Guest Post: White House "Patent Troll" Report Challenged under the Federal Information Quality Act.

April 6, 2015 Dennis Crouch

By Ron D. Katznelson

A letter to Congress from 51 professors of law and economics argues that "the net effect of patent litigation is to raise the cost of innovation and inhibit technological progress." In response, an equally strong letter to Congress from other 40 professors of law and economics expresses "deep concerns with the many flawed, unreliable, or incomplete studies about the American patent system that have been provided to members of Congress." The response letter defends the patent system and notes a pattern of analytical flaws in some studies underlying the 51 professors' letter, listing basic empirical analysis reliability criteria that such studies fail to meet. Are criteria for reliable empirical analysis fungible? Should our patent policy turn on a "they said – they said" contest?

The answer must be a resounding NO. It turns out that the government has developed detailed criteria, requirements and standards for reliable empirical analysis and information quality. Because the public disproportionately relies on information disseminated by the government, the government holds itself to substantially higher standards than those used by private parties or non-government entities in disseminating information on the internet or in academic journals, with its high variability in accuracy and reliability. Congress enacted the Information Quality Act ("IQA") in order to ensure that information disseminated by government agencies meet the standards of "quality, objectivity, utility, and integrity." 44 U.S.C. § 3516, note. Information disseminated by the government for reliance by government and the public must be "presented in an accurate, clear, complete, and unbiased manner." The IQA forbids agencies from endorsing or approvingly disseminating information of substandard quality from third-parties.

The Office of Management and Budget ("OMB") promulgated guidelines for agencies to comply with the IQA, including the Bulletin for Peer Review and the Standards and Guidelines for Statistical Surveys. These quality standards are quite specific. For example, they set criteria for presentation and substantive balance and objectivity, transparency of data and methods, conditions under which peer-review is required, design of survey frames and sample coverage, minimum survey response rates below which specific bias analyses are required, etc. Virtually all government agencies, including the Executive Office of the President, are subject to these guidelines and standards. Under the IQA, agencies are required to establish administrative procedures enabling "affected persons" "to seek *and obtain* correction of information

maintained and disseminated by the agency that does not comply with [the OMB IQA] guidelines;" agencies have established a 60-day period for their review and corrective action in response to such requests. Agency responses to such petitions are not judicially reviewable because the IQA establishes no Article III standing for petitioners. However, the President and OMB regulations require agency compliance with the IQA.

Whereas 51 professors, relying on works that do not meet the IQA standards, can freely publish and argue (as they have) that patent litigation inhibits technological progress, the *government* is precluded from doing so. But that is exactly what the White House has done in contravention of the IQA by publishing its "patent troll" report known as the Patent Assertion Entities ("PAE") Report. It relies on many of the works cited by the 51 professors' letter, without even having conducted an IQA pre-dissemination review—a basic first-level IQA requirement. For these reasons, I have filed with the White House a petition under the IQA, requesting correction and removal of this PAE Report from all government websites.

My Petition shows that the PAE Report contravenes the IQA because it expressly relies on third-party information that does not meet the IQA standards. The sources relied on by the PAE Report purport to document patent litigation rates, quantify the private and social costs of patent litigation, survey "victims" of PAE litigation, and show the purported adverse effects of PAE activities. This information includes studies that have undergone no peer review; that have relied on opaque or erroneous methods and surveys; that lack objectivity; and lack practical utility.

To achieve agency compliance with identifiable IQA standards, my Petition concludes with 21 specific requests for correction supported by evidence and arguments. My Petition provides a compendium of detailed analyses of fundamental flaws surrounding data and methods used in eight commonly cited studies purported to document PAE harms, upon which the PAE Report relies.

Examples of some of the PAE Report's assertions failing the IQA are:

- that PAEs take advantage of the patent litigation cost asymmetries to force settlements and that they have an incentive to drag out litigation; my Petition shows that this allegation lacks supporting evidence and merely relies on a citation to a reference that does not exist, therefore failing to meet the IQA;
- that the social costs of PAEs patent litigation is $83 billion per year; my Petition shows in detail that the Bessen et al. paper upon which the allegation relies is erroneous, biased and fraught with fundamental analytical flaws and the information fails to meet the IQA standards;
- that the direct costs to defendants of PAE litigation are $29 billion per year; my Petition shows that the Bessen & Meurer paper upon which the allegation relies, incorrectly defines "costs" and is based on a biased and opaque sample in a flawed survey that fails to meet the IQA Survey Standards;
- an allegation of a "dramatic rise" in PAE litigation and that PAEs brought 62% of all patent suits; my Petition shows that the Chien blog post upon which the allegation relies, fails to meet the IQA because (i) it is irreproducible by independent qualified

parties since it is based on secret data and methods, and is financially supported by parties that have an interest in the outcome of the study, and (ii) because it lacks objectivity by failing to even mention the effects of the AIA joinder provisions on the surge in the number of suits;

- that 40% of technology startups targeted by PAEs suffered a "significant operational impact;" my Petition shows that the survey upon which the allegation relies fails to meet the IQA because the only thing known about the sample frame is its purposeful bias against NPEs. Solicitations (i.e., "trolling") for the survey were made by entities that are "critical of the patent system," encouraging respondents to participate in order to send a message to Congress—not to conduct bona fide research.

I also show (including through FOIA revelations) that the PAE Report's secret author, a patent law professor, dominated its content by her own works, and those substantially reflecting her views. The White House omitted some in-text citations to the professor's works from the bibliographic reference list and falsely attributed her survey results to a news reporter. Together, these errors had the effect of concealing the dominance of this professor's works in the PAE Report. But where the professor's own publications elsewhere strike a balance by at least acknowledging and crediting references with views opposing her own (see Petition, Sec. 5.5.1), it appears that the White House overruled her approach, as the PAE Report generally fails the objectivity requirement of the IQA. It lacks objectivity both on presentation and substance, because it focuses only on the ostensible negative aspects of NPEs or PAEs. The IQA "objectivity" standard requires analysis that also includes the salutary economic benefits of patent enforcement, or the positive role of NPEs as intermediaries—analysis that is entirely omitted.

The results are troubling. For example, the PAE Report disseminates this sweeping conclusory economic assessment: "the losses caused by excessive litigation [include] lost value to consumers who are not able to buy innovative products, and reduced income for workers whose pay is lower because they are unable to work with more productive new processes." Absolutely no evidence or other bases are cited in support of this allegation. Ironically, the stark failure to meet the IQA standards may produce the opposite result of that intended by the proponents of patent reform. For example, estimates of the number of NPE demand letters based on extrapolation from *one extreme outlier case* (see Petition at 41) are so fantastic that they undermine the credibility of the legitimate efforts to address a genuine (but infrequent) problem of abusive demand letters.

The Petition and supporting material may appear to some readers as cumbersome and repetitive. This may be so because it is written to overcome the burden on the petitioner of establishing non-compliance with the IQA, including the requisite particularized requests for correction. Stay tuned to see what corrective action the White House may take.

Link to the full IQA Petition for Correction

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