

Boosting Patentee Diversity By Relaxing the Technical Barriers to Patent Bar Membership

To: U.S. Patent & Trademark Office (USPTO) [successact@uspto.gov]
From: Prof. Eric Goldman, Santa Clara University School of Law
Jess Miers, 2L Santa Clara University School of Law
and the 20 additional signatories listed on Appendix A
Date: June 30, 2019
Re: Comments regarding the Study of Underrepresented Classes Chasing Engineering and Science (SUCCESS) Act, Docket No.: PTO-C-2019-0010

The USPTO has asked how it can help underrepresented inventors obtain more patents—an important question given that “women inventors made up only 12 percent of all inventors on patents granted in 2016”¹ and we don’t have any USPTO statistics on minority inventors.

Our comments explain how a lack of diverse patent prosecutors inhibits patentee diversity. We further explain how USPTO’s technical degree requirement for patent bar membership,² a prerequisite for prosecuting patent applications and representing clients before the PTAB, exacerbates the lack of diverse patent prosecutors. To help diversify patentees, the USPTO should diversify the community of patent prosecutors by relaxing the patent bar’s technical degree requirement.

Diverse Inventors Benefit from Access to Diverse Patent Prosecutors

Diversity in patent bar membership benefits the patent system in many ways. For example, access to women patent prosecutors can increase women’s patenting activity in several ways. Women patent prosecutors can bring extra substantive expertise on goods and services catering to women customers. This expertise can help inventors recognize patentable inventions and better describe them in patent applications. Women patent prosecutors use their unique social networks to cultivate and support women inventors, and they make it easier for women inventors to “see” themselves in the patent system. Also, women patent prosecutors may develop more effective client relationships with women inventors than would develop with male patent prosecutors. That, in turn, can help women inventors feel comfortable seeking patent prosecution assistance and produce the evidence necessary to succeed with their patent applications.

Though our comments focus on women, we believe similar dynamics play out for other diverse communities.

¹ *Progress and Potential: A Profile of Women Inventors on U.S. Patents*, USPTO (Feb. 2019), <https://www.uspto.gov/learning-and-resources/ip-policy/economic-research/progress-potential>

² See *General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases before the United States Patent and Trademark Office*, USPTO (June 2019), https://www.uspto.gov/sites/default/files/documents/OED_GRB.pdf.

Women Are Underrepresented Among Patent Prosecutors

Even though access to women patent prosecutors would benefit women inventors (and the patent system generally), men dominate the ranks of patent prosecutors. As Prof. Vishnubhakat estimated in 2012, at least 70% of patent bar members are male.³

Due to this sizable gender disparity, women inventors struggle to find women patent prosecutors. For example, Sara Blakely, the inventor of Spanx, could not find a single women patent attorney in the entire state of Georgia to help patent her invention.⁴

Qualified Women (and Likely Other Diverse Candidates) Are Blocked from Patent Bar Membership By USPTO's Technical Education Requirements

The underrepresentation of women in the patent bar partially reflects the underrepresentation of women with science, technology, engineering, and math (STEM) degrees. In 2019, women earned only about 1/3 of STEM degrees awarded by postsecondary institutions in the U.S.⁵ This ratio isn't likely to improve in the foreseeable future. For example, in the key STEM area of computer science, the percentage of degrees being awarded to women is on a long-term decline.⁶

These numbers create a serious pipeline problem for women patent prosecutors. Because women are underrepresented as STEM graduates, the patent bar requirement of a science, technology, or engineering (STE) degree virtually ensures that women similarly will be underrepresented in all activities requiring the patent bar, including patent prosecution and representing clients before the PTAB.⁷

An undersupply of STE degree holders (both men and women)⁸ contributes to a broader undersupply of qualified patent prosecutors of any gender.⁹ The USPTO can improve this situation by tapping into the larger pool of well-educated college graduates without an STE degree.¹⁰ While superficially gender-neutral, this move also benefits women. Since 1981-82, more

³ Saurabh Vishnubhakat, *Gender Diversity in the Patent Bar*, 14 J. MARSHALL REV. INTELL. PROP. L. 67 (2014), <https://scholarship.law.tamu.edu/facscholar/645>; see also Kenneth L. Port et al, *Where Have all the Patent Lawyers Gone? Long Time Passing...*, 97 J. PAT. & TM OFFICE SOC. 193 (2015), <http://open.mitchellhamline.edu/facsch/267>.

⁴ *Female Patent Lawyers, Women Inventors, and the Gender Gap in the Patent System*, <https://kgulick.com/female-patent-lawyers/>.

⁵ *Quick Take: Women in Science, Technology, Engineering, and Mathematics (STEM)* CATALYST, Jun. 14, 2019, <https://www.catalyst.org/research/women-in-science-technology-engineering-and-mathematics-stem/>

⁶ *Chart of the Day: The Declining Female Share of Computer Science Degrees from 28% to 18%*, AEI, Dec. 2018, <http://www.aei.org/publication/chart-of-the-day-the-declining-female-share-of-computer-science-degrees-from-28-to-18/>.

⁷ Christopher Buccafusco & Jeanne C. Curtis, *The Design Patent Bar: An Occupational Licensing Failure*, 37 CARDOZO ARTS & ENTERTAINMENT L.J. 263 (2019), http://www.cardozoaej.com/wp-content/uploads/2019/06/BUCCAFUSCO-CURTIS_ARTICLE.docx.

⁸ *Undergraduate Education Enrollment and Degrees in the United States* (2018), <https://www.nsf.gov/statistics/2018/nsb20181/report/sections/higher-education-in-science-and-engineering/undergraduate-education-enrollment-and-degrees-in-the-united-states>.

⁹ See Ralph D. Clifford et al, *A Statistical Analysis of the Patent Bar: Where Are the Software-Savvy Patent Attorneys*, 11 N.C. J.L. & TECH. 223 (2010), <http://scholarship.law.unc.edu/ncjolt/vol11/iss2/2>.

¹⁰ William Hubbard, *Razing the Patent Bar*, 59 Ariz. L. Rev. 383 (2017), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2031&context=all_fac.

women than men have earned bachelors' degrees—a gap projected to produce about 300,000 more degrees per year for women than men 10 years from now.¹¹ Expanding the eligibility pool to include the broader pool of college graduates would inevitably lead to a higher number of women patent prosecutors.

Conclusion

There are many good reasons to diversify, and increase the size of, the patent bar membership. Among other benefits, opening up membership to more diverse patent prosecutors should improve the availability and quality of patent prosecution services to diverse inventors. Accordingly, reconsideration of the technical requirements for patent bar membership can become an unexpected but powerful way for the USPTO to increase diverse patentees.

Appendix A: Additional Signatories

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¹¹ *Number of Bachelor's Degrees Earned in the United States from 1949/50 to 2028/29, by Gender (in 1,000s)*, STATISTA (last edited May 20, 2019), <https://www.statista.com/statistics/185157/number-of-bachelor-degrees-by-gender-since-1950/>.