Coalition for Patent Information Dissemination

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*Derwent Inc. * IFI/Plenum Data Corporation * Knight-Ridder Information, Inc.*
*LEXIS-NEXIS * MicroPatent, Inc. * Questel-Orbit * West Publishing Company*

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Sally Katzen
Administrator
OIRA
OMB

Fax: 395-3047

Bruce W. McConnell
Chief, Policy and Technology Branch
OIRA, OMB

Fax: 395-5167

Dear Sally and Bruce:

The undue pressure you have received leading to the "request" to PTO to provide free online service has resulted, we believe, in your acting in violation of the letter of OMB Circular A-130 and of the principles of the Paperwork Reduction Act of 1995. Further, this "request" is contrary to the principle of public-private partnerships and encouragement of private investment in the information age espoused by the Administration in its first two years. Accordingly, we believe the request to PTO should be rescinded or withdrawn, and hereby request the same. There are a number of reasons that support this view, including:

1. The request that came from Carl Malamud through friends in OSTP and related staff to you, originated because it costs money -- substantial amounts -- to develop and operate an online service on the Internet or any other network. Thus, in one respect, this is merely a request for funding that has followed an oblique route not authorized, to our knowledge, by any statute or regulation.

2. An unofficial study by PTO technologists earlier this year estimated it would cost around $8 million the first year to start an online patent full-text search service, and around $4.6 million per year thereafter to operate. (For text only, patent image service costs would be much higher.) This was a good-faith, rough estimate that primarily indicates the probable cost levels for a service of the type requested. However, private sector experts who reviewed the estimate were of the opinion it significantly underestimated total costs. (This level of costs is in contrast to, for example, the estimated cost level of not more than $250,000 per year for EDGAR online service.) In a year when both the Congress and the President are trying to lower costs, and in a year when PTO has already had millions of dollars of its ratepayer funds diverted to other uses, it seems unconscionable to issue what amounts to an unfunded mandate to PTO.

3. The pressure on PTO from OMB to continue the Malamud system amounts to a violation of your own OMB Circular A-130 and of the principles of the Paperwork Reduction Act of 1995.

a. OMB Circular A-130, Section 8a(5)(d)(i) requires agencies to minimize the cost (of information dissemination) to the government and the public, while Section 8a(5)(d)(ii) requires dissemination on "equitable and timely terms." What does "equitable" mean? Your OMB Analysis that accompanied the June 25, 1993, Revision, states that the word "equal" was "removed from this Section since there may be instances where, for example, an agency determines that its mission includes disseminating information to certain specific groups or members of the public, and the agency determines that user charges will constitute a significant barrier to carrying out this responsibility." In the Malamud-PTO case there has been no claim that a specific group is not being served, nor has there been any showing that Malamud's Town Hall System -- or a system developed by PTO -- has design features that allow its use to be restricted to a specific group.

b. The assertion of violation of Section 8a(5)(d)(ii) is also supported by the legislative history of the Paperwork Reduction Act of 1995. Section 3506(d)(1) of that Act requires "timely and equitable access." The Conference Report (at 19) states that:

> "The conferees concluded that the word "equal" was unnecessary in the agreed-upon text of section 3506(d)(1), given that the statutory obligation for an agency (to) ensure that the public has "timely' and "equitable" access to information available in the possession of the agency includes the obligation to make such information available on a non-discriminatory and non-exclusive basis to any public or private entity for any lawful purpose. **This obligation is sufficient to prevent agencies from discriminating against or otherwise disadvantaging any class of users, particularly commercial users.**" (emphasis added)

An order by OMB to PTO, or independent action by PTO itself, which results in giving patent information free to one class of users while charging fees as high as $33,960 (for text and images) per year to commercial organizations that provide value-added services to the patent user community certainly violates, on its face, the "equitable access" provision of your own Circular A-130 and of the principles of the 1995 Act.

c. The OMB "request" to PTO also violates Section 8a(6)(b) of A-130, which requires agencies to: "Consider whether an information dissemination product available from other Federal or nonfederal sources is equivalent to an agency information product and reasonably fulfills the dissemination responsibilities of the agency;... ." Your analysis of this subsection states that agencies "should not expend public resources filling needs which have already been met by others

in the public or private sector." In the case of patent information, these needs are already being met by PTO and the Patent and Trademark Depository Libraries, and by the private sector patent information dissemination industry.

d. The Paperwork Reduction Act of 1995 is also applicable to the *sub rosa* process that has been pursued in this case. Even though it will not become effective until October 1, 1995, the Act sets forth requirements with which we know you are familiar. For example, Section 3506(d)(3) requires an agency to "provide adequate notice when initiating, substantially modifying, or terminating significant information dissemination products." This implies, *inter alia*, an open process. Surely, the Malamud-to-OSTP *et.al.*-to-OMB-to-PTO process does not meet this standard.

4. Long before the Internet -- in fact, in 1977 -- the private sector began creating machine-readable patent information. PTO started providing patent text in electronic form in 1982; and image data in the late 1980s. As a result, a whole new industry segment has developed specializing in patent information. Over 28 organizations purchase weekly patent tapes. Thus, the massive PTO computer files have now been replicated many times and many "virtual PTOs" -- for dissemination purposes -- now exist. Hundreds of products and services are provided and a number of new businesses have been created in the past three years alone. This is now a well-established industry that has been an effective means of disseminating patent information. Every company is in the midst of changing its delivery systems and a number are now testing new business models including free full-text and image searching on WWW sites. Your action in the instant case will have the effect of crippling these new business models before they have a chance to develop commercial viability. As to existing services, the large ones will probably not go out of business because of your actions, but some of the start-ups certainly will. However, even the larger ones will suffer use reduction, the result of which will be higher prices for patent information users, and reduced investment by these companies at the very time when the information age -- especially the WWW and multimedia applications such as patent text and images -- calls for more investment in order to grow and keep the U.S. in the lead.

As you well know, the appearance of justice is as important as doing justice. In this case the appearance certainly suffers. We believe also that a reasonable interpretation of your own policy guidance indicates you are promoting substantive violations thereof. Accordingly, we respectfully request that the "request" to PTO be rescinded.

Yours very truly,

Joseph L. Ebersole
For the Coalition