

MEMORANDUM

To: Honorable Congressman Howard Berman

From: Howard Friedman, President of NTEU 245

Re: Patent and Trademark Office's Proposed Reduction in Force

Date: August 2, 2002

Attached is a review of Mr. Rogan's letter dated July 24, 2002 addressing Congressman Berman's inquiries dated July 11, 2002. Upon careful review of Mr. Rogan's letter, we have noted a number of inconsistencies. There are several specific issues that stand out in particular, namely, overtime, implementation of the Madrid Protocol, pendency and customer service.

Overtime

In response to the question of "how pendency will change if 135 attorneys are let go," Mr. Rogan states that the re-institution of the bonus and overtime programs for the remaining 250 attorneys "will return production to normal levels."

Mr. Rogan is relying on the wildly unrealistic expectation that the remaining 250 attorneys will work overtime in order to compensate for the lost work product of the 135 attorneys. This unrealistically assumes that (1) all 250 attorneys remain, (2) each completes the maximum 32 hours of permissible overtime per bi-week, and (3) each works for all 26 bi-weeks for a total of 832 over-time hours in the fiscal year. Mr. Rogan's scenario would amount to 208,000 overtime hours. Interestingly, if 127 attorneys were retained and examined at 1,640¹ hours per year, then the same number of hours of examination would be achieved.

Mr. Rogan's position assumes that:

- (1) 250 attorneys will choose to remain after the RIF for a prolonged period of time, and
- (2) each of those 250 attorneys chooses to work the maximum 32 hours of permissible overtime per bi-week, and
- (3) each of those 250 attorneys works the maximum 32 hours of overtime for all 26 bi-weeks that comprise a year.

¹ The 1,640 hours was taken from Mr. Rogan's response letter dated July 24, 2002 to Congressman Berman. Mr. Rogan states that each attorney advisor is expected to work 1,640 hours (or 80% of 2,080 paid hours) on examination each year.

It follows that retaining the 135 potentially affected attorneys and requiring them to work the expected examining hours of 1,640 hours per year is a much more realistic scenario and a better way to meet pendency goals than by expecting the remaining 250 attorneys to work a maximum of 32 permissible overtime hours per bi-week for all 26 bi-weeks of a year. Mr. Rogan's plan to re-institute the over-time program will not improve pendency.

Madrid Protocol

Mr. Rogan's response asserts that the adoption the Madrid Protocol "will have little or no effect on the number of examining attorneys who will be needed in the Trademark Operation." He goes on to state that other countries who have adopted the Protocol have not experienced significant increases in applications. However, implementation of the Madrid Protocol in the United States will have an immediate and significant impact on Trademark operations for the following reasons:

- The Office has consistently maintained that 25-35 attorneys will be pulled away from examination for up to a year for the purpose of implementing the Madrid Protocol in Trademark Operations.
- According to former Director of the PTO, Q. Todd Dickinson, "when the Madrid legislation is enacted, the USPTO will prepare to have its Madrid-Protocol processes operational within one year from the date of enactment. This will be a huge undertaking for our Office, but well worth it." (Excerpted from the 11th Annual New York Educational Forum "Current Trends in Trademark Law"). Clearly, the former Director of the USPTO understands the implementation of the Madrid Protocol will significantly impact the work demands on examining attorneys.
- Implementation will result in an increased number of filings; an overhaul of the current Trademark Acceptable Identification Goods and Services Manual; extensive changes to the database infrastructure of the Office; and changes in substantive examination of trademark applications. Further, contrary to Mr. Rogan's assertion, the United Kingdom is on record as saying that adopting Madrid did increase their workload.

Trademark Pendency

Mr. Rogan believes that pendency will not be affected by a reduction in workforce. However, the 2.5 first action pendency level set out in the President's 2003 budget fails to take into account the following:

- Current first action pendency rates as of June 2002 were at 4.1 months with a disposal rate of 19 months, which clearly reflects an increase from 3.8 months in May, 3.6 months in April and 2.7 months at the end of fiscal year 2001. Thus, it is taking longer to process even the first reviews of the applications. Look for this figure to at least double if the proposed employee reductions take place. The Office has been unable to meet this goal with the current workforce of 382 examining attorneys.
- First action pendency has never achieved 2.5 in recent times. See the trademark Office figures, which show that first action pendency rising from 2.7 at the close of fiscal year 2001 to 4.1 as of June 2002. (See Chart on Page 2 of Mr. Rogan's response comparing the number of first office actions to the number of new filings).
- Pendency is rising, which is why there are currently over 55,000 new cases that have yet to be touched. This backlog, in addition to thousands of other application "amendments", sits waiting to be worked on. Mr. Rogan apparently thinks that cutting the staff by one third will somehow reduce that backlog. Again, this is illogical and unsubstantiated in reason.
- First quarter 2002 filings rose 7.4% from the fourth quarter 2001. Filings rose 8% in the second quarter 2002 compared to the first quarter 2002. May 2002 filings were the highest so far in this fiscal year; the trend is clearly upward.
- With the current staff of 383 attorneys performing an estimated 525,000+ number of action points, the average approval time per application still takes over 18 months.
- Mr. Rogan believes that pendency will continue to improve with the implementation of e-government initiatives. However, current PTO records indicate that first action pendency in e-commerce law offices (102, 110 and 112) is the same or higher than first action pendency in other law offices. E-government maintains but does not improve pendency rates. (See chart entitled Trademark Law Offices First Action Pendency at the Office's website address: <http://ptoweb/ptointernet/trademarks/comm.htm>).
- Mr. Rogan's statement that backlog pendency will not be a problem due to the experience from high attrition rates from fiscal years 1999-2001 (when 162 attorneys resigned) is fallacious and disingenuous. While it is true that there were 162 "attritions" during that time frame, this was more than offset by 270 new hires during the same period. So essentially there was no attrition at all during this period, but rather an increase of 108 examining attorneys. Mr. Rogan's analogy portrays a net loss of 162 attorneys when in fact there was a net gain of 108 attorneys. Moreover, these "attritions" occurred gradually over a period of two years and were more than adequately replaced by new

hires. Under Mr. Rogan's proposed RIF scenario, 135 attorneys will leave on the same day and will never be replaced. It remains that the dockets of the 135 affected attorneys must be absorbed by the remaining attorneys. Such a seismic change to the organization is unprecedented and will drastically and adversely impact pendency and quality of examination.

Customer Service

Mr. Rogan claims that the USPTO's Strategic Plan for implementing e-government processing will improve customer satisfaction by eliminating the source of many quality and pendency issues. However, the Strategic Plan does not address the following factors:

- A reduction of current staffing levels by 35% will not only increase pendency rates, but will also severely impact remaining attorneys ability to timely and courteously respond to applicants.
- Examining attorneys in e-government law offices work at a reduced production rate of 10% to compensate for the increase in customer service demands. The reduced production rate means less new cases are worked on by each of these attorneys. Therefore, pendency is not helped by current e-government initiatives.

Further, a RIF is shortsighted and does not support the long-term goals of pendency, quality and customer service.

- According to Nils Montan, President of INTA, the International Trademark Association, in his April 11, 2002 testimony to the Subcommittee on Courts, the Internet and Intellectual Property, he stated:

"The real test for the USPTO will be to maintain low trademark pendency and backlog numbers, as well as continue to retain experienced employees, especially during a period of sustained economic growth. Our collective goal for the agency, its customers, and the Congress must be to work towards an efficient trademark operation in a healthy economy. It is during times of prosperity when consumers and trademark owners alike need the protection afforded by a federal trademark registration.

Mr. Montan went on to state that the Office should "[d]evelop a means for increasing total compensation for trademark examiners to discourage them from leaving the USPTO during times when jobs in the private sector are plentiful. It is when experienced examiners leave that quality of examination suffers and pendency tends to increase."

