

PATENT AGENT GOVERNANCE AND THE INVISIBLE HARMONIZATION OF THE GLOBAL PATENT SYSTEM

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RESEARCH QUESTION:

What effect does the regulation and governance of patent agents have on the development of patent institutions that are more, or less, responsive to public interests?

RESEARCH OBJECTIVE:

The harmonization of the global patent system exists largely outside of multilateral treaties or international dispute resolution bodies. Rather, synchronization of global patent governance largely takes place through the technocratic cooperation between international patent offices. This level of coordination is what Peter Drahos calls the ‘invisible harmonization’ of the international patent system, as this harmonization occurs largely outside of treaty negotiations and political attention. Furthermore, the highly technical nature of patent office processes make it accessible only to small groups of patent insiders that understand the language. While the role of multi-national corporations and patent office officials in influencing patent office practices and driving this invisible harmonization has been documented, the role of patent agents and agent governance has received less attention.

The paucity of scholarship focusing on patent agent governance is surprising, given that, as Andrew Morriss and Craig Nard have stated, the development of our fundamental patent institutions during the early-to-mid 19th century was very much the “story of the creation and growing dominance of the patent bar as an interest group.” A historical analysis of patent agency demonstrates how the growth of corporate dominance over patent filings, combined with the professionalization of patent agency, generated an ideological narrative justifying harmonization of the global patent system, a narrative that has been institutionalized through the political effort of patent practitioner interest groups. Many decades of unabated domination of patent politics by patent practitioners has allowed the profession to create an expertise barrier surrounding patent institutions. Patent agency in the early-to-mid 19th century was far more proximate to the inventive community, creating early forms of patent organization that were integrated with and responsive to the needs of the inventive community. However, an expertise barrier created by this dominant patent narrative has disconnected the patent system from its earliest foundations, and now, patent institutions have taken on a life of their own.

The objective of this research is to fill a gap in this body of scholarship by examining various patent agent governance frameworks and propose new models which better account for public interest concerns.

METHODOLOGY APPLIED:

This research will examine the historical growth of the international patent profession and its role in the development of international patent institutions. Furthermore, this research will review different patent agent governance models from various jurisdictions, including the U.S. and the European Patent Office (EPO). Specific attention will be given to the Canadian governance model, as Canada is currently in the process of creating a unique patent agent self-governance framework. The Canadian experience could present opportunities for the creation of a responsive governance framework which is open to public interest concerns, or could lead to the entrenching of professional self-interest within a closed, insular body.