

## FY 2002 Budget: Give the USPTO Its Due

The U.S. patent examination system is in trouble. Application inventory and pendency are rising alarmingly. Some foreign prior art goes unfound by U.S. examiners (who lack time) but not their European counterparts (who have time). Examiners are leaving the USPTO for better pay in the private sector. Yet U.S. lawmakers can enact the solution to these debilitating problems: Allow the USPTO to keep the fees paid by its customers.

More than \$554 million in USPTO revenues have been diverted, rescinded or otherwise not made available over the last ten years, wrote Rep. John Conyers (D-Mich), ranking member of the Judiciary Committee, and Rep. Howard Berman (D-Calif.), ranking member of the Subcommittee on the Courts, the Internet and Intellectual Property, in a February letter to President Bush.

"Patent and trademark experts agree that America cannot maintain its innovative dominance if this fee diversion is permitted to continue," wrote Reps. Conyers and Berman.

### A Laundry List of Ills

**Pendency:** The pendency of patent applications is rising to a level applicants and invention owners feel diminishes the economic value of some patents. More applications are filed yearly than the USPTO can handle without use of all of its revenue. This undercuts the basic Constitutional purpose of patents as an incentive for invention.

At a recent Patents Public Advisory Committee meeting, committee members expressed grave concerns over USPTO's projections that the pendency of a significant number of applications would extend beyond 36 months. To many on the

committee that is unacceptable.

The too-long waiting periods "act as a disincentive to future expansion of corporate research and development spending," wrote PatentCafe.com CEO Andy Gibbs in a recent article, "and that does not bode well for the long-term technological superiority of U.S. business."

Gibbs likened the USPTO to a "technology time bomb" that few in government are willing to acknowledge.

**Validity:** Because of the crush of overwhelming workloads, examiners often lack time and resources to find all prior art relevant to a patent application. Examiners need more time per case to do the best quality job.

In addition to the need for more time, examiners need better resources to find all prior art. For example, foreign patents are not even classified under the U.S. Classification system. The hurdles for examiners to find prior art are often impossible to surmount.

**Examiner attrition:** The agency is losing examiners, both experienced and inexperienced, to higher paying jobs in the

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## USPTO Denies Advanced Sick Leave for Childbirth

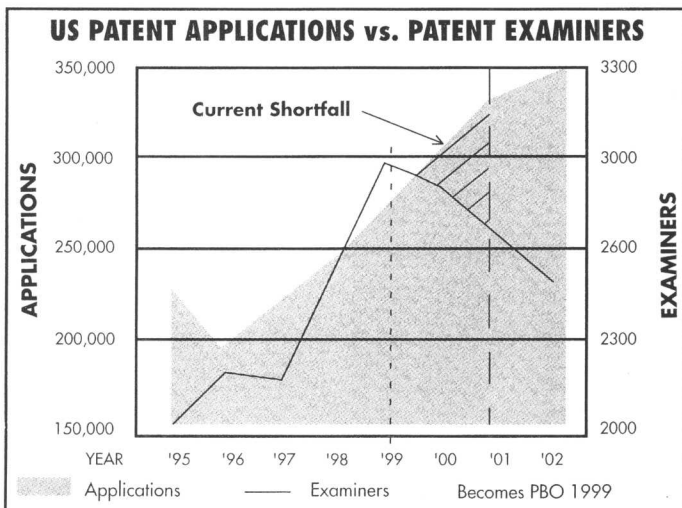
A TC 2100 group director recently refused to advance sick leave to a three-year USPTO employee after childbirth in the amount customarily granted. POPA challenged these actions on the employee's behalf by filing a formal grievance.

The agency had approved an 8-week period for the employee to recover from her Caesarian-section delivery. But between managing her own health needs and that of her preschool-age child with a serious health condition, she had been unable to accrue sick leave. She applied for advanced sick leave to ensure that her total recovery period would be on paid sick leave.

Her group director refused to grant the full request for advanced sick leave. His claimed reason: the USPTO's concern for her ability to pay it back, because she had been unable to accrue much sick leave in her three years of service. But the USPTO has nothing to lose by granting the leave; if employees leave the federal government with advanced leave outstanding, they must reimburse the government for it.

Worse yet, the agency failed to inform the employee of its decision before she left to have her baby. In a surprise

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private sector. Though the USPTO has applied for an increased special pay rate for examiners, it has yet to be established.

Though recently improved benefits help stem examiner flight, the lack of budget funds still shortchanges the USPTO workforce compared to the private sector. During an online chat, when an examiner asked Acting Director Nick Godici if the USPTO will take part in the new program allowing agencies to repay employees' student loans, Godici responded, "The Federal Student Loan Program is optional to agencies to address recruitment and retention issues. The USPTO has elected to address these issues through numerous other programs.... At this time, we have no plans to implement this program."

Yet examiner attrition continues to rise. With a halt to USPTO fee diversion, the agency could afford this and other benefits that are commonplace outside of government.

**Senators Weigh In**

Six U.S. senators wrote to President Bush in February to express their bi-partisan support for legislation to "reduce fee withholding at the PTO because we believe underfunding the PTO delays the development of new technologies."

Sens. Orrin Hatch (R-Utah), Patrick Leahy (D-Vt.), Robert Bennett (R-Utah), Harry Reid (D-Nev.), Bill Frist (R-Tenn.), and George Allen (R-Va.) wrote, "Since 1996 the agency's workload has increased by more than 60 percent. ...A well-staffed, efficient PTO is essential to keep the high-tech economy growing."

Patent owners and inventors are becoming increasingly aware of the problems caused by fee diversion, and are increasingly voicing their concerns to Congress and the administration. [See the letter on this page from Intellectual Property Owners Association President Ronald E. Myrick.]

**"Federal Budget Games"**

In a January 2001 opinion piece in the *Boston Globe*, intellectual property lawyer David L. Feigenbaum claimed that many "treat the [USPTO] as nothing more than a cash cow to be milked."

Feigenbaum cited a litany of problems at the agency: "abysmal" turnaround times, "exquisitely picayune procedures," automation tools that have taken years and millions of dollars to launch. But he stated:

"In the world of technology, patents matter. Technology ventures depend on strong patent positions to build markets and attract capital. So, when plans by the PTO to improve its performance are threatened by federal budget games, these companies ought to be incensed."

Andy Gibbs of PatentCafe.com called the diversion "an insidiously short-sighted play."

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February 23, 2001

The Honorable Donald L. Evans  
Secretary of Commerce  
US Department of Commerce  
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Washington, DC 20230

Dear Mr. Secretary:

I am writing on behalf of Intellectual Property Owners Association to urge you to request adequate resources for the U. S. Patent and Trademark Office (USPTO) to handle its workload during fiscal year 2002.

Intellectual Property Owners Association represents companies and individuals who own patents, trademarks, copyrights, and trade secrets. Our members obtain about 30 percent of patents that are granted to U.S. nationals and federally register thousands of trademarks each year. They pay around \$200 million a year in USPTO user fees. Our members are largely technology-based and consumer products firms.

If it is to provide strong incentives to our members and other U.S. companies and inventors for creating and developing new technology and investing in manufacturing and marketing, the USPTO must function effectively. Unfortunately, the agency's effectiveness is now in jeopardy. It is faced with an unprecedented increase in patent and trademark filings. Last year the President's budget projected that average patent application pendency will rise to 31.7 months in 2005 - a 52 percent increase in delay since 1996. Last year trademark applications increased by more than 25 percent for the second consecutive year.

The USPTO deserves separate budgetary treatment from other programs in the Department of Commerce. Because it is a user fee funded agency, it creates no drain on the general taxpayer revenue. As its workload increases, its fee income also increases. We want the agency to be able to perform the work that our members expect when they pay their fees.

Sincerely,

*Ronald E. Myrick*

Ronald E. Myrick  
President

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