U.S. Patent and Trademark Office
Global Intellectual Property Academy Travel Funding

Summary:

A recent decision of the Office of Legal Counsel (OLC) of the Department of Justice interpreting 31 U.S.C. § 1345 casts serious doubt on whether the U.S. Patent and Trademark Office (USPTO) may fund the travel-related expenses of non-federal participants in the USPTO's Global Intellectual Property Academy (GIPA) training and USPTO's international Intellectual Property (IP) seminars. As discussed more fully below, the OLC has decided that general statutory authority to conduct programs is insufficient to overcome the restrictions in 31 U.S.C. § 1345 prohibiting the use of funds to cover travel-related expenses of non-federal participants in such programs. This will hamper the ability of the United States to help nations develop systems to protect intellectual property and prevent counterfeiting and piracy, especially with respect to the intellectual property of Americans doing business overseas. This problem is not unique to the USPTO; several agencies have to rethink their authorizing language. However, the OLC decision will effectively mean the end of training programs that have trained Supreme and appellate court justices, judges and officials from around the world (critical to reach the hearts and minds of those having the power to influence their respective legal systems); customs and border officials from throughout the world (critical to share our operational expertise on how to stop counterfeiting and piracy at their borders); officials protecting against IP theft in the digital environment (critical to, among others, our copyright industries, which are losing billions to piracy throughout the world); and officials from offices that recognize intellectual property rights throughout the world (critical to ensuring the adoption of best practices for the substantive and administrative aspects of the grant of intellectual property rights, especially for Americans seeking those rights).

Through May 2008, the USPTO's GIPA has offered 18 U.S.-based training programs including 508 participants from 101 countries. Were it not for USPTO funding of travel and lodging expenses for officials from less developed countries, the participation of most of the foreign officials would not have been possible. Recent notable programs include the November 2007 program captioned Criminal Enforcement of Intellectual Property Violations and Crimes attended by 28 foreign prosecutors from 22 countries (23 participants funded by the USPTO); the January 2008 program captioned Customs Enforcement of Intellectual Property Rights attended by 32 customs officials from 21 countries (24 participants funded by the USPTO); and the March 2008 program captioned Intellectual Property Rights Enforcement for Judges attended by 34 judges from 18 countries (29 participants funded by the USPTO).

Congress has repeatedly directed the USPTO to concentrate resources on international IP development. As the USPTO has indicated to Congress, effective international programs depend on ensuring that the United States can fund the transportation and travel-related expenses of foreign officials to attend educational sessions.

Our enabling legislation says nothing specific about paying for travel expenses for non-federal employees to participate in our international or domestic IP programs, studies and exchanges. The Congress directed the USPTO to spend $20 million in December 2004 for IP efforts overseas but this provision mentioned nothing about travel expenses for non-federal employees. This budget was increased by Congress in November 2005 to $25.3 million to further strengthen the USPTO's international IP efforts. However, OLC reads the need for specific statutory authority very narrowly, and the general authorizing language for the USPTO is not sufficient to satisfy OCL's test.

Analysis:

31 U.S.C. § 1345 states in relevant part as follows:

> "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit (1) an agency from paying for the expenses of an officer or employee of the United States carrying out an official duty. . ."

The Office of Legal Counsel (OLC) for the Department of Justice, whose opinions are binding on the Executive Branch, has opined that the Department of Commerce International Trade Administration's two-week "management training fellowship program[s]" in Washington for representatives from foreign governments constitute *meetings* under 31 U.S.C. §1345 and that, absent specific statutory authority otherwise, appropriated funds cannot be used to cover related travel expenses for the non-federal participants. 28 Op. Office Legal Counsel (2004).[1]

Until recently, USPTO maintained that it could use appropriated funds to pay the travel expenses of non-federal GIPA and international IP seminar participants based on its authorization to "conduct programs, studies or exchanges of items or services" regarding international IP law, IP policy and the effectiveness of IP protections in accordance with 35 U.S.C. §§ 2(b)(11) and 2(b)(12).

As mentioned, OLC, however, recently determined that similar general authorizations to conduct training or other programs were insufficient to overcome the restrictions of 31 U.S.C. § 1345 prohibiting the use of funds to cover travel-related expenses of non-

[1] The Government Accountability Office (GAO) disagrees with OLC, explaining that 31 U.S.C. § 1345 was originally enacted to prevent numerous requests from various private organizations for appropriated funds to cover "lodging, food and transportation" for conventions or other forms of assemblages or gatherings. GAO believes that legislative history makes it clear that the prohibition was meant to address only those gatherings that private organizations sought to hold at government expense and would not apply to government-sponsored events. 72 Comp. Gen. 229 (May 1993); B-310023, April 17, 2008; B-300826, March 3, 2005. OLC, however, considers legislative history less clear and that the statute's plain, unambiguous language clearly includes more than simply privately sponsored meetings. 28 Op. Office Legal Counsel (2004). Notably, OLC considers its opinions as binding on the Executive Branch and that GAO's opinions are simply helpful, nonbinding guidance. 20 Op. Office Legal Counsel 341, 342 n. 3 (1996); 31 Op. Office Legal Counsel, n. 1 (2007).

federal participants in such programs. 31 Op. Office Legal Counsel (2007) (The Environmental Protection Agency's statutes that generally authorize training or conferences of non-federal individuals and several other statutes encouraging it to fund related research were not specific enough to satisfy the requirements of § 1345.) Notwithstanding this conclusion, OLC opined that the restrictions within § 1345 were not part of an appropriation and that failing to follow them did not violate the Antideficiency Act, explaining that Congress could impose penalties by other means. *Id.*

Similar to the USPTO's authority to hold programs regarding the value of IP protections, EPA has authority under the Clean Air Act to establish national research and development programs and is required to "conduct, and promote the coordination and acceleration of training for individuals relating to the causes, effects, extent, prevention and control of air pollution." Despite this authority and similar authority found in the Clean Water Act, the Solid Waste Disposal Act and several other statutes, OLC opined that EPA's authority was not sufficiently specific to overcome the restrictions found in § 1345.

Recommendation:

Congress could expressly authorize the agency to cover travel expenses for GIPA and International IP seminar non-federal participants to remove any doubt about whether 31 U.S.C. § 1345 applies to USPTO programs. A simple amendment to section 2(b)(11) of title 35 that reads "funds are authorized to be expended to cover the subsistence expenses and travel-related expenses, including per diem, lodging costs and transportation costs, of non-federal employees attending such programs;" would provide that authorization.