The Examiner Count System: Why Patent Examiners Are on Your Side

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The examiner count system is the stick by which a patent examiner’s production is measured. Although the U.S. Patent and Trademark Office (USPTO) does set expected time limits for each task, examiners’ production goals are met by receiving “counts,” which are accrued by completion of various tasks associated with the examination process. Under the current count system, more counts are granted for tasks performed early in prosecution to provide an incentive for examiners to “dispose” of cases quickly—either through abandonment or the granting of a Notice of Allowance. Thus, the count system serves as a reminder that patent examiners and patent applicants are not opponents, but rather members of the same team who are intended to work together to move patent applications through the system.

The goal of the examiner count system is to place a majority of the weight on the First Office Action on the Merits (FAOM). Examiners are encouraged to perform the best search and provide the most relevant rejections to the claims that are before the USPTO when drafting the FAOM. The hope is that by giving examiners a higher percentage of credit at the beginning of prosecution, the USPTO can promote efficient prosecution. Also, theoretically, because the examiner has performed the majority of the work at the time of the FAOM, less time is needed to complete a final Office Action or issue a Notice of Allowance, thereby further expediting prosecution.

Specifically, under the current scheme, an examiner will receive a total of 2.0 counts for achieving “a balance disposal.” A balance disposal is when an examiner examines an application from the first Office Action through disposal. A disposal action can be one of abandonment or allowance of the application, writing of an examiner’s Answer, or the filing of a Request for Continued Examination (RCE). Normally, the examiner receives 1.25 counts for performing the initial search and preparation of the FAOM; 0.25 counts for issuing a final rejection closing prosecution; and 0.5 counts for issuing a disposal action like those discussed above. In an effort to reduce the incentive for examiners to push applicants towards filing an RCE, the examiner receives only 1.00 counts for the FAOM after the first RCE and 0.75 counts for the FAOM after each subsequent RCE filed. Therefore, the total amount of counts for a balance disposal decrease after the filing of an RCE.

The count system also incentivizes examiners to reach agreement with the applicant regarding arguments or claim amendments that could move the case to allowance without issuing an Office Action. If the examiner is able to do so, he or she will receive up to 0.75 counts and the applicant, in turn, has their application allowed. This reflects the counts that the examiner would have received for issuing both the final rejection (0.25 counts) and the disposal (0.50 counts). This can be particularly useful for examiners in the event that the examiner made an error in his or her rejection. In such situations, the examiner would otherwise have to issue a second (or subsequent) non-final action without receiving any counts.
Another way that the count system affects patent applicants is through the increased USPTO activity at the end of each quarter. While examiners are concerned with ensuring that they are producing counts at acceptable levels year round, there are four times a year when examiners feel an increased amount of pressure to meet their quotas. The USPTO operates on a four quarter fiscal year which runs from October 1st through September 30th. Examiners are expected to maintain an average minimum production level at each end of quarter and must end the fiscal year at the minimum level in order to avoid disciplinary action by the USPTO. Further, examiners are eligible for performance based bonuses which are normally reviewed at the end of the fiscal year. These performance based bonuses provide financial compensation for those examiners who produce upwards of 110% of their expected production, with increasing bonus sizes in five percent tiers up through 135%. Therefore, as the end of a quarter or the fiscal year draws near, the output by examiners will likely spike to ensure that they have met their required production for the specified rating period.

Thus, while the count system may cause fluctuations in Office activity, as a whole it serves to align the applicants’ goals with the examiner’s goals to ensure amicable, efficient prosecution.

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