

It's Time To Fix The Patent System's Gender Problem

By **Julie Reed and Marie Weiskopf** (March 3, 2021)

If we had a nickel for every incidence of astonishment on the faces of people when they learn we work in patent law — and have engineering degrees — we might be rich by now.

At networking events, when meeting new clients, and even when talking to the rare female inventor, both of us have heard surprise that we are admitted to the patent bar, or disbelief that we have backgrounds in electrical engineering.

It's hard to break the stereotype that the typical patent attorney is male with a science or engineering degree, because that is exactly who mostly is admitted to the patent bar. It's an unfortunate, self-reinforcing system.

Because it's the 21st century — and because we and many other female attorneys, female business owners and female inventors are so ready to enrich the entire field with new and diverse ideas — we believe it's time to rethink qualifying for the patent bar, as well as the educational and business systems that unwittingly or not, make the patent lawyer stereotype a reality.

In October 2019, the U.S. Patent and Trademark Office issued a report to Congress acknowledging that, among other things, too few patent applications were being submitted by women and people of color.

Last fall, a law review article written by Marshall, Gerstein & Borun LLP patent agent Mary Hannon[1] called for reforms to change "the perpetuation of an institutionally biased and archaic set of scientific and technical requirements" at the USPTO was released. The paper caught the attention of U.S. senators last year, increasing scrutiny of the USPTO[2] and shining a bright light on the low numbers of female inventors receiving patents, as well as the minimal number of female attorneys admitted to the patent bar each year.

On Jan. 19, prior to his departure, USPTO Director Andrei Iancu responded[3] to the U.S. senators, stating that he shares the belief that it is critically important that the criteria for sitting for the patent bar are up to date. Iancu said that he has directed the USPTO to evaluate whether a number of immediate changes can be made and what other changes may be possible in the future.

Currently, female inventors receive about 13% of all patents and just 28% of patent law practitioners are women, far below the 36% share of women currently earning degrees in science, technology, engineering and mathematics, or STEM, fields or the 50% share of those currently earning degrees in law [4].

We believe that most practitioners in the fields of business and law widely support any and all efforts to diversify the pool of patent recipients and patent practitioners. Indeed, the USPTO recently announced that it is studying options for diversifying who practices at the patent bar, which we support.[5]

Yet as with any systemic issue, the lack of female participation in patent work — both at the



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patent bar and as business owners and inventors — is a symptom of a much bigger problem. In short, it's not a problem the USPTO and patent bar can solve on its own.

That's because, starting in elementary school and continuing on through higher education and employment, women are impeded by a biased STEM education approach, the structural inequality of corporations and law firms, and outdated attitudes about what inventors and patent attorneys look like.

The lack of diversity in the U.S. patent system is on all of us, and to solve these issues, business, education and legal leaders will need to commit to the following.

1. Support programs that help girls choose a STEM education and a STEM career.

As the patent bar is a natural extension of STEM fields, it will be nearly impossible to close the gender gap at the patent bar as long as a significant gender gap continues in STEM education and careers.

We believe it is on all of us in the patent bar to do our part to continue to encourage STEM education among girls, as well as for people of color.

For example, those of us in the patent bar could attend career days at our local schools to discuss our STEM-related careers. We can get actively involved in elementary and secondary school science fairs and in many other school-related programs that exist across the country to encourage girls to pursue STEM educations and careers.

What's needed is widespread recognition of the need and a long-term investment of time and energy by lawyers and others with a stake in the patent system advocating for diversity.

2. Support changes to USPTO requirements to qualify lawyers for the patent bar.

Currently, to sit for the patent bar, one must meet a concrete set of scientific and technical requirements, enumerated in two categories.[6]

Category A requires a bachelor's degree in a specific, recognized technical subject — a variety of engineering and science degrees; Category B requires a bachelor's degree in another subject and the demonstration of completion of certain numbers of semester hours for science courses, such as physics, chemistry, biology and engineering.

We both feel strongly that technical degrees are necessary to provide our clients with quality representation in utility patent preparation and prosecution. Utility patents cover processes, compositions of matter, machines and manufactures that are new and useful. A patent attorney must be able to understand an invention in order to have the ability to draft and prosecute a quality utility patent application that captures said invention.

To meet the scientific and technical requirements of Category B means showing the description for each of the courses on which one is relying.

However, Category A currently only requires technical or scientific bachelor's degrees. We believe master's degrees and doctorate degrees should also meet the requirements of this category. Someone with a master's degree or doctorate degree in engineering will absolutely have the skills necessary to provide quality work product for clients, and there is no reason that Category A should only be open to those with bachelor's degrees.

Further, a design patent covers designs embodied in or applied to an article of manufacture, but not the article itself. There is no need for a technical degree to be a successful and competent design patent attorney. In fact, for example, graphic designers — who may not meet the qualifications for sitting for the patent bar — may be well-suited to draft and prosecute these applications. Having a design patent subset of the patent bar may open up the bar to highly talented lawyers who otherwise would not qualify.

3. Lift up female patent lawyers and female inventors.

We have both been extremely lucky to work with clients that value our input as female patent attorneys and who strive to hire firms with a diverse staff. We're grateful we work for a firm that truly strives to diversify the partnership, other attorneys and staff.

All firms should be striving for the Mansfield Rule certification, under which they have considered at least 30% women, attorneys of color, LGBTQ+ and lawyers with disabilities for leadership and governance roles, equity partner promotions, client pitching opportunities and senior lateral positions.[7]

Firms should ensure adequate representation of women and attorneys of color on the public side of firms as well as internally. Firms and corporations should strive to ensure women, people of color and other nontraditional candidates are equal members of teams a normal and routine course of business, not an anomaly.

In addition, it may be beneficial for us to consider starting programs to help elevate female inventors. These programs could include providing pro bono services or reduced fee services for female inventors, to encourage them to seek patent protection for their own inventions, which otherwise they may pursue.

Ultimately it falls on all of us in our respective firms and businesses to continue address our unconscious biases and to address biases we see at work every day. We must speak up when we see biases, to ensure that everyone has a voice at the table. The entire patent system benefits from a diverse patent bar.

The U.S. has rarely faced an era of crisis like the one in which we find ourselves today. The economic crisis engendered by a global pandemic continues to damage entire sectors of the economy, even as other sectors struggle with more demand than they can handle. Rebuilding is going to be hard and it will take time.

Yet hidden in the crisis, an opportunity exists to rethink the systems that prepare women for the workforce and support them once they're in it. We believe the time has come to ensure our rebuilt business and legal systems take advantage of the creativity and talents of everyone, regardless of gender. We call on everyone to help us reimagine how we better capture the talents of male and female inventors and attorneys alike, all in service of a more prosperous future.

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[1] <https://www.repository.law.indiana.edu/ipt/vol10/iss1/1/>.

[2] <https://assets.documentcloud.org/documents/20438019/20201211-letter-to-pto-re-patent-bar-gender-gap.pdf>.

[3] <https://www.law360.com/articles/1347185/attachments/0>.

[4] <https://www.techdirt.com/articles/20201227/17432045955/senators-tell-uspto-to-remove-arbitrary-obstacles-preventing-inventors-especially-women-inventors-getting-patents.shtml>.

[5] <https://news.bloomberglaw.com/ip-law/pto-considers-patent-bar-qualifications-amid-gender-gap-concerns>.

[6] https://www.uspto.gov/sites/default/files/documents/OED_GRB.pdf.

[7] <https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/>.