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Submitted by email to InformationCollection@uspto.gov
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Subject: Patent Processing (Updating); Proposed collection; comment request

Public Comment and Information Quality Act Error Correction Request

I provide herein my comments and an error correction request concerning this 60-day notice for ICR 0651-0031 ("Patent Processing (Updating)").[1] In accordance with the Information Quality Guidelines of the U.S. Patent and Trademark Office (USPTO), I am submitting it both as a comment during the designated public comment period set forth at 77 Federal Register 16813 and as a request for correction. These guidelines commit the USPTO to respond "in the issuance of any final rule, plan, or action."[2] For an ICR, the relevant action is the "30-day notice" in the Federal Register accompanying submission of the ICR by the USPTO to the Office of Management and Budget (OMB).[3]

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[1] U.S. PATENT AND TRADEMARK OFFICE, *Patent Processing (Updating); Proposed collection; comment request*, 77 Federal Register 16813 (2012).

[2] U.S. PATENT AND TRADEMARK OFFICE, *Information Quality Guidelines* (2002), http://www.uspto.gov/products/cis/infoqualityguide.jsp.: "A proper request received concerning information disseminated as part of and during the pendency of the comment period on a proposed rule, plan, or other action, including a request concerning the information forming the record of decision for such proposed rule, plan or action will be treated as a comment filed on that proposed rulemaking, plan, or action, and be addressed in the issuance of any final rule, plan, or action."

[3] 5 CFR § 1320.12(a)(2).

I. PERTINENT INFORMATION ON THE DATA QUALITY ERROR CORRECTION REQUEST

- Requester: Richard Burton Belzer, PhD
- Requester's telephone number: 703-780-1850
- Requester's electronic mail (e-mail) address: rbbelzer@post.harvard.edu
- Requester's return address: PO Box 319, Mount Vernon VA 22121
- Accurate citation to and a description of the particular information disseminated that is the subject of the request for correction: See Sections III.C and III.D below.
- Explanation of how the requester is affected by the alleged error; how the information at issue fails to comply with the USPTO information quality guidelines or the applicable OMB guidelines; and why the requester believes that the disseminated information is not correct: See Sections III.C and III.D below.

II. SUMMARY

I wish to highlight the following four points:

1. This 60-day notice does not comply with the requirement in the Paperwork Reduction Act that agencies prepare "specific, objectively supported estimate[s] of burden."[4] The notice does not include objective support for any of its estimates.
2. This 60-day notice does not comply with Information Quality Act (IQA) requirements that information disseminated by an agency be transparent and reproducible.[5] The notice includes a table with 43 separate information collections (ICs). For none of them does the USPTO transparently explain how it derived its estimates of burden-hours per response and the number of annual responses. The U.S. Patent and Trademark Office's burden estimates are reproducible only in the sense that its estimates of burden-hours per response can be multiplied by its estimates of annual responses to obtain its estimates of aggregate burden-hours per IC. (Across all 43 ICs, the USPTO estimates 4,777,532 annual responses, 11,972,777 annual burden hours, and $356,886,130 in non-burden hour costs.)

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[4] 44 USC § 3506(c)(1)(A)(iv) and 5 CFR § 1320.8(a)(4).

[5] 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 8452 (2002); U.S. PATENT AND TRADEMARK OFFICE, *Information Quality Guidelines*, http://www.uspto.gov/products/cis/infoqualityguide.jsp.

3. This 60-day notice almost certainly does not comply with Information Quality Act requirements that information disseminated by an agency be objective.[6] In 2008, I identified numerous ways in which the USPTO grossly underestimated the burden of a previous iteration of this ICR.[7] The primary issue then was the USPTO's failure to account for 45 million to 73 million new burden-hours resulting from promulgated and planned regulatory actions, which I estimated would cost $13 billion to $34 billion per year. The USPTO did not make any effort to refute these alternative estimates.
4. This 60-day notice displays no improvement in burden estimation methodology despite a 2010 USPTO-sponsored project ostensibly initiated to improve these methods.[8] Indeed, the USPTO continues to rely on crucial third-party data that are invalid for use in estimating burden. I submitted a formal IQA error correction request on this subjected on January 14, 2011.[9] Instead of responding in good faith, the USPTO disingenuously deemed burden estimates outside the expansive definition of "information" in OMB's and its own guidelines.[10]

III. DISCUSSION

In this Section, I explain these four points in greater detail.

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[6] OMB Information Quality Guidelines; U.S. PATENT AND TRADEMARK OFFICE, *Information Quality Guidelines*, http://www.uspto.gov/products/cis/infoqualityguide.jsp.

[7] 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), http://www.reginfo.gov/public/do/DownloadDocument?documentID=57744&version=1.

[8] ICF INTERNATIONAL, *Methodology for Conducting an Independent Study of the Burden of Patents-Related Paperwork; Submitted to United States Patent and Trademark Office, Contract No. GS23F8182H/DOC44PAPT0809009* (2010); U.S. PATENT AND TRADEMARK OFFICE, *Request for Comments on Methodology for Conducting an Independent Study of the Burden of Patent-Related Paperwork; Request for comments*, 75 Federal Register 8649 (2010).

[9] 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), http://www.uspto.gov/ip/boards/bpai/procedures/rules/rule_comment_nov2010_belzer.pdf. The USPTO treated this error correction request "as a comment on a proposed rule and the final rule served as the response." See http://ocio.os.doc.gov/ITPolicyandPrograms/Information_Quality/PROD01_009472.

[10] See U.S. PATENT AND TRADEMARK OFFICE, *Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals; Final rule.*, 75 Federal Register 72270-72298, p. 72205 (2010).

First, however, I must address the USPTO's disingenuous claim that burden estimates are outside of the definition of "information" and thus are exempt from the Information Quality Act.

A. The USPTO's Claim that Paperwork Burden Estimates Are Not "Information," and thus Are Exempt from Challenge Under the Information Quality Act, Cannot Be Reconciled with the Plain Text of OMB's and USPTO's Information Quality Guidelines, or on the USPTO's ICR Submissions

In its response to a pair of requests for correction filed in 2010 pursuant to its administrative procedures implementing its Information Quality Guidelines,[11] the USPTO asserted that paperwork burden estimates are not within the definition of "information" set forth in OMB's and its own guidelines:

> The basis for providing various estimates is explained in the Supporting Statement and further detailed in the responses to these comments. Under the IQA, certain influential information must be reproducible under certain circumstances. The burden ''estimates'' of which the commenter complains do not qualify as ''information'' within the meaning of the IQA. ''Information'' is defined as ''any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms.'' USPTO's IQG, Section IV, A, 4. By definition, estimates do not represent knowledge such as facts or data. ''Information,'' not estimation, is subject to certain reproducibility requirements. *See* USPTO's IQG, Section IV, 7 (''reproducibility'' means the ''information is capable of being substantially reproduced, subject to an acceptable degree of imprecision.''). No correction is warranted for matters not involving ''information.'' *See* USPTO's IQG, Section XI, A, 4, a.

These assertions are disingenuous and simply reek of bad faith. They are not supported by the internal references or the USPTO's previous requests for approval.

The definition of "information" is very broad:

> ''Information'' means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical,

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[11] 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*, http://www.uspto.gov/ip/boards/bpai/procedures/rules/rule_comment_nov2010_belzer.pdf; RON KATZNELSON, *Request for Correction under the Information Quality Act [ICR 0651-0032]* (2010), http://ocio.os.doc.gov/s/groups/public/@doc/@os/@ocio/@oitpp/documents/content/prod01_009471.pdf.

> graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate. This definition does not include opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion rather than fact or the agency's views.[12]

To the best of my knowledge, the USPTO is the only federal agency that has ever claimed that "estimates do not represent knowledge such as facts or data." Every other federal agency explicitly or implicitly recognizes that burden estimates are "information," they are subject to the Paperwork Reduction Act, and thus they are subject to the portion of the Act that constitutes the Information Quality Act.

In its own agency-specific guidelines, OMB says "any information collected by OMB and subject to the Paperwork Reduction Act should be collected, maintained, and used in a manner consistent with Paperwork Reduction Act and the OMB information quality standards."[13] The lion's share of this information consists of burden estimates. OMB's statement is utterly nonsensical if burden estimates are not "information."

Finally, in its most recent Supporting Statement for ICR 0651-0031, the USPTO itself acknowledges that Information Quality Guidelines apply to estimates (including burden estimates):

> The Information Quality Guidelines from Section 515 of Public Law 106-554, Treasury and General Government Appropriations Act for Fiscal Year 2001, apply to this information collection and comply with all applicable information quality guidelines, i.e., OMB and specific operating unit guidelines.[14]

In short, there is no merit whatsoever to the USPTO's bizarre claim that burden estimates it prepares and disseminates pursuant to the Paperwork

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[12] OMB Information Quality Guidelines, p. 8460. See also Office of Management and Budget," Office of Information and Regulatory Affairs (OIRA) Q&A's," Available at: http://www.whitehouse.gov/omb/OIRA_QsandAs/. "Question 24: What kinds of information does OIRA review under the Paperwork Reduction Act? Answer: The definition of 'information' in the PRA is very broad…,"

[13] OFFICE OF MANAGEMENT AND BUDGET, *Office of Management and Budget Information Quality Guidelines*, Office of Management and Budget (2002), http://www.whitehouse.gov/omb/info_quality_iqg_oct2002/.

[14] U.S. Patent and Trademark Office, "Sf-83 Supporting Statement; United States Patent And Trademark Office; Patent Processing (Updating); OMB Control Number 0651-0031," p. 4. See http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201111-0651-001, click on "Supporting Statement A." Note that this sentence itself is nonsensical, a fact that has been pointed out in numerous public comments but which the USPTO nevertheless has not corrected.

Reduction Act are outside the definition of "information." Rather, they are squarely within that definition; they always have been within that definition; and the USPTO has knows that they are within the definition.

It was only the receipt of a pair of requests for correction in 2010 that led the USPTO to invent this disingenuous, contrary claim. It is appalling that the USPTO would resort to such chicanery to avoid having to respond in good faith to these requests for correction. It is reasonable to infer that the USPTO reviewed these requests, fully recognized that they were valid, and invented this hoary exclusion only to evade having to admit error and make the corrections required by law.

Subsections C and D below provide the documentation in support of the present request for correction. Should the USPTO also fail to respond in good faith, the damage to its already sullied reputation will only be magnified.

B. This 60-Day Notice Does Not Comply with 5 CFR § 1320.12(a)(2), Which Requires Agencies to Prepare "Specific, Objectively Supported Estimate[s] of Burden"

The Paperwork Reduction Act (44 USC §§ 3501 et seq.) and its implementing rules (5 CFR Part 1320) specify detailed procedures agencies must follow when creating or maintaining paperwork burdens on the public. Among other things, agencies are required to prepare and include within their requests for public comment "specific, objectively supported estimate of burden."[15] A "specific" estimate" is one that is reported with a reasonable degree of precision. An "objectively supported" estimate is one that is based on facts, data, and/or the analysis thereof using credible and appropriate statistical techniques.

The estimates in this 60-day notice appear to meet the definition of "specific." Many estimates of average response time are amazingly reported to the nearest minute, implying that the average response time is known within ± 30 seconds. Estimates of the annual number of responses are reported with less apparent (but undisclosed) precision. Nonetheless, they appear to be minimally "specific."

However, none of the estimates in this 60-day notice are "objectively supported." For none of the 43 ICs does the USPTO even explain how the estimate was derived. This makes informed public comment on the 60-day notice extremely difficult and, for some ICs, impossible.

Objectively supported burden estimates are required by law and regulation. Compliance is not optional for the USPTO. Without objectively supported burden estimates, this notice violates the companion requirement in law and regulation to provide at least 60 days for the public to "[e]valuate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the

[15] 44 USC § 3506(c)(1)(A)(iv) and 5 CFR § 1320.8(a)(4).

validity of the methodology and assumptions used."[16] It is impossible to do this when an agency hides the relevant information.

C. This 60-Day Notice Does Not Comply with Information Quality Act Requirements that Information Disseminated by an Agency Be Transparent and Reproducible

The absence of objectively supported burden estimates means that this 60-day notice is neither transparent nor reproducible. "Transparency" and "reproducibility" are minimum procedural requirements in OMB's government-wide and the USPTO's agency-specific Information Quality Guidelines.[17] The USPTO has reiterated these requirements in its agency-specific Information Quality Guidelines.[18]

This 60-day notice does not comply with OMB's or the USPTO's own guidelines with respect to transparency and reproducibility. Every burden estimate in the notice is not reproducible; thus, the notice does not met the minimum standard of transparency.

Remedy: To correct this information quality error in a manner that complies with the Paperwork reduction Act, the USPTO must republish the 60-day notice with complete documentation for each burden estimate and component thereof.

D. This 60-Day Notice Almost Certainly Does Not Comply with Information Quality Act Requirements that Information Disseminated By An Agency Be Objective

Because this 60-day notice is not transparent and reproducible, it cannot be independently determined whether any individual estimate (or component thereof) is objective. "Objectivity" is the principal substantive quality standard set forth in OMB's government-wide Information Quality Guidelines.[19]

Moreover, the USPTO has a record of grossly underestimating burden. The Office does this two ways. First, it neglects to include any burden estimate at all for a

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[16] 5 USC § 1320.8(d)(1)(ii).

[17] OMB Information Quality Guidelines, p. 8460; U.S. PATENT AND TRADEMARK OFFICE, *Information Quality Guidelines*, http://www.uspto.gov/products/cis/infoqualityguide.jsp. Section IV.A.7 "'Reproducibility' means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision."

[18] U.S. PATENT AND TRADEMARK OFFICE, *Information Quality Guidelines*, http://www.uspto.gov/products/cis/infoqualityguide.jsp.

[19] OMB Information Quality Guidelines, pp. 8459-8460; U.S. PATENT AND TRADEMARK OFFICE, *Information Quality Guidelines*, http://www.uspto.gov/products/cis/infoqualityguide.jsp. Section IV.A.6.a.

host of information collections it has initiated and sought to maintain.[20] Second, when it does provide specific burden estimates, the USPTO appears to grossly underestimates actual burden.[21] The USPTO declines to make corrections, whether in response to public comments or formal IQA error correction petitions.[22]

The absence of transparency and reproducibility, combined with the USPTO's longstanding practice of grossly underestimating burden, establishes a prima facie case that the USPTO's estimates are not in fact objective. The burden of proof now rests with the USPTO to show that its estimates adhere to the IQA objectivity standard.

E. This 60-Day Notice Displays No Improvement in Burden Estimation Methodology Despite a 2010 USPTO-Sponsored Project Ostensibly Initiated to Improve These Methods

In 2010, the USPTO initiated a project to conduct an independent review of its burden estimation methodology.[23] I provided comments on the draft methodology set forth to conduct this review, including numerous suggestions concerning how the analysis could be improved.[24]

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[20] The millions of hours of burden, valued in the tens of billions of dollars, that the USPTO neglected to include in its 2007 revision of this ICR, testify to the Office's practice of neglecting to include burden estimates for many ICs. See footnote 7.

[21] Gross underestimation of burden has been a consistent them in numerous public comments submitted to the USPTO on previous 60-day notices. See, e.g., comments submitted in 2010 on the 60-day notices for 0651-0032 (http://www.uspto.gov/news/fedreg/fr_2010.jsp) and in 2008 on 0651-0063 (http://www.uspto.gov/news/fedreg/fr_2008.jsp).

[22] See Ron Katznelson, "Request for Correction under the Information Quality Act, November 23, 2010 (http://ocio.os.doc.gov/s/groups/public/@doc/@os/@ocio/@oitpp/documents/content/prod01_009471.pdf); the USPTO's response dated January 21, 2011 (http://ocio.os.doc.gov/s/groups/public/@doc/@os/@ocio/@oitpp/documents/content/prod01_009511.pdf), Katznelson's appeal dated March 21, 2010 (http://ocio.os.doc.gov/s/groups/public/@doc/@os/@ocio/@osds/documents/content/prod01_009594.pdf ; and the USPTO's response to the appeal dated May 19, 2011 (http://ocio.os.doc.gov/s/groups/public/@doc/@os/@ocio/@osds/documents/content/prod01_009595.pdf).

[23] Methodology for Conducting an Independent Study of the Burden of Patents-Related Paperwork; Submitted to United States Patent and Trademark Office, Contract No. GS23F8182H/DOC44PAPT0809009; Request for Comments on Methodology for Conducting an Independent Study of the Burden of Patent-Related Paperwork; Request for comments.

[24] RICHARD B. BELZER, *Letter to Raul Tamayo RE: Request for Comments on Methodology for Conducting an Independent Study of the Burden of Patent - Related Paperwork (75 Fed. Reg. 8649)* (2010), http://www.uspto.gov/patents/announce/pra_study_regchkbk.pdf. It appears that I was the only

The USPTO appears to have abandoned this project; there is nothing else about it on the Office's website, and the project could not have required more than two years to complete.

A reasonable inference is that USPTO management had a change of heart. It is conceivable that my comments, combined with what the contractor communicated privately and what senior USPTO managers already knew, made clear that an improved methodology for burden estimation would have yielded much higher burden estimates.

In any case, the USPTO has made no discernable improvement in burden estimation since this project was initiated. Indeed, the USPTO's response to requests for correction submitted pursuant to the Information Quality Act strongly hint that any interest there might have been to improve the quality of burden estimates has fully dissipated.

IV. CONCLUSIONS

This 60-day notice violates clear standards set forth in the Paperwork Reduction Act, its implementing regulations, and the Information Quality Act. The USPTO's burden estimates are not objectively supported; they are not transparent and reproducible; and the overwhelming evidence from past Office actions indicates that they grossly understate actual burden.

According to the USPTO's most recent supporting statement, the hourly burdens imposed by this ICR are valued at more than $424 million per year, with another $148 million in non-burden hour costs.[25] Given the USPTO's penchant for gross underestimation, it would not be surprising to learn that objectively supported estimates of burden were ten times greater. That would mean the aggregate paperwork burden of this ICR exceeds $4 billion per year.

According to the 2011 Information Collection Budget, the aggregate paperwork burden imposed by the entire Department of Commerce (of which the USPTO is merely a part) was 144 million hours.[26] If an objectively supported burden estimate for this ICR yield ten times the 12 million burden-hours estimated by the

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member of the public who commented.. See http://www.uspto.gov/patents/announce/pra_study.jsp.

[25] U.S. Patent and Trademark Office, "Sf-83 Supporting Statement; United States Patent And Trademark Office; Patent Processing (Updating); OMB Control Number 0651-0031," pp. 11-17. See http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201111-0651-001, click on "Supporting Statement A."

[26] OFFICE OF MANAGEMENT AND BUDGET, *Information Collection Budget of the United States Government: 2011* (2011), http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/2011_icb.pdf. Table 2.

USPTO, this ICR alone would impose burdens approximately equal in magnitude to the total estimated burden for the entire Department. Because of the nature of the respondents involved, the economic costs of these burdens would be a large multiple of the value of Commerce Department burdens generally. It may well be that the reason that the USPTO grossly underestimates burden is that an accurate accounting would be frighteningly large.

Reform of the USPTO's burden estimation methods is sorely needed. There are two baby steps the USPTO can take now. First, it can (and should) begin complying with the Paperwork Reduction Act by publishing 60-day notices that include transparent, reproducible, and objectively supported burden estimates. Second, it can (and should) respond to this request for correction in good faith.

Respectfully submitted,

Richard Belzer, PhD

V. REFERENCES

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), http://www.reginfo.gov/public/do/DownloadDocument?documentID=57744&version=1.

RICHARD B. BELZER, *Letter to Raul Tamayo RE: Request for Comments on Methodology for Conducting an Independent Study of the Burden of Patent - Related Paperwork (75 Fed. Reg. 8649)* (2010), http://www.uspto.gov/patents/announce/pra_study_regchkbk.pdf.

ICF INTERNATIONAL, *Methodology for Conducting an Independent Study of the Burden of Patents-Related Paperwork; Submitted to United States Patent and Trademark Office, Contract No. GS23F8182H/DOC44PAPT0809009* (2010).

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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), http://www.uspto.gov/ip/boards/bpai/procedures/rules/rule_comment_nov2010_belzer.pdf.

RON KATZNELSON, *Request for Correction under the Information Quality Act [ICR 0651-0032]* (2010), http://ocio.os.doc.gov/s/groups/public/@doc/@os/@ocio/@oitpp/documents/content/prod01_009471.pdf.

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

U.S. PATENT AND TRADEMARK OFFICE, *Request for Comments on Methodology for Conducting an Independent Study of the Burden of Patent-Related Paperwork; Request for comments*, 75 Federal Register 8649 (2010).

U.S. PATENT AND TRADEMARK OFFICE, *Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals; Final rule.*, 75 Federal Register 72270-72298 (2010).

U.S. PATENT AND TRADEMARK OFFICE, *Patent Processing (Updating); Proposed collection; comment request*, 77 Federal Register 16813 (2012).