



UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D.C. 20230

November 5, 2010

MEMORANDUM FOR: David Kappos, Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office

A handwritten signature in black ink, appearing to read "Todd J. Zinser".

FROM: Todd J. Zinser
Inspector General

SUBJECT: U.S. Patent and Trademark Office (USPTO) Patent Quality Assurance Process (Final Report No. OIG-11-006-I)

We are providing our final report on our inspection to determine the effectiveness of USPTO's patent quality assurance program in ensuring that established quality standards are met, and whether USPTO's patent quality assurance process complies with applicable federal, bureau, and other laws, regulations, policies, procedures, and guidelines. Our report describes internal control weaknesses and recommends steps to improve internal controls related to the quality assurance program.

While USPTO incorporates quality assurance into its patent review process, our review found that USPTO lacks standard policies, procedures, and practices for the patent quality assurance program in both the technology centers (TCs) and the Office of Patent Quality Assurance (OPQA). We also found that TCs are not required to consider OPQA's decisions during the resolution and adjudication of patent errors, and that OPQA does not monitor how the patent processing errors it finds in its reviews are adjudicated within the TCs. Lastly, we discovered potential violations of departmental litigation hold notices and improper disposition of records.

We recommend that the Commissioner for Patents establish standard policies, procedures, and practices for quality assurance reviews within the TCs and OPQA; clarify OPQA's role in monitoring the final adjudication of patent errors within the TCs; implement practices to ensure that patents are reviewed and issued within the timeframes established by the American Inventors Protection Act (AIPA); adhere to USPTO's *Comprehensive Records Schedule*; and comply with litigation hold notices.

We met with USPTO officials on October 14, 2010, to discuss our findings and recommendations; we later received written comments from USPTO in which the agency generally concurred with our findings and recommendations. Based upon this input from USPTO, we modified certain recommendations and made other technical edits as appropriate. According to USPTO, since we completed our review the agency has begun to develop and implement changes that address our recommendations. We request that, within 60 days of this letter, you provide us with an action plan outlining the actions USPTO has taken or will take to address our recommendations.



We thank USPTO personnel for the assistance and courtesies they extended to us during the review. If you have any further questions or comments about the report, please feel free to contact me at (202) 482-4661 or Ron Prevost, Assistant Inspector General for Economic and Statistical Program Assessment, at (202) 482-3052.

Background

The mission of USPTO is to foster U.S. innovation and competitiveness by providing high-quality, timely examinations of patent and trademark applications; guiding domestic and international intellectual property policy; and delivering intellectual property information and education worldwide. In its 2007-2012 Strategic Plan, USPTO defines quality as “accurate and consistent results in examination. It presumes improved inputs, better-focused examination, improved review processes, and consistent examination results.”

USPTO’s quality assurance program is executed through two major components: integrated quality reviews within each of USPTO’s nine TCs¹ and quality assurance reviews by OPQA. Within each TC, supervisory patent examiners (SPEs) and training quality assurance specialists (TQASs) support quality assurance. The SPEs directly supervise the performance of primary and junior examiners. The TQASs assist examiners with questions, conduct examination reviews, and determine training needs for the TC. Both SPEs and TQASs report to TC directors.

OPQA’s primary goal is to assess the quality of patent examination and to provide the metrics used by USPTO to report patent quality: the allowance compliance rate (i.e., the percent of allowed patent cases reviewed in which no unpatentable claims were found), and the in-process review compliance rate (i.e., the percent of final and non-final actions reviewed in which no examination deficiency was found). OPQA is under the direction of the Deputy Commissioner for Patent Examination Policy, and OPQA’s performance is evaluated independently of the TCs.

Objectives, Scope, and Methodology

In June 2008, the Senate Subcommittee on Commerce, Justice, and Science requested that the Department of Commerce’s Office of Inspector General examine USPTO’s quality assurance program. The objectives of our inspection were to determine

- the effectiveness of USPTO’s patent quality assurance process in ensuring that established standards are met for patent examination quality, and
- whether USPTO’s patent quality assurance process complies with applicable federal, bureau, and other laws, regulations, policies, procedures, and guidelines.

We performed our fieldwork from August 2008 to November 2009 at USPTO’s headquarters in Alexandria, Virginia. We reviewed applicable laws, regulations, and USPTO operating procedures. We also interviewed USPTO officials and representatives from the Patent Office Professional Association (the patent examiners’ union) and conducted analyses of the quality assurance policies, procedures, and practices of TCs and OPQA.

¹ TC 1600, 1700, 2100, 2600, 2800, 2900, 3600, 3700, and 4100.

We conducted this review in accordance with the Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency, dated January 2005, and under the authority of the Inspector General Act of 1978, as amended, and Department Organizational Order 10-13, dated August 31, 2006. Our findings are discussed in detail in the following sections.

Technology Centers Lack Standard Policies and Procedures for Quality Assurance Reviews

USPTO reviews and processes patent applications in compliance with Title 35 of the U.S. Code; Title 37 of the Code of Federal Regulations; and USPTO's own *Manual of Patent Examining Procedure*.² However, the criteria do not require or recommend that USPTO prepare written policies, procedures, and standards for its quality assurance program.

While the TCs have guidelines for preparing examiner performance appraisal plans and checklists for conducting quality assurance reviews, they lack comprehensive, consistent policies and procedures for ensuring the quality assurance process was performed accurately and timely. Specifically, the TCs are not consistently (1) resolving errors reported in OPQA reviews, (2) reviewing quality assurance cases in a timely manner, (3) practicing consistency in charging examiners with errors, and (4) ensuring impartial selection of individual patent cases for closer review.

As a result, improper patents could potentially be issued; errors in patent applications may not be corrected; processing time for patent applications may exceed AIPA timeframes; errors charged to examiners may be inconsistently determined, thereby negatively impacting staff performance appraisals; and favoritism may be introduced into the selection process for reviewing examiners' patent cases.

Recommendation

We recommend that the Commissioner for Patents establish policies and procedures for quality assurance reviews, including standards for

1. resolving errors reported in the OPQA reviews,
2. reviewing the OPQA referrals within AIPA timeframes,
3. implementing consistent practices for charging examiners with errors, and
4. establishing clear criteria for closer reviews of individual patent cases.

²See 35 U.S.C. §§ 1 – 376 (2010); 37 CFR §§ 1.1-5.25 (2010); and *Manual of Patent Examining Procedure*, revised July 2008.

OPQA Lacks a Substantive Role in the Final Disposition of Conceded Error Adjudication

Although OPQA's primary role is to assess the quality of patent examination, OPQA does not have the authority to ensure that the TCs implement any change that impacts the final decision on an application, even when the TCs agree the application contains errors. Also, based on our review, OPQA is not involved in the final disposition of conceded errors, nor does it collect data on how these errors are adjudicated within the TCs.

If the TCs inform OPQA of their responses to conceded errors, or provide OPQA copies of applicable corrective action forms, it would clarify OPQA's role in the quality review process, potentially limiting the number of applications issued in error. The lack of OPQA follow-up prevents USPTO from receiving valuable information that it could use to improve patent examination quality and examiner competency, such as feedback on the quality review process, potential training indicators, deficiencies in review criteria, error resolution processes, and adherence to timeframes.

Recommendation

We recommend that the Commissioner for Patents (1) clarify the role for OPQA in the resolution process and in monitoring the final adjudication of agreed-upon errors within the TC, and (2) establish a transparent resolution process, including procedures for use within the TCs.

OPQA Lacks a Formal Training Program and Uniform Guidance for Its Quality Assurance Process

OPQA does not have an established quality assurance specialist training program or documented training procedures. Because of OPQA's mission, the lack of such processes is detrimental to patent quality. Without training programs and procedures in place, OPQA cannot ensure a consistent and equitable review process. Furthermore, at the time of our review, USPTO lacked a documented, uniform process to ensure the effectiveness of its quality assurance program; however, USPTO stated that it has since updated its standards for the quality review process. Given the increased complexity and volume of patent applications, it is more important than ever to establish standard policies and procedures governing the quality assurance process so that examiners and quality assurance specialists can identify errors in a timely, efficient, and accurate manner.

Recommendation

We recommend that the Commissioner for Patents establish documented procedures and standards for quality examination reviews, and develop and implement a consistent training policy and program for quality assurance specialists.

Instances of Potential Improper Records Disposition Were Identified

USPTO's *Comprehensive Records Schedule* provides record retention requirements for the TCs, including what should be maintained and when it may be destroyed. According to the schedule, the types of records, including documents related to signatory authority, used in the quality

assurance program should be maintained for at least 2 years.³ Further, during the period covered by our review, USPTO was under active litigation holds from the Department of Commerce's Office of General Counsel. Each of the two litigation holds prohibited the destruction of human-resource-related information. One litigation hold dated back to November 1997 and was in effect during the entire time of our review;⁴ the other, dated June 2008, related to two cases with similar issues as the case in the 1997 notice. The two cases identified in the 2008 notice were both resolved by late 2009, but the litigation hold notice was not rescinded because it pertained to the same documents identified in the 1997 notice.

During our review, we discovered several potential instances of improper disposition of records. In interviews conducted during our review, three TC directors and nine TQASs informed us that the TCs do not maintain quality review documentation as called for by USPTO's *Comprehensive Records Schedule*. Personnel in six of the nine TCs said that information on quality assurance, such as examiner errors, are not readily available and are intentionally not maintained. Some TC officials stated that records are not readily available because USPTO lacks a central repository to store such data, while several TC officials said that records are intentionally not maintained (i.e., it has been USPTO practice for years to shred signatory review data and other quality assurance data) in order to minimize requests for such information through the Freedom of Information Act and the Patent Office Professional Association.

USPTO's practice of destroying signatory review records appears to violate the Federal Records Act, USPTO's records retention policies, and Departmental litigation holds. The potential cases of improper disposition will be examined in greater detail by our Office of Investigations.

Recommendation

We recommend that the Commissioner for Patents ensure that the TCs are adhering to litigation hold notices, and that they clarify and comply with USPTO's *Comprehensive Records Schedule* for the appropriate retention and disposition of records.

cc: Welton Lloyd, Audit Liaison, USPTO
Robert Stoll, Commissioner for Patents, USPTO
Margaret Focarino, Deputy Commissioner for Patents, USPTO
Robert Bahr, Acting Associate Commissioner for Patent Examination Policy, USPTO
Bo Bounkong, Associate Commissioner for Patent Resource and Planning, USPTO
Paula Hutzell, Director, Office of Patent Quality Assurance, USPTO
John Mielcarek, Administrator for Patent Resource, USPTO

(BSD-19345)

³ United States Patent and Trademark Office. 2008. *Comprehensive Records Schedule*. September 2008 Edition.

⁴ This litigation hold remains in effect because that particular case is still open in Federal Court.