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Delivered by email: regulatory_review_comments@uspto.gov

Comments on "Improving Regulation and Regulatory Review; Request for information" (76 Fed. Reg. 15891)¹

Dear Mr. Oettinger:

I am pleased that the U.S. Patent and Trademark Office (USPTO) is seeking information from the public concerning how best to implement President Obama's Executive Order 13563,² and happy to supply these comments to support that effort.

My comments are organized in three sections. First I address longstanding regulatory principles that President Obama has reiterated in his Order. Second, I comment on two new principles the President has now directed agencies (including the USPTO) to follow. Finally, I offer suggestions in response to each of the five specific questions posed by the Office in the Federal Register notice.

My general message is unambiguous and uncomplicated. The USPTO is a longstanding, serial violator of established regulatory principles. This is the product of a bureaucratic culture that treats presidential direction as interference, is adamantly opposed to basing regulatory decision-making on informed analysis, and has serious difficulty adhering to the rule of law. Each of these deficiencies is by itself a likely reason for bureaucratic failure, but in combination, they

¹ U.S. PATENT AND TRADEMARK OFFICE, *Improving Regulation and Regulatory Review; Request for Information*, 76 Federal Register 15891 (2011).

² BARACK OBAMA, *Executive Order 13563: Improving Regulation and Regulatory Review*, 76 Federal Register 3821 (2011).

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make success virtually impossible. Correcting them requires a radical change in the organization's culture.

An important step forward would be for the Director to appoint a qualified individual charged with reforming the Office's culture and to delegate to this person both the responsibility and the authority to make it happen. Tasks would include replacing counterproductive existing internal systems with modern ones designed and implemented to ensure that the Office complies with statutory requirements (e.g., the Administrative Procedure Act, the Paperwork Reduction Act, and the Regulatory Flexibility Act³) and presidential directives (e.g., Executive Orders 12866 and 13563, OMB's Bulletin for Good Guidance Practices, OMB's Information Quality Guidelines, and OMB Circular A-4⁴). Systems need to be established to ensure that rule-writing staff do not backslide at a later date. At a minimum, a number of personnel reassignments no doubt would be necessary.

LONGSTANDING REGULATORY PRINCIPLES

First, the President reiterated several fundamental regulatory principles that have been in place since at least 1993. Restated in bullet form, they are:

1. Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.
2. Our regulatory system must be based on the best available science.
3. Our regulatory system must allow for public participation and an open exchange of ideas.
4. Our regulatory system must promote predictability and reduce uncertainty.

³ 5 U.S.C. § 551 and 553; 5 U.S.C. §§ 601-612; 44 U.S.C §§ 3501-3520.

⁴ WILLIAM J. CLINTON, *Executive Order 12866--Regulatory Planning and Review*, 58 Federal Register 51735 (1993); EO 13563; OFFICE OF MANAGEMENT AND BUDGET, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication*, 67 Federal Register (2002); OFFICE OF MANAGEMENT AND BUDGET, *Final Bulletin for Good Guidance Practices*, 72 Federal Register 3432 (2007).

5. Our regulatory system must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.
6. Our regulatory system must take into account benefits and costs, both quantitative and qualitative.
7. Our regulatory system must ensure that regulations are accessible, consistent, written in plain language, and easy to understand.
8. Our regulatory system must measure, and seek to improve, the actual results of regulatory requirements.⁵

As a regular commenter on recent USPTO proposals and information collection requests, it is clear to me that the Office has had trouble incorporating these principles into its regulatory development processes. The specific questions on which the Office now seeks comment are important, to be sure, but they presume a counterfactual level of familiarity with and commitment to longstanding regulatory development principles and practices. Before the USPTO can effectively manage the new responsibilities the President has given it, the Office must actually make a habit of adhering to these longstanding principles. To do otherwise is to put the cart before the horse.

The starting point, of course, is compliance with the Administrative Procedure Act. This is an unusual problem in two respects. First, the USPTO is one of few Federal agencies that claim that their rulemaking actions are exempt. Second, the USPTO is a major violator of the APA insofar as it issues the vast majority of its regulations in the form of guidance. The Office succeeds because few persons with standing to challenge these violations are willing to risk its retaliation.

In the proposed regulations I have reviewed, the USPTO has not displayed much familiarity with or interest in the normal tools of regulatory policy analysis that have been used widely by Federal agencies for more than 30 years.

1. "Promoting economic growth, innovation, competitiveness, and job creation"

⁵ Paraphrased from EO 13563, Section 1(a).

To balance competing regulatory interests and goals, including the promotion of economic growth, innovation, competitiveness, and job creation, agencies must institutionalize a program of regulatory impact analysis. But the USPTO does not have such a program, and it has never performed a Regulatory Impact Analysis.

2. "Best available science"

Before an agency's regulations can "be based on the best available science," it must devote significant resources to obtaining such information and ensuring that it meets high information quality standards. The USPTO is fortunate insofar as it is a data-rich agency in many respects, but its recent regulatory actions do not show that it actually utilizes these data effectively.

3. "Allow for public participation and an open exchange of ideas"

The USPTO is poorly positioned to understand the external burdens and economic effects of its regulations and guidance, yet its culture does not welcome the "public participation and an open exchange of ideas" necessary to find out. Effecting cultural change is perhaps the most difficult management task any organization's leaders must accomplish, and given that the USPTO's culture displays such fervent resistance, there is no gainsaying how hard this could be to accomplish.

4. "Promote predictability and reduce uncertainty"

A routine complaint made by the USPTO's customers is that its regulations and guidance do not "promote predictability and reduce uncertainty," but instead often do the opposite. These deficits are magnified when the Office declines to supervise examiners who unilaterally deviate from established rules, guidance, and procedures.

5. "Identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends"

Recent regulatory proposals have not even sought to identify, much less implement, the "best, most innovative, and least burdensome tools for achieving regulatory ends." Rather, they have sought to export to applicants as much as possible of the burden of examination, while simultaneously refusing to account for these burden-shifts in accompanying Information Collection Requests. It has become the USPTO's practice to concern itself only with its own costs

and give little or no attention to the burdens it imposes on its customers, who after all, have nowhere else to go to obtain a U.S. patent.⁶ The vast majority of burdens the USPTO imposes appear to be illegal, having no valid OMB Control Numbers as required by the Paperwork Reduction Act.

6. "Take into account benefits and costs"

Before an agency can "take into account benefits and costs, both quantitative and qualitative," it must make a reasonable effort to estimate them. The USPTO has an established practice of not performing regulatory analysis, instead simply assuming that the benefits of its regulatory proposals are obvious and the costs are either negligible or unimportant. In my reviews of USPTO proposed regulations and guidance, I have not encountered a single instance in which the Office even considered the possibility that its actions could have unintended, adverse effects on innovation and competitiveness—a notably ironic result given the centrality of these factors in the agency's mission.

7. "Ensure that regulations are accessible, consistent, written in plain language, and easy to understand"

The USPTO does a generally excellent job making its regulations accessible, but consistency and comprehensibility have often taken a back seat to other goals, such as maximizing the Office's ad hoc interpretative discretion. Sometimes, as in the case of the USPTO's use of an undisclosed internal memorandum modifying restriction practice, the contrast between its generally transparent practices and its occasional lapses into authoritarian secrecy are starkly evident.⁷ USPTO leadership seem to lack effective management tools to prevent these lapses, or even to ameliorate them after the fact.

8. "Measure, and seek to improve, the actual results of regulatory requirements"

⁶ The standard economic model of monopoly explains the USPTO's performance. It produces suboptimal quantity at a superoptimal price, and fritters away the rents. See Chapter 4 in W. KIP. VISCUSI, et al., *Economics of Regulation and Antitrust* (MIT Press 2nd ed. 1997).

⁷ JOHN LOVE, *Changes to Restriction form paragraphs* (U.S. Patent and Trademark Office 2007).

To be sure, no Federal agency is highly enthusiastic about conducting ex post analysis of the effects of regulation to ascertain what really happened, for there is a significant risk that the results will not be pleasant. In this regard, the USPTO is not appreciably different from its sister agencies. What distinguishes the USPTO from other agencies is the wealth of data it has available that could be utilized to measure regulatory performance and quickly discover unintended effects.

In sum, the primary impediment facing the USPTO in implementing President Obama's 2011 Executive Order on regulation is that it hasn't yet implemented President Clinton's 1993 Executive Order on regulation. The Office's willful and persistent evasion of the 1993 directive has spanned multiple presidencies and numerous Patent Office Directors, so it cannot be remedied overnight. What could be remedied quickly is the Office's cultural expectation that it is tacitly exempt from these requirements.

As suggested above, the Director could accomplish this by appointing a specific individual to ensure that the Office fully complies with these longstanding regulatory principles. Such an appointment must include a delegation of bureaucratic authority commensurate with the responsibility. To ensure that the management reform outlives the tenure of the person assigned to establish and initially implement it, and that the bureaucracy does not return to its old ways, the Director must establish systems whereby the USPTO's customers can enforce Office compliance. One way to do this is to amend the rules making departures from administrative practice expressly petitionable. Another is to amend the Office's Information Quality Guidelines⁸ to expressly create a right of action whereby affected persons could contest defects in transparency and reproducibility unresolved by the internal administrative error correction process.

NEW REGULATORY PRINCIPLES

Second, President Obama announced two very important new principles for regulation. They are paraphrased in bullet form below,

⁸ See U.S. PATENT AND TRADEMARK OFFICE, *Information Quality Guidelines* (2002), at <http://www.uspto.gov/products/cis/infoqualityguide.jsp>.

with comments interspersed explaining why they are relevant to the USPTO.

9. Each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.⁹

Superficially, it might seem that the directive on scientific integrity does not apply to the USPTO. This is a cramped reading of the Executive Order. In the context of regulatory development, it means that the USPTO has an obligation to ensure the clarity, accuracy, and unbiasedness of all technical, statistical, and economic information it disseminates and utilizes in support of regulation.

Whereas the USPTO's historic practice has been to limit its disclosures to summary information supporting its predetermined goals, the Office now must open up its databases to the public. Whereas the USPTO's historic practice has been to spin the information it does disclose in unreasonably favorable terms, the Office now must refrain from injecting policy biases into its characterizations of the problems it intends to address by regulation and in its descriptions of the likely consequences of these actions. Regulatory analysis is supposed to be a tool for informing decision-making, not justifying decisions that have already been made.

10. Regulations shall be adopted through a process that involves public participation and based on the open exchange of information and perspectives.¹⁰

President Obama's directive on "open exchange" is elucidated more clearly in an implementation memorandum sent to all agency heads by Cass Sunstein, the Administrator of OMB's Office of Information and Regulatory Affairs. Administrator Sunstein explains what President Obama means by "open exchange":

In this context, "open exchange" refers to a process in which the views and information provided by participants are made public to the extent feasible, and before decisions are actually made. Section 2 [of the Executive Order] thus seeks to increase

⁹ Paraphrased from EO 13563, Section 5.

¹⁰ Paraphrased from EO 13563, Section 2.

participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself. In this way, Section 2 is designed to foster better and more informed agency decisions.

This provision is not satisfied simply through the acceptance of electronic submission of rulemaking comments by interested parties who lack information about the arguments and information provided by other parties.¹¹

In short, the USPTO must (a) make all relevant information public, (b) make it public early, (c) and make it public in such a fashion that a genuine dialogue amongst interested parties is both feasible and fostered. This is fundamentally different from the Office's longstanding practices—practices that, ironically, it follows even in this notice!¹²

Inexplicably, the USPTO's Federal Register notice does not even mention the Sunstein Memorandum, leaving most potential commenters utterly clueless and thus unable to respond effectively. This is, of course, an excellent way to limit the quantity and quality of public comment, thereby creating the misimpression that there is little or no interest among the USPTO's constituents in the reforms President Obama has mandated. Given the Office's well-documented cultural aversion to public participation, many will infer that the misimpression was intentional.

The second new regulatory principle continues by reminding agencies of existing procedural requirements:

¹¹ CASS R. SUNSTEIN, *Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies: Executive Order 13563, "Improving Regulation and Regulatory Review"*, Office of Management and Budget (2011), at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

¹² "All comments will be available for public inspection upon request at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available on the USPTO Web site at <http://www.uspto.gov>. All comments submitted through the Federal eRulemaking Portal will be made publicly available on that Web site." See *Improving Regulation and Regulatory Review; Request for Information*, p. 15892. Access will be non-interactive and too late to permit, much less foster, dialogue amongst interested parties.

- 10 (cont'd). To promote that open exchange, each agency shall:
- a. provide the public with an opportunity to participate in the regulatory process;
 - b. afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days;
 - c. for both proposed and final rules, provide timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded; and
 - d. for proposed rules, provide an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.¹³

On the last three of these requirements, the USPTO's practices are usually deficient. First, the Office often allows only 30 days to comment, as it has done for this notice.

Second, the USPTO is parsimonious in its disclosure of relevant information related to a regulatory proposal. This is especially so in the case of the regulations it issues via the dubious method of guidance (e.g., amendments to the MPEP). I am aware of several instances in which members of the public have, out of frustration with the USPTO's niggardly disclosure practices, resorted to Freedom of Information Act requests in an attempt to pry loose information that should have been routinely disclosed as part of a proposed rule. The Office's responses have been dilatory and abusive, often demanding thousands of dollars for the production of readily available electronic documents that ought to have been provided as a matter of normal and proper administrative practice.

Third, the incentive for the public to engage an agency through public comment depends on its expectation that the agency will take its comments seriously. On this margin, the USPTO fares poorly. The Office has an aversion to responding cogently to the public comments it receives, particularly if they address information that was not part of

¹³ Paraphrased from EO 13563, Section 2(b).

the Office's limited voluntary disclosure. In my reviews, I have noticed that the USPTO often reframes comments in unrecognizable ways, then responds only to its reframed comment. I have frequently noticed that the USPTO simply ignores comments that it apparently finds inconvenient to address. And the USPTO's most common response to an unsupportive comment is a simple refusal to engage. The Office merely says that it disagrees with the commenter; that it has well-founded beliefs that justify this disagreement; and that it declines to disclose or document these well-founded beliefs in any way that might permit accountability.

If the Director were to appoint an official to be responsible for compliance with administrative rules and procedures, it would be simple to change internal incentives so as to correct these persistent defects. The official could require full public disclosure as a prerequisite for the Director's signature, and act as the Office's point of contact should any member of the public identify information that ought to have been disclosed but was withheld. The official could require response-to-comment documents be structured so that it is easy to crosswalk each significant comment with the staff's reply. As Administrator Sunstein notes:

A central goal of public participation is to improve the content of rules, and open exchanges of information by interested parties can be helpful in that endeavor.

That goal cannot be achieved if agencies refuse to take public participation seriously.

SPECIFIC REQUESTS FOR COMMENT

In its request, the USPTO asks five specific questions. Each is reprinted below with suggestions concerning how the Office ought to proceed.

1. What is the best way for the Office to identify which of its significant regulations should be modified, streamlined, expanded, or repealed? What process should the Office use to select rules for review and how should it prioritize such review?

The best way to start identifying areas that need regulatory reform is to focus on those which have been the subject of complaints

by applicants and counsel. These complaints will have several flavors. Some will be about absolute or relative burden; e.g., a specific regulatory requirement requires much more time and expense than the USPTO realizes, or disproportionate burden relative to its marginal contribution to the examination task. Other complaints will be much more substantive; e.g., examiners fail to follow MPEP guidance that is nondiscretionary, imposing additional regulatory requirements on their own authority, or applying rules and guidance unpredictably, inconsistently, or punitively.

Some complaints will have been memorialized in petitions, public comments, and similar communications initiated by the public. Thus, an obvious starting point is to review these petitions and other communications. Such a review must be conducted independently of the offices that managed them initially; asking them to review their own work is a clear conflict of interest.

Other public complaints presumably would be available in reports published by professional associations and comments on patent law blogs (including, to a lesser extent, the Director's own blog). Social media have become the predominant form of interactive communication, and of course they are the most likely model for "open exchange" of the form envisioned by the President.

A final source of information is problem reports made by examiners to their supervisors. If the Office does not have such informal reports, then it has not been monitoring the work of the examination corps very closely. In that case, it would have to survey a representative sample of applicants.¹⁴

Setting priorities for regulatory reform is admittedly a more complex task. Nonetheless, some approaches can be ruled out. The Office must avoid any approach that ranks alternatives in accordance with their potential cost savings to the USPTO, or some other internal metric such as pendency for its own sake. As noted above, the Office

¹⁴ Surveys must be performed in compliance with the Paperwork Reduction Act and government-wide guidelines for statistical surveys. See OFFICE OF MANAGEMENT AND BUDGET, *Standards and Guidelines for Statistical Surveys*, Office of Management and Budget (2006), at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/statpolicy/standards_stat_surveys.pdf.

has displayed a near fetish for reducing its own costs without regard for the effects of these actions on applicants or on the broader social goals that the USPTO exists to advance. Similarly, the Office must not rank regulatory reform opportunities based on legislative ambitions, or misuse the President's directive to promote its legislative agenda. That could backfire at both ends of Pennsylvania Avenue.

Given the regulatory principles stated in President Clinton's 1993 Executive Order, now reiterated by President Obama, an appropriate way to rank alternative regulatory reform opportunities is in terms of their marginal net social benefit. This ranking should be performed two ways: (a) an unrestricted ranking that does not take account of expenditures by the USPTO that would be required to manage regulatory reform; and (b) constrained by a dollar-denominated resource commitment established by the Director for expenditures on regulatory reform activities. The latter ranking would reveal which reform opportunities the USPTO can accomplish within its current budget; the former ranking would identify for the President and the Congress what additional regulatory reform it could obtain if additional funds were appropriated.

2. What can the Office, relative to its regulation process, do to reduce burdens and maintain flexibility for the public while promoting its missions?

To develop a program aimed at reducing burdens and costs on the public, the USPTO must first produce comprehensive and objective estimates of burdens and costs under existing law and guidance. The Office routinely misclassifies its economically significant regulatory actions and thereby evades the requirement to conduct Regulatory Impact Analyses.¹⁵ On at least two recent occasions, the USPTO has designated billion-dollar regulations as "not significant."¹⁶

¹⁵ See, e.g., RICHARD B. BELZER, *Cost of Complying with the Proposed IDS Rule; Meeting at OMB, October 18, 2007* (2007), at http://www.whitehouse.gov/omb/oira_0651_meetings_663; RICHARD B. BELZER, *Letter to Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs [October 26, 2007]* (2007), at <http://www.whitehouse.gov/omb/assets/omb/oira/0651/comments/478.pdf>; RICHARD B. BELZER, *Letter to Nicholas A. Fraser, Desk Officer for the U.S. Patent and Trademark Office, Office of Information and Regulatory Affairs, Office of Management and Budget RE: ICR 0651-00xx ["October 14th ICR Comment"]* (2008), at

For this reason, responding constructively to President Obama's directive will require a radical change in USPTO culture. For a start, this means designating by default every proposed regulation as economically significant, as that term is defined in Section 3(f)(1) of President Clinton's 1993 Executive Order, and budgeting for the time and expense of a Regulatory Impact Analysis. Only if it can be shown persuasively that a proposed regulation or guidance is not economically significant should this presumption be rescinded.¹⁷

As I have shown in previous public comments to the USPTO, virtually every Office regulatory action has effects that plausibly exceed the threshold for economic significance if it increases paperwork burden by about 2%.¹⁸ This is much less than uncertainties

<http://www.reginfo.gov/public/do/DownloadDocument?documentID=90554&version=1>; RICHARD B. BELZER, *Letter to Nicholas A. Fraser, Desk Officer for the U.S. Patent and Trademark Office, Office of Information and Regulatory Affairs, Office of Management and Budget RE: ICR 0651-00xx: ICs and Burden Estimates ["November 17th ICR Comment"]* (2008), at
<http://www.reginfo.gov/public/do/DownloadDocument?documentID=93894&version=1>; RICHARD B. BELZER, *Letter to Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget RE ICR 0651-0031* (2008), at
<http://www.reginfo.gov/public/do/DownloadDocument?documentID=57744&version=1>.

¹⁶ U.S. PATENT AND TRADEMARK OFFICE, *Examination of Patent Applications That Include Claims Containing Alternative Language; Proposed Rule [0651-AC00]*, 72 Federal Register 44992 (2007); U.S. PATENT AND TRADEMARK OFFICE, *Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals; Proposed Rule [0651-AC12]*, 72 Federal Register 41472 (2007).

¹⁷ A reasonable approach is to designate every draft proposed or final rule as economically significant unless the Administrator of the Office of Information and Regulatory Affairs directs the USPTO in writing to lower the classification.

¹⁸ RICHARD B. BELZER, *Public Comment on Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals; Notice of Proposed Rulemaking (RIN 0651-AC37; Docket ID PTO-P-2009-002, ICR Reference Number 201010--0651--001, 75 FR 69,828); and Error Correction Request submitted pursuant to USPTO's Information Quality Guidelines* (2011), at
http://www.uspto.gov/ip/boards/bpai/procedures/rules/rule_comment_nov2010_belzer.pdf.

in the Office's current burden estimates and it is dwarfed by known errors in these estimates.¹⁹

To reduce paperwork burdens on the public the USPTO must first correctly estimate the burdens of its existing information collections. Current USPTO burden estimation practices are substandard, and the Office is unresponsive to public comments that say so. USPTO has no comprehensive inventory of its information collections and it ignores the information collection burdens created by the MPEP. Over a year ago, the Office sought comment on a proposed revision to its burden estimation methodology. Nothing apparently has come of this effort.

The USPTO is well aware of the requirement to perform Regulatory Impact Analysis and OMB's guidance explaining how to do so. The USPTO also is well aware of its statutory obligation under the Paperwork Reduction Act to objectively estimate burden. The Office simply has refused to comply with these statutory requirements and presidential directives. Correcting this state of affairs will require a radical cultural change, something only the Director has the authority to mandate.

3. How can the Office ensure that its significant regulations promote innovation and competition in the most effective and least burdensome way? How can these Office regulations be improved to accomplish this?

The purpose of performing economic analysis, as required by President Clinton's 1993 Executive Order, is to identify and compare an array of reasonable regulatory and nonregulatory alternatives and objectively estimate their costs, benefits, and other effects such as innovation and competition. As noted above, however, the USPTO has an established culture that rejects the principal that regulatory analysis might usefully inform decision-making. Thus, the Office's regulatory decisions are grounded more ethereally, most notably on the intuition and opinions of its senior staff. What informs their intuition and opinions, however, is anybody's guess.

This means the USPTO has two logical paths whereby its regulations might be improved so as to promote innovation and

¹⁹ The USPTO understates paperwork burden by about 12% just by using a median rather than a mean value for the "average" cost of attorney time.

competition in the most effective and least burdensome way. The first path involves establishing an effective program of regulatory impact analysis, as has been required of all federal agencies since 1981. The other path involves replacing the Office's senior staff with individuals, who by dint of clairvoyance or superior intellect, happen to have better intuition and more informed opinions.

4. Are there USPTO regulations that conflict with, or are duplicative of, regulations from other agencies? If so, please identify any such rules and provide any suggestions you might have for how this conflict or duplication can be resolved in order to help the Office achieve its mission more effectively.

As an analyst who is not an inventor or a registered patent attorney, I am unable to provide specific examples of possible interagency conflicts or duplications. Nonetheless, I am confident based on more than 25 years of experience performing and reviewing Regulatory Impact Analyses that such conflicts and duplications are much more likely to be discovered when rigorous analysis is performed. The absence of evidence that such conflicts exist is not evidence that they are absent, just the predictable result of failing to investigate.

5. How can the Office best encourage public participation in its rule making process? How can the Office best provide a forum for the open exchange of ideas among the Office, the intellectual property community, and the public in general?

In addition to recommendations made above, I have two concrete suggestions for how the USPTO could implement President Obama's principle of open exchange.

First, the Office could establish a social media portal to foster discussion, develop ideas, and share information relevant to the regulatory process. The technology for this is in widespread use in the private sector. To achieve open exchange, such a portal must expressly permit public interaction without mediation or supervision by USPTO staff.²⁰

²⁰ The USPTO should retain, and exercise prudently, the responsibility for removing comments that violate established netiquette principles.

The portal must provide the public with direct, unencumbered access to all relevant data, models, and analyses under the Office's control that could be useful for informing discussion and identifying problems that might warrant regulatory solutions. To make this work, the USPTO also should actively participate in the discussion and must utilize the information it generates. The Office's customers will invest in open exchange only to the extent that they perceive that the Office is taking it seriously.

Second, the Office could use the Paperwork Reduction Act as an instrument for informing regulatory decision-making rather than treating it as a nuisance. The PRA process is supposed to be public and transparent, so it provides a valuable setting in which to discuss regulatory alternatives and identify data that could inform the estimation of costs, benefits, and other effects. Where data gaps are discovered that impede good analysis, the PRA provides the legal machinery for devising data collection protocols and obtaining the necessary clearances. By utilizing the Paperwork Act intentionally, the USPTO can reduce conflict and controversy and expedite both the analytic process and the regulatory development timeline.

Sincerely yours,



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