

December 4, 2014

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives
B-351 Rayburn House Office Building
Washington, DC 20515

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government
Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government
Reform
United States House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

**Re: Hearing on “Abuse of USPTO’s Telework Program:
Ensuring Oversight, Accountability and Quality”**

Dear Chairmen Goodlatte and Issa, and Ranking Members Conyers and Cummings:

I am writing on behalf of the American Intellectual Property Law Association (“AIPLA”) to express our views in relation to the hearing on November 18, 2014, entitled “Abuse of USPTO’s Telework Program: Ensuring Oversight, Accountability and Quality.” We are grateful for the opportunity to provide the Committees with AIPLA’s perspective on the importance of telework to United States Patent and Trademark Office (USPTO or Office) operations generally and on the importance of finding management processes that can address any abuses by USPTO employees without sacrificing the essential benefits that a flexible work environment provides to the USPTO mission. We would ask this statement be included in the record of the hearing.

AIPLA, with nearly 15,000 members, is in a unique position to comment on the importance of the patent system and the need for careful stewardship of that system by the USPTO. Founded in 1897, AIPLA members represent both owners and users of intellectual property, as well as those who litigate intellectual property (IP) rights and file and prosecute patent and trademark applications before the USPTO. As customers of the USPTO, AIPLA members have a keen interest in ensuring that the USPTO is operating both efficiently and effectively to provide the highest quality of patent examinations.

Introduction

The USPTO provides an indispensable service to U.S. innovators and the economy by granting quality patents for the protection of valuable IP assets. Quality patents are the cornerstone of the U.S. patent system, providing confidence in the U.S. intellectual property system and ensuring the incentives for innovation. Thus, high quality examinations must be the number one priority of the Office.

The USPTO telework program is an important element in the pursuit of quality patents. Generally speaking, it provides an economical way to accommodate a growing workforce of examiners, benefitting, the agency, and users of the U.S. patent system. For employees, the program eliminates commuting costs, provides flexibility, and introduces a positive balance to work life and personal or family needs. For the Office, the program saves money on space rental, increases employee retention and efficiency, and enhances employee morale. For users of the U.S. patent system, the program contributes to the retention of experienced USPTO employees who perform high quality examinations at reduced operating costs.

Working from home is becoming more and more common in American businesses. According to the Bureau of Labor Statistics, 23 percent of employed persons in 2013 did some or all of their work at home.¹ Advancements in technology have allowed for the growth of such teleworking programs. At the USPTO, ever-improving IT systems have given teleworking examiners access to the same patent examination tools that are used at the USPTO campus. Current IT systems are intended to allow examiners to work from home in a virtual environment in the same manner as examiners that come into the office every day.

The title of the November 18th hearing referred to abuses of the USPTO telework program, but some of the problems discussed concern issues of general management and supervision that are not necessarily unique to teleworking. While many of the problems identified do occur with teleworking, similar concerns have been raised at times about the examination system as a whole. This is not to minimize the seriousness of the problems, because any abuse of the system is intolerable. That said, testimony at the hearing suggested that lapses in oversight, accountability, and quality probably arise in a small proportion of all of the Office's activities, and thus we are confident that the majority of USPTO workers—both remote and at the office—are dedicated and professional employees.

However, the USPTO must ensure that examiners are not abusing the flexibilities of their work plan, whether as teleworker or not, by not working the hours expected. Users of this fee-funded agency who bear its entire operational cost (over \$3 billion in fiscal year 2014) are entitled to expect in return for their fees the highest quality performance of USPTO employees as well as the necessary management to produce that result. USPTO managers must ensure that examiners spend the time needed to conduct thorough prior art searches, to complete detailed evaluations of patentability, to produce clear and comprehensive Office Actions, and to fully consider applicant responses.

¹ See American Time Use Survey—2013 Results, USDL-14-1137 (U.S. Bureau of Labor Statistics, June 18, 2014). Available at <http://www.bls.gov/news.release/pdf/atus.pdf>.

The benefits of a flexible work arrangement, whether for teleworkers or office workers, are only justified when there are sufficient controls in place to ensure that quality examination is not sacrificed. Patent applicants and others using the patent system deserve a full and complete examination in return for the fees users pay to the agency.

With the freedoms and flexibilities of the USPTO telework programs comes the need for responsibility and accountability as to both employees and managers. Some USPTO employees and managers have reported to the Inspector General of the Commerce Department incidents of a variety of behaviors at the USPTO, including time fraud, “end-loading,” and “mortgaging.” To the extent that problematic behaviors have occurred, they *must* be corrected. Not only are these behaviors wrong, but they also threaten the integrity of the Office, the federal government, and the public confidence in our patent system.

There must be appropriate supervision of all employees, including teleworkers, to ensure that the Office is maintaining the highest standard of quality as it strives to meet its productivity goals. First line managers must be given the tools to do their job, that is, to ensure a proper high quality examination, and they should not be hindered from doing that job through lax policies.

Goals That Should Be Pursued

In considering the problems identified by the reports to the Office of the Inspector General and at the hearing, AIPLA believes that the USPTO should pursue the following goals that are applicable to both teleworkers and office workers.

Examiner accessibility. Quality examination of a patent application often requires a collaborative process between the applicant and the examiner, and yet we have heard reports of examiners who were either inaccessible or unresponsive to applicant communications. We urge the Office to enhance the opportunities for applicants and examiners to interact as we believe this leads to higher level of understanding and better examination results.

AIPLA has expressed support for several new programs at the USPTO, including the First Action Interview Program, the Track One option, the After Final Consideration Pilot (2.0), the Pre-Appeal Program, and the Quick Path Information Disclosure Statement option. (AIPLA Comments on USPTO Strategic Plan FY 2014-2018). We see these as opportunities for greater interaction between examiners and applicants. We also urge the USPTO to continue promoting interviews as an effective tool for identifying and addressing issues during prosecution. In order for these programs to work effectively, examiners must be accessible to applicants. We understand that this has been emphasized in examiner training, and we encourage the Office to continue those efforts.

We also acknowledge the April 2013 Guidance on how to address nonresponsive examiners and the agreement with Patent Office Professional Association (POPA), the patent examiner union, to strengthen the document management element. AIPLA looks forward to working with the USPTO to assess how the steps already taken to address telework concerns are working, and whether further steps are needed.

Cost-effectiveness. The USPTO is an agency funded by user fees, and therefore dependent on customers paying fees for patent and trademark services. Congress recently gave the Office authority to set its own fees, and this authority includes the responsibility to provide users what they pay for – a quality examination.

Efficiency. Efficiency in any operation is an important goal, but efficiency is not achieved when the cost of speed and productivity is a reduction in the quality of the work. Great harm to the patent system would result if the USPTO were to sacrifice quality in order to get its work completed.

As for hiring additional examiners, the USPTO should not do so without putting in place adequate accountability, supervisory, and training measures. Training a patent examiner is a costly and time-consuming commitment, and it often takes several years for an examiner to learn to work independently. If the USPTO finds that flexible work plans are getting in the way of proper training and oversight, corrections must be made.

Culture of accountability. The managerial issues noted in the reports to the Inspector General demonstrate a culture where the policies for monitoring and supervising the work being done are not always clear or are not being enforced. If supervisors at the USPTO feel that they are not supported in monitoring, overseeing, and enforcing rules and policies, upper management at the USPTO needs to take note and act accordingly.

It is improper for any examiner to manipulate the system to claim more hours than actually worked and to meet productivity goals without actually completing the work or by producing low quality work. It is equally improper for supervisors to forego the review of examiners or to be discouraged from correcting any identified problems. There are supervisors who feel they have not been given the tools to appropriately manage employees, or if they have the tools they are unable to use them. The USPTO must correct these problems before the vast majority of employees who follow the rules and produce high quality work become disenchanted with the lack of oversight.

The USPTO reports that steps are being taken to address concerns raised by the internal review of the telework program. We understand that the Office has reached an agreement with POPA on the use of collaboration tools. While these are positive steps, the open question is whether further actions are necessary. For example, we note that the use of the “presence indicator” has been excluded. We encourage the USPTO to explore other ways to measure responsiveness, collaboration, and customer service by all of its employees, regardless of location.

As AIPLA stated in a letter to the USPTO in 2013, a renewed emphasis on quality management is a critical issue facing the USPTO, requiring adequate metrics for patent quality not only for the patent document itself but also for examination procedures. (AIPLA Comments on USPTO Strategic Plan FY 2014-2018). The USPTO recently announced a series of public meetings for early 2015 to gain feedback from stakeholders on ways to enhance the quality measures at the USPTO, and AIPLA looks forward to participating in those meetings.

Additionally, we also understand, based on a comment by Deputy Director Lee during the Opening Plenary Session at the AIPLA 2014 Annual Meeting, that a third-party company audit of the patent telework program is to be conducted. It was recently announced that the National Academy of Public Administration (NAPA) has been contracted to take on this process. AIPLA stands ready to offer assistance to the USPTO and/or NAPA in evaluating the telework program.

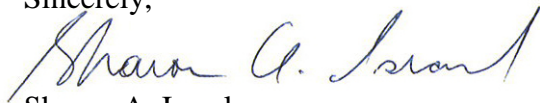
Conclusion

Ultimately, the benefits of allowing examiners to telecommute are worth the risks associated with the flexibilities afforded to employees. However, systems need to be in place to ensure the high quality examination of each and every patent application and the issuance of patents of proper scope when justified.

It is apparent that there is more work to be done to address the problems identified in the reports to the Inspector General. Although most examiners follow the rules and procedures in place, any findings of abuse in the system are objectionable. Additionally, the Office must provide supervisors with the tools and support to do their jobs of training their examiners, monitoring the quality of the work product, and monitoring compliance with the rules and policies for patent examiners.

AIPLA looks forward to working with the Committees and the USPTO to enhance operations at the Office, to ensure high-quality patent examination through adequate supervision of examiners, and to ensure that our members are getting the services for which they are paying. We thank you in advance for your consideration of these comments and we would be pleased to answer any questions they may raise.

Sincerely,



Sharon A. Israel

President

American Intellectual Property Law Association