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USPTO Tells Examiners to Type or Get Out

A recent Federal Services Impasses Panel (FSIP) decision will implement the USPTO's proposals to effectively shut down Action Writer, Form Writer and PCT Writer software and force all examiners to type their own documents—even if they have been unable to learn keyboarding, will lose production, and may leave the agency as a result.

The FSIP ruled on the issue after USPTO-POPA negotiations stalemated on the Office Action Correspondence System (OACS), a Microsoft Word based action-writing system. The panel considered the proposals of both parties and could have implemented facets from each, but chose the agency proposal in its entirety.

Approximately 100 examiners depend heavily upon typists to prepare most documents. They either dictate or handwrite the information. Most of them are senior examiners with more than 10 years of service who produce at 110 percent to 130 percent of their production goals.

The procedures that the FSIP approved the USPTO to implement include:

- Making typists available to certain employees for two years
- Keeping Action Writer, Form Writer and PCT Writer software on examiners' computers for six months
- Maintaining a fully functioning copy of WordPerfect for two years in each electronic information center
- Issuing "guidelines" on training, for supervisors of employees who do not use OACS, for training of two to four hours in length
- Two to four hours for training and practice using a typing software module for employees who cannot type

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USPTO Defies International Trend for Combining Search and Examination

The president-elect of the American Intellectual Property Law Association (AIPLA) stated at an April international conference that the "immediate advantages" of merging search and examination for Patent Cooperation Treaty (PCT) applications include, "Better search results focused more directly on the relevant claimed invention; this will aid users in making more timely, more informed decisions about whether to pursue protection given anticipated scope of protection."

AIPLA President-elect Richard Nydegger included this statement in his presentation before a colloquium in France cosponsored by AIPLA and the Federation Internationale des Conseils Propriete Industrielle (FICPI—the International Federation of Intellectual Property Attorneys). At the same conference, Nydegger voiced AIPLA's support for separating search and examination in the USPTO's 21st Century Strategic Plan.

In a paper presented at the conference, the FICPI underscored the priority of a sound search and recognized the lack of current consistency in searches among the different international searching authorities (ISAs). The paper stated, "[A] high quality, reliable search report stands alone as the single-most important factor [that] adds value to the application procedure, enhancing the credibility of the system as a whole and promoting faith in it by applicants and third parties alike."

The FICPI report added, "A straw poll of FICPI's European members indicates that the USPTO identifies relevant art not identified by the EPO in about 20 to 30 percent of cases." This suggests that if the USPTO separates search and examination, about 20 percent to 30 percent of patent applicants will receive an inadequate, sub-par search.

At the same colloquium, a paper presented by Charles Baker, immediate past chairman of the intellectual property law section of the American Bar Association, pointed up the problems with quality, issuance delays and other inefficiencies inherent in separating search and examination.

"An examiner who is going to make decisions about the obviousness of an invention begins to make that determination as the search proceeds," stated Baker. During the process, "the examiner adjusts the search accordingly to find the best art...We therefore believe that the search is an integral part of the examination, and if the examiner does not do the search it will not be done as well, which would decrease the quality of issued patents and weaken the presumption of that validity."

Regarding the deferred examination inherent in separating the functions, Baker stated that the downside is "the additional layer of unnecessary procedure, which would increase patent application pendency and thereby harm the public because the claims that will be allowed would remain uncertain until issuance."

Baker added that the inefficiencies inherent in the

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USPTO: 'Type or Get Out'

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The FSIP's Unspoken Messages

The FSIP called POPA's proposal "arbitrary and expansive," and characterized the union's request for 20 hours of classroom instruction for employees who do not type as "unwarranted." The FSIP bought wholesale the USPTO's allotment of two to four hours maximum of typing training. In essence, the panel has told these senior, high-producing examiners to quickly learn to type or leave the agency.

POPA had also requested for those learning to type that one hour extra be allowed for each action typed for three months. The FSIP rejected that. FSIP's between-the-line message to examiners is, "Learn typing on your own, or leave."

POPA also proposed grandfathering the relatively few senior examiners who are close to retirement to allow them to finish their tenure without the burden of being forced to learn typing after a career of not typing. Instead, the FSIP shut them out. In a last ditch to craft a compromise, POPA proposed continuing the typists' services for merely three years, explaining that maintaining the high production levels of the affected employees is "vital to the agency's goal of issuing high quality patents." The FSIP said no.

The USPTO will not allow any extra time for typing actions for those unable to type. The agency stated that the two-year period represents "a very generous learning curve," and that by policy, "an examiner may request additional time from his/her SPE to accommodate unusual circumstances on an office action." Again, though an employee may ask the SPE, POPA has no knowledge of a SPE ever granting such a request.

Examiners as Highly-paid Typists

Several members of the Patent Public Advisory Committee (PPAC) asserted that it's in the agency's best interest to assign as many duties as possible to the administrative staff to free examiners' time for search and examination.

A 20-year veteran examiner, who will be harmed by the agency's typing edict, concurred and wrote in a declaration to the FSIP, "It is simply ludicrous in an economic sense to saddle your most expensive labor with chores that can be contracted out at a small fraction of the cost."

"For every chore, and this one is particularly burdensome, added to the examiner (without any compensation in time), a corresponding effect is felt in either the amount of time spent searching or writing up the action or considering the references," added the senior examiner.

The FSIP was insensitive to the written declarations that POPA submitted from many potentially harmed examiners.

Another adversely affected examiner wrote, "Even with training and practice, I know that [my typing] would never approach the speed of dictation....It would be exceedingly difficult for me to do the professional, error free job that [my typist] does."

Quality and Production Harmed

Examiners who now use typists agree uniformly that forcing them to type will harm their work quality and productivity. "My office actions would be shorter and not have the level of detail that they do now because I would find it difficult to type all that additional information," wrote a 32-year employee. "Furthermore, I am concerned that the documents would not look as professional as they do now."

A GS-15 expert examiner wrote that in addition to his examining work, "I train several junior examiners in my art unit, classify pre-grant publications, assign applications to the examiners in my art unit and act in lieu of my SPE....If I was forced to type my own actions, it is inconceivable that I could continue to work at the level I am currently working."

Losing Knowledge Through Forced Retirements

Without exception, the affected examiners said they will consider retiring earlier than planned because of the lost production forced on them by having to type.

"Making me type...would force me to retire sooner than later, because I do not feel that I would be able to continue to do my job," said one.

"The loss of typists would cause me to reevaluate this position and would force me to retire," wrote another examiner. He added that he'd get a job in a law firm that "would value my legal and technical skills over my ability to type; a place that would treat me as a professional, not a highly paid typist."

The USPTO said it will make "every reasonable effort" to provide the OACS and typing training within six months of the implementation date.

USPTO Child Development Center Starts Waiting List

The waiting list for the new USPTO Child Development Center, opening at the Carlyle campus in spring 2004, began in May.

Hours of Operation
Monday - Friday: 7:00am - 6:00pm

The Innovation Station Child Development Center will have a maximum capacity of 138 children, ages 6 weeks to 6 years. The center's enrollment policy, including the waiting list, is first-come, first-served. To secure a spot on the waiting list for your child or dependent, please deliver a pre-enrollment registration form and a $50 non-refundable check or money order to Crystal Park 1, Suite 717.

To learn more about the center, including fees and operating hours, or to obtain registration forms go online to: http://ptoweb/ptointranet/ adminqs/osa/ccenter/index.html. Forms may also be picked up at Crystal Park 1, Suite 717. E-mail questions to ChildDevelopmentCenter @uspto.gov.

USPTO Fee Bill Moves Forward

In late May a House subcommittee approved a bill that would end USPTO fee diversion by removing the USPTO from the congressional appropriations process. It would authorize the USPTO director to control agency spending.

The action by the House Judiciary Subcommittee for the Courts, the Internet and Intellectual Property passed the bill forward to the full committee for consideration.

While stopping fee diversion will laudably provide needed funds for the work of the USPTO, the process by which it's proposed, which would effectively take USPTO operations out of Congress's line of vision, raises concerns about adequate oversight. Congressional appropriators' routine review of agency operations ensures a needed standard for transparency and responsibility at USPTO. If Congress doesn't perform that function, who will?

Ranking Subcommittee Democrat Howard Berman (Calif.) stated that he is considering an amendment to the legislation to limit the USPTO's plan for separating search and examination and contracting out searches when the bill, H.R. 1561, is considered by the full Judiciary Committee.

While the legislation would more than double some user fees to net additional USPTO revenue, the agency devised the bill's proposed fee structure with the intent of both raising funds for new projects and maintaining fee diversion. The fee structure has not been amended. Thus, it will create a revenue windfall for USPTO and unnecessary fee increases for applicants. For example, the bill would raise large entity filing fees from $750 to $1,000, and small entity fees from $350 to $750. The fee for a request for oral hearing on appeal would grow from $280 to $1,000.

The USPTO-POPA Contract Imposed by the FSIP on the Implementation of the Office Action Correspondence System (OACS)

The Patent Office Professional Association (hereinafter "POPA") and the United States Patent and Trademark Office (hereinafter "USPTO" or "Office") agree to the following procedures and appropriate arrangements in accordance with 5 USC § 7106(b)(2-3) with respect to the USPTO's termination of the use of the Action Writer, Form Writer, PCT Writer, and WordPerfect software (hereinafter legacy systems) as of the date of approval of this agreement by the Agency Head and the mandatory use of the Office Action Correspondence System (hereinafter OACS) based upon the Microsoft Office suite of software applications per notification delivered to POPA on April 10, 2002.

1. Any bargaining unit member using the services of a typist to create Office correspondence as of July 1, 2002, will be permitted to continue the use of typists for a period of two years from the date of implementation of this agreement. Office actions will continue to be counted prior to being forwarded to a typist.

2. Action Writer, Form Writer and PCT Writer software will remain on an examiner's computer for at least six months following the implementation date of this agreement.

3. A joint labor-management working group shall be formed to gather information on the developmental and operational issues related to OACS that become apparent within six (6) months of the implementation date of this agreement. The working group shall consist of three (3) representatives designated by POPA and three (3) management representatives designated by the USPTO with each party designating a lead representative. The working group shall meet at least monthly for up to six (6) months from the implementation date of this agreement. The joint working group shall make at least quarterly reports to the parties setting forth recommendations for enhancements and improvements to OACS to provide additional stability and functionality. If the lead representatives agree that the working group has completed its work, the working group may dissolve itself at any time prior to the six (6) month termination date.

4. The Office will maintain a fully functional copy of WordPerfect software on at least two (2) shared computer workstations in each Electronic Information Center affiliated with the individual Technology Centers for a period of two years from the implementation date of this agreement.

5. The Office provides and will continue to provide user guides and manuals on OACS and Microsoft Office 2000 through the Office of the Chief Information Officer (OCIO) and the Search and Information Resources Administration (SIRA).

6. The Office will issue guidelines to supervisors concerning appropriate training for legacy system users (i.e., examiners that were using the Action Writer, Form Writer, PCT Writer, and WordPerfect software for preparation of office actions prior to July 1, 2002). This may include formal training courses and/or time with an Information Technology Resource Provider (ITRP), to be assigned at the discretion of the Supervisory Patent Examiner (SPE). It is understood that those examiners who do not currently use OACS and who have not recently attended OACS training may need to be retrained.

Employees who display a need for additional training over and above the mandatory training that has already been provided will be provided two (2) to four (4) hours of additional training at the discretion of the SPE. Additional training may be provided at the discretion of the SPE.

The Office will make available a typing practice training module to those examiners who lack basic typing skills and were exclusively using typists for preparation of office actions as of July 1, 2002. Non-production time of two (2) to four (4) hours will be granted for completion of the training module and practice at the discretion of the SPE. Additional time may be granted at the discretion of the SPE.

Employees who believe they need training should promptly request training from their SPE. In order to assess training requirements, examiners may meet with their SPE to discuss their training needs. Requests for training will be reviewed for appropriateness by the SPE within a reasonable time period. If an employee's request is denied, he/she may discuss the matter with the Technology Center Director. Requests for training in accordance with the training guidelines and this agreement will not be unreasonably denied. Every reasonable effort will be made to provide training under this agreement within six (6) months following the implementation date of the agreement.

7. If the employee did not have a fully operational workstation and/or the course material was not fully covered in a training session under this agreement, the employee may request to be retrained.

8. Prior to each new substantive upgrade of OACS, the Office will determine whether to train employees on changes and enhancements included in the new version. The training time for these courses will be accurately recorded under a separate time code.

9. The implementation of this agreement shall be in accordance with Title 5 USC § 7114(c).

Sen. Byrd Flips Over Outsourcing

The Bush administration's headlong push to privatize will be getting extra scrutiny from some members of Congress, including Sen. Robert Byrd (D-W.V.), ranking member of the Senate Appropriations Committee.

"I am very suspicious of this privatization scheme," said Byrd at a May hearing about outsourcing at the Internal Revenue Service. "It seems to be stretching across the board with this administration. Congress needs to oversee it very, very carefully. We will be watching and listening."

Several of Byrd's comments about the IRS apply equally to the USPTO. "If we are looking for the best value for the American taxpayer, why are you advocating a proposal that costs more and does less to protect the privacy rights of taxpayers?" he asked an administration representative. "...the Department [of Treasury] could simply request more money to hire additional IRS personnel... ."

Byrd has criticized the Bush administration's plans to privatize as many as 850,000 federal jobs "without adequate justification," according to a statement from the senator.

Electronic File Wrapper System Expanding

The pilot program for the image file wrapper system (IFWS), also known as E-Phoenix or Electronic File Wrapper, will be adding three to six more art units, in addition to its current five art units, by the end of June.

The IFWS process electronically scans each page of each application, creating a picture—or .tif—file. After June 30, all new applications will be scanned into an electronic form. The USPTO plans to hire 60-90 contracted employees to do the scanning.

As of July 1, the agency each week will be converting seven new art units in Technology Center 1600, 1700 and 2800 to IFWS. These are the art units that the agency claims will be the first to move to the new Carlyle campus. The agency wants to convert all paper files into an electronic form to avoid having to move the paper files. Individual employees can request a working folder with a paper copy of an application, but the USPTO requires employees to store them. This can result in each employee storing more than 200 frequently used files in individual office spaces.

The fact that the USPTO will be hiring contractors to scan the files indicates that the agency considers this pilot program a foregone conclusion. The "test" results will have no impact on the USPTO's decision to destroy the examiners' paper files.

Examiners in the art units participating in the pilot report some printing problems and that they sometimes need to wait up to two minutes for the Patent Application Location and Monitoring System (PALM) to come up on their screens. When the agency adds more employees to the system, the wait times will likely rise. A corresponding increase in time must then be allotted for examiners.

Why Are We Not Surprised?

Former USPTO Commissioner Lehman Says "Examination Has to be Privatized."

Technology Review *featured an interview with Former USPTO Commissioner Bruce Lehman on May 9. The following is an excerpt.*

Technology Review: What are some other key patent globalization issues, other than first-to-file versus first-to-invent?

Lehman: First of all, we're going to set up a single patent examining authority. And this is where I think what current U.S. Patent and Trademark Office director James Rogan is doing is ultimately going to be the solution. First, patent searching, and then examination, has to be privatized. The patent examiner should be more like a defense contractor. The Defense Department doesn't build F-15 or F-18 fighter planes itself. It supervises contractors to make sure that they get the quality that they need. Nothing is more critical to the sovereignty of a country than its defense, and yet a handful of defense contractors supply all of the weapons used in the world, even those that are used against us. So, if you detach the actual examination from government itself, then you can have one or two private entities that really become experts at patent examining, and then everybody in the world can hire them to do the examining.

USPTO Defies Trend *(continued from page 1)*

USPTO's proposals will increase the total costs to the public and the applicant overall. While some estimates place USPTO costs savings at under 5 percent, Baker questioned whether that figure accounted for the "added costs to certify and maintain the quality of private search firms." He stated his certainty that the costs "of lowered patent quality and less investment in technology were not taken into account."

The international patent community agrees with combining search and examination within the patent examiner's job, Baker noted. The USPTO is running "exactly contrary" to the PCT process and the European Patent Office, which is increasingly bringing examination and search together.

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