

STATEMENT OF
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**UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY
AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE**

BEFORE THE
**SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND
RELATED AGENCIES
COMMITTEE ON APPROPRIATIONS
U.S. HOUSE OF REPRESENTATIVES**

“USPTO FY 2013 Budget Request”

MARCH 1, 2012

Introduction

Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee:

Thank you for this opportunity to discuss the United States Patent and Trademark Office's (USPTO) operations, programs, and initiatives, and the President's FY 2013 budget request to support those efforts.

Mr. Chairman, before I do so, I want to extend the special thanks of over 10,000 USPTO employees to you and the subcommittee for your efforts that ensured our access to all fee collections in the current fiscal year. Our FY 2012 appropriation has enabled us to effectively begin the process of implementing the important provisions of the America Invents Act (AIA) and continue our ongoing efforts to improve the patent process and USPTO operations.

Accomplishments

More specifically, Mr. Chairman, I would like to share with the subcommittee the progress the USPTO and its dedicated employees have made over the last year.

Patent Examination

- In FY 2011 we received over 506,000 patent applications, issued over 223,000 patents, and made almost 231,000 final rejections; those are all record-setting numbers. We expect approximately 533,000 filings this year. These figures confirm that innovation is alive and well and will help speed our nation's economic recovery.
- As of the end of FY 2011, our backlog of utility patent applications was reduced to under 670,000, the lowest level in several years, despite a 5% increase in filings. Currently, the backlog is down to under 655,000. We expect to have it down to under 622,000 by the end of FY 2012, and to reach our final goal of 329,500 by the end of FY 2015.

- Our first office action pendency is down to 22.8 months; our goal is to reduce that number to 10.1 months by the end of FY 2015.
- Our current total pendency average is 33.9 months; our goal is to reduce that number to 18.3 months by the end of FY 2016.
- We increased our total number of interview hours – time spent working with patent applicants to understand their inventions and resolve issues – to 140,692 hours in FY 2011. This represents an increase of 80% over FY 2008 and sets another all-time record for our agency. We expect to log over 150,000 hours of interviews this fiscal year.
- Our Ombudsman Program, now in its second year, has enhanced the USPTO's ability to assist applicants and their representatives with issues that arise during patent application prosecution. More specifically, when there is a breakdown in the normal application process, including before and after prosecution, the Ombudsman Program assists in getting the application back on track. Applicants have given this program strongly positive reviews, and we are working to significantly expand usage this fiscal year.
- Clearing Our Oldest Patent Applications 2.0 (COPA 2.0) is a continuation of the original COPA effort to eliminate the “tail” of backlog applications. For COPA 2.0, the tail is considered to be applications that are 13 months and older, as of October 1, 2011, and have not received a first office action. The goal for FY 2012 is to complete a first office action on 260,000 applications. To date, we have worked on 106,634 COPA 2.0 applications, or 41% of the goal.

Patent Examiner Hiring/Retention

- We currently have more than 6,800 patent examiners on board and our plan is to hire a total of 1,500 examiners this fiscal year for a net number of 7,787. Our attrition level, less transfers and retirees, is just 3.28% for the one-year period through January 2012.
- Our award-winning telework programs have positioned the USPTO as an employer of choice and continue to serve as a model for other Federal agencies. There are currently more than 10,200 employees of the USPTO and more than 6,800 employees (85% of eligible positions at the agency) are currently teleworking at least one day per week.
- The USPTO's Patent Hoteling Program has enabled the agency to hire new employees without securing additional real estate. A report released last month by the Department of Commerce Inspector General's office calculated that the USPTO realizes a cost avoidance of \$1,710 per hoteling participant in the first year in the program and \$3,385 for each subsequent year. Hoteling employees relinquish office space on the USPTO campus to work from home 4-5 days per week. A total of 3,438 teleworking employees are currently hoteling.
- Hoteling participants are more productive than eligible non-participants; our analysis of the production data for FYs 2009 and 2010 shows that patent examiners participating in the program worked, on average, approximately 14 more examination hours, including overtime, per year than non-participants.
- Pursuant to the Telework Enhancement Act of 2010, the USPTO has begun to conduct a pilot program that allows full-time teleworkers, who decide, for their own convenience, to live further than 50 miles from the USPTO, to change their duty station to an alternative worksite in the city

in which they live. Under the program, these employees agree to travel to the USPTO when directed by the Office.

- As a further means of attracting and retaining qualified patent examiners, the AIA directed the USPTO to establish, within three years, three satellite offices. The USPTO is already on track to open our first satellite office in Detroit this summer. The general public and city and state officials were invited via a *Federal Register* notice to submit comments and suggestions regarding the selection of the additional two offices. That comment period closed on January 30 and we are in the process of reviewing and analyzing the more than 600 responses submitted.

America Invents Act (AIA) Implementation

- We have made substantial progress in implementing the critical provisions of the AIA.
- We have already implemented seven provisions of the legislation -- all in a timely manner --and we have completed draft proposed rules for nine more provisions. We remain on-track to implement all of them on time. We submitted two studies to Congress: an analysis of the prior user rights defense, and a report on international patent protections for small businesses. Comments have been solicited and a hearing has been held, and a second scheduled for next week, on the issue of genetic testing; a report to Congress is due in June 2012.
- In early February, the USPTO published proposed fees for all of the patent services it provides, pursuant to the new fee setting authority under the AIA. The proposed fee schedule represents only an initial proposal and is far from final. We have invited feedback and recommendations from the public and look forward to a meaningful dialogue over the coming months as we work to set these fees at the optimal levels.

Throughout the fee setting process, the USPTO will be guided by two overriding principles: First, the agency must operate within a more sustainable funding model than it has in the past to avoid disruptions in agency operations caused by fluctuations in the economy. Doing so requires that the fees charged for services more closely reflect the actual cost of delivering those services. This cost must account for both planned expenses and unanticipated events, which requires that the Office responsibly build an operating reserve to ensure its long-term financial stability. Second, the USPTO is adhering to the strategic imperative set by its user community to dramatically reduce patent pendency and the backlog of unexamined patent applications in accord with the USPTO's 2010 – 2015 Strategic Plan.

The Patent Public Advisory Committee (PPAC) held two public hearings on the proposed fee schedule and will issue a report to the USPTO detailing its comments, advice, and recommendations.

- In addition to the two hearings for the Genetic Testing Study, and two PPAC fee setting hearings, the USPTO is in the process of conducting seven AIA roadshows, at coast-to-coast locations, to explain its proposed rules for various new provisions required under the AIA, including supplemental examination, *inter partes* review, and post grant review.
- The USPTO has launched the AIA-mandated accelerated examination program (Track I) that allows patent applications to be processed to completion in 12 months and offers small businesses a discount on this option. We have already issued hundreds of office actions and even granted

patents under Track I, which is enabling new technologies, new industries, and new markets to grow quicker than ever before.

- As an effective, cost-saving alternative to litigation, the USPTO is developing new in-house review processes for challenging granted patents. For both our post-grant review process and our *inter partes* review process, we are building state of the art procedures that will balance the interests of third-party challengers and patent owners—all within a 12-month time frame.
- We are working with intellectual property law associations across the country to expand the availability of *pro bono* programs designed to assist financially under-resourced independent inventors and small businesses.

Patent Initiatives

- The USPTO recently extended the deadline for filing petitions under the Green Technology Pilot Program, originally set to expire on December 31 of last year, through March 30, 2012, or until 3,500 applications have been accorded special status under the program. Program statistics show that stakeholders participating in the pilot program have obtained patents much more quickly as compared to the standard examination process. Currently, the average time between granting of a green technology petition and first office action on the merits is just 85 days. In many instances, applicants have had their Green Technology inventions patented in less than one year from the application filing date. A total of 3,375 petitions have been granted to green technology patent applicants since the pilot began in December 2009.
- In early February, at a White House event, the USPTO announced the *Patents for Humanity* pilot program that will incentivize patent owners to use their patented technology to address humanitarian needs. This 12-month pilot advances the President's global development agenda by rewarding companies who bring life-saving technologies to underserved regions of the world, and by highlighting positive examples of humanitarian actions that are compatible with business interests and strong patent rights.

The pilot will be run as a prize competition for applicants that have leveraged their patented technology to significantly address public health or quality of life issues faced by impoverished people. By demonstrating how they have contributed a patented technology to advance scientific research on neglected humanitarian issues, organizations will be awarded with a certificate for accelerated processing of a select matter before the USPTO. Up to 50 awards will be given during the 12-month pilot, depending on the number and quality of submissions.

Patent Prosecution Highway (PPH) – Work Sharing

- In recent years, the PPH has proven to be one of the most significant work sharing initiatives for the USPTO, and a successful vehicle enabling faster and less expensive multi-country patent prosecution for the Intellectual Property (IP) community.
- As of the end of 2011, more than 9,000 applications at the USPTO have been processed within the PPH program. This represents a 100%+ increase in usage, two years running. Users benefit not only by fast portfolio-building but also by enjoying the collective savings of millions of dollars in the process. A recent study by our user community demonstrated that—in a single application—anywhere from \$2,000 to \$13,000 in reduced prosecution costs can be realized

through PPH, depending on the complexity of the invention. For international filers of all sizes, that level of savings adds up quickly.

- And even while the PPH has grown tremendously in usage, we are working with our partner offices—which now total 21—to further improve the program. One of the first major steps taken was expansion of the PPH into the Patent Cooperation Treaty (PCT) system. This has opened up the advantages of PPH to an entire sector of international filers, and has also paved the way for making the PCT system the work sharing model it was originally intended to be.

Trademark Operations

- Our Trademarks team continues to perform at world-best level, handling record numbers of new applications (almost 400,000) last year, launching a 21st century total quality program that would keep pace with any private sector equivalent, and serving as voice and conduit for U.S. brand-owners small and large.
- We are pleased to report that trademark pendency is at historically low levels. Much of the reason for this is because some 75% of all trademark applications are filed and processed electronically. Disposal pendency – the time from when an application is filed until a trademark is registered or abandoned – is 10.2 months, the lowest ever. In fact, it has been under 11 months for the past seven quarters in a row. First action pendency, which measures the time it takes for a new application to receive an initial response from our Office was at 3.2 months at the end of the first quarter, well within the optimal range as specified by the U.S. business community.
- Pendency for applications involved in *inter partes* proceedings or appeals has also been reduced to an all-time low of 12.1 months. All of this while the number of application filings has increased 7.8% over the same period last year.

International Efforts

- During FY 2011, the USPTO continued to engage with other Federal agencies in bilateral, plurilateral, and multilateral negotiations involving the protection and enforcement of IP around the globe. The USPTO's cooperation with foreign IP offices, including expansion of the PPH program to several new partner offices, was greatly expanded during FY 2011.
- Through the USPTO's Global IP Academy (GIPA), we greatly expanded IP rights training, capacity building, and technical assistance offerings to promote improved IP protection and enforcement. The USPTO also continued to work closely within the Administration to implement the Administration's IP enforcement plan and establish a U.S. Government-wide database of training and capacity building efforts.
- Through our IP attachés, the USPTO has met a number of important objectives in host countries. For example, an agreement was signed with the Russian Federal Service for IP, Patents and Trademarks (Rospatent) in which Rospatent agreed to undertake international search and international preliminary examination for international applications filed with the USPTO as the receiving office. This will be beneficial for U.S. applicants as it will provide them with an additional choice of international authorities for searches and preliminary examinations based on the field of technology of the invention, as well as the speed and cost of service. Other accomplishments include the introduction of legislation to improve Brazil's criminal IP laws and

the government of India's decision to maintain patent protection for certain computer-related inventions.

President's FY 2013 Budget

- The Budget requirements assume \$2.822 billion in USPTO spending and 12,212 FTE (including nearly 8,800 patent examiners) to be derived from fee collections of \$2.953 billion; obligations by program activity are \$2.547 billion for Patents and \$273 million for Trademarks and include more than \$130 million for IT modernization.
- The Budget fully supports our overall priorities: patent pendency and backlog reduction, information technology, sustainable funding, and implementation of the AIA.
- The USPTO is, and will continue to be, fully funded by user fees. In addition to fee revenue, the Budget assumes \$23 million in income from other sources, such as parking and reimbursable agreements.
- Accounting for this other income, the Budget will add \$154 million to the operating reserve. Building an operating reserve will help the USPTO build a more solid financial foundation for the long term upon which to further strengthen the organization.
- Key FY 2013 funding priorities include:
 - Hiring 1,500 new patent examiners (net of 1,007) to reduce first action pendency to 10.1 months by the end FY 2015, total pendency to 18.3 months in FY 2016, and the backlog to 329,500 in FY 2015. With this hiring, the USPTO will have hired more than 3,800 patent examiners since FY 2011.
 - Expanding the Nationwide Workforce initiative to two additional satellite locations.
 - Hiring additional Trademark Examining Attorneys to maintain first action pendency at 2.5 - 3.5 months and total pendency at 12.0 months or less.
 - Meeting current and AIA-driven workload and hiring demands for the Board of Patent Appeals and Interferences (BPAI) and the Office of the General Counsel.
 - Expanding our successful IP Attaché program by hiring and placing a new attaché in South Asia and in South America.
 - Modernizing IT for patent and trademark processing including the Patent End-to-End and Trademark Next Generation systems and related infrastructure.
- The AIA provides the USPTO with the authority to set fee levels by regulation, and a fee rulemaking under this authority is estimated for implementation by February 2013. Budget estimates are based on the USPTO receiving additional fee revenue during the fiscal year based on the proposed revised fee structure that would be a part of this rulemaking. The USPTO has taken, or is taking, the following actions pursuant to this fee-setting authority:

- Conducted a fee review process that included economic, financial, and business impact analyses.
 - Engaged the PPAC to obtain stakeholder input on options and preliminary proposals on a revised fee structure. Two public hearings were held last month.
 - Will publish a Notice of Proposed Rulemaking (NPRM) with a revised fee structure after assessing initial stakeholder feedback. The USPTO anticipates publishing an NPRM by early summer this year.
 - After considering public comments and ensuring proper notifications, the USPTO plans to publish a final revised fee structure by December 2012.
- The USPTO assumed in the budget a continuation of the current 15% fee surcharge under authority of the AIA, as well as implementation of an adjustment of fees by the Consumer Price Index (CPI) through a separate rulemaking to be conducted prior to implementation of a revised fee structure.

Conclusion

Mr. Chairman, while we feel the USPTO is making good progress, we acknowledge significant challenges remain. One such challenge is the backlog of requests for continuing examination (RCE). While we are pleased that we have arrested the previous rapid growth of RCE filings -- RCE filings dropped in FY 2011 for the first time since Congress created RCE practice back in 1999, and they are dropping further this FY -- we would like to do more, and have more in process, to further reduce the need for applicants to use RCE practice, and to reduce the growing backlog of RCEs awaiting examination.

Another challenge is our information technology systems. While we have made progress in modernizing the USPTO's IT infrastructure -- including consolidating our entire workforce onto a single, modern, personal computing platform, upgrading our voice communications system to a maintainable, high-function platform, moving our patents and trademarks examining procedures manuals to modern editing and viewing platforms, and bringing up the first modules of our major new patent examination support system called PE2E (Patents End-to-End) -- much more remains to be done to complete PE2E as well as to bring up a major new counterpart system for our Trademarks area called TMNG (Trademarks Next Generation).

Mr. Chairman, we look forward to working with you to ensure that the innovation-advancing, job-creating, deficit-neutral work conducted at the USPTO is supported in FY 2013.

We appreciate your continued leadership and support for the employees and operations of the USPTO.

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