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Mr. Nicholas Fraser
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Office of Information and Regulatory Affairs
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Washington, DC 20503

Subject: [ICR Reference No: 201305-0651-002](#) (USPTO "Grace Period Study")

Dear Nick:

This letter is a follow-up to my letter dated 5 June 2013 concerning statistical deficiencies in the U.S. Patent and Trademark Office's proposed Grace Period Study.¹ In that comment, I noted that the USPTO's projected 14% response rate does not comply with applicable OMB statistical policy standards and guidelines and that the proposed survey also lacks the nonresponse bias analysis OMB requires.²

I have now reviewed the proposed questionnaire that would be sent to approximately 3,000 respondents ("Respondent Questionnaire"),³ and the proposed questionnaire that would be sent to those who do not respond ("Nonrespondent Questionnaire").⁴

¹ Richard B. Belzer. "Comments to OMB on ICR Reference No: 201305-0651-002 (USPTO "Grace Period Study")," 2013.

² Office of Management and Budget. "Standards and Guidelines for Statistical Surveys," Washington, D.C.: Office of Management and Budget, 2006.

³ U.S. Patent and Trademark Office. "Grace Period Study: Proposed Survey Letter." Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=398733&version=0>; accessed June 11, 2013, _____. "Grace Period Study: Proposed Survey Questions." Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=398732&version=0>; accessed June 11, 2013.

⁴ _____. "Grace Period Study: Proposed Nonresponse Letter." Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=398738&version=0>; accessed June 11, 2013, _____. "Grace Period Study: Proposed Nonresponse Questions." Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=398736&version=0>; accessed June 11, 2013.

In my first letter, I expressed doubt concerning whether respondents could complete a substantive 15-question survey in the 10 minutes that the USPTO estimates would be required. Having now reviewed the Respondent Questionnaire and Nonrespondent Questionnaire, I no longer believe that the unit burden is underestimated by, say, more than a factor of two. Most of the questions on the Respondent Questionnaire, and all of the questions on the Nonrespondent Questionnaire, require only minimal effort to answer. Even the core questions in the Respondent Questionnaire related to the detrimental effects of disclosure without grace periods are easy to answer because the information requested has extremely low resolution. (As I point out below, the fact that the survey seeks low-resolution information also means it lacks practical utility.)

The Nonrespondent Questionnaire is troubling on several fronts. It appears that the USPTO expects nonrespondents, who by definition have declined to answer the Respondent Questionnaire despite multiple requests, will suddenly become more receptive, though only with respect to demographic questions aimed at statistical control. It seems highly unlikely that anyone willing to provide demographic information would be unwilling to answer core survey questions. Thus, if the expected response rate for the Respondent Questionnaire is 14%, the likely response rate for the Nonrespondent Questionnaire ought to be a small fraction of that.

Presumably, the USPTO hopes that the handful who complete the Nonrespondent Questionnaire will not be demographically dissimilar to those who completed the Respondent Questionnaire. If so, then the USPTO might try to claim that nonrespondents are no different than respondents—ergo, the Respondent Questionnaire does not suffer from nonresponse bias. But a high response rate on the Nonrespondent Questionnaire is essential for testing the hypothesis that respondents and nonrespondents are not different. A low response rate would mean that the Nonrespondent Questionnaire also has nonresponse bias; a response rate below 14% would mean it has even greater potential nonresponse bias.

This is not a legitimate nonresponse bias analysis plan. Such as it is, the plan consists of assuming that nonresponse bias is absent and avoiding the collection of sufficient data that could refute the assumption.

Substantively, the USPTO makes unsupportable practical utility claims, most notably that the survey “will be used to improve patent policy”⁵ and to “estimate the value of lost commercial opportunities in Europe due to

⁵ _____. "Grace Period Study: Proposed Survey Letter." Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=398733&version=0>; accessed June 11, 2013. 1.

the lack of adequate patent grace periods in many European countries.”⁶ The proposed PRA disclosure statement makes similarly exaggerated claims that mislead prospective respondents.⁷

How the proposed study is supposed to have actual practical utility is hardly self-evident, even if the response rate problem could be solved. The USPTO acknowledges that it lacks an empirical basis for adopting the European approach to disclosure: “Up to this point, the USPTO has not conducted any studies that have quantified the effects of premature disclosure on European scientific researchers’ failure to apply for or receive patents.”⁸ But this survey solicits *qualitative* information that cannot overcome the USPTO’s admitted *quantitative* ignorance. The information sought by the USPTO has such limited resolution⁹ that the Office would not be able to “estimate the value of lost commercial opportunities” resulting from absent grace periods. The best that the USPTO could do (assuming a high response rate) is reject the qualitative hypothesis that premature disclosure is unimportant.

But the USPTO already knows that premature disclosure is important. Contrary to the Supporting Statement, this is not just a matter of improving customer service.¹⁰ The grace period was a key issue in the March 2013 recent public hearing on international harmonization.¹¹ Given the obvious

⁶ _____. "Supporting Statement, Part A: Grace Period Study, OMB Control Number 0651-00xx (May 15, 2013)," 2013g, 2. Table 1.

⁷ _____. "Grace Period Study: Proposed Survey Questions." Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=398732&version=0>; accessed June 11, 2013. "This survey will collect data from European scientific researchers from select European research institutions, foreign government officials, and other stakeholders to evaluate the effects of premature disclosure of patentable inventions or ideas on researchers’ failures to apply for or receive patents. The USPTO will use the data collected from the survey to estimate the value of lost commercial opportunities in Europe due to the lack of adequate patent grace periods in many European countries."

⁸ _____. (2013g, 2-3).

⁹ See the Appendix to this letter, which reproduces the relevant survey questions.

¹⁰ U.S. Patent and Trademark Office (2013g, 1). “ There are no statutes or regulations requiring the USPTO to conduct these customer surveys. The USPTO uses surveys to implement Executive Order 12862 of September 11, 1993, *Setting Customer Service Standards*, published in the *Federal Register* on September 14, 1993 (Volume 58, Number 176).”

¹¹ _____. "Notice of Public Hearing and Request for Comments on Matters Related to the Harmonization of Substantive Patent Law." *Federal Register*, 2013e, 78(22), 7411-7412. The USPTO has not uploaded the presentations, transcript and public comments for this hearing at Regulations.Gov. Nine public comments and a transcript are available at _____. "Public Hearing on the International Harmonization of Substantive Patent Law." Available at http://www.uspto.gov/ip/global/patents/Public_Hearing_on_the_International_Harmonizat

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importance of high-quality data to inform this debate, it is hard to understand why the USPTO wants to waste scarce resources on such a low quality project. This is especially troubling in times of real or perceived budget austerity.

Even if the USPTO is content with wasting taxpayer money, OMB has a statutory obligation to ensure that collections of information, including surveys, have practical utility commensurate with their burden. This one does not. It would be an equally significant mistake for OMB to allow such waste to occur just because a mere \$150,000 and 71 burden-hours appear to be at stake. The USPTO needs to sponsor a serious study of the effects of European-style disclosure rules.

Respectfully submitted,



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CC: Dr. Katherine Wallman
Chief, Statistics and Science Policy Branch

References

Belzer, Richard B. "Comments to OMB on ICR Reference No: 201305-0651-002 (USPTO "Grace Period Study")," 2013.

Office of Management and Budget. "Standards and Guidelines for Statistical Surveys," Washington, D.C.: Office of Management and Budget, 2006.

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ion_of_Substantive_Patent_Law.jsp; accessed June 11, 2013. "Grace period" appears 147 times in the transcript.

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____. "Notice of Public Hearing and Request for Comments on Matters Related to the Harmonization of Substantive Patent Law." *Federal Register*, 2013e, 78(22), 7411-7412.

____. "Public Hearing on the International Harmonization of Substantive Patent Law." *Available at* http://www.uspto.gov/ip/global/patents/Public_Hearing_on_the_International_Harmonization_of_Substantive_Patent_Law.jsp; *accessed* June 11, 2013.

____. "Supporting Statement, Part A: Grace Period Study, OMB Control Number 0651-00xx (May 15, 2013)," 2013g.

Appendix

Draft Survey Questions Capable of Providing Qualitative Information About the Detrimental Effects of Short or Absent Grade Periods^{12, 13}

If you were not granted a patent, why was it not granted?

- a. **Prior disclosure by you or co-author**
- b. **Prior disclosure by employer or sponsor of the research**
- c. Other reason related to novelty
- d. Other reason related to patentability besides novelty
- e. Don't know

Have you ever filed a patent application that was rejected because you, a co-inventor, an employer, or a sponsor of your research disclosed the invention to the public?

- a. **Yes**
- b. No

Has the requirement that inventions not be disclosed to the public such as in a publication or presentation prior to filing a patent application resulted in any of the following problems? (Select all that apply.)

- a. *Could not complete the patent application in time and did not protect the invention*
- b. *Could not complete the patent application in time and did not publish the results of the research*
- c. *Could not determine patentability of the invention until after publication and did not protect the invention*
- d. *Could not determine patentability of the invention until after publication and wasted time and money filing a patent application to try to protect an invention that was not novel*
- e. *Did not include certain content in publication to avoid disclosing invention*
- f. *Filed a patent application on the initial concept of the invention prior to publication which later adversely impacted filing a later patent application on the full invention*
- g. *Filed a patent application on the invention prior to publication which contained mistakes (e.g. omission of relevant data, mislabeling of a*

¹² _____. "Grace Period Study: Proposed Survey Questions." Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=398732&version=0>; accessed June 11, 2013.

¹³ **Boldface** = answers providing qualitative support for the hypothesis that short or absent grace periods have detrimental effects; *italics* = answers concerning types of detrimental effects.

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component of the invention, omission of an additional embodiment of the invention, etc.) that may have been corrected if not pressed for time to file the patent application prior to publication

h. No problems