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November 1, 2012

Hon. David J. Kappos
Under Secretary of Commerce for Intellectual Property
And Director of the U.S. Patent and Trademark Office
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Attn: Cynthia C. Lynch

Submitted Via Electronic Mail: TMFRNotices@uspto.gov

Re: Intellectual Property Owners Association (IPO) comments in response to "Request for Comments Regarding Amending the First Filing Deadline for Affidavits or Declarations of Use or Excusable Nonuse," 77 Fed. Reg. 159, 49425 (August 16, 2012).

Dear Under Secretary Kappos:

Intellectual Property Owners Association (IPO) thanks the United States Patent and Trademark Office ("Office") for the opportunity to provide input and comments regarding potentially amending the First Filing Deadline for Affidavits or Declarations of Use or Excusable Nonuse.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members.

In order to assure that marks on the register have not gone out of use or have been used, the Office is exploring whether there would be a benefit to shortening the first filing deadline for Affidavits or Declarations of use or excusable nonuse under Sections 8 and 71 of the Trademark Act from between the fifth and sixth years after the registration date to between the third and fourth years after the registration date.

A registration is valid for ten years from the date of registration if the owner files an acceptable Section 8 or 71 Affidavit or Declaration currently due between the fifth and sixth years. While we understand and appreciate the Office's continued effort to remove "deadwood" from the register, we believe that requiring a Section 8 or 71 Affidavit or Declaration to be filed in the third year may actually result in a less accurate register particularly in the case where use of the mark ceases shortly after the third year, as the registration would remain in force for seven more years to the end of the ten year term of the registration.

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IPO believes that if there is a sense that registrations, including registrations granted based on Sections 44 and 66, are not in use in the United States, the Office should provide objective data supporting that premise. While we understand the Office's concerns, we wonder whether the volume of such registrations supports making a statutory change that affects all registrations.

Moreover, shifting the deadline to between the third and fourth year would only further remove the United States from international standards. Most countries do not even require an affidavit of use in absence of a third party challenge. The Philippines is one example of a country that does require proof of use in absence of a third party challenge. Similar to our current statutory time frame, the Philippines require an affidavit of use between the 5-6 years from registration.

The Office's data state that more businesses fail within two years of their establishment. We do not believe that this data sheds light on how this may affect the efficacy of the register. Many businesses file applications based on Section 1(b) intent-to-use, so if a business fails within two years, such business is not even likely to obtain a registration. If, however, the business perseveres past two years and obtains a registration, even if such business ultimately fails and/or faces bankruptcy proceedings, the business may have built up goodwill, and if so, the business' trademarks remain valuable intellectual property assets, which could be assigned to another entity.

At any moment in time the register may not be 100 percent accurate. There may be changes in businesses and their use of marks. We believe that the current Trademark Act adequately provides for keeping the register as accurate as possible by requiring proof of use at the time of registration and through Sections 8, 71, and 9 that allow for voluntary surrender of the registration at any time.

In addition, the Trademark Act provides for cancellation of registrations for marks that have been abandoned. Section 45 of the Trademark Act defines "Abandonment of a mark" as "When its use has been discontinued with intent not to resume such use. ... Nonuse for three consecutive years shall be prima facie evidence of abandonment." Therefore, a registered mark that has not been used for three years and for which the owner cannot demonstrate an intent to resume use, is subject to cancellation based on abandonment on petition to cancel by any entity who believes it will be damaged by the continued existence of the registration for the mark.

Also, we believe that the foreclosure of the ability to file a Section 8 or 71 Affidavit or Declaration combined with a Section 15 Affidavit or Declaration will have financial and substantive consequences to trademark owners. Aside from the need to docket two separate dates, the added time required by each Registrant for each registration owned will consume additional resources.

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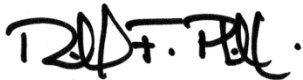
In sum, IPO answers the questions set forth in the Federal Register Notice as follows:

- (1) No, “deadwood” on the trademark register is not a major concern;
- (2) IPO opposes an amendment to shorten the first filing deadline for Section 8 or 71;
- (3) Not applicable; and
- (4) Yes, there is concern about separating the timing for filing a Section 8 or 71 Affidavit or Declaration from the timing for filing a Section 15 Affidavit or Declaration.

IPO believes such a statutory change is not necessary at this time.

Again, IPO thanks the Office for providing the opportunity to submit these comments. We look forward to working with the Office on any further information on this potential statutory change.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "R.F. PHILLIPS".

Richard F. Phillips
President