

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

November 18, 2014

**Joint Hearing by The Committee on the Judiciary and The Committee on
Oversight and Government Reform**

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Vice Chair, Patent Public Advisory Committee (PPAC)

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Introduction and PPAC Background

Good afternoon Chairman Goodlatte, Chairman Issa, Ranking Member Conyers, Ranking Member Cummings, members of the Committees, it is my great pleasure to be here today on behalf of the Patent Public Advisory Committee (PPAC) to the USPTO. My name is Esther Kepplinger and I am Vice Chair of the Committee.

As you may be aware, the Public Advisory Committees for the USPTO were created by statute in the American Inventors Protection Act of 1999 to advise the Under Secretary of Commerce for Intellectual Property and Director of the USPTO on the management of its patent and the trademark operations. The PPAC members, appointed by the Secretary of Commerce, are selected to represent the interests of the diverse users of the USPTO, such as IP practice, industry/manufacturing, research & development, academia and independent inventors and included are one member from two employee unions. The role of the PPAC is to review the policies, goals, performance, budget, and user fees relating to patent operations, and to advise the Director on these matters. In order to permit consideration of internal USPTO information, during their work, PPAC members are special government employees.

The PPAC is an unbiased politically neutral stakeholder group with the highest degree of expertise in every area of IP and we provide the on the ground daily oversight that the Congress and the public cannot. Many things are addressed by the PPAC with the USPTO outside of the public eye, not because we are protecting the USPTO, but because if the issues are addressed in a timely fashion, there may be no need to take the issue to a higher level or the issue may be averted altogether. However, sometimes it is necessary to raise concerns with the USPTO and you will see those in our annual report that we send to Congress every year.

As intended by Congress, much of the role of the PPAC is to focus on operational issues of Patents, a role which has increased in importance in recent years not only because of the growth of the patent examining corps and accompanying operations, but also because of the new statutory authority provided to the USPTO and the significant implementation of that statute which required substantial public outreach.

The PPAC currently enjoys a healthy, productive relationship with the USPTO and together we work closely with the unions facilitating a collaborative dialog and approach regarding a number of facets of the USPTO patent operations and implications for patent applicants and the public. From our perspective, this positive, open relationship has been conducive to in-depth discussions

resulting in the implementation of a number of programs in the USPTO which provide more flexible options to applicants, and we believe higher quality and more timely review. In the areas of quality and pendency, the PPAC has consistently provided feedback and ideas that have been embraced by the USPTO.

The PPAC has consistently worked closely with the USPTO on various issues and in areas which we think are not working well. Uniformly, the USPTO has listened and attempted to incorporate our advice into modifications and initiatives that address our concerns. We look forward to working collaboratively with the USPTO on this and other issues relating to the patents aspects of the USPTO.

I am honored and appreciative for the opportunity to address you today about the USPTO's telework program and allegations made about potential misconduct. For the last five years, I have served on the PPAC, and am currently the Vice-Chair. I speak today in that capacity, with my comments representing the views of myself and the whole committee. I spent my career at the USPTO, starting as a patent examiner, Supervisory Patent Examiner (SPE), Group Director, and as Deputy Commissioner for Patent Operations from 2000-2005, with all patent examiners in my chain of oversight. During the period of time that the patents side of the USPTO began its telework program, building on the successes realized by the Trademarks area, I was in management positions. I retired from the USPTO in 2005, joined the law firm, Wilson Sonsini Goodrich & Rosati, and since my departure the telework program has expanded dramatically. Having spent nearly thirty-two years in the USPTO and over eight years in a law firm, I believe I have a broad perspective of the challenges and demands of both areas.

Changing Environment

Recent studies have highlighted the important role of Intellectual Property IP in driving the economic growth of the country. According to a study prepared by the Economics and Statistics Administration and the USPTO in 2012, the entire U.S. economy relies on or uses some form of IP and according to a Brookings Institution study from 2013, metropolitan areas with lower than average patent growth showed higher unemployment levels. The effectiveness of the patent system, however, relies on the granting of high quality patents with clear claims of the proper scope which assist and not impede further innovation and business development and the accompanying job growth.

The USPTO is fully fee-funded with Congress appropriating to the USPTO some or all of the fees received. These fees are paid by applicants in exchange for the examination of their patent applications with the expectation that the USPTO will effectively and efficiently utilize those fees. As for all employees, public or private, there is an expectation that employees will meet the work requirements in exchange for the salary received.

The past five to ten years have brought incredible changes in the IP arena, including several significant legislative changes taking the U.S. from a first to invent to a first inventor to file

system; an increasingly active Supreme Court rendering decisions which in some instances dramatically shifted the understanding and assumptions of key areas of the patent statutes; and changes within the USPTO, such as telework programs and the adoption of a number of initiatives directed to improvements or options for applicants. From an operational perspective, the implementation of the telework programs has taken time and efforts to develop programs that are acceptable to USPTO management, the examiners' union, POPA, and USPTO employees. The challenges of managing any large organization, such as the USPTO, are extensive so successfully incorporating all of these significant changes in a short span of time takes energy and sometimes an iterative process. From what the PPAC has witnessed and been told, the USPTO recently has worked well with POPA on many issues and on others is still endeavoring to find resolution that suits all stakeholders.

Over the past five years, the telework programs expanded dramatically at the USPTO and have become a model for other government agencies. With congressional authority for expansions, the USPTO has been successful in developing a nationwide workforce, with employees working at the main campus in Alexandria, Virginia; satellite offices in Detroit, Denver, Silicon Valley and Dallas; Patent Telework Program (PTP) in which employees work on-campus a minimum of three days a week; and a Patents Hoteling Program (PHP) permitting patent examiners to work from their homes full-time. These programs have contributed to increased examiner satisfaction and increased retention of patent examiners, a significant benefit because patent examiners require extensive legal training to become the independent workers on which the USPTO relies to examine the hundreds of thousands of patent applications filed annually. Currently, 59.4% of eligible examiners and 47.3% of all examiners work remotely in one of these programs. Because such a large proportion of patent examiners are participating in PTP and PHP, it is absolutely critical that the programs be well implemented and supervised. These programs have been beneficial to the USPTO in a number of ways and they were validated as effective by the OIG in 2013. However, it is my understanding that the OIG analysis of the programs did not include a review of the time and attendance aspects, which is, of course, important and relevant to all examiners regardless of their physical work location. All groups of patent examiners enjoy very flexible work schedules and work largely independently to complete their examination of patent applications. By its nature, this work is technically and legally challenging and requires thoughtful time of study and review for each patent application. The PPAC believes that the majority of patent examiners abides by the rules of the USPTO and consistently performs the work with integrity, dedication and a high level of quality.

On August 29, 2014, the Office of the Inspector General (OIG) received an anonymous complaint reporting abuse by patent examiners primarily within the telework and hoteling programs. The OIG referred the complaint to the USPTO and requested an internal investigation be conducted and a response to the complaint be provided. The OIG requested that the USPTO address whether there is time and attendance (T&A) abuse and whether there are appropriate internal controls in place to prevent time and attendance abuse. The USPTO performed an

internal investigation interviewing Supervisory Patent Examiners (SPEs), Group Directors and the Assistant Deputy Commissioners for Patent Operations (ADCs) with questions concerning possible abuse of the USPTO time and attendance telework programs. The interviews included questions regarding controls in place for on-campus employees, controls in place for PHP participants, controls in place for teleworking employees, end-loading, overtime and bonuses.

As a result of the investigation, the final report provided by the USPTO indicated that they did not find any objective evidence of T&A abuse, either on regular or overtime hours but the investigation was inconclusive as to whether examiners are accurately reporting T&A or whether the Agency has effective controls in place to guard against T&A abuses by patent examiners.

USPTO Actions

The USPTO is taking the allegations and the investigation seriously and according to our information, already has implemented a number of changes. Regular phone calls are being made at random times to full-time telework employees to check their work status and responsiveness to a supervisor; new guidance was provided to supervisors to ensure proper accounting of hours worked; an education program for supervisors and employees on telework policies has been launched; full-time teleworking employees are required to use collaboration tools (except the presence indicator), including the instant messaging feature, which requires access to the Virtual Private Network (VPN); changes to the Docket Management element of the Performance Appraisal Plan (PAP) have been made to better address cases not being timely acted upon; and heightened quality reviews are made for individual examiners if a very large amount of work is turned in at the end of a quarter or the fiscal year. These represent good steps and the PPAC looks forward to working with the USPTO in identifying additional avenues for addressing any concerns.

PPAC Annual Report

When completing the FY 2014 annual report, the PPAC had considered the allegations of abuse and addressed concerns related to these allegations. The PPAC endorsed the promotion and expansion of the PHP but strongly recommended that systems be put in place to properly manage this program to measure productivity and monitor potential abuse. You will note that the telework and PTAB paralegal issues are barely mentioned in the 2014 annual report because we reviewed the documents, conferred with the USPTO and are confident that these issues have been and are being addressed. We agree with the USPTO that any alleged abuses are isolated incidents and do not represent systemic abuse.

Allegations of Telework T&A Abuse

The anonymous complaints to the OIG were directed primarily at the abuse in the telework programs. However, we believe this is not a telework issue per se, but rather a broader management issue that should be addressed regarding the entire patent examining corps. The

identified concerns- T&A abuse, end-loading (accomplishing a significant proportion of one's work at the end of a rating period), and mortgaging (submitting incomplete work for credit and finishing it later) are employee misconduct issues that are not related to duty station or whether an individual examiner works on-campus or remotely. Unfortunately, instances of employees failing to work all required hours, end-loading and mortgaging all existed prior to the implementation of the telework programs. Occurrences of T&A misconduct and mortgaging have been and continue to be identified through data analysis and addressed by the management of the USPTO. Telework has changed the way and places that we work and perhaps has raised a discomfort in managers about how to effectively manage employees who no longer work right beside them. This is a natural and not unexpected reaction but one that should gradually fade as managers become more adept at handling these new arrangements. Misconduct issues are best handled when the problems are addressed early and intervention occurs early. It is important that management make clear their expectations regarding appropriate behavior and take actions against offenders.

It is highly improbable that systematic and wide-spread abuse of T&As exists at the USPTO when one considers the available objective criteria demonstrating their performance. The backlogs of unexamined applications have been decreasing, the backlog of Requests for Continued Examination (RCEs) was dramatically decreased from about 110,000 in March of 2013 to fewer than 46,000 by September of 2014, pendency of applications continues to decrease, and the customer surveys reflect a response that the quality of the work is increasing. The USPTO is a results oriented agency which demands a high level of performance from the patent examiners. The existing measures in place, and they are extensive, utilized by the USPTO consistently show improvement in the performance and output by patent examiners, undercutting any contention of the existence of wide-spread abuse.

While it may currently be difficult to determine for sure whether or not abuse is occurring and whether or not the existing controls are effective, the PPAC encourages the USPTO to identify additional means of making these evaluations.

Quality & Pendency

A significant concern for PPAC regarding the allegations of patent examiners not working the hours claimed is a potential impact on the quality of the resulting patents. If one asks stakeholders of the patent system what is the most critical mission of the USPTO, most will say that issuing high quality patents remains the number one job of the USPTO. The pendency of patent applications is also important but quality ranks highest. While the interviews held with supervisors was not unanimous that end-loading negatively impacts the quality of the product, most agreed that this is true. For years, critics of the USPTO production system have complained that patent examiners were not afforded sufficient time per application to do a good quality examination. Recently, patent examiners were allocated more time on average per application to contribute to quality examination. However, if an examiner fails to work

consistently or waits until the end of the rating periods to complete a very large portion of the work and thus completes it in a much shorter period of time than normal, it is believed that the quality of that work may suffer. The impact on quality, of course, depends upon the employee, the technology being examined, the circumstances, and the amount of work completed at the end. The USPTO utilizes the quality element of the PAP, Quality Assurance Specialists (QASs), and regular random reviews of the work to ascertain and improve the quality performance of the examiners. According to the USPTO statistics, the quality of the work continues to improve based on internal measurements and stakeholder feedback. The USPTO has established a director working group to determine how cases are counted and the impact of examinations done at the end of an evaluation period. Therefore, it seems that the established tools along with the new steps being taken by the USPTO are and will be effective for monitoring and controlling the quality of the work. The USPTO must remain vigilant on quality, however, because the applicants, competitors, the patent system and the U.S. economy may suffer if poor quality patents are granted.

The salaries of USPTO employees come from the fees paid by patent applicants who expect these fees to be utilized effectively and efficiently in carrying out the mission of the Agency. As with any government agency, it is critical that USPTO ensures that this revenue is spent appropriately. Allegations that overtime is being claimed without the corresponding time being worked are very troubling contentions that deserve scrutiny and further evaluation. Overtime has consistently been an extremely valuable contributor to the successful completion of the large numbers of applications received by the USPTO. It is understood that at the USPTO overtime historically has resulted in work product at a lower cost than that created on regular time. The PPAC encourages the USPTO to review existing controls to determine whether additional reporting by patent examiners is necessary for effective management of the overtime program.

The USPTO has recently modified the docket management element of the Performance Appraisal Plan (PAP) to address some issues relating to the timely movement of applications. This is a positive step and the PPAC suggests that regular monitoring of the effectiveness of these elements should be made to identify if and when tweaks are needed to the bonus program to ensure that the benefits stemming from the bonuses are in alignment with the costs incurred.

Culture

The USPTO has strived to create a professional culture staffed by highly educated and trained patent examiners rooted in expectations of performance and conduct. In any large organization, one may expect some aberrant behavior. While the report indicates that the USPTO has been reluctant to pull electronic records in investigations, most importantly, actions have been taken to correct misconduct. The USPTO indicates that they believe communication, counseling and coaching address problem examiners and this may be true for some or all examiners. However, finding more tools to reasonably assess and address any potential misconduct can only increase confidence that the USPTO is well managed and resources are effectively spent.

According to the report, the USPTO did take performance actions against some examiners although the responses from managers in the interviews may suggest a perception that actions are not always taken or that actions for quality deficiencies are not worth the effort. This is a serious situation because this perception may create a deleterious attitude and undermine the culture of the organization. It appears from the interviews that many managers had not received adequate communications about how to handle potential misconduct issues, what approaches are being taken, or what has been successful and this deficit of information has fostered frustration and a feeling of loss of control over their workers. The USPTO has increased the communication to employees and supervisors about the policies, but they should evaluate whether more communications to patent examiners about the rules, expectations and consequences of misconduct and particularly information to managers regarding management responsibilities and guidance for accomplishing those responsibilities are needed. The PPAC believes it is important not only to deliver a consistent message of the USPTO's quality and performance expectations but also to emphasize that message with fair application of the rules.

Closing

In summary, because telework programs have been demonstrated to be effective and financially beneficial to organizations, they will likely expand and increasingly be adopted by other agencies. For this reason, it is important that these programs are managed as effectively as employees working on-campus.

The PPAC shares the committees' concern regarding the recent allegations of instances of abuse in the USPTO's telework and other programs. In its role in reviewing and advising the USPTO on policies and procedures, the PPAC became aware of the reports when they became public this summer and since then have had discussions with senior management about the reports and the steps taken to address the issues. Although it seems clear that the reported abuses are not systemic, and that the USPTO's telework programs are successful, no abuse should be tolerated. The PPAC intends to continue monitoring this issue and will work with the USPTO and union representatives to communicate USPTO's policies more effectively and to identify possible changes to programs to curb abuses in the future. We commend the committees for focusing on this issue and we intend to make it a priority.

On behalf of myself and the whole Patent Advisory Committee, I would like to express our appreciation for the opportunity to address this issue. I would be happy to answer any questions you may have now or in the future.

Thank you,

Esther M. Kepplinger

Vice Chair, Patent Public Advisory Committee

United States House of Representatives
Committee on the Judiciary
Bob Goodlatte, Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(5) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.


Hearing: Abuse of USPTO's Telework Program: Ensuring Oversight, Accountability and Quality
Date: November 18, 2014

1. Name: Esther M. Keplinger	2. Entity(ies) you are representing: Patent Public Advisory Committee (PPAC)
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3. Business Address and Telephone Number:	1700 K Street, NW, 5th Floor Washington, DC 20006 (202) 973-8810 (work) (703) 623-5202 (cell)
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4. Have <u>you</u> received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	5. Have any of the <u>entities that you are representing</u> received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
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6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. <i>(Please use additional sheets if necessary.)</i>
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7. Signature: 	Date: November 13, 2014
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CURRICULUM VITAE

Name: Esther M. Keplinger

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Education:

1971 - BS, Biology, Indiana University of Pennsylvania, Indiana, PA.

1971-1973 Graduate studies, Biochemistry, Indiana University of Pennsylvania, Indiana, Pennsylvania

2000 Certificate of Advanced Public Management, Maxwell School of Citizenship and Public Affairs, Syracuse University, Syracuse, New York

Professional Positions:

2005- Chief Patent Counselor, Wilson Sonsini Goodrich & Rosati

1973-2005 United States Patent and Trademark Office (USPTO)

Deputy Commissioner for Patent Operations- 2000-2005

Director, Technology Center 1700 (Chemical and Materials Engineering), 3700 (Mechanical and Medical Devices)

Supervisory Patent Examiner (Supervised Art Unit handling Immunoassays and Specific Binding Assays (1990-1994) and another examining Food Technology (1996))

Biotechnology Practice Specialist

Patent Examiner, biotechnology (1973-1990), food technology (1973-1976)

Honors and Awards:

Senior Executive Service Meritorious Rank Award, United States Government

Two Gold and two Bronze medals from the United States Department of Commerce

Intellectual Property Today, Who's Who in IP, 2001

Gold Medal from United States Department of Commerce on 2013 as PPAC member

Professional Affiliations:

Vice- Chair of Patent Public Advisory Committee (PPAC) to USPTO

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