not even acknowledging there is another side or story to be told. Worse, she has the audacity to proclaim she speaks for everyone when she knows or should know that she does not. That is why so many dislike her and oppose her continuing on as Director of the USPTO. They feel that she has thoroughly politicized the Office, refuses to stand up for the rights of patent applicants, and has put the Office, and the patent system, on a downward trajectory to the detriment of innovators. In the eyes of many that is her legacy.

**Tags:** [CBM](#), [covered business method review](#), [covered business methods](#), [inter partes review](#), [IPR](#), [Michelle Lee](#), [patent](#), [patent examiner](#), [patent examiners](#), [patent office](#), [patent quality](#), [patent system](#), [Patent Trial and Appeal Board](#), [patents](#), [post grant procedures](#), [post grant proceedings](#), [PTAB](#), [US Patent System](#), [USPTO](#), [USPTO Director Chronicles](#)

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There are currently 40 comments.

**Paul Morinville** February 2, 2017 10:22 am

US Inventor is currently visiting every Senate office with a similar message. We want Michelle Lee gone.

**Martin Hoyle** February 2, 2017 10:41 am

EXCELLENT!! The old saying, "a lie is halfway around the track before the truth ever gets out of the starting gate", is very true here!! Years of lies are finally beginning to catch up with her. Who can, with a straight face, say that she has done her best to promote the common good and not that of her former, and most likely, future employer, Google?

**Aquinas** February 2, 2017 11:17 am

At a bare minimum, the taxpayers deserve to know if she is still drawing a paycheck. I find the conspiracy of silence coming from the USPTO to be downright eerie. No wonder the career staff at the agency are rumored to hate her. She has put them in a very tenuous position. Who's in charge?

**Night Writer** February 2, 2017 12:13 pm

This is just ridiculous. She is a joke. Never did prosecution and was put in charge of 8,000 people that did prosecution.

Want to bet? I will bet that she cannot even read a file wrapper and figure out the quality of the patent. So, she is incapable of even evaluating the quality of the work.

Just outrageous ridiculous Orwellian crxp.

**Invention Rights** February 2, 2017 12:58 pm

Takata should be applauded for efforts to improve air bag quality. Millions of defective air bags have been recalled and hundreds of thousands have been removed from the roads. Plus, they shipped more airbags in 2016 than they did in 2015.

**James** February 2, 2017 1:40 pm

Seems logical that if one wants to be the Director of USPTO, then they should have gone through the experience of filing a patent application in the past and put up with the BS that comes back from the examiners.....

**Golden Gate** February 2, 2017 4:10 pm

Here's a look at Silicon Valley's political investments:

<https://fivethirtyeight.com/features/nearly-all-of-silicon-valleys-political-dollars-are-going-to-hillary-clinton/>

Can anyone see Michelle Lee being welcomed back the the Valley with open arms after serving in the Trump administration? This is career suicide.

**Patent Investor** February 2, 2017 7:09 pm

Do we know yet if she spoke in San Fran this morning?

**Anon** February 2, 2017 9:31 pm

Some of us have pushed – before, during, **and** after the AIA for Congress to focus on actual quality of examination.

Anything post grant is – by definition – an admittance of a lack of quality examination.

It would be like car companies trying to sell you on their quality by boasting how many recalls they have undertaken.

**Old Examiner** February 3, 2017 6:42 am

James stated:

“Seems logical that if one wants to be the Director of USPTO, then they should have gone through the experience of filing a patent application in the past and put up with the BS that comes back from the examiners.....”

I believe your comment needs to be modified to read –from some examiners–. Like any other professional, many do excellent work, some don't.

**RanMan** February 3, 2017 9:12 am

Does the funding provisions in the AIA have any effect on patent quality?

**Gene Quinn** February 3, 2017 11:02 am

Old Examiner-

I have to agree. That is the frustrating thing about dealing with the Office. There are many, almost certainly an overwhelming majority, of examiners that do excellent work. There are some examiners that are an embarrassment to themselves and the Office, and do nothing other than unnecessarily call into question the integrity and hard work of the vast majority of examiners that play a vital role in our innovation ecosystem. I've never understood (and never will) why the union isn't as concerned about getting rid of those examiners that don't do work at all, or who only really harass applicants.

**Search Horizon** February 3, 2017 11:13 am

While I agree with many of your ideas, I'd like to point out what most people do not understand about time/attendance issues at the PTO. Most people  
Gene Quinn February 7, 2017 5:10 pm completely failed to grasp the following.

The compensation system at the PTO is geared to reward the examiners based on production. Thus, although the time tracking system is there for the sake  
of accountability, the system is designed to ensure that examiners are not penalized for taking time to do their jobs properly. This is not to say that the system is perfect, but it is designed to ensure that examiners are not penalized for taking time to do their jobs properly. This is not to say that the system is perfect, but it is designed to ensure that examiners are not penalized for taking time to do their jobs properly.

Ms. Lee's assertions, you should not waste  
time on a system that is designed to ensure that examiners are not penalized for taking time to do their jobs properly. This is not to say that the system is perfect, but it is designed to ensure that examiners are not penalized for taking time to do their jobs properly. This is not to say that the system is perfect, but it is designed to ensure that examiners are not penalized for taking time to do their jobs properly.

You seem to be following the unhelpful assumption that PTAB is only invalidating the patents which it should be invalidating.  
says.  
Sorry. Wrong. This article proves that everything Lee said was erroneous. Whether a good or bad claim escapes IPR doesn't change the fact that a majority  
of stakeholders just don't share her beliefs. She has to know that, or she is completely tone deaf.  
with you about this. This is a perfectly fair complaint. Once again, however, it really does not speak to the one point that Director Lee promised - improved  
mechanism for allocating an evidentiary burden. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981). In other words, to say that a  
patent is "presumed" valid is merely to say that the challenger has the burden to prove that it is not valid. That is exactly what the PTAB requires (except  
with regard to proposed amendments - on that point the PTAB really is in flagrant violation of the statute). If you mean to say that the PTAB is ignoring the  
district courts. You also ignore that the Federal Circuit has overruled the PTAB several dozen times. Something is seriously wrong at the PTAB and those  
who choose not to acknowledge it are just fooling themselves.  
should only require the challenger to show that the claims are invalid. I suppose that if IPRs - in practice - only canceled valid claims and always  
decreases in the process). I suppose that if IPRs - in practice - only canceled valid claims and always decreases in the process).

"Interesting that you choose to ignore ALL the OVERWHELMING evidence of patent owner harassment, lack of due process and the PTAB invalidating claims  
for obviousness a much higher rate than district courts. You also ignore that the Federal Circuit has overruled the PTAB several dozen times."

True. As I tried to acknowledge in #22, my post did not touch on any of these points. Suffice it to say, I largely agree with you. I think that that the CAFC  
should reverse more IPR decisions than it has. As I tried to explain, however, these points are still talking past Director Lee. She did not promise justice, or  
equity, or any of the other worthy goals that your complaints consider. She only promised patent quality. You do not really give the lie to her promise by  
noting all of these other considerations, although they are all good arguments for why the IPR enabling statutes (or at least the regs) should be amended  
fairly considerably.

