

Senate Appropriators Pass Bill Enabling Search Outsourcing *Allow Applicants to Supply Their Own Search Reports*

The Senate Appropriations Committee this month passed a fiscal year 2005 appropriations bill that would allow the USPTO to outsource to foreign companies, enable patent applicants to conduct their own prior art searches, and reinstate USPTO fee diversion—actions that POPA and other intellectual property associations worked hard to prevent in the House-passed Fee Modernization bill earlier this year.

The appropriations bill, S. 2809, would grant unconditional authority to the USPTO to accept prior art searches provided by patent applicants and to contract agency searches with “a qualified search authority.” However, the bill neglects to define “qualified.”

Without statutory protections, the bill implicitly sanctions commercial search providers to compete for applicants’ business. This creates a conflict of interest by permitting search providers to offer the most advantageous search outcomes to applicants. Commercial vendors may not have the government’s best interest in mind when competing for search dollars.

Giving applicants the opportunity to supply their own search reports—a situation first proposed in the USPTO’s 21st Century Strategic Plan—is again like allowing the fox to guard the henhouse.

The House Judiciary Committee tempered this and the agency’s broader push to outsource by passing legislation last spring (H.R. 1561) that limits the search outsourcing to an 18-month pilot program. Other conditions for outsourcing in H.R. 1561 include requiring all individuals who conduct USPTO searches to be U.S. citizens, allowing only USPTO personnel to search applications that concern classified information, and prohibiting search contracts to any commercial entity that has a financial interest in any current or pending patent or patent application.

Those conditions are gone from the Senate Appropriations bill, giving the USPTO carte blanche to outsource.

Lose-Lose Situation for Patentee Community

Organizations representing patentee concerns had promoted an end to the government practice of diverting patent fees to the general U.S. Treasury. They accepted steep administration-proposed increases in patent fees in exchange for no fee diversion. Their rationale was that ending fee diversion would dramatically increase USPTO funding, which would enable faster processing of patent applications.

During the House Judiciary Committee’s consideration
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POPA Meets with USPTO Director

Since assuming the helm of the USPTO, Jon Dudas has met twice with POPA. At these meetings he listened to employee concerns relative to “festering” problems at the agency that lower-level officials have been unwilling to address. These include the heavy-handed employee monitoring at Carlyle and the agency’s refusal to honor labor-management agreements.

Mr. Dudas on Badging Out

When told of employees’ concerns over the time-clock method of badging in and out, Mr. Dudas was puzzled by any objection an honest employee would have to monitoring of his or her whereabouts.

POPA representatives explained to him:

1. The USPTO has shown no legitimate security reason to have badging out. In an emergency the gates will be opened, allowing all to exit without badging. Employees also will be using emergency exits that do not have monitoring equipment. Therefore keeping track of employees will be impossible. In a non-emergency situation, the agency has no security need to know who is in the building at any time.

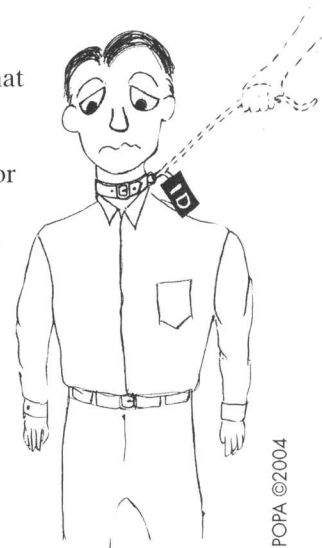
Therefore, employees conclude that the only reason for the badging out is minute-by-minute staff monitoring—a highly unusual workplace practice for professionals.

2. Badging in and out violates the USPTO’s own Day One Initiatives. The agency enacted these standards when the USPTO became a performance-based organization in 2000. The initiatives eliminated the sign-in/sign-out requirements and guaranteed no agency subterfuges to closely watch employees.

One long-time employee described the Day One Initiatives as “an inspiring act of trust” in employees that made her feel renewed loyalty and responsibility to the agency. She said the USPTO’s confidence in her

USPTO Professional: On a Short Leash

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Examiners Gain Timely Notice of Express Abandonments

The USPTO agreed to keep patent examiners in the information loop regarding Image File Wrapper express abandonments as a result of a grievance that POPA filed in July.

The USPTO process had been that when the agency received express abandonments it first notified examiners. Then in spring 2004 the agency changed the process so that express abandonments went immediately to the IFW staff, which then gave credit for abandonments to the examiners without telling them. Examiners wouldn't discover the abandonments until one to two pay periods later. The USPTO began this process without any forewarning or notification to employees. POPA then filed a grievance.

If an examiner is striving hard to achieve a production goal award, he or she may work unpaid overtime to meet that goal. When the examiner then finds out too late that the extra effort—and the sacrifice of valued family and personal time—was unneeded for earning the production award, the natural result is resentment towards the agency and low morale.

The USPTO, on the other hand, has a legitimate need to have a procedure to quickly note express abandonments so that those applications are not published under the pre-grant publication procedure. Scanning those papers immediately into the system before sending notice to examiners achieves that requirement.

The agency said in its Sept. 3 response to POPA's grievance that it will:

1. Notify examiners "by sending an IFW message when express abandonments are counted in the Pre-Grant Publication Office."

2. Each fiscal year examiners "will be given an opportunity to delay credit until the next fiscal year for an express abandonment that comes in during the last biweek of the fourth quarter."

3. While the USPTO will not adjust third quarter FY '04 production reports at the time, upon an examiner's request it will manually adjust the reports on a case-by-case basis in instances in which the timing has an effect "on ratings, awards or any other aspect of employment." This would include being able to work paid overtime or receive a within-grade increase.

Senate Passes Search Outsourcing Bill

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of H.R. 1561, the parties agreed to compromise on a system that accounted for the concerns of House appropriators about congressional control of USPTO funds. H.R. 1561 includes a system for depositing fee revenues in excess of the legislatively determined USPTO appropriation into a trust fund, from which the USPTO would rebate the unused fees to patent applicants at the end of the fiscal year.

S. 2809 incorporates most of the fee increase provisions from H.R. 1561, but drops the rebate system. Patentees therefore are left with a highly inflated fee schedule with no assurance of rebates or significantly more funding for the USPTO.

While the appropriations bill outwardly would affect only fiscal year 2005, specific language in the legislation says otherwise. The proposal states upfront that the fee increase only affects FY 2005, but language later in the search fee portion of the bill puts a maximum on fees paid to a contracted search provider for a three-year period and then says: "The [USPTO] Director may not increase the search fee by more than 20 percent in each of the next three one-year periods." [Emphasis added.]

POPA is advocating on Capitol Hill to have the appropriations bill amended on the Senate floor or in the House-Senate conference. The union has proposed amendments that will allow an increased USPTO appropriation while protecting the integrity of the patent system from reckless outsourcing.

POPA Meets with USPTO Director

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motivated her to do the best she could.

The badging-in and out, on the other hand, has demoralized employees to the point where they may become clock-watchers, only doing what is required to get by.

3. The USPTO invested many millions of dollars in the ultra-high tech guard stations, but the agency claims it can't afford to turn the air conditioning on during weekend non-peak hours or pay for employee training. By its actions the USPTO demonstrates that it doesn't value employees as individuals willing to strive and excel at all hours on the government's behalf.

USPTO Changes Phone Monitoring Process

On a positive note, Mr. Dudas agreed to reprogram the Carlyle campus phone system so that it only records the phone numbers of incoming and outgoing calls. POPA had published in its August newsletter that the agency was recording all the digits keyed in for incoming and outgoing calls, including personal identification numbers and access codes.

This Management Directive was memorialized in the Aug. 30, 2004, *USPTO Weekly*. POPA hopes that this is the first in a series of positive changes that will help to improve employee quality of life and morale at the USPTO.

While Mr. Dudas may not have expressed enthusiasm for some of the issues brought forth at these meetings, he is (unlike his predecessor) taking the time to listen to the concerns of employees. He is at least interested in looking into issues and in hearing POPA's suggestions and solutions to these problems. POPA hopes to hear from the agency soon about the above and other issues, and looks forward to the lines of communication remaining open.

