

Dear TPAC Member:

As we are sure you have heard by now, the Trademark Office has set in motion a Reduction in Force (RIF) of 135 Trademark examining attorneys. We believe that this action will have a disastrous effect on the United States trademark registration system and, in turn, will have a terrible impact on you, our customers. We think that you should know exactly how this RIF will affect you in the areas that matter most: pendency, quality and customer service.

PENDENCY

Under the proposed RIF, 135 highly trained attorneys will leave the Trademark Office on September 30, 2002, and will never be replaced. It follows that on October 1, 2002, the remaining attorneys must absorb the dockets of the 135 dismissed attorneys. The net result of the RIF is that the dockets of the remaining 250 attorneys will increase by at least 50%. However, the Trademark Office has yet to establish how it will organize, distribute and manage the remaining workflow of the 135 attorneys they have just let go. In fact, we believe that the Trademark Office has not yet even contemplated the logistical nightmare awaiting them on October 1, 2002.

Furthermore, the proposed RIF fails to take into account the following facts:

- 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, 3.5 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 RIF takes place.
- Additionally, the Office's projected first action pendency rate of 2.5 months for 2003 has never been achieved in recent times with the current workforce. *See the Trademark Law Office First Action Pendency Chart (Attachment A)*, which shows first action pendency rising from 2.8 months at the close of October 2001 to 4.1 months as of June 2002. A reduction of current staffing levels by 35% will not only increase first action pendency rates, but will also severely impact the remaining attorneys' ability to timely and courteously respond to applicants. Disposal pendency as of June 2002 was 19 months with 382 examining attorneys on staff.¹
- Also, pendency is and will continue to be impacted as filings continue to rise. 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

¹ The 19 month disposal rate for June 2002 was provided by Director Rogan in a response letter to Congressman Berman dated July 24, 2002.

2002 filings were the highest so far in this fiscal year; the trend is clearly upward. The Office projects increases of 9% to 10% in future years. Clearly, the first action pendency goal of 2.5 months for 2003 is unachievable if current staffing levels are reduced by 35%.

- Office statistics show that new application filings already far exceed first office actions for fiscal year 2002. *See Attachment A.*
- The trend of filings exceeding first office actions will continue to rise with a RIF. Currently, there are 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.
- The Office also assumes that Trademark [Work@Home](#) (TWAH) examiners will spend 10% more time examining than non-TWAH attorneys. This ignores two basic facts:
 - (1) The TWAH required production rates are not any different than the non-TWAH rates; and
 - (2) TWAH users often experience lengthy technical delays which in fact decrease their examining time.
- The Office also maintains 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 Attachment A.*

Also, 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 rates mean less new cases are worked on by each of these attorneys. Therefore, again we see that pendency is not improved by current e-government initiatives.

- Mr. Rogan’s assertion that “there will not be significant problems regarding the distribution of work”² defies logic. Contrary to the Office’s position, experience with past attrition from Fiscal Years 1999-2001 (during which 162 attorneys resigned) will not overcome current and future pendency problems. 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. In actuality, there was no attrition at all during this period, but rather a net gain of 108

² This statement was taken from Director Rogan’s response letter to Congressman Berman dated July 24, 2002.

examining attorneys. Moreover, these “attritions” occurred gradually over a period of two years and were more than adequately replaced by new hires.

- The vast majority of examiners directly affected by the RIF were hired within the last two years and were trained in an extensive program (TOTAL) as part of the Office’s attempt to improve pendency and upgrade customer service. By implementing the RIF, the Office has essentially thrown away money and resources invested in training. Moreover, the RIF ignores the inevitability that more resources will have to be spent training new people to replace the dismissed attorneys, thereby increasing pendency and negatively impacting customer service.
- The Office has consistently maintained that the implementation of the Madrid Protocol will take away 25-35 attorneys from examination for up to one year, but has not accounted for this distinct possibility in implementing the RIF.

The proposed RIF is shortsighted and does not support the long-term goals of pendency, quality and customer service. Accordingly, the customer base will be severely impacted by the loss of highly skilled trademark attorneys.

As aptly stated by Nils Montan, President of the International Trademark Association (INTA), in his April 11, 2002, testimony to the Subcommittee on Courts, the Internet and Intellectual Property, “It is when experienced examiners leave that quality of examination suffers and pendency tends to increase.”

QUALITY

As discussed above, the proposed RIF will increase pendency and the workload of the 250 remaining examining attorneys. It logically follows that there will be a detrimental effect on the quality of trademark examination.

As previously shown, first action pendency is rising and new application filings are trending upward. Nevertheless, the Office states that it does not believe that backlogs and pendency will be affected because overtime and the bonus program will be re-instituted such that the remaining 250 examining attorneys will be performing at peak efficiency. It is not difficult to see that this plan will fail to achieve even the modest goal of maintaining the status quo.

There is an inherent trade-off between quality of work and volume of work. As the volume of work demanded or expected of an examining attorney increases, there is an increased likelihood that quality of examination will suffer. Insisting that the examining attorneys perform more work in less time will result in a marked decrease in the quality

of the examination. The exact details of the effect on quality of examination are as follows:

- Examining attorneys have production quotas, that is, they must examine a certain number of trademark applications per examining hour. Any unrealistic production demands generated by increased workloads will impact the quality of examination.
- On October 1, 2002, the dockets of the remaining 250 examining attorneys will increase by over 50%. This is a necessary consequence of the dockets of the 135 discarded attorneys being absorbed by the 250 attorneys that remain. Examiners are required to work all amended cases within a limited period of time. As a result, the remaining attorneys will now have to examine 150% of their usual amended docket within essentially the same time constraints. If the Office expects to maintain pendency objectives, examining attorneys will be asked to do substantially more work in the same amount of time and the likelihood of error in examination will increase.
- The Office is relying on the reinstatement of overtime to offset the workload backlogs caused by the RIF. The Office assumes that many, most or even all examiners will avail themselves of overtime. However, this is not what occurred when overtime was available. Regardless, if overtime expectations are increased to make up for the Office's self-created, sudden shortage of human capital, quality of examination will suffer. Finally, those attorneys who decide to work overtime may be more likely to commit errors or omissions in examination.

In sum, the drastically increased workload foisted upon the remaining examiners can only result in a lower quality of examination for applicants. Shifting the workload of 383 attorneys to 250 attorneys will inevitably increase pendency and processing times. Under such a system, the value of a United States trademark registration, previously unquestioned as the international gold standard, will be lessened.

CUSTOMER SERVICE

“Our customers deserve - and our economy demands - that we provide a quality product in the shortest possible time. That's our mission at the USPTO.”

-- James E. Rogan, Director of the United States Patent and Trademark Office, International Trademark Association Annual Meeting, May 20, 2002 [one week prior to announcing the RIF]

“I'm happy to report that Trademarks is focused on customers.”

-- Anne H. Chasser, Commissioner for Trademarks, USPTO *Pulse*, May 2001

Over the past several years, the Trademark Organization has given constant attention to the concept of customer service, mailed out customer satisfaction surveys and has even required its examining corps to participate in customer service training. Now, in an alleged time of crisis—when such customer service should be of the utmost importance—the agency is essentially back-pedaling.

As recently as February 11, 2002, before this very committee, Anne H. Chasser, Commissioner for Trademarks, stressed the following trademark business goals:

- Quality work
- Consistent legal examination
- Convenient access
- Correct and timely service

Such goals are laudable and have merit. Nevertheless, a mere six months after making this presentation, the agency has decided, in implementing a RIF of 135 Examining Attorneys, as well as its newly unveiled 21st Century Strategic Plan, that customer service no longer seems to matter.

As all of you know, the examining attorneys are the very heart of the examining system. We are the face of the trademark office to all applicants, who have come to expect recourse from the Trademark examining corps where none exists elsewhere in the system. Examining attorneys are leaders in spite of systemic obstacles, often acting at a personal level to effectuate procedural efficiency otherwise lacking in the system. In addition to examining applications, examining attorneys take the time to provide the following courtesies, which include but are not limited to:

- Explaining statutes and office procedures to applicants
- Receiving and sending e-mails and faxes to expedite processing time
- Retrieving files from other areas of the Office
- Hand delivering cases to other parts of the Office to correct mistakes
- Faxing lost office actions
- Checking the status of applications for applicants

With the increase in expected volume of work and the increased pressure on examiners to examine at breakneck speed, the Trademark examining corps will be operating at a reduced capacity and will not be able to regularly provide such helpful, albeit time-consuming customer services.

Another issue that cannot be overlooked is the morale of the remaining attorneys. The Trademark Office has long been regarded by its attorneys as a good place to work. The job offers the ability to control one's own workflow and work product, and fosters a strong spirit of camaraderie and friendship between examiners. These are quality of life and quality of workplace issues. Examiners have been very proud of the work they

produce as representatives of the Trademark Office. This has resulted in a quality work product and excellent customer service for the applicant.

The RIF represents a monumental breach of trust between the Trademark Office and its employees. Employee morale, which has already been shattered, will be at a historical nadir after September 30, 2002, a depth from which it will not soon, if ever, rise. In light of this, many of those 250 examining attorneys who remain may be less eager to work overtime, to go the extra mile, to give that little extra for the Trademark Office, as they always have been in the past. Yet, the Office's plan to offset the effect of the RIF appears to rely on precisely these attributes of the workforce. Quality of examination can only suffer in a dispirited workplace.

21ST CENTURY STRATEGIC PLAN

**“However, to date, there has been little or no internal or external demand to substantially change examination processes to address quality or pendency issues.”
--The 21st Century Strategic Plan, Action Plan Attachment, p. T-01, June 3, 2002.**

Despite this express acknowledgment, the Office nevertheless sees fit to radically restructure the current trademark examination system under a new “21st Century Strategic Plan.”

While the RIF will render a serious blow to Trademark operations, the Office's proposed 21st Century Strategic Plan is the other shoe that is waiting to drop. The Office claims that the Strategic Plan is unrelated to the RIF. In fact, they are inextricably linked. The Office projects filings to continue to rise into the future, sees the need to immediately re-institute a bonus and overtime program for the remaining attorneys, and envisions hiring new, non-attorney examiners as early as one year following the RIF. Clearly, this demonstrates an increased need for work to be done, and a need for increased labor in both the near and long-term future.

Notwithstanding the issue of the relatedness of the RIF and the Strategic Plan, the Strategic Plan raises numerous issues that will severely impact pendency, customer service and examination quality.

The keystone of the Strategic Plan is to replace experienced and dedicated attorney examiners with newly hired, non-attorney examiners. The Strategic Plan envisions piecemeal examination whereby multiple parties both inside and outside the Trademark Office each perform the separate functions of searching, substantive examination and non-substantive examination. Simply put, vital examination functions now provided by attorneys will instead be provided by less trained, less experienced and less accountable personnel.

Despite the overly ambitious goals of the Office, the Strategic Plan ignores real-world practical considerations. Consider the following:

- Outsourced searches conducted pre-filing cannot anticipate a prior pending identical mark filed moments after the search was completed but before the application was filed.
- Likelihood of confusion decisions, a substantive function to be performed by attorneys, can be severely impacted by identification issues, ostensibly purely procedural informalities to be handled by non-attorney examiners.
- This clunky, bifurcated system would make it extremely difficult for applicants to deal with one point person or contact within the office, which certainly confuses the notion of customer service.
- Even if these newly-hired, non-attorney examiners do in fact have any marketable legal skills, they will certainly jump at the first chance to pursue better opportunities and pay in private sector paralegal positions in the Washington D.C. area.

In short, the proposed 21st Century Strategic Plan will shift the workload from highly competent and dedicated professionals to untrained low-wage substitutes, thereby disrupting the reliability of the U.S. trademark registration system—the world’s premier government intellectual property agency. The ultimate result will be unreliable, error-laden decisions, which will only create an unintended appeal process that could literally choke the system and result in a de facto grinding halt of registrations.

ATTACHMENT A

TRADEMARK LAW OFFICE FIRST ACTION PENDENCY CHART

Law Office	Oct.01	Nov.02	Dec.01	Jan.02	Feb.02	Mar.02	Apr.02	May.02	Jun.02
101	3.6	3.7	3.0	3.4	3.4	3.5	3.3	3.6	3.7
102 (e-com)	2.7	3.1	3.0	3.5	3.9	4.2	3.6	3.7	4.1
103	2.7	3.0	3.1	3.2	3.3	3.5	3.7	3.8	4.0
104	2.8	2.9	2.6	3.2	3.2	3.2	3.0	3.2	3.4
105	2.6	2.8	2.6	3.0	2.8	3.2	3.1	3.6	4.2
106	3.2	3.5	3.2	3.7	3.7	4.0	3.7	4.3	4.5
107	2.6	3.1	3.2	3.6	3.8	3.5	3.6	3.7	4.1
108	2.8	3.0	2.6	2.9	3.4	3.7	3.7	3.9	4.3
109	2.6	2.5	2.7	2.9	3.4	3.5	3.6	3.8	4.1
110 (e-com)	3.0	2.4	2.7	3.1	3.3	3.3	3.4	3.9	4.4
111	2.9	3.6	3.1	3.4	3.5	3.7	3.3	3.6	3.8
112 (e-com)	2.0	3.2	3.0	3.4	3.7	3.8	3.7	3.9	3.9
113	2.7	2.9	3.3	3.9	3.3	3.4	3.6	3.9	4.0
114	2.5	2.8	2.7	3.4	3.1	3.3	3.0	3.1	3.6
115	3.1	3.5	3.4	3.6	4.4	4.1	3.2	3.9	4.8
116	N/A	N/A	3.0	3.3	3.4	3.8	4.4	4.4	4.0
Average	2.8	3.1	3.0	3.3	3.5	3.6	3.5	3.8	4.1

FIRST OFFICE ACTIONS IN RELATION TO FILINGS

Month	Jan.02	Feb.02	Mar.02	Apr.02	May.02	Jun.02
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Filings	19,037	22,281	22,140	23,245	23,747	22,250 ³
1st. Action	16,590	16,486	14,690	16,565	15,407	16,941

³ This figure was taken from Director Rogan's response letter to Congressman Berman dated July 24, 2002.