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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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July 6, 2017

The Honorable Wilbur L. Ross, Jr.
Secretary
United States Department of Commerce
1401 Constitution Avenue, Northwest
Washington, D.C. 20230

Dear Secretary Ross:

As the Chairman and a member of the Senate Judiciary Committee, which has jurisdiction over patent and trademark laws of the United States, and as the Senate co-chairs of the Congressional Trademark Caucus, we understand the importance of patents and trademarks to the economic prosperity of this country. We hope to work with you to ensure that the U.S. Patent and Trademark Office (USPTO) is operating to produce high quality patents and trademarks that drive economic growth and support American competitiveness.

We support the Department of Commerce's (Commerce) overall goals of finding cost savings and reducing duplicative government spending. As part of such efforts, Commerce has begun efforts to implement an "Enterprise Services" initiative to build a common infrastructure for certain human resource (HR), information technology (IT), and procurement services and make them available to Commerce's bureaus. However, stakeholders and users of USPTO's services are raising concerns about whether the USPTO will realize any cost-savings from its participation in Enterprise Services. The USPTO is unique among Commerce's bureaus in that it is entirely funded by user fees—e.g., those who pay for patent and trademark applications—and in exchange for requiring these users to pay for government services, statutory provisions were designed to ensure that collected USPTO fees remain in service of the mission of the agency. If the USPTO will not be utilizing what Enterprise Services offers, but is being asked to pay for its setup costs, it would strongly suggest that this will undermine the statutory protections specifically put in place to prevent USPTO fees from supporting other parts of the federal government and to provide for USPTO's operational independence.

Beyond these statutory limits, users of USPTO services point out that there are good reasons for the USPTO to maintain its independence and have its own, separate services in many—if not in all—of these areas. The USPTO Director's operational independence is

important to ensuring that the USPTO's mission of supporting innovators and entrepreneurs is the priority when tough budget decisions are made. This is important to those innovators and entrepreneurs who fund the agency to examine their trademarks and patents. It is also necessary to ensure that the USPTO can make the long-term investments in new IT needed for examination to keep up with innovation, which is to the ultimate benefit of our country's economy overall.

Due to its particular mission, the USPTO also has unique needs which include identifying and targeting a scientifically trained workforce. USPTO must support new hires as they move through the years-long process of becoming a patent examiner with full, independent authority to examine patents. We understand that the USPTO has developed a skilled HR workforce that is uniquely able to respond to the needs of its specialized personnel. Stakeholders who fund the USPTO through user fees have raised concerns that switching to a centralized, offsite HR service would not be able to replicate this type of direct support and could lead to higher rates of attrition, which is particularly costly for the USPTO because of the resources needed to train new examiners to get them to full production capacity. Additionally, the USPTO has unique IT support needs stemming from its geographically dispersed workforce, much of which is authorized to telework and who work flexible hours using customized software to process patent and trademark applications.

Accordingly, it is important that we better understand the case for the USPTO's participation, especially given that the USPTO has made significant investments of its own to improve many of its services in recent years after it received the authority to set its own fees under the Leahy-Smith America Invents Act of 2011. Given these circumstances, we request the following information to better understand how the USPTO's participation in Enterprise Services comports with its governing statutory scheme:

- Prior to the launch of Enterprise Services, was an analysis conducted to show whether the USPTO would see an improvement of services and realize cost-savings from this initiative, apart from any analysis conducted to show how Commerce overall might benefit? If yes, please provide a copy of that analysis and any updates to that analysis since Enterprise Services' operations have begun.
- What services does Commerce plan to offer through a location that is offsite to the USPTO? From where would those services be offered, and how would the USPTO be expected to access them?
- Does Commerce plan to require the USPTO to subscribe to these services if it would require a loss of quality to what the USPTO currently offers, or if the USPTO otherwise objects? If yes, how is this consistent with 35 U.S.C. § 1, which states that:

In carrying out its functions, the United States Patent and Trademark Office shall be subject to the policy direction of the Secretary of Commerce, but otherwise shall retain responsibility for decisions regarding the management

and administration of its operations and shall exercise independent control of its budget allocations and expenditures, personnel decisions and processes, procurements, and other administrative and management functions in accordance with this title and applicable provisions of law. (Emphasis added.)

- Would the USPTO's participation in any part of Enterprise Services allow executives in Commerce other than the USPTO Director to have ultimate decision-making authority over aspects of human resources, information technology, or procurement issues? If yes, how is this consistent with the requirement under 35 U.S.C. § 1 that the Director "shall retain responsibility for decisions regarding the management and administration of its operations"?
- How much money has the USPTO contributed to Enterprise Services to date, and what has this money been used for? How much money has Commerce requested that USPTO contribute to Enterprise Services for the remainder of fiscal year 2017 and for fiscal year 2018?
- How is the expenditure of these funds consistent with 35 U.S.C. § 42(c)(3)(A), which states that "[a]ny fees that are collected under this title, and any surcharges on such fees, may only be used for expenses of the Office relating to the processing of patent applications and for other activities, services, and materials relating to patents and to cover a proportionate share of the administrative costs of the Office" (emphasis added), and 35 U.S.C. § 42(c)(3)(B), which provides the same limitation for trademark applications?
- We understand that the USPTO is being asked to contribute a pro-rata share of the costs for Enterprise Services based on the Office's number of full-time equivalent (FTE) employees as a percentage of the overall Department of Commerce FTE numbers, amounting to approximately twenty-eight percent. How does this reconcile with the statutory requirement contained in 35 U.S.C. §§ 42(c)(3)(A) and 42(c)(3)(B) that USPTO's collected fees may only be used "to cover a proportionate share of the administrative costs of the Office"?
- USPTO stakeholders have raised concerns that instead of paying a proportionate share of the cost to create services that the USPTO knows it will use and will reduce its costs, the USPTO appears to be paying nearly a third of the costs for the entire initiative regardless of projected use or cost savings. Why was this metric chosen instead of having bureaus each contribute according to the extent that they are using the services offered by Enterprise Services? How is this consistent with the USPTO's statutory mandate?

We appreciate your cooperation with this request and look forward to your response by July 20, 2017.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive style with a large initial "C".

CHARLES GRASSLEY
Chairman
Senate Committee on the Judiciary

A handwritten signature in blue ink that reads "Chris Coons". The signature is written in a cursive style with a large initial "C".

CHRISTOPHER A. COONS
Senate Committee on the Judiciary