

# Memorandum

To: President Obama's USPTO Transition Team

From: John B. Farmer, Chair of the USPTO Trademark Public Advisory Committee ("TPAC")

Date: February 12, 2009

Re: Ideas for TPAC Structural Changes and Transparency

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You have asked that TPAC submit to you two kinds of ideas: (1) ideas for any structural changes that should be made to TPAC, and (2) ideas for increasing the transparency of TPAC's operation and/or the transparency of the USPTO. TPAC has conferred regarding these topics and presents the following ideas:

**I. Executive Summary of Ideas.** Here's a menu of the recommendations in this memo:

- A. Idea #1 – Change how the TPAC chair is selected and the term of that office. Create another TPAC officer –TPAC Secretary/Chair-Elect.
- B. Idea #2 – Get terms of TPAC members on a regular, calendar-year schedule.
- C. Idea #3 – Get needed talents on TPAC when appointing new TPAC members.
- D. Idea #4 – Establish regular channels of communication between TPAC and (1) major IP organizations, (2) the trademark community generally, and (3) the public generally.
- E. Idea #5 – Put more information and interactivity on the TPAC portion of the USPTO website.
- F. Idea #6 – Post webcasts of public TPAC meetings.

**II. Structural Change Ideas.**

- A. Idea #1 – Change How the TPAC Chair is Selected and the Term of that Office; Create a TPAC Secretary/Chair-Elect. The purpose here is to ensure that the chair has TPAC experience, and so that the TPAC chair will have proven his commitment and effectiveness.

1. Why Make the Change? I was appointed to be chair of TPAC without having been on TPAC. It would be better if an incoming TPAC chair was someone who has served on TPAC, so that this person will have experience before becoming chair. Also, it would be better if the incoming TPAC chair was someone who has demonstrated hard work and effectiveness on TPAC, to reduce the risk of having a poor chair.
2. Legislation Needed. 5 U.S.C. § 35(a)(1) says the Secretary of Commerce (the “Secretary”) “shall designate a chair of each Advisory Committee, whose term as chair shall be for 3 years.” Accordingly, under present law, one of two things must happen. Each option is sub-optimal:
  - a. An existing TPAC member must be appointed chair. If the appointed person is completing a three-year term on TPAC, that would mean the person would serve six years on TPAC with three years as chair. Because being effective on TPAC requires a large time commitment, some TPAC members might decline continued service for an additional three years.
  - b. Someone who is not a member of TPAC must be appointed chair.
3. Recommendation. Create a TPAC officer chain of a (i) secretary/chair-elect and (ii) a chair. Absent extraordinary circumstances, these individuals would be drawn from TPAC membership, like this:
  - a. Expand TPAC to eleven members. Each year, the Secretary would appoint three new members to a three-year term. These nine regular members, plus the secretary/chair-elect and the chair, would comprise TPAC.
  - b. Absent extraordinary circumstances, each year the new secretary/chair-elect would be drawn from the three TPAC members completing their third year on TPAC. Yet, the statute should permit drawing from outside of this pool of TPAC members if circumstances make doing so wise.
  - c. The secretary/chair-elect and chair each would serve for one year.

- d. The secretary/chair-elect would automatically become chair after one year without additional appointment being necessary.
- e. The secretary/chair-elect would take minutes at each public and executive-session TPAC meeting and distribute them to all TPAC members.
- f. Thus, hypothetically, if this structure existed now, and if all appointments were for calendar years (see below), the composition and flow of people on TPAC would look like this:

<b>Term</b>	<b>TPAC Member Identification</b>
2009	TPAC Chair
2009	TPAC Secretary/Chair-Elect
2009-2012	TPAC Member A
2009-2012	TPAC Member B
2009-2012	TPAC Member C
2010-2013	TPAC Member D
2010-2013	TPAC Member E
2010-2013	TPAC Member F
2011-2014	TPAC Member G
2011-2014	TPAC Member H
2011-2014	TPAC Member I

- g. How would the new secretary/chair-elect be selected? While other means of selection could be chosen, we recommend that this person be chosen by a nominating committee comprised of the current TPAC chair and the two prior TPAC chairs. Each of those people would have had the chance to see each officer candidate's participation. TPAC as a whole then would have the final power to accept these nominations or to elect a different secretary/chair-elect.
  - i. If law or protocol requires that the secretary/chair-elect and chair be appointed by the Secretary of Commerce, TPAC recommends that this appointment be automatic.
  - ii. The public advisory committees sometimes must be critical of or probing of the USPTO. They should think and act independently. In theory, allowing

USPTO leadership to select TPAC officers could be a tool to compromise this effectiveness.

B. Idea #2 – Get Terms of TPAC members on a Regular, Calendar-Year Schedule.

1. Problem. The terms of the current TPAC members do not have a common start-date. John Farmer's appointment month falls in June. The appointment month of the three newest TPAC members is October. Other TPAC members have other appointment months.
2. Synchronization Needed. It would be better if there was a common appointment date for all TPAC members so all annual TPAC turnover occurs at the same time in the year. This would allow for TPAC to better plan for orientation of new members and would avoid having time-gaps when TPAC isn't at full strength.
3. When Should Terms End/Begin? It would be better if TPAC members were appointed to terms that coincide with the calendar year due to the statutory requirement that TPAC produce an annual report to the President, the Secretary of Commerce and Congress. 35 U.S.C. § 35(d)(2) requires that this report be submitted within 60 days of the end of the federal fiscal year. That means the report is due by November 29 each year. The report needs to be written by TPAC members who were on TPAC for the prior federal fiscal year. Not much happens on TPAC for the rest of the calendar year after preparation of the annual report due to the hard work it takes to produce it and due to the December holiday season. Thus, it makes sense for turnover to occur at or near the end of the year. Here, there are two options:
  - a. Appoint for calendar year terms, to keep things simple.
  - b. Have all TPAC terms run from December 1 to November 31, to line things up with the annual report duty.
4. TPAC Member Replacement. TPAC history demonstrates that many TPAC members will not complete their three-year terms. This happens for various reasons not cataloged here. Any replacement members should continue to be appointed for the balance of the term left by the departing member, to keep things on schedule.
5. Is Legislation Needed? TPAC offers no legal opinion on whether 35 U.S.C. § 5 must be amended to implement this regular

- C. Idea #3 – Getting Needed Talents on TPAC. The Secretary should consider TPAC input on what kinds of talents are needed in new TPAC members before making appointments.
1. For TPAC to be effective, it collectively needs to possess the skills to handle the issues before it. Those issues vary over time.
  2. This spring, TPAC plans to begin making recommendations to the USPTO Director and the Secretary as to what types of skills are most needed in new members of TPAC. TPAC might even suggest specific people (who appear to have those skills) for possible appointment for TPAC.
  3. TPAC hopes that the Secretary of Commerce and the USPTO Director will give these recommendations strong consideration when appointing new TPAC members.

### **III. Transparency Ideas.**

- A. Idea #4 – TPAC Outreach. TPAC plans to have regular communications with intellectual property organizations so that TPAC can receive ideas and concerns, and so that TPAC can propagate information of interest to the trademark community.
1. Contacting IP Organizations. TPAC plans to contact major IP organizations and tell them:
    - a. TPAC exists.
    - b. TPAC wants to be available to receive comments and suggestions on issues in which TPAC may be uniquely positioned to help or act due to TPAC's relationship with the USPTO and unique access to information and individuals within the USPTO.
    - c. TPAC will encourage IP organizations to contact the TPAC chair or any other TPAC member to relay those comments and/or suggestions.
    - d. TPAC will encourage IP organizations to come and speak at TPAC public meetings.

- e. TPAC will encourage IP organizations to provide written comments and/or suggestions, which TPAC would note at public meetings and place on the record.
2. For any comment and/or suggestion received:
  - a. This will function like a suggestion box.
  - b. TPAC will discuss the issue and consider whether to do anything with it at all, either in the form provided by TPAC or as TPAC changes it.
3. If TPAC feels an issue deserves action:
  - a. TPAC might assign it to a TPAC subcommittee for action,
  - b. TPAC might make a TPAC member a champion of the issue, and/or
  - c. TPAC might raise the issue with the USPTO, in the same or modified form.
  - d. TPAC will not be a mere conduit for directing comments and suggestions to the USPTO.
4. This is not exclusive. TPAC will accept comments and/or suggestions from anyone else by the same means (contacting a member, public meeting comment, document on public record). See idea below of soliciting comments on the USPTO website.
5. Also, TPAC may choose to send notice to major IP organizations of things it thinks they should know.
  - a. TPAC also would give these notices at its public meetings.
  - b. TPAC would put these outbound notices on the USPTO website (see below).

B. Idea #5 – Put More Information and Interactivity on the TPAC Portion of the USPTO Website.

1. Create an electronic suggestion box where member of the public can submit comments and suggestions to TPAC. Of course, TPAC would not get involved in complaints/requests about specific mark applications or registrations.

2. Put up full biographies for all members (including union ex-officio members), not just the chair.
  3. Put up contact information for all TPAC members (including union ex-officio members).
  4. Post all documents produced at public TPAC meetings.
    - a. Ideally, we would post documents produced for an upcoming public TPAC meeting two weeks in advance of that meeting.
      - i. TPAC has asked that all documents that will be produced at public TPAC meetings be (a) given to TPAC at least two weeks prior to the meeting, and (b) placed in an online “team room” that TPAC members can access via the Web with a username and password. This team room has not been established.
    - b. This posting would not include any confidential information, which is submitted to TPAC in executive session (e.g., drafts of not-yet-public USPTO budget documents).
    - c. Create a means for individuals to subscribe to TPAC website postings by means of an email list.
  5. Put this memo on the TPAC Portion of the USPTO Website.
- C. Idea #6 – Post Webcasts of Public TPAC Meetings. Starting with the February 2009 meeting, public TPAC meetings will be webcast. These webcasts also should be posted on the TPAC Portion of the USPTO Website.