

Independence is bliss? Congress revisits proposal for independent USPTO

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Inconspicuously located on page 50 of the 63-page 2018 Budget Resolution released by the House Budget Committee earlier this autumn, under the heading "Eliminate Overlap and Consolidate Necessary Department of Commerce Functions Into Other Departments", the following statement appears: "[e]stablish the U.S. Patent and Trademark Office as an independent agency." No other mention of the proposal, timeline or implementation steps appear in the resolution. The section appears under the larger heading "Eliminating Waste and Duplication", where the resolution's authors had this to say about the Department of Commerce in general:

"The federal regulatory regime of the previous administration allowed the rulemaking process to protect established corporate actors, to the detriment of innovative small businesses... Our budget supports the recent Presidential directives established by the Trump Administration to combat the regulatory burden placed on manufacturers and streamline the permitting review and approval processes... The Department of Commerce and its various agencies and programs are rife with waste, abuse and duplication."

Still, many commentators were quick to point out that this is hardly the first time that an independent US Patent and Trademark Office (USPTO) has been proposed; the idea received some serious consideration roughly two decades ago during a discussion surrounding the American Inventor's Protection Act 1999. Despite this, others viewed the committee's mention of the issue as a small but not insignificant step on the path to action in restructuring the USPTO within the Department of Commerce.

The USPTO is one of the few federal agencies that actually makes a profit from its operations, versus the majority of other US federal agencies which require taxpayer dollars to carry out their delegated functions. At present, the USPTO collects filing fees from applicants for patents and trademarks, as well as additional fees for many other services. These fees cover the USPTO's operations, including the Trademark Trial and Appeal Board (TTAB) and the Patent Trial and Appeal Board (PTAB). Historically, however, the federal government has diverted excess fees collected by the USPTO away from that office and into unrelated government programmes – some estimates put the figure at more than \$1 billion diverted from the USPTO since the early 1990s alone. With the enactment of the America Invents Act in 2011, the Patent and Trademark Fee Reserve Fund was created to hold all patent and trademark fees collected by the USPTO, with all allocations from the reserve fund to be determined by Congress under the USPTO's annual appropriation amount.

Needless to say, many on the ground foresee strong efforts by Congress and the broader Department of Commerce to resist the establishment of the USPTO as a separate agency. Both pros and cons have been envisioned for the separation even if it were to gain traction. To begin with, it is unclear whether establishing the USPTO as an independent agency would alter its budget allocation, or the practice of Congress in requisitioning funds collected by the USPTO for programmes unrelated to the prosecution and administration of patent and trademark applications. However, if such fee diversion was curtailed, many practitioners would view this positively, allowing the USPTO to invest more money in programmes to improve the speed of patent and trademark prosecution and the quality of issued US patents and trademarks, or even to lower the fees collected from applicants. One other positive, possible impact is the potential for the USPTO to avoid some of the red tape that comes with its position under the arm of the Department of Commerce, such as the department's controversial 'shared services' programmes for IT services. Others mention that the separation of the USPTO as an independent agency may allow its director to have a more forceful voice at the table where policy decisions are made, rather than being subsumed under the wing of the Department of Commerce. Many members of the US IP community view this positively, given that those directly responsible for the operations of the USPTO have a more focused and realistic view of the issues faced by patent and trademark applicants and practitioners.

However, overall, the USPTO currently enjoys a meaningful amount of autonomy as compared to other government agencies. Therefore, in the relatively unlikely event that the proposal to make it an independent agency gets off the ground, the eventual changes may not be all that significant or short term. Patent and trademark applicants should neither make nor expect any sudden moves based on this development.



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