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

**Second Public Comment and
Second Information Quality Act Error Correction Request**

On 21 May 2012 I submitted a public comment and error correction request concerning this 60-day notice for ICR 0651-0031 ("Patent Processing (Updating)") published by the U.S. Patent and Trademark Office (USPTO) pursuant to the Paperwork Reduction Act (PRA).¹ I provide herein a second comment and second request for correction.

This second comment supplements the first by focusing in greater detail on three specific Information Collections (ICs) included in the 60-day notice. This second request for correction supplements the first; whereas the first focused on information quality deficiencies resulting from the USPTO's general lack of transparency and reproducibility about burden estimates, the second request for correction focuses on the USPTO's astounding lack of transparency about the nature of the ICs themselves. This lack of transparency makes it impossible for the public to provide informed comment on their practical utility or the USPTO's burden estimates.

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

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: This request for correction concerns the last three ICs in the unnumbered table of ICs on pp. 16814-16815 in this 60-day notice.
- Explanation of (a) how the requester is affected by the alleged error; (b) how the information at issue fails to comply with the USPTO information quality guidelines or the applicable OMB guidelines; and (c) why the requester believes that the disseminated information is not correct: (a) I am a member of the public with a scholarly and professional interest in agency compliance with applicable laws, including the Paperwork Reduction Act; (b) this 60-day notice fails to comply with the USPTO information quality guidelines and the applicable OMB guidelines because it includes no coherent description of these three ICs, including (i) whether they are voluntary or mandatory (including mandatory to receive a benefit) and (ii) what the public must do to comply if they are mandatory; (c) this 60-day notice is not correct because it is not transparent and reproducible, thus preventing the public from providing informed comment on (i) whether these three ICs have practical utility or (ii) whether the USPTO's burden estimates for them are valid, reliable, and objectively supported.

II. THREE NEW, AND VERY LARGE, INFORMATION COLLECTIONS IN THE 60-DAY NOTICE FOR THIS ICR

This 60-day notice concerns a largely a conventional renewal of an ICR that the USPTO has had in place for decades. This particular notice, however, is very different because it includes three new Information Collections (ICs) shown in the table below.

Not only are these ICs new, they comprise about 70% of the USPTO's estimated burden for the entire ICR—7,680,000 burden hours, to be exact. When multiplied by a plausible average hourly rate for patent counsel, these three new ICs impose about \$3.7 billion worth of new burden. This is an obviously an

extraordinary amount of burden. It is approximately equal to the USPTO's estimate of the financial cost associated with the burdens of patent applications.²

New Information Collection	Burden-Hours/ Respondent	Number of Respondent Per Year	Burden-Hours	
			Total	Economic Value at \$450 per Burden-Hour
Rule 1.130, 1.131, and 1.132 Affidavits or Declarations	10	50,000	500,000	\$225 million
Electronic Amendments and Responses	8	893,000	7,144,000	\$3,219 million
Amendments and Responses	8	67,000	536,000	\$241 million

III. WHAT DO THESE THREE NEW INFORMATION COLLECTIONS REQUIRE OF THE PUBLIC?

This 60-day notice says nothing about what these massive new obligations might be. The only text in the notice that speaks about them says nothing informative:

The two items being separately accounted for in this collection are (i) Rule 1.130, 1.131, and 1.132 Affidavits or Declarations and (ii) Amendments and Responses.³

Given the multi-billion dollar scale of the burdens these three ICs would impose on the public, one would expect the USPTO to describe them with considerably greater cogency and detail. Indeed, the USPTO is required by 5 CFR § 1320.8(b)(3)(iv) to

² U.S. PATENT AND TRADEMARK OFFICE, *Supporting Statement; United States Patent and Trademark Office; Initial Patent Applications; OMB Control No. 0651-0032; September 2010 Table 3* (2010).
<http://www.reginfo.gov/public/do/DownloadDocument?documentID=204632&version=1>.

³ Patent Processing (Updating); Proposed collection; comment request, p. 16814. The phrase "being separately accounted for" seems to imply that these ICs are currently in a different ICR, but that the USPTO wants to move them here.

have ensured that this information was disclosed to the public.⁴ The absence of any such disclosure renders this 60-day notice in gross violation of the public notice requirements of the PRA.

The PRA imposes on agencies a number of specific procedural and substantive responsibilities. Among them are requirements to provide the following information to OMB prerequisite to obtaining approval:

- “A summary of the collection of information”⁵
- “A brief description of the need for the information and proposed use of the information”⁶
- “A description of the likely respondents”⁷

Prior to publishing this 60-day notice, the USPTO’s information resources management office was required to have:

- Prepared “a functional description of the information to be collected”⁸
- Performed “an evaluation of the need for the collection of information, which shall include, in the case of an existing collection of information, an evaluation of the continued need for such collection”⁹
- Prepared “a plan for the efficient and effective management and use of the information to be collected, including necessary resources”¹⁰
- Ensured that the information collection “[i]nforms and provides reasonable notice to the potential persons to whom the collection of information is addressed of the reasons the information is planned to be and/or has been

⁴ “The [USPTO’s Information Resources Management office] shall review each collection of information before submission to OMB for review under this part... Such office shall ensure that each collection of information ... [i]nforms and provides reasonable notice to the potential persons to whom the collection of information is addressed of ... [w]hether responses to the collection of information are voluntary, required to obtain or retain a benefit (citing authority), or mandatory (citing authority)” (emphasis added).

⁵ 5 C.F.R. § 1320.5(a)(1)(iv)(B)(2).

⁶ 5 C.F.R. § 1320.5(a)(1)(iv)(B)(3).

⁷ 5 C.F.R. § 1320.5(a)(1)(iv)(B)(4).

⁸ 5 C.F.R. § 1320.8(a)(2).

⁹ 5 C.F.R. § 1320.8(a)(1).

¹⁰ 5 C.F.R. § 1320.8(a)(7).

collected [and] the way such information is planned to be and/or has been used to further the proper performance of the functions of the agency..."¹¹

Finally, 60-day notices (such as this one) must include sufficient information to inform the public and enable it to provide meaningful comments. The scope of this required information disclosure is suggested by the range of topics on which agencies must ask commenters to address. These topics for comment include:

- "Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility"¹²
- "Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used"¹³
- "Enhance the quality, utility, and clarity of the information to be collected"
- "Minimize the burden of the collection of information on those who are to respond..."¹⁴

This 60-day notice complies with none of these regulatory requirements, making it extraordinarily deficient given the magnitude of burdens involved. For this reason, the notice also violates USPTO's and OMB's information quality guidelines.¹⁵ Information that is disseminated by an agency must be transparent and reproducible, which this notice decidedly is not.

IV. CERTAIN PROVISIONS OF THE PAPERWORK REDUCTION ACT PROTECT THE PUBLIC FROM INFORMATION COLLECTIONS THAT DO NOT HAVE A VALID OMB CONTROL NUMBER

The previous sections assume *arguendo* that these three ICs are genuinely new and not contained in an existing ICR. However, it is possible that they are

¹¹ 5 C.F.R. § 1320.8(b)(3).

¹² 5 C.F.R. § 1320.8(d)(1)(i).

¹³ 5 C.F.R. § 1320.8(d)(1)(ii). This 60-day notice does not seek comment on "the validity of the methodology and assumptions used," even though the PRA requires agencies to seek such comments.

¹⁴ 5 C.F.R. § 1320.8(d)(1)(iii).

¹⁵ 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* (2002), <http://www.uspto.gov/products/cis/infoqualityguide.jsp>.

neither new nor contained in an existing ICR. They could instead be ICs that the USPTO has been imposing on the public for an indeterminate period without a valid OMB control number.

The PRA states, “An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information” it has performed the enumerated tasks required by law, including having obtained a valid OMB control number.¹⁶ Further, an agency violating this law must explicitly inform the public that it is not permitted to conduct or sponsor such an IC and that the public is not required to respond, even to obtain a benefit such as a patent allowance.¹⁷

Unlike almost every other statutory text, the PRA includes a specific provision that protects the public from illegal paperwork burdens. This public protection language is provided in 44 U.S.C. § 3512:

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if—

(1) the collection of information does not display a valid control number assigned by the Director in accordance with this chapter; or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

The phrase “notwithstanding any other provision of law” means the PRA trumps other statutes, including the Patent Act and regulations promulgated by the USPTO to implement it. In its regulation implementing the PRA, OMB makes clear that the term “penalty” in subsection (a) includes “the revocation, suspension, reduction, or denial of a license, privilege, right, grant, or benefit.”¹⁸ In other words, the USPTO cannot legally deny an allowance to a patent applicant for failure to provide information for which the Office did not have a valid OMB control number.

¹⁶ 44 U.S.C. § 3506(a).

¹⁷ 5 C.F.R. §§ 1320.5(b) and 1320.8(b)(3)(vi).

¹⁸ 5 C.F.R. § 1320.3(j).

Applicants in this position have wide latitude. They may invoke the PRA's public protection provision as an affirmative defense "at any time during the agency administrative process or judicial action applicable thereto." This means at any time during examination, or during an appeal, or in any court.

V. REMEDY REQUESTED UNDER THE INFORMATION QUALITY ACT

The primary remedy I request is full public disclosure of everything that the PRA requires the USPTO to have disclosed to the public in this 60-day notice. This disclosure must occur no less than 60 days before the USPTO submits this ICR to OMB for approval. Disclosure includes, but is not limited to, a complete and accurate description of exactly what information the USPTO intends to be covered by these three ICs.

Fully public disclosure also must include no less than 60 days for public comment. Presumably, the USPTO would need additional time to respond to these comments and make whatever changes in the ICR the law requires or the USPTO considers appropriate. The most sensible way to accomplish this is for the USPTO to publish a new 60-day notice.

Respectfully submitted,



Richard Belzer, PhD

VI. REFERENCES

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* (2002),
<http://www.uspto.gov/products/cis/infoqualityguide.jsp>.

U.S. PATENT AND TRADEMARK OFFICE, *Supporting Statement; United States Patent and Trademark Office; Initial Patent Applications; OMB Control No. 0651-0032; September 2010* (2010).

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