

## **Franklin Pierce Law Center's Fifth Biennial Patent System Major Problems Conference**

### **III. FUTURE OF THE U.S. PATENT AND TRADEMARK OFFICE**

MR. BENSON: The person who is going to introduce the topic on the patent office being a private corporation probably knows more about it than anybody else in the country. Herb Wamsley got into this issue early, has followed it continuously, and has been involved in the drafting of almost every bill that's ever been introduced in Congress on this subject. So, Herb, your turn.

MR. WAMSLEY: I'll take a few minutes to introduce this topic. As we go around the room, I think we'll find there's not a consensus on a lot of the details. Two years ago, I was honored to be invited up here, and I introduced this same topic. I think it was late in the afternoon, and we needed one more topic to fill out the day. We had a discussion about what a bill might look like that would make the Patent and Trademark Office a government corporation. Even then, in 1993, the idea had been around a long time but I remember as we went around the table, most people thought it was an interesting idea, but it would probably never get far. We were talking about trying to reform the government and how hard it would be to get that onto anybody's radar screen in Washington.

A lot has happened in the last two years. Reinventing government came into style in the Clinton Administration and this year, also, in the Republican controlled Congress. Suddenly these ideas for converting the Patent and Trademark Office to a government corporation got on the radar screen of politicians in Congress, the Clinton Administration, and on the Patent and Trademark Office's radar screen. There has been a great deal of discussion this year. Right now, there are three bills pending in Congress to establish the Patent and Trademark Office as a government corporation and maybe a fourth bill to be introduced. The one bill that was mailed out to you in advance of this meeting is the Moorhead Bill, H.R. 1659. It's the one bill that's been discussed most. It's a complicated proposal. We don't have time to go into all the details of it today. I'm going to take you quickly through some of the main features of that bill and mention a couple of things that aren't in it. As we go around the table to discuss this, I suggest to you that we need to talk not just about the technical aspects of the bill, but about whether proposals like the Moorhead Bill overall are likely to do anything about the costs \*384 that we were talking about earlier. We also should discuss whether the government corporation has anything to do with where we're trying to go internationally. Is the government corporation a step

forward or a step backward with respect to regional patent offices or world patent offices? If the Patent and Trademark Office becomes a government corporation, will it still be involved in intellectual property policy with the U.S. trade representatives and others in the government at a high level?

It's impossible for anyone right now to say where these bills are heading in Congress. Last week, the House of Representatives actually passed one form of the government corporation bill. In fact, Congress passed it twice in the last two weeks, as a part of a measure to, as we call it down there, dismantle the U.S. Department of Commerce, which means to abolish the U.S. Department of Commerce. One chapter of the Commerce dismantling provision establishes the Patent and Trademark Office as a government corporation. Commerce dismantling was passed by the House of Representatives as a part of the Omnibus Budget Reconciliation Bill. As we speak today, the House and Senate conferees are meeting in Washington to decide whether Commerce dismantling will stay in the Omnibus Budget Reconciliation Bill. The Senate probably will knock it out today. If they don't, the President is sure to veto the bill. Just a few days ago, the House also put Commerce dismantling on the debt limit bill, and the Senate took that out yesterday.

That gives you a flavor of how this issue is being batted around down there. Chairman Moorhead in the House Judiciary Subcommittee has said that if a government corporation bill does not get enacted as part of Commerce dismantling, he plans to take it up as a separate measure within the next several weeks. That's the more likely avenue for having it enacted perhaps sometime in 1996. There is still a lot of opportunity to shape this legislation. My guess is that if something is ultimately enacted by Congress next year, it's going to be different from any of the measures now on the table.

I will mention the main features of the Moorhead Bill, H.R. 1659, which has been the subject of one hearing in the House already, and then leave it for discussion. The Moorhead Bill makes the Patent and Trademark Office an independent government corporation. It is not "privatization" because the bill does not create a private corporation. \*385 The bill eliminates some of the standard government red tape, some of the restrictions on government managers. It gives the Patent and Trademark Office some of the operating and financial flexibility enjoyed by managers of private companies, while retaining the Patent and Trademark Office in the executive branch of the government as an agency that is subject to the control of the President of the United States. How does it give it this operating and financial flexibility that hopefully would bring the efficiency and the effectiveness that is generally thought to exist more in the corporations and law firms than in the government? Well, the Moorhead Bill gives the Commissioner the power to set the salaries of employees of the Patent and Trademark Office up to an upper limit. The conventional GS- scale would be scrapped, and the Commissioner would set the salaries. The Commissioner would have the authority to hire as many employees as the Patent and Trademark Office has money. Today, the PTO and other government agencies are subject to artificial employment ceilings. Even when they have the money, often they can't hire the employees. The Moorhead Bill would loosen the government personnel restrictions. It would make it somewhat easier to hire and fire government employees, though not all the restrictions are eliminated. Under the Moorhead version,

the subjects that are permissible for labor- management negotiations would be cut back slightly. The Moorhead Bill would give the Commissioner freedom to contract out without going through the bureaucratic General Services Administration (GSA). The Moorhead Bill would give the Commissioner the power to lease office space for the PTO or build office buildings without going through the GSA. The Moorhead Bill would make the PTO independent from the Department of Commerce, which it is argued would eliminate problems that have existed with micro-management of the Patent and Trademark Office by middle managers in the main Commerce building who work for the Secretary of Commerce. The Moorhead Bill, although not the version now in the Budget Reconciliation Bill, would solve the problem of the House and Senate Appropriations Committees withholding patent fee surcharge money. The Patent and Trademark Office would have the power to issue bonds up to \$2 billion total indebtedness, which is about three times the current annual budget of the Patent and Trademark Office. The Moorhead version does not change the existing fee-setting authority under which the fees are fixed by statute subject to the \*386 authority of the Commissioner to adjust for inflation. The Administration's version of the bill recently sent to Congress, H.R. 2533, would give the fee-setting authority to the Commissioner.

Finally, the Moorhead version establishes a management advisory board which by statute would have considerable independence from the Commissioner and would advise the Commissioner, the Congress, and the President on effective management of the Patent and Trademark Office. The Moorhead version has 18 members on that management board: six appointed by the President, six appointed by the House of Representatives, and six appointed by the Senate. Those are the main provisions of the Moorhead Bill. I've mentioned a couple of points where the other bills now on the table differ.

MR. BENSON: Okay, we're now open for general discussion.

MS. HAYES: For those who don't know, I publish Inventors' Digest, a national magazine for inventors. The focus of the magazine is to educate the independent inventor about the process of new product development, which is probably why I was quiet during the talk about international costs, because we really don't address that issue. Most independent inventors can't afford international patents. They have enough trouble trying to get patents in the United States.

As to the issue of the Patent Office becoming an independent corporation, I understand there has been only one hearing, a one day hearing, on this issue. It's a rather huge and complex issue to only give one day of hearings on. The fact that it is in the Budget Reconciliation Act is something that troubles people from my arena because it seems as though something is being just shoved in, and we haven't had a chance to discuss it. One interesting point that I don't understand is on page seven of this bill. There is something that talks about gifts, that the Patent Office has the right to accept gifts and donations. An issue like that is very simply a technical issue, but we should have the chance to discuss it. So, I do hope that it doesn't make it in the budget, that we can discuss it, that the Patent Office will get the support and the money it needs to develop and grow. We also need to

discuss the issue of debt. At a time when our country is trying to get out of debt, we are now authorizing an agency to take on \$2 billion worth of debt. I think that needs to be discussed in great detail before it's passed.

\*387 MR. GHOLZ: If the PTO becomes an independent corporation, I think the significant probability is that the first CEO of that independent corporation will be Commissioner Lehman. I'd like to put in a favorable word for the nameless, faceless bureaucrats of the Commerce Department, the ones that Commissioner Dann was railing against in the material that we were given. I think there is some advantage to having somebody else in the government riding herd on the Patent Office and making them justify some of the things they'd like to do.

Two initiatives of the current commissioner have attracted the most attention around Washington. I'm sure Nancy will not agree that these are the most important initiatives. I don't think they're the most important initiatives, but they are the things we talk about most—the big neon sign on the roof of the Patent Office and the Commissioner's desire to make the Patent Office's upper circles look more like America. The Chief Administrative Patent Judge has recently retired, and we have been told that the Commissioner is now looking for minority candidates to replace him. Fortunately, there are some good minority candidates within the Office, but, if the circle of possible candidates is so limited, you're cutting out an awful lot of obvious candidates.

Those are two examples of what the current Commissioner is doing that I personally don't like. I'm sure that other people around this table could come up with other examples that the current Office is doing that we're not happy with. There is something to be said for having control and having these people justify their positions to other government bureaucrats, particularly with respect to fees. If the Office does get the right to set its own fees, those fees may go to the level where the examiners in our Patent Office get paid like the examiners in the European Office. I'm sure that would solve the retention problem, but it would have some other costs. I have not yet been persuaded that giving the Patent Office the amount of independence that it's asking for is going to be a good idea. We may all live to regret it if they get that independent.

MR. MACKEY: This is a point that Herb Wamsley may want to comment on when we come to the rebuttal period, but on page five of his testimony and proceeding on over to page six, there's a comment on labor organizations. It says, "Labor organizations in the PTO government corporation should not be permitted to strike, to bargain over \*388 compensation, or to bargain over the number of employees assigned to work projects," and it goes on. I find that an interesting observation as to what H.R. 1659 would accomplish albeit probably politically impractical. I inquire what in fact can be done with regard to the labor management relations within the Patent Office. At least my observations from outside are that they are not good. The quality of the work coming out, I should really say the quality of the administration, leaves something to be desired in many instances. How will this new organization improve that?

MR. LOWIN: On the subject of PTO fees, as I understand it, and Nancy, please correct me if this is wrong, the Patent Office proposes a budget to Congress. That budget is designed by the Patent Office as its best estimation of the revenues it will need to generate in order to carry out its business for the next fiscal year, and there's discussion about whether the fees are being set properly. That budget gets adopted at some level, and then, off the top, Congress pulls off ten percent and says, "Well, now do it with ten percent less." That's the part that bothers me because it leaves the Patent Office trying to accomplish what it has fairly represented will require ten percent more revenue, and that ten percent disparity throws the Patent Office out of whack. If Congress wants to place a tax on innovation, I think they should be honest about it and put it on top of what the Patent Office requires to function, not take it out after that budget has already been set.

MR. GOLDSTEIN: I want to reiterate the point Herb made. When we spoke about this issue two years ago, it seemed pie in the sky. In 1995-96, it appears that this really might happen! Now, I think it's up to us and the entire Patent Bar to make sure it gets implemented right.

The quality of the patent examination is critical to a reliable patent system. Currently, the quality of the examination is spotty at best. Sometimes it's reasonably good, sometimes it's pretty awful, and it depends on many factors. One of the key factors is the retention of trained, hard-working patent examiners. If the PTO independent corporation is a means for providing better working conditions, better salaries for examiners, and would allow for greater retention, I think that would be an overall positive factor in terms of better patent examinations. Another point that I'd like to make, and someone, if I'm wrong, please correct me, relates to the retention of EPO examiners. Few, if \*389 any, examiners leave the EPO to work in corporations or private practice. I think one the reasons for retention in the EPO is not so much the fact that the salaries per se are higher, but rather that EPO examiner salaries are not taxed. That is why examiners want to work in the EPO and how the salaries can in fact be higher, even though the dollar amounts paid are not.

I think it's essential that whatever corporate structure is adopted that the structure be such that those setting it up get meaningful input from customers of the Patent Office. That's something that hasn't happened historically and is absolutely essential to the performance of the Office. In addition, while I think it is important that the PTO manage itself, I don't think it's necessarily good that they go off on their own with no effective checks on their operations. Perhaps a board of advisors with board of directors-type powers should be considered. Under this structure, the Commissioner, like a corporate CEO, would be held responsible for PTO performance and for specific actions taken. I also think it's important that the PTO set its own fees.

The only other point that I would like to make deals with performance bonuses for the Commissioner. Such bonuses, which are not in the Moorhead Bill, but are in the Administration Bill, are very risky unless they are done right. One of the problems with the PTO right now is the disposal system, a type of performance bonus, where quantity rather than quality of the work seems to rule the roost. I think if there is going to be a

performance bonus, it is absolutely essential that it be based on quality of the work rather than merely the number of hits on a chart. That is difficult to implement since quantitative measures are easier to deal with, but it is very important not to fall into that trap again.

MS. LINCK: I may want to rebut. I went to the PTO because of what I saw as Commissioner Lehman's vision for the Office and for a better intellectual property system. I think that he has gone a long way toward fulfilling that vision or starting down many avenues that will fulfill that vision. I feel like I made the right decision going to the Office. I think that he has brought intellectual property into the limelight in our country in a way it never has been before. I think that's important and maybe a sign on the PTO is not the way that all of us would have done it, but I think it's a reflection of his desire to make us more visible.

With respect to looking for a new Chief Judge, and this is the first \*390 I have heard he was looking for a minority person, he does have a commitment to diversity. I don't think that that means that he is not looking at all qualified candidates. He came to me and asked me if I had any recommendation. He didn't ask me if I had any recommendations in the minority area, so, in fact if you have qualified candidates or know people that are interested that are qualified, I'm sure that Commissioner Lehman will take a very hard look at those candidates. I think the comment really didn't reflect where the Commissioner is coming from. That's really broader than the corporation bill, which I've also been very involved in with respect to the Administration Bill. Initially, I believe it was conceived that the Office is running pretty well. I think we do have a well run operation. There are problems with it, as there are with any business, but the problems were from limits on the number of people we could hire, taking away our money, and fixing fees in a way that did not rationally relate to services among others.

The union issue, I'm not sure that the Moorhead Bill really changes the union power all that much. I don't know whether that's what Len was trying to say. Right now, they don't have the right to strike or power to negotiate wages. They still are quite powerful, and I think often times that stands in the way of what we'd like to do for the examiners, but that's a personal view. I don't think either bill drastically changes the labor management relations.

With respect to the performance bonus, while bonuses in the examining core are related to disposals, there is a commitment in the Office to reorganize the Office and have the performance bonuses tied more to quality and service to our customers. In fact, I just read a document that does that. With respect to bonuses at the higher levels in the Office, which would be what the bill speaks to, they aren't related to disposals, of course. The people in my Office that get bonuses are the truly outstanding lawyers. They are strictly rewarded for the quality of their performance.

I have a couple of concerns about the Moorhead Bill as compared to the Administration Bill, and who knows where we are going to end up. I hate to see too much change by any bill. I'd really like to just see the strings that keep us from being the best office we can be

removed. There's a concern about how much input the Office would have with respect to policy making in the intellectual property area. Without \*391 having any tie to Commerce, without having any tie to a seat at the Cabinet table, the feeling is that we would not be very effective in the policy making arena. Now, maybe there are those who think that we should have no role to play, but someone within the government has to be a spokesman for the government with respect to policy. That is where we are now, not only in the patent and trademark area, but also in the copyright area because the Copyright Office, of course, is not tied to the executive branch. It's tied to the legislative branch, and that's a real concern about the Moorhead Bill along with the fee setting by Congress rather than the Office. I think it probably is a good idea to have an advisory board. Our bill started out with an advisory board. I don't know whether it's in or out at this point with the Administration Bill.

I was concerned that someone said we don't get input from our customers. I think that's one area where the Commissioner really has reached out to our customers. We have held numerous hearings and whenever we think we are making a move that will impact our customers in any substantive way, we have tried to hold hearings on those topics. There are hearings coming up, as a matter of fact, in San Diego on November 29 and December 7 on examination of biotechnology applications. You might want to jot those dates down if you haven't heard about them. The notice just went out.

MR. JORDA: Just a couple of observations based on clippings I started to collect recently. This has become a hot issue and has engendered a lot of publicity. In fact, one struck me as of particular interest. It has to do with Switzerland. As of January 1, 1996, Switzerland is going to have a new institute for intellectual property that is going to be independent and self-supporting. It will be a slimmed down version of the government department that it is replacing. The federal government sees the operation as a pilot project, which if successful, could be followed by the separation of other government departments as part of the slimming down of the federal bureaucracy. I remember having read about yet another country where this is happening. I forget now which country it is, but perhaps this is a bigger movement, something that is in the air.

Incidentally, Business Week a couple of weeks ago had an interesting article on this issue titled "New Patent Office Pending." It refers to the fact that millions of dollars are now being squandered on inflated rents set by the General Service Administration, which could be \*392 avoided. It also mentions that the Patent and Trademark Office can't expand its staff because of the '94 Workforce Restructuring Act. This new corporatized Patent and Trademark Office would become more flexible and be able to cut waste. On the other hand, it was pointed out that opposition is building among the PTO staff, independent inventors, and small bio-tech companies. So, it may become controversial, and when something becomes controversial, watch out. Congress doesn't want to touch it. This would be very regrettable because I see a lot of merit in corporatizing our Patent and Trademark Office.

MR. GOLDRIAN: I have a remark and a question. First, the remark: The German Patent Office is one of the very few which are dependent on the Justice Department. Most

of the others are dependent on Commerce Departments. I remember that the former President of the German Patent Office, Erich Hausser, frequently complained about the obstacles laid in his way by the Justice Department. One of these obstacles was that Mr. Hausser wanted to do a lot in patent documentation and information. There was some doubt whether the Patent Office should do more than just handle patent matters and do some information and documentation for the publication of patent literature. So, he was complaining about that. I just wanted to put that up for consideration-whether you would believe that this is a good thing for a patent office to do. I personally believe so.

Second is a question: Would it be possible to sue the patent corporation in an ordinary court for patent grant?

MR. WITTE: I have a couple of quick comments in response to some things that Joanne Hayes and Nancy Linck said. I just wanted to remind the group that the Patent Office has had a gift program for many years that's been very successful. It's the money that corporations donate for examiner education, particularly field trips. It's done on an anonymous basis. I've never heard any criticism that these gifts in any way influenced what went on in the Patent Office.

Joanne also raised a point regarding the debt of \$2 billion. As I understand it, the debt would give the Patent Office corporation a chance to achieve efficiency and actually save money on matters such as exorbitant rents that they pay right now for the Crystal City Office and also the large costs involved in buying automation equipment. I think \*393 those are the main reasons for the debt authority.

Also, Nancy Linck talked about the receptivity of the current Patent Office administration to input from the Bar and the private sector. Well, as I understand it, one of the first things that Commissioner Lehman did was to throw out the report of the Advisory Commission that took place prior to his administration. That was a tremendous amount of very fine work from a lot of talented people. I just don't really compare that to receptivity by the current commissioner to input from the outside.

MR. ARMITAGE: I would like to begin by following up on a comment Chico made. I told Bruce Lehman that I was extremely upset with the sign that was put up on the Patent and Trademark Office. I told him it was much smaller than the sign I had planned to put up, and his sign didn't even flash.

In any event, to respond to one more point that Joanne made, the source of this interest in the PTO as a government corporation actually goes back quite a number of years. I don't know if Herb cited the original interest in this issue on the part of IPO, but it really goes back to the mid to late 1980s. It started as a great last hope to solve some long standing problems that the Patent and Trademark Office has had. The IPO commissioned a study. That study was published and was fairly widely circulated.

Beginning in about 1990, the American Intellectual Property Law Association actually established a special committee designed to look into this issue. I had the privilege of

chairing that committee, and we prepared about an 80-page report that examined the historical problems of the PTO in terms of its relationship to the Administration and its relationship to Commerce. The problems were not new. They are chronic.

The problems have been episodically dealt with by Congress, but Congress has yet to really accomplish much. There were actually hearings that Senator Deconcini held in 1993. Don Banner testified on behalf of the ABA, and I testified on behalf of AIPLA. We both emphasized that the government corporation was an idea that Congress ought to take seriously. The fact that the Clinton Administration in the course of reinventing government picked this issue up is more than fortuitous. It now provides the real possibility that Congress will take a \*394 serious interest in getting something done.

Now, why should we do this strange thing? For me, the reason that we should do this is because nothing in PTO management can ever get any better. We almost have nothing to lose by giving the PTO management more flexibility. We now have a situation where all sides are losers. The PTO loses in the way it procures things from the private sector, the way it deals with the private sector, and the constraints it has on its own budgetary process. The PTO is shackled in such a manner that it really can't run itself efficiently.

From the user side, there is frankly very little influence over how the PTO sets its fees, and how it negotiates with Congress when it seeks a major fee increase. There are just certain things that by law can't be divulged in terms of PTO records. The key thing about the bill that AIPLA supports is that there will be a private sector advisory board and that private sector advisory board will have resources to actually determine how the PTO operates. That is a very powerful tool. It's a powerful tool because nobody in the Administration wants anyone writing a bad report or saying they're doing a bad job or saying their proposed fee increases are too large. My hope would be, if the PTO were to become a government corporation, that we would see a balance of power and influence.

The PTO would get all the flexibility it needs to really efficiently run itself, more or less like any enterprise would run itself, including the authority to propose and set its own fees. My hope would be that whenever a major change in management was being undertaken or an operation would be undertaken, that the private sector advisory board could either say, "We've been listened to and this makes sense," or say, "This is dumb, and it's dumb because we now have our 30-page report that explains why it's dumb." Congress will not do that through oversight hearings, but Congress will be very interested if there seems to be tension between the private sector and the PTO. The private sector has more than just glib generalizations. They actually have some documentation as to what's gone wrong.

We have seen enormous management problems in the PTO. You can look at the automation project the Office has undertaken in a profoundly misguided way for so long and see hundreds of millions of dollars wasted, and say, "It's not a product of the people in the Office \*395 being incompetent, but the product of the people in the Office suffering under an incompetent system." You can also look at the very top echelon of the PTO and see the revolving top management of Commissioner in, Commissioner out, and

believe that no enterprise could ever operate that way and be successful. So, my hope is that we will see good legislation passed. We will see balanced legislation passed and it will be supported broadly by all users: big, small, domestic, and foreign users of our patent system.

MR. MYRICK: I'm basically in support of the corporate concept, but I still have misgivings. Perhaps in Nancy's rebuttal she can clear up for me one point that I heard some months ago. I assume it's still true that a real management board with real power to control the CEO of the Patent Office is not a possible thing under federal legislation. Now, that's what we were told at one meeting. Who was it from the Patent Office that came to AIPLA that time, Bob?

MR. ARMITAGE: Brad Huther.

MR. MYRICK: Brad Huther. I believe that's what he told us, but if that's not correct, I'd like to have that clarified for me. In any event, what I'm getting at is that I think what we're doing in creating this organization is basically good. But, I also feel that we are commissioning the PTO Commissioner to raise the rates of pay of all the employees, and unless we find efficiencies to offset that, our rates are going up. Our fees are going to go up for all the services that the Patent Office provides. I think we have to face that as a certain reality. We are telling him to do it. That's the reason we are creating this body so we have to accept that that's what's going to happen. There is no competition for this body save for the very offices we just talked about as being so much more expensive than this body.

So, if the PTO compares itself with the Europeans or with the Japanese, then they're going to have very favorable statistics to justify whatever they do. I don't think we should go into this with blinders on that any advisory board, or whatever, is going to have the power to control what's going to happen to fees unless it is the Congress. I'm not at all sure we want to leave it with the Congress in view of the circumstances we have with trying to balance our budget in seven years. There are a lot of issues that are not resolved in my mind. I see in the Moorhead \*396 Bill that the fees are supposedly access limited to the rest of the government. I'll be interested to see if that shows up in the final passed language of the act.

MR. KEEFAUVER: I played a small role in that IPO study because I had been asked by the previous commissioner to come in and help him think through whether or not we should have a private corporation. At that time, I was against it because it seemed to me the main issue trying to be solved was to get some person off his back who was giving him problems. I thought there were better ways to solve personnel problems. One could just wait for the passage of time, and one or both of them would have departed. But I gradually became a mild supporter of the concept because it seemed that there might be some advantages. At the moment, however, I'm more curious than thoroughly convinced.

Down to basics. I think, first of all, we need to put in some order and rather clearly state what are the problems we are trying to solve. Although I think Bob's study, which I need

to revisit, perhaps details them in some degree. Is it just some general idea that getting the PTO semi-out of government would be good, or not? If we're trying to solve personnel problems, I recall talking to the government corporation people. Don't be too optimistic, because the bill is going to have enough hooks in it that the unions will operate pretty much as they do now, and you still may be subject to some degree to civil service and one or another federal laws relating to how you compensate people. So, to the extent that that's a priority, I think we need to be aware that, once Congress gets its hands on the bill, they could add additional bells and whistles. After all is said and done, you may be worse off with a corporation than without.

Second, I think we need to be clear as to the context in which we are looking at this problem. Initially, we were looking at it as: Is the PTO better in the Department of Commerce or in a private corporation? That has a given set of pros and cons. Now, as I understand it, we are looking at it more in the context of: Assuming that the Department of Commerce self-destructs, where should we put the PTO? Now, that raises an entirely different set of issues because now we're saying: Should the PTO be in the Department of Justice or in a private corporation? Well, I think we can more rapidly reach an answer on that one than we can on the first one, but I think we need to be clear as to the context of our \*397 study.

Another point that was of great concern to me, because I spent a lot of time personally working on it, is: Who would be the spokesman or provide the principal input on making international patent and trademark policy? We felt we were very fortunate to have Mike Kirk's services. Mike Kirk, Bob, I, and others spent quite a few years trying to wrestle the State Department to give up their predominate role in that issue. It took us quite a few years to move Mike up in the Chairs, if I can put it that way. I think we achieved a lot by restoring the articulation of patent and trademark policy to people that really understood it. So, I'm still concerned that with a government corporation, that policy making role would shift back into the Department of State, although the people in State currently are much more receptive to input. I can say that from personal knowledge. Again, they're not going to be there forever, and when they're looking at patent policy and trademark policy, they're looking at it in the context of a lot of other Department of State issues. I think the answer on harmonization and a lot of issues might be quite different in that particular stew.

I think it would be a mistake to look at this issue one way or another based upon what we may think of the present commissioner, primarily because I think that's short sighted. I don't mean to imply anything by that. I think that should be taken out of the equation, with one minor exception, and that is the present commissioner's tendency to become Commissioner of Patents and Trademarks and Copyrights. I think we need to be clear what should be done with copyright policy. Will that be the responsibility of this government corporation? Should it become an intellectual property corporation, not just a patent and trademark corporation? I haven't heard anything to that effect, but it seems to me that there is still some ambivalence about where the sources of policy in the copyright area will be. I don't think we should ignore that completely. My main point is that we need to know what problems we are solving and what context we are solving them in.

MR. BARDEHLE: Following what Bob Armitage has said, if I may just for a short moment draw your attention to the actual situation of the EPO. We are now fighting for better representation of the users, the payers in the Administrative Council. The Administrative Council is the governing body of the European Patent Convention, but it receives \*398 decisions from the circle of the so-called head of delegations, to which we have no access at all. The profession that is the Institute of Professional Representatives is allowed to send one or two observers to some meetings of the Administrative Council, and that's it. They can speak there, but the influence is more or less zero. In a hearing before all delegation of the Administrative Council, I made the following comparison. I compared the situation of the Administrative Council with the situation of a company on shares with General Assembly, to which the payers, the shareholders, are excluded. That's exactly the situation of the payers, or the users, in the EPO system.

My conclusion is then: If it is not possible to have users with the right to vote in the Administrative Council, then you leave the EPO to people who make political decisions. When I look here at that bill, which I have seen for the first time here, there is Section 5, "Appointment of Members of the Advisory Board." It seems to me that these people, if I understand it correctly, are all political people, all political positions. People, at least in Europe, want and fight for a real representation of the users of the system with the right to vote, because they pay everything. Why should they be completely excluded from the decisions? In my view, it makes no sense just to give the Patent Office a new trademark as a commercial enterprise instead of having the users represented in any board which governs that enterprise.

MR. BREMER: Just a comment, and my comment focuses really on the Patent and Trademark Office management advisory board. I know Bob referred to it as a private sector management board. The word advisory bothers me. The point and counterpoint is laid out in the proposition that Dick made and in the recommendation that the Advisory Commission on Patent Law Reform made, whose report was also ignored. So, if you've got an advisory board, if that's what it is, it's one thing. If it's truly a management board, it's quite another.

To pick up on what Heinz said, I made a note: Although they seem to have taken care of the political party orientation, we would still be dealing with political appointments because you have to look at where the appointments are made. They're all at the political level. If we had input from the users of the system and could get people who have that persuasion or orientation, that is, the user's view of the system. I'm particularly looking at the private inventor input. You should have \*399 someone representing the private inventors, the universities, and the nonprofit teaching hospital groups. The board should be expanded to a different composition rather than just looking at where those appointments come from, which I am convinced would be only political in nature. I think that's a factor. I would also think that you need some kind of oversight rather than to let the Office go out on its own. I think Nancy's comment about a Cabinet representation could be extremely important for that purpose, too.

MR. KONKOL: I'm not a public administration expert, but I want to just say that the proposal seems generally to be a very good idea for a number of reasons that Herb discussed. I think Mike Kirk in the AIPLA has also given a number of very good reasons for a government corporation for the Patent Office, and Don Banner, I believe, has mentioned similar reasons. I think I might add comments in two areas.

One relates, I guess, to what Leonard Mackey said about the personnel policy, as far as whether civil service status would continue. I don't know very much about that, but when I was a patent examiner from 1977 to 1982, my impression, at the time, was that considering the tremendous job that the Patent Office did, I thought it was amazing they did the job as well as they did. I thought the quality of the people was very high. I thought the examiners and supervisors were generally excellent. Since leaving the Patent Office, I've dealt with board members in interferences and appeals, and I've been very impressed with my experiences in that forum. So, I don't know what has caused all these problems lately with turnover. I know that when I was there, the pension system was very good, and I understand that under President Reagan that was significantly changed. So, that might be one reason. Another reason I think many very good patent examiners stay in the Office is for job security, perhaps at the expense of higher pay in the private sector. So, I don't think I would want to take that away. If increased compensation in certain parts of the Patent Office will improve performance, I agree with that.

But getting to another detail, Bill Keefauver mentioned the issue of who's going to be making patent policy, aside from the administrative management side of the corporation idea, and how will this affect patent policy? It seems to me, looking at this bill, the attempt is to increase the patent policy role of the Commissioner. It says here that he or she is \*400 going to report directly to the President. I'm not sure I want the President to be worrying about In re Hilmer. I know there have been various other proposals, for example, the PTO reporting to the Department of Justice, and I can see that that is inappropriate because of the obvious tension there with the Antitrust Division. It was interesting to note that the Patent Office was once part of the Interior and State Departments and only in 1926 came under the Commerce Department. So, I don't know where the Patent Office should be in terms of how patent policy is set, but my concern is that this bill may backfire in that respect for the reasons alluded to by Bill Keefauver. I think if the Commissioner is a CEO who is supposed to worry about administrative matters and who on paper reports to the President, I think that he may have less of a role in the international arena than people might expect.

MR. KLITZMAN: I think there's a problem in the Patent Office that's been there for years. I was chairman of a quality examination committee for AIPLA for a number of years. Herb Wamsley was on that committee, and he will recall the number of meetings we had with the officials of the Patent Office. One of the things we focused on after many meetings was that there was a lack of supervision of examiners. When you talk about quality, and as you increase the amount of supervision to improve quality, you automatically impact productivity and immediately you get a response from the union—you can't do that.

There is another problem. If you increase supervision, many of the examiners have a higher rating because they're not supposed to be supervised. So, you have these conflicting interests. It seems to me that you have to have a commission outside of the Office itself that has some real say so about how they're going to resolve that type of conflict. We pinpointed the conflict to the Office. I don't know if the Office has been able to resolve it. The Office may still have that problem. It is a real problem that has to be addressed. It relates to the control that any group must have in the say so of the operation of the Office.

MR. WAMSLEY: This morning people were asking quite a few questions about what the bill means, how it will work out, or how it will be interpreted. It struck me that there really aren't clear answers to a lot of these questions. I certainly don't know the answers. On a number of the points that were mentioned, it's really impossible to insure that the bill \*401 will work out the way you want it to work out. I'll mention some of those areas where everyone hopes it works out, but it may or may not. We shouldn't get too optimistic, because it's going to be a government corporation that still has no real competition. In the private economy in the U.S., I think the organizations that are really lean and mean are the ones that have competitors. No matter how well this corporation turns out, it's not going to be as lean and mean as the Union Carbide Corporation, Rodel Incorporated, du Pont, or 3M. Those companies have built-in incentives every day to innovate, to be as efficient as possible, or else they will die. The odds are that if this bill passes the result will be a net improvement over the way the PTO operates now.

There are some danger areas. One is the labor management area. Probably the most likely political opposition is from members of Congress who tend to be sympathetic to the government employee unions. This legislation could get amended in ways that would make it worse than no legislation. The Moorhead Bill, as it stands now, is pretty close to the status quo. It cuts back a little on the bargaining position of the unions. The version that's in the Reconciliation Bill is better from the management viewpoint. If the government corporation has to go through Congress as a stand-alone bill later, it's going to be open to possible amendments.

Another area of danger is the management advisory committee. How will that committee work out? I think people here agree, based on the comments, that a strong voice for users in advising on the PTO corporation is important. Unfortunately, the Administration Bill does not have an advisory committee. If there is an advisory committee, as Heinz was saying, will the people on that advisory committee be political hacks, or will they be real representatives of the users? With the members being appointed as in the Moorhead Bill by the House of Representatives, the Senate, and the President, it could go either way. In practice, this legislation will only work if the users become politically active and lobby to have their people appointed.

In the fee area, my personal view is that the fee-setting should stay with the Congress, where it is now. There's a lot of misunderstanding, I think, about the fee problems. There are two issues relating to this bill having to do with fees. One is the problem that has grown since 1990 when the House and Senate Appropriations Committees began

siphoning \*402 off the so-called patent fee surcharge money. In my mind that really has nothing to do with establishing the PTO government corporation. This siphoning off was something Congress never intended. The Appropriations Committee is taking advantage of a leak in the system. The money is leaking out, and the leak has to be plugged through some kind of legislation.

The other issue, which is a separate issue, is whether Congress should set the schedule for patent application filing, issue, maintenance fees, and so on, and have it capped as it is now, except for the ability to adjust for inflation, or whether that system should be repealed in favor of the PTO setting the fees. The Administration Bill gives the PTO carte blanche authority to set the fees. Personally, I believe the fees are sure to go up if the PTO is given that authority.

The final area where things might not turn out so well, or on the other hand, they might, relates to policy making on trade-related issues, TRIPs kinds of things, in the patent, trademark, and copyright area. Is the Commissioner going to still have a voice in policy making if we set up a government corporation? There are those who argued this morning that if you don't have a Cabinet level officer like the Secretary of Commerce to go to bat for the PTO, maybe the Commissioner will no longer have a policy making voice. There are arguments on both sides of this issue. The current versions of the bill don't really give us any assurance of how that will turn out in practice. Maybe somebody can figure out a better way to draft the bill.

I didn't respond to all the points that were raised. I suggest this group of experts should follow this issue over the next several months, because there is still time to shape this legislation.

MR. GRISWOLD: I just wanted to say something about the last topic. Since I'm president of IPO, I obviously support the Moorhead Bill. We don't have any rule, I don't think, but I do support it. I do wish, though, in the ideal world we could set this up more like a corporation in the private sense and have a board of directors that managed it, that was cost conscious, that was composed of non-political people, i.e., users, that would set the fees on a cost basis in conjunction with the Commissioner. I think that's the best way to operate something like this. I don't know whether you can actually do that in the world that we live in, but that, I think, is the best way. I think it's better than having \*403 Congress do it or the Commissioner by himself. So, if somehow we could ever get to that, Herb, in my view that would be the best way to operate this organization.

MR. ARMITAGE: I just wanted to make a few comments, I guess in the form of rebuttal. This issue is exceedingly complicated. You have to fully understand this issue, understand almost all about how federal agencies actually work and how they relate to the executive authority, understand rules on conflicts of interest, and it goes on and on and on. I've always tried to look at this in much simpler terms and to look at this kind of a legislation as not being some revolution in the way in which the PTO will operate or some panacea, but rather an evolution. An evolution where you're making a series of what could well be discreet and independent changes to the way the Office operates. For

example, if we did nothing else other than to create a private sector advisory board that would be representative of the user community and gave that board the ability to investigate what goes on in the PTO and issue reports with its own staff, would that give users of the patent system more of an opportunity to influence the PTO for the good? I answer that question in the affirmative. Would it be better for the Office not to be subject to procurement regulations under the GSA, not be under all the government housing regulations, which we now find out cost the PTO perhaps millions of extra dollars a year just to be housed in almost substandard quarters? The answer is yes.

As I tick through this bill, I add up the positives. I admit there are some negatives, but realize that we're going to have legislation as a package. In all likelihood, unless we don't get an advisory board and unless a couple of other things don't happen, we will form the basis really for making at least evolutionary improvements in the Patent and Trademark Office. I don't worry one whit about where the policy ends up. I don't worry about it for two reasons. The President of the United States conducts foreign policy on behalf of the government. If he decides that he's going to move all foreign policy and all IP policy into the White House and lock the State Department out and lock the Patent Office out, he can do so. Therefore, you can't, by legislation, control how the President makes policy. On the other hand, we know that the only people in the United States government who know how to run a patent office and know patent policy issues inside out, because they do \*404 know how to run the patent office, are in the United States Patent and Trademark Office. I can't imagine a scenario, even if we end up with an Undersecretary for Intellectual Policy, under which the Patent Office will truly be shut out of what had become increasingly technical discussions about how to get patent offices to work better with one another and how to get economies from harmonization.

Finally, I'd like to make one pitch for the Patent and Trademark Office to be able to set its own fees. I've had a lot of discussions with Gary Griswold, and I've explained to him that I'm part of the user group of 3M products, and I'm disgusted with the fact that Post-it Notes, which are little pieces of paper with some inferior adhesive on them so they don't really stick to one another very well, cost as much as they do. As part of his user community, he needs to reduce the cost of Post-it Notes by 30 percent. However, Scotch Tape is different. Lots of people make good Scotch Tape, frankly, and I'm willing to let him get at least a 10 percent fee increase for Scotch Tape. The idea that the PTO ought to be chained to an act of Congress in order to rationally set fees I think is an unfortunate one. Also, we know if the Commissioner has the authority to set fees, and we know that there's a private sector advisory group that can make noise with substance behind it, that there will be checks and balances. We know that even if Congress today gives the Commissioner the authority to set fees, and if the Commissioner is irresponsible or unpolitical in doing so, then Congress will take the fee setting authority back. In my view we need a proposal that's comprehensive and provides the PTO reasonable management authority. We're well along our way there. I just hope our brethren at IPO share our desire for flexibility as we go ahead and hopefully finalize this legislation.

MR. GRISWOLD: I would appreciate your comments on marketing of "Post-it" Notes and "Scotch" Tape. We'll get you connected with our marketing people, but as I

mentioned before, in an ideal world, I believe it would be nice to have the Commissioner and this advisory group set the fees. Our concern is that the world is not ideal, and we believe that the best process may occur through Congress to get this done. We're concerned about having the fees go up too much, but if we can figure out how to approach the ideal, then maybe we're on the same page.

MR. KLINE: A number of the points that Herb had expressed \*405 concern about also concern me. Consider particularly the advisory group as stated in the Moorhead Bill. You've got six members appointed by the President, six by the House, and six by the Senate. Isn't that leading towards this becoming a political group? Also, it states that they are supposed to represent the interests of diverse users. That's a very broad term. It just strikes me that there are so many uncertain issues here. This has got to be approached very, very carefully. If not, I think, as Bill Keefauver said, we'll end up with a lot of bells and whistles hung on this and be sorry that it ever happened.

MS. LINCK: It's the Office's position that the advisory commission, appointed as it's going to be under the Moorhead Bill, violates the appointments clause, and it's unconstitutional. I believe the advisory board that the Office envisioned, which may or may not be part of the present Administration Bill, that's forever changing at this point, really envisioned a commission of users appointed by someone who would know who the users are and who could contribute in a meaningful way to the running of the Office. I believe we ended up with the Secretary of Commerce making the appointment. For administrative reasons it wouldn't be the Undersecretary or the CEO, but the Undersecretary or CEO would be the party that would know who in the user community could contribute and that would be the person who would recommend the appointments to the Secretary of Commerce. Hopefully, we'll end up there in the long run.

I did want to respond to a couple of comments that were made by Dick and one other regarding the Advisory Commission report. I do not believe it was scrapped by the Commissioner. In fact, I think we have pushed to get into place almost every single recommendation of that commission. In fact, we have credited the Advisory Commission with doing work in those areas such as 18- month publication and expanded reexamination, etc. I really don't believe there was any intent not to give credit. Obviously, when a different administration takes over, you can't expect them to buy hook, line, and sinker into a different administration's report. But, in fact, it was read critically, and adopted, not scrapped.

As to a management board, I think the comment had to do with absolute control of the Office by users which, of course, doesn't make any sense. The Administration Bill really put teeth into the Advisory \*406 Commission's position requiring that the Office give consideration to any recommendations of the Commission. I have never seen a board more interested in being responsive to our users, in being committed to doing what the private sector wants done in Office, to the extent that's good for the system. We should be working together for a better system.

Given the policy making situation, being tied to Justice is impossible. I think we agree with IPO that Justice comes from a different angle when it comes to policy. I've worked with Justice, and antitrust is alive and well, as is the FTC. You see a division. You see the copyright and patent people on the one side of the table and the antitrust people and the FTC on the other side. So, tying us to Justice, I think, would be a big mistake. But I don't think it's a matter of what happens if Commerce goes away, rather, the question is: Will we be tied to Justice or will we be a private corporation? There probably is a different group that we could align with. I don't know what that would be, and maybe that's something for you people to think about. Maybe the Department of State, maybe that's a possibility, I don't know. Tying us to an independent copyright office would not give us the necessary policy making power.

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