

A Special Washington Report

from BIRCH BAYH

December 7, 1979

Dear Friend:

I just thought you might be interested in an update of our latest patent legislation.

Sincerely,

Birch Bayh
United States Senator

United States of America

Congressional Record

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Senate

By Mr. BAYH (for himself, Mr. DANFORTH, and Mr. NELSON):

S. 2079. A bill to improve the administration of the patent and trademark laws by establishing the Patent and Trademark Office as an independent agency, and for other purposes; to the Committee on Governmental Affairs and when and if reported, then to the Committee on the Judiciary.

INDEPENDENT PATENT AND TRADEMARK OFFICE ACT

● Mr. BAYH. Mr. President, today I am introducing the Independent Patent and Trademark Office Act. This bill will remove the Patent and Trademark Office from within the Commerce Department and establish it as an independent agency. The bill also creates a 6-year term of office for the Commissioner of Patents and Trademarks. The Independent Patent and Trademark Office Act will not be creating any new bureaucratic entity, but will help the Patent and Trademark Office to function more efficiently than is now possible.

There has been a great deal of discussion and concern recently about what has gone wrong with our patent and trademark system. I have been told by independent inventors, small business owners, and the largest corporations in America that the present confusion in the patent and trademark system is a heavy millstone around their necks as they attempt to deliver new products to the American public. The patent system was originated to protect the interests of inventors in exchange for the disclosure to the public of new discoveries. Our Government is becoming unable to uphold its end of this bargain. When there is increasing doubt about the worth of a U.S. patent, when it takes longer and longer to get a patent or trademark issued, when it is learned that from 2 to 28 percent of the patents are missing from every subclass in the Patent Office files—and that one of these missing patents can be used in court to challenge the validity of an issued patent—and when the Patent and Trademark Office cannot even hire to fill present vacancies but must try to process more and more applications with less and less staff, a clear message is sent to our inventors that the Government does not take them very seriously despite all of the rhetoric about lagging innovation and productivity.

We are all familiar with the statistics indicating the present sorry state of American ingenuity. Statistics like the 47 percent decline in our patent balance between 1965 and 1975 (while Japan's patents have increased nearly 100 percent in every major industrial category) and the fact that 35 percent of all patents issued in this country are going to foreign inventors, are pretty good indications that something has gone wrong. There are many explanations for this disturbing trend, yet virtually every expert that I have talked with has mentioned the crisis in the Patent and Trademark Office as a significant contributing factor to our decline in innovation and productivity.

In his speech to the American Bar Association, Mr. Donald W. Banner, our most recent Patent and Trademark Commissioner, summed up the situation like this:

> In my view we are faced with a slowly but steadily declining Patent and Trademark Office. Not only are we failing to make the PTO a model office, we are failing to provide the necessary maintenance. If we do not promptly reverse this direction of movement, it shall soon be infected with an administrative dry rot condition, rendering it moribund.

This is not an idle warning from someone who is speculating about something that he does not really understand, but the thoughtful statement of a man who has actually tried to update and reform the patent and trademark system from within and has been frustrated in his attempts.

The problem quite simply is that the Patent and Trademark Office is never able to directly make its needs known, but must communicate with the Congress and the Office of Management through the Commerce Department which has not shown much sensitivity to its needs. The Patent and Trademark Office budget as it is presented to the Congress does not reflect the opinions of the people who are actually running the system. The Patent and Trademark Office has been seriously underfunded for years, yet this simple fact has never been clearly stated in the budget requests that we consider. The real needs of the Office became evident to me when I received replies to the written questions that I had submitted during the presentation of the fiscal year 1980 Commerce Department authorization about the situation in the Patent and Trademark Office.

The answers that I received were shocking. I discovered that not only are a large number of patents missing from the files, but that only a small percentage of the files are covered by a security system to prevent theft and misfilings. The Patent and Trademark Office is not

able to hire the needed personnel to fill existing vacancies—the number of trademark examiners in 1980 will be the same as in the mid-1970's yet they are expected to process 65 percent more applications. Patent examiners have 20 percent to 30 percent less time to spend on patent applications than 30 years ago which means that all too often a patent holder is shocked to find his patent struck down by the courts because of data that was not considered by the patent examiner in his hurried search of previous patents and related materials. Inventors and businesses must also wait longer and longer for their patent and trademark applications to be processed. These are extremely serious matters to the inventor or business which is competing with increasingly strong foreign competitors who have dependable patent systems to insure the protection of their inventions.

The answer is not to blindly throw more money into the Patent and Trademark Office and hope for the best, but to undertake a fundamental reform which will insure that the Office will be able to carry out its mission as effectively as possible. The Congress must be able to find out directly what the real needs are and to consult directly with the people who are actually carrying out the day-to-day duties of the Office without any intermediaries. As long as any communication from the Patent and Trademark Office has to filter through the Commerce Department bureaucracy this will be impossible. As former Commissioner Banner said recently:

> The PTO has nothing to hide and would welcome close scrutiny by the Congress and OMB. It would thrive in the bright sunshine of such scrutiny, out of the shadow of the Department of Commerce. The mission of the Patent and Trademark Office is clearly set by the statutes under which it performs. The Department of Commerce cannot and does not assist the PTO in carrying out its functions under those statutes in any way which cannot be better done by the PTO itself. The added cost of the PTO as an independent agency would be minimal, estimated at about $150,000 a year, but this would be well spent in achieving a much more efficient operation than we have today.

This view has been seconded by former Patent and Trade Commissioners Ooms, Kingsland, Marzall, Watson, Gottschalk, and Dann.

During its history the Patent and Trademark Office has been under the auspices of the Departments of State, Interior, and Commerce. Its technical function quite clearly does not fall within the mission of any of these agencies. My bill will not create any new bureaucracy, but will insure that the Patent and Trademark Office will be able to improve its efficiency and give American inventors and businesses the services that they deserve. I urge my colleagues to carefully study this legislation and to join in restoring confidence in our patent and trademark system which was once the envy of the world.

We should remember the words of Abraham Lincoln—a patent holder—who said that "the patent system adds the fuel of interest to the fires of genius." If we stand idly by and permit that fuel to run out we will suffer serious economic consequences that are even now becoming apparent. Even more seriously we will be cheating our children and grandchildren of the rich heritage that we ourselves have been enjoying. To a great extent we are all still living "on Grandfather's money," because the high standard of living that we have is the direct result of the unprecedented wave of inventiveness of the last 80 years. If we are not to squander this inheritance we must act forcefully to shore up our patent and trademark system which has served us so well in the past as an incentive to American inventiveness.

I ask unanimous consent that the text of the Independent Patent and Trademark Act be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2079

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 101. Title 35 of the United States Code is hereby amended as follows:

SEC. 102. Section 1 is repealed and the following is inserted in lieu thereof:

"SECTION 1. Establishment.

"The Patent and Trademark Office, referred to in this chapter as the 'Office', shall be an independent agency, where records, books, drawings, specifications, and other papers and things pertaining to patents and to trademark registrations shall be kept and preserved, except as otherwise provided by law."

SEC. 103. Section 3(a) is amended by striking out the last sentence and inserting in lieu thereof the following:

"The Commissioner shall be the Chief Officer of the Office and shall be a person of substantial experience in patent and trademark matters. The Commissioner shall be appointed for a fixed term of six years and shall be removable from office by the President with the consent of the Senate, only for good cause. The Commissioner shall appoint all other officers and employees of the Office."

SEC. 104(a). Section 3(b) is repealed.

(b). In Section 3(c) the word "Secretary of Commerce" are struck out and the word "Commissioner" inserted in lieu thereof, and Section 3(c) is redesignated as Section 3(b).

(c). In Section 6, the words "under the direction of the Secretary of Commerce" and "subject to the approval of the Secretary of Commerce" are struck out wherever found.

(d). In Section 7, strike out "Secretary of Commerce" and insert in lieu thereof "Commissioner".

(e). In Section 31, strike out, "subject to the approval of the Secretary of Commerce".

(f). In Section 181, the third paragraph, in the last sentence strike out "appeal to the Secretary of Commerce" and insert in lieu thereof "a right to appeal from the order under rules prescribed by the Commissioner".

(g). In Section 188, strike out "Secretary of Commerce" and insert in lieu thereof "Commissioner of Patents and Trademarks".

SEC. 201. Section 1511(e) of Title 15 United States Code is repealed.●

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