POPA NEWS
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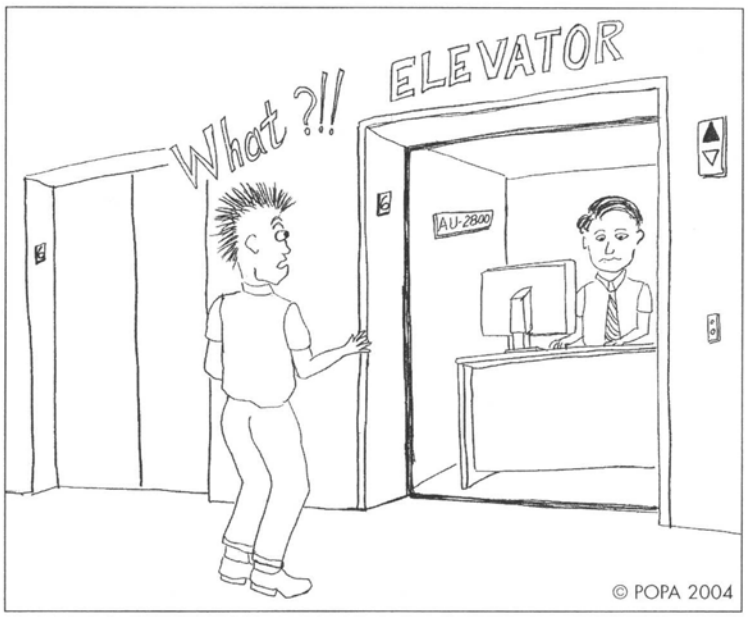
Carlyle Move Deja Vu

USPTO employees who moved to the new Carlyle campus six months ago are packing up their offices to move again, some even within their own building. The agency hasn't provided any meaningful explanation as to why it didn't foresee the need for this costly and disruptive second move.

Precipitating this office shift is the major move of 200-250 employees in Tech Center 2600 from Crystal City to the Jefferson Building at Carlyle. To make room, the agency is uprooting and relocating approximately 400 professional staff already in Carlyle, packing a larger number of employees in the same amount of space, causing crowding and much frustration.



Some of the needed space to house the incoming employees is being taken from areas now used by technical support staffers, who have voiced disappointment that they're being removed from offices and placed in open areas. As initially assembled, their new workstations provide no privacy. The agency has said that it is purchasing privacy panels and that the workstations will be converted to cubicles.

The open areas occupied by the technical support staff were previously used for examiner search files. These areas were made available by moving the search files to the concourse—or basement—level, making their use by examiners more difficult. To compensate for the extra time necessary to travel to the files, examiners are entitled to receive up to an hour every second biweek.

Domino Effect

Complicating the process is the USPTO's preference for the practice of locating all employees within an art unit in close proximity to one another. This practice made sense when examiners used only paper files and didn't have e-mail and electronic file sharing, but it's not required in today's workplace. Some art unit supervisors and managers already have set a precedent by successfully operating with their art units split between floors, in both Crystal City and in Carlyle.

Insisting on locating art units together exacerbates the domino effect begun by crowding and displacing employees in some offices. The groundless requirement to keep art unit

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Post-grant Opposition: Getting It Right the Second Time

The USPTO count system so compromises patent quality - by rewarding "overburdened" examiners for granting patents - that only patents that have undergone the opposition process should be presumed valid, according to congressional testimony by Google legal counsel in June.

"There is general agreement that patent examiners need more time to examine applications," stated Karl Sun, patent counsel for Google, Inc., before a hearing on post-grant review by the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property. "Current estimates for the total time an examiner spends per patent application from start to finish range from 8 to 25 hours on average. Moreover, patent examination is conducted as an ex parte process between an examiner and an applicant, with no third party involvement. Finally, examiners are rated according to a 'count' system that creates incentives for granting patents. Patents which are issued by an overburdened PTO without inter partes safeguards as to quality should not be accorded a presumption of validity by the courts."

As one of his proposed remedies, Sun proposed that Congress "increase funding for the PTO so that examiners' workloads may be reduced to allow an adequate amount of time for considering patent filings." He also recommended that the USPTO count system be modified "to remove artificial incentives to grant patents. ...A system that provides neutral incentives with respect to allowance versus rejection should be implemented."

Members of Congress and other witnesses at the hearing spoke in favor of revising the current ex parte and inter

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employees together is forcing some examiners to pack up and move just for the sake of maintaining art unit proximity.

The USPTO's allocation of window offices among the Carlyle professional staff also has created the perception of arbitrariness and unfairness. The Carlyle buildings have fewer window offices available for professional, non-management staff compared to the Crystal City buildings that were vacated. With more outside offices in Crystal City, a larger percentage of primary examiners got window offices, including all senior primaries.

At Carlyle, some art units with more senior primary employees will find that they haven't enough window offices for them all, while art units with fewer primaries will be able to place a junior primary examiner in a prime window office. This creates the impression of unfair treatment among the more senior employees.

Separating art unit members, in some cases moving them to other floors—or leaving some while moving others, would enable the agency to assign window offices on a seniority basis across art units within a building. This generally creates no hardship because examiners consult easily via phone and e-mail and share documents electronically.

However, the agency's lack of foresight is now water under the bridge. These problems can be solved through a common-sense approach of working with employees to determine their preferences, according seniority its due, and spending a little extra time on planning to create the least disruption.

A new plan would give priority to placing the most senior employees building-wide in window offices and cut down on the number of office moves. The USPTO can achieve this parity by ending the goal of keeping individuals in art units all together.

The USPTO's quick resort to high-density office usage within the examining corps in Carlyle indicates that the agency will either soon exceed its promised limit of 7,100 employees and contractors at Carlyle or that it plans to build very spacious offices for nonexamining employees at the yet-to-be completed Madison Building, or both.

"Proximate" Technical Libraries?

The USPTO is reneging on its own proposal in its agreement with POPA to place technical center libraries "proximate" to the technical center offices being served.

In the design area, more than 80 professionals are moving from the second floor of the Jefferson Building to the fifth floor of the Remsen Building. The design library, which had been with the design examiners on the second floor of Jefferson, is being squeezed into the first floor of Remsen within the biotech area library.

"Proximate," by most dictionary definitions, means adjacent, nearby, adjoining or contiguous—not four floors away. When a reference library is proximate it is easier to use, and therefore employees are more likely to use it. If it is too difficult to get to and use, then they won't. This will have a subtle, negative impact on quality.

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partes procedures to allow post-grant opposition. Rep. Rick Boucher (D-Va.) called the inter partes reexamination process "a white elephant" that few use because of its limitations and called for "a more meaningful process."

USPTO General Counsel James Toupin noted in his testimony that during the nearly five years that the process has been available, inter partes reexamination has been requested only 46 times.

Under current law, reexamination does not permit cross-examination of witnesses or discovery, yet it makes the result of the process binding on the initiating third party. Because it's binding, the third party deserves those recourses.

Michael Kirk, executive director of the American Intellectual Property Law Association, cited the National Academy of Sciences report earlier this year that recommended the creation of an "open review procedure" to provide "more timely, lower cost, and more efficient review of granted patents."

Kirk outlined the AIPLA proposal for creating a new post-grant opposition process, including:

- Allow opposition requests only within nine months post-issuance.
- Identify the real party of interest, but allow its name to be kept confidential until justice and fairness require disclosure.
- "Front-load" the requester's evidence supporting the opposition to expedite proceedings.
- Allow the patent owner to respond with evidence and amend the claims at least once.
- Limit discovery to cross-examination of affiants, but allow broader use exceptions in the interests of justice.
- Limit review time to one year, start to finish, but allow extensions to no more than 18 months in appropriate cases.
- Allow for oral hearings, brief filings, reconsideration, and court appeal by all parties to the opposition.
- Bar later inter partes reexamination by the opposer and concurrent reexamination proceeding until the opposition terminates.

Kirk cautioned that adopting any post-grant opposition system "would be of limited value unless the necessary resources are dedicated to its implementation." He cited that the European Patent Office (EPO) granted 59,992 European patents in 2003 with 2,634 patents, or approximately 4.4 percent, opposed. Using the same percentages, the USPTO's 189,597 allowed patents in 2003 would translate into over 8,000 oppositions. With 900,000 patents issued in the last five years, the number of oppositions could create a huge initial load that could require massive expenditure of agency resources to manage. Even a much reduced U.S. percentage would create a flood that would overwhelm the USPTO Board of Patent Appeals and Interferences.

If the USPTO were to reallocate its funds significantly to bolster post-grant opposition instead of increasing time for examination, it would be banking on getting patent quality right only the second time around. Absent changes

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to promote higher quality in the examination system—such as giving more examination time per case and granting credit to examiners for all actual work done, including second actions and final actions—the USPTO would have little motivation and insufficient resources to get the job done right the first time.

Claim Your Lost Computer Time

Take action when the Image File Wrapper or electronic Desktop Application Navigator slows down or quits altogether. Examiners who accurately record the time lost due to IFW/eDAN problems can and should claim the time on their 690e time and activity report.

Track the extra time needed to print out the papers necessary for examination and your voluntary overtime caused by using IFW and send it to your POPA representative. Claim all the time lost due to computer downtime. If management denies your time by crossing it out on your time sheet, then keep a copy of the sheet and send it to your POPA representative. The data gathered from your experience (without using your name or any other identifying information) and that of many other examiners could be used as evidence in the prosecution of a POPA unfair labor practice charge (ULP) against the agency.

The ULP claims that the USPTO failed to negotiate over the impacts on employees and the implementation of the IFW system. POPA also has filed an Association grievance with the agency for denying nonexamining time to examiners when the IFW system goes down. Unfortunately, both ULPs and grievances often take considerable time to reach their final conclusions.

Without employees' records of time claimed for "Computer Systems Outages," "Computer Catastrophic Time" or "Power Outages," a third party may not be easily persuaded of the real impacts of IFW on examiners. In both the ULP and the grievance, objective evidence of harm can help get meaningful remedies for examiners.

Codes for Claiming Lost Time

Computer Catastrophic Time—Code 090180. For situations when a computer system goes down in the middle of work being done and the work that is lost needs to be recreated. The time is only that used to recreate the work that was lost.

Computer Systems Outage Time—Code 160498. For situations when one or more of the computer systems goes down and a supervisor confirms that there is no other work that the examiner can do.

Power Outage Time—Code 011091. For situations when the electricity (power) goes out.

Attempted Extortion in Patents Community

The owner of a small business that provided copies of file wrappers of issued patents recently pleaded guilty to trying to extort $17 million from MicroPatent, a company that maintains a large commercial collection of Web-based, searchable, full-text patent data.

The defendant, Myron Tereshchuk, 42, of Hyattsville, Md., faces a maximum potential sentence of 20 years imprisonment and a $250,000 fine. Sentencing is scheduled for October 2004 for Tereshchuk, the owner of Potomac Filewrapper Service.

Tereshchuk began in February 2003 sending hundreds of derogatory e-mails that were "spoofed" to resemble authentic MicroPatent correspondence to the company's clients. He sent the e-mails by using computer equipment from his car to gain unauthorized access to unsecured wireless computer networks in residences and businesses in Maryland and Virginia.

In February 2004 Tereshchuk began demanding in e-mails to MicroPatents' president that the company pay $17 million or he would disclose proprietary MicroPatent information and launch denial-of-service attacks against intellectual property attorneys' computers.

The FBI, with the assistance of Yahoo, AOL and the University of Maryland, apprehended Tereshchuk as he was sending e-mails to MicroPatent in March 2004.

U.S. Attorney Paul J. McNulty stated that a search of Tereshchuk's residence last March uncovered the components for hand grenades, the formula and items necessary for making the poison ricin and literature about poisons. Those items remain under investigation.

Examiner Sidelined by Stroke Needs Leave Donations

Irene Cuda-Rosenbaum, an examiner in Art Unit 3726 and a POPA delegate for the mechanical areas, has been seriously ill and very much needs leave donations.

Irene is suffering from a rare tumor that dangerously elevated her blood pressure and caused her to have a stroke. She has some paralysis on her right side and is currently in rehabilitation to regain the use of her right arm and leg. Irene still faces surgery for the tumor followed by further recovery and rehabilitation. She expects to be away from work for several months. Any leave donations would greatly help her and her family.

You can obtain the CD-505 leave donation form from the HR Web site on the USPTO Intranet. Please either fax the completed form to Stacy Hoffman in HR at 703-746-8495 or hand deliver them to Marc Jimenez, CP2-5A05 or Mark Rosenbaum, CP2-11A06 in Crystal City, or Robert Budens, REM 3A35, in Carlyle.

POPA — In Your Corner

Another in a series highlighting POPA's efforts on behalf of individual bargaining unit employees—people like you.

POPA Assists Employee in Attaining Full Sig

The USPTO denied full signatory authority to an examiner in the chemical area this past March based upon four alleged patentability determination errors. The examiner asked POPA for help early enough to enable a grievance to be filed within the required 20 days after receiving the denial. Upon review, POPA found that the issues the agency used in the denial letter did not rise to the level of "clear error" in patentability determination or were not patentability determination issues per se.

During the informal grievance meeting, POPA set forth the deficiencies in the written denial. The USPTO officials apparently understood and agreed with POPA that the examiner's positions were consistent with Office practice and granted the grievance and all requested remedies. This gave the examiner full signatory authority and seniority retroactive to the date first eligible (including a retroactive pay raise of almost $14,000 per annum). Because the agency dropped at least three of the alleged clear errors, this employee qualified as "fully successful" on the patentability determination element. Usually, one can make a single patentability error and still be considered fully successful under the performance appraisal plan.

Although hard-nosed litigators, the USPTO officials involved in this grievance kept their minds open to the legitimacy of the employee's position in each of the patent applications involved. They were more interested in doing the right thing than in digging in their heels and forcing additional litigation. This created a win/win situation for the employee and the agency.

POPA concentrated its argument on the fact that the examiner did not commit clear error—that the examiner took factually and legally supported, reasonable positions in the Office actions in question. Under the examiner performance appraisal plan, if the determination made by the examiner is reasonable and the determination proposed by the supervisor is reasonable, this constitutes "an honest and legitimate difference of opinion," not clear error. This is equally true for any of the quality elements: patent examining functions, action taking, and patentability determination.

An October 2003 decision by Arbitrator Suzanne R. Butler supported this understanding of "clear error" by overturning the agency's allegations of clear error in several Office actions for just these reasons. This decision resulted in the reinstatement of an employee that the agency had removed for alleged unacceptable performance in patent examining functions.

POPA Loses Battle, But Wins One Issue

A May 2004 arbitrator's decision upheld the removal of a GS-7 employee who performed at 88 percent for a fiscal quarter after successfully completing her written-warning performance improvement period (PIP).

Arbitrator Barbara Franklin sustained the employee's removal despite evidence presented by POPA at arbitration relative to piecemeal review by her supervisor (thereby requiring an excessive number of rewrites), disallowance of legitimate "other" time, and lack of proper preliminary instruction. POPA is appealing this decision to the Court of Appeals for the Federal Circuit.

However, the decision holds some good news for employees. Arbitrator Franklin found that the agency had acted improperly in the removal by using time periods of "rolling biweeks," which the agency defined as any seven or more consecutive biweeks used to evaluate performance. The agency had argued that it did not matter that an evaluation period started or ended in the middle of a fiscal quarter. She rejected the USPTO's use of unconventional evaluation periods in conflict with established periods as "manifestly unfair."

The agency had based the grievant's removal on two time periods—the fiscal quarter at 88 percent production and a 12-biweek period following the performance improvement period in which the grievant's production was 77 percent. Arbitrator Franklin threw out the latter in its entirety, stating, "Under such a system, it would be too easy to single out a seven biweek period of relative inactivity, ignoring production figures from subsequent biweeks that might contain numerous counts for work performed earlier but not counted for some legitimate reason."

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