

United States Senate

WASHINGTON, DC 20510

VIA ELECTRONIC TRANSMISSION

January 26, 2022

Mr. Matthew L. Wiener
Acting Chairman
Administrative Conference of the United States
1120 20th St NW, Suite 706 South
Washington, DC 20036

Mr. Todd Rubin
Counsel for Congressional Affairs
Administrative Conference of the United States
1120 20th St NW, Suite 706 South
Washington, DC 20036

Dear Acting Chairman Wiener and Mr. Rubin:

I write you today to request the Administrative Conference of the United States (ACUS) conduct a study on whether Congress should create a unified, stand-alone, and independent Intellectual Property Office.

The current fractured approach to intellectual property (IP) in the federal government, with multiple IP functions housed in different agencies, leads to conflicting policy agendas and unnecessary bureaucracy. Concentrating our intellectual property rights (IPR) expertise into one agency will not only provide a “one stop shop” to assist Americans with engaging in their intellectual property system, it will also appropriately reflect intellectual property’s elevated role in our modern, digital economy.

As you may be aware, I am currently exploring the possibility of creating an independent agency that at a minimum would unite the Patent and Trademark Office (currently within the Department of Commerce) and the Copyright Office (currently within the Library of Congress). My proposal may also include the Intellectual Property Enforcement Coordinator (currently within the Executive Office of the President) and other relevant IP functions located in other agencies. I believe that a single, Senate-confirmed, presidentially appointed Director should lead such an office and that it should have, at a minimum, separate Commissioners for Patent, Trademark, Copyright, and Policy Coordination that would report to the Director.

However, before pursuing legislation I believe Congress would benefit from a detailed study exploring this concept and all of the implications of creating such a unified office. With that in mind, I ask that ACUS to contract with the United States Patent and Trademark Office (USPTO) and the United States Copyright Office (USCO) to study this issue. Specifically, I request that such a study consider the following issues:

A. Funding Models: Fee-Funded vs. Taxpayer Funding

As you are likely aware, the USPTO is fee funded. The Copyright Office is funded from both fees and dollars appropriated as part of the Library of Congress's budget request. A proposal that combines the USPTO and USCO raises questions about whether a new agency should be entirely fee funded, or whether it should be funded by a combination of user fees and taxpayer dollars. If it is to be entirely fee funded, then questions arise about how best to ensure sufficient financial support for intellectual property functions that are not directly tied to the processing of patent, trademark, and copyright registrations or other operational programs. If it is to be a hybrid model that includes appropriated funds, then questions arise about what funds should be mandatory and what should be subject to discretionary appropriations.¹

Accordingly, I ask that one part of the study address the possibility of different funding models for a unified agency, including:

- (1) a fully fee-funded Office. This should consider whether it money collected in fees for one system (trademark, copyright, patent) pays for that particular type of intellectual property, or whether cross-subsidization could create efficiencies – for example, in funding shared administrative staff. It should also consider how these costs and collections can be tracked to ensure transparency.
- (2) a hybrid model where only core IP registration, recordation, and copyright licensing functions² that collect fees from the public (“IP Operations”) are fee funded, but other functions are subject to a mix of discretionary and mandatory appropriations; and
- (3) different variations of a hybrid fee-funded and appropriations model where certain functions listed below, such as education, training, and outreach activities, will be covered by collected fees, but other functions, such as the intellectual property attaché program, or domestic and international advice and policy guidance or coordination, are subject to mandatory or discretionary appropriations.

Regardless of the ultimate funding mechanism(s), it is imperative that the IP Office have a reserve fund to provide continuity in operations, similar to the USPTO's current reserve. Fees collected must not be diverted to other purposes, so any funding model must ensure fees collected will be used for intellectual property functions. It is important that the IP Office is “buffer[ed] from budgetary insecurity and political fluctuations, as well as the funding visibility and predictability required for long term investments and operational confidence.”³ Please ensure that such a study takes into account the need for reserve funds and how those funds would impact the Office's operations.

¹ For example, some considerations could include: whether the funded functions will serve the rights holder community that pays fees, the broader public, other federal agencies, or general improvements to the intellectual property system worldwide; estimated costs of particular functions.

² For example, the Copyright Office's Licensing program collects royalty fee payments and assists in the administration of certain statutory licensing provisions that are fully supported by its collection authority.

³ The IPO of the Future Think Tank, Report: The Intellectual Property Office of the Future, International Trademark Association, pg. 32 (Nov. 2020), available at: https://www.inta.org/wp-content/uploads/public-files/perspectives/industry-research/Think-Tank-Report-The-Intellectual-Property-Office_IPO_of_the_Future.pdf

B. Key Functions of a Unified Intellectual Property Office

In addition to studying fee structures, a study on this issue should also involve an assessments of the key functions of a unified office. For each item listed below, it will be helpful to determine, in consultation with USCO and USPTO, how such a unified office would perform such functions.

1. Granting and issuing of patents, and related recordations of assignments, grants, or conveyances.
2. Federal registration of trademarks, and related recordations of assignments, grants, or conveyances.
3. Registration of copyrights, related recordations, and licensing programs.⁴
4. Providing information to the public about intellectual property.
5. Advising the President, Congress, Courts of the United States, and other Federal departments and agencies on national and international issues relating to intellectual property, other matters arising under the intellectual property laws, and related matters.
6. Conducting evidence-based studies regarding intellectual property and other matters arising under the intellectual property laws, or the administration of the Office.
7. Conducting educational programs for other federal agencies, members of the public, or cooperatively with foreign intellectual property offices and international intergovernmental organizations.
8. Representing the United States in international fora and negotiations on intellectual property matters.
9. Issuing rules and regulations, as needed, regarding intellectual property.
10. Participating in meetings of international intergovernmental organizations, and meetings with foreign government officials, relating to intellectual property, other matters arising under the intellectual property laws, and related matters.
11. Performing such other functions as Congress may direct, or as may be appropriate in furtherance of the functions and duties specifically set forth under the intellectual property laws.
12. Engaging directly with the public, including underrepresented communities, on intellectual property issues to appropriately balance diverse interests.
13. Providing administrative tribunals, such as the Copyright Royalty Board, the soon to be operational Copyright Claims Board, the Trademark Trial and Appeal Board, and the Patent Trial and Appeal Board.

⁴ For example, the Copyright Office's Licensing program collects royalty fee payments and assists in the administration of certain statutory licensing provisions that are fully supported by its collection authority.

14. Funding for Public Advisory Committees: including the Patent Public Advisory Committee, a Trademark Public Advisory Committee, a Copyright Public Advisory Committee, and a Policy, Training, and Outreach Public Advisory Committee.
15. Any other functions that are deemed necessary or desired for the intellectual property office of the future.⁵

C. Streamlining Duplicative Functions

Certain functions may be reduced by a combined agency. For example, both the USPTO and USCO engage in domestic and international copyright policy activities. I ask that in your discussions with the USPTO and USCO, you assess what functions currently within USPTO and USCO may be streamlined by the creation of a single intellectual property office.

Thank you for your prompt attention to this matter. I look forward to you contracting with the USPTO and Copyright Office and producing this study. I ask that you confirm receipt of this letter by no later than February 15, 2022 and complete the requested study by no later than February 1, 2023. If you have any questions, please do not hesitate to contact me.

Sincerely,



Thom Tillis
United States Senator

cc:

Mr. Drew Hirshfeld
Performing the Functions and Duties of the
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Ms. Shira Perlmutter
Register of Copyrights and Director,
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Washington, D.C. 20559-6000

⁵ See, e.g. IPO of the Future Report, n. 3 above.