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SENT VIA EMAIL TO TMFRNotices@uspto.gov

Commissioner for Trademarks
Attn: Cynthia C. Lynch
P.O. Box 1451
Alexandria, VA 22313-1451

Comments of
Erik M. Pelton & Associates, PLLC
in response to
**USPTO Request for Comments Regarding Amending the First Filing Deadline for
Affidavits or Declarations of Use or Excusable Nonuse**
[Docket No. PTO-T-2012-0031]

Dear Commissioner Cohn:

We write to express our support for the USPTO's proposed change in legislation to amend the first filing deadline for Affidavits or Declarations of Use or Excusable Nonuse under §§ 8 and 71 of the Trademark Act to between the third and fourth years after registration, or the six-month grace period that follows. We agree that "deadwood" registrations impose significant burdens on applicants and other stakeholders in the trademark system, and we are highly confident that the proposed change will result in a significant reduction in the volume of deadwood on the register.

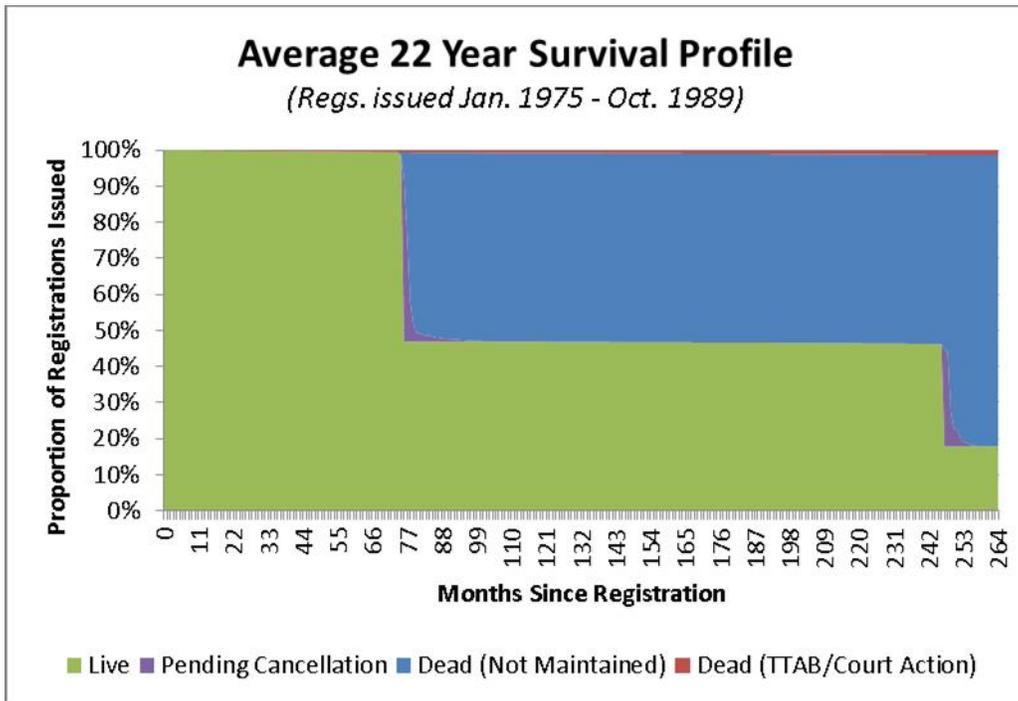
Based on the empirical analysis described below, we estimate that the proposed deadline change will result in at least a 14.3% reduction in the total volume of deadwood registrations during the first ten years of the registration lifecycle. At current registration rates, this is the equivalent of culling 60,000 more deadwood registrations per year than the current schedule. This benefit will continue each year into the future, and it will increase in proportion to future registration rates.

We also find that the proposed timing of the first deadline is nearly ideal, meaning no other maintenance schedule would produce a superior reduction in deadwood volume without adding additional maintenance deadlines or altering the term of trademark registrations. Therefore, we strongly support the USPTO's proposal.

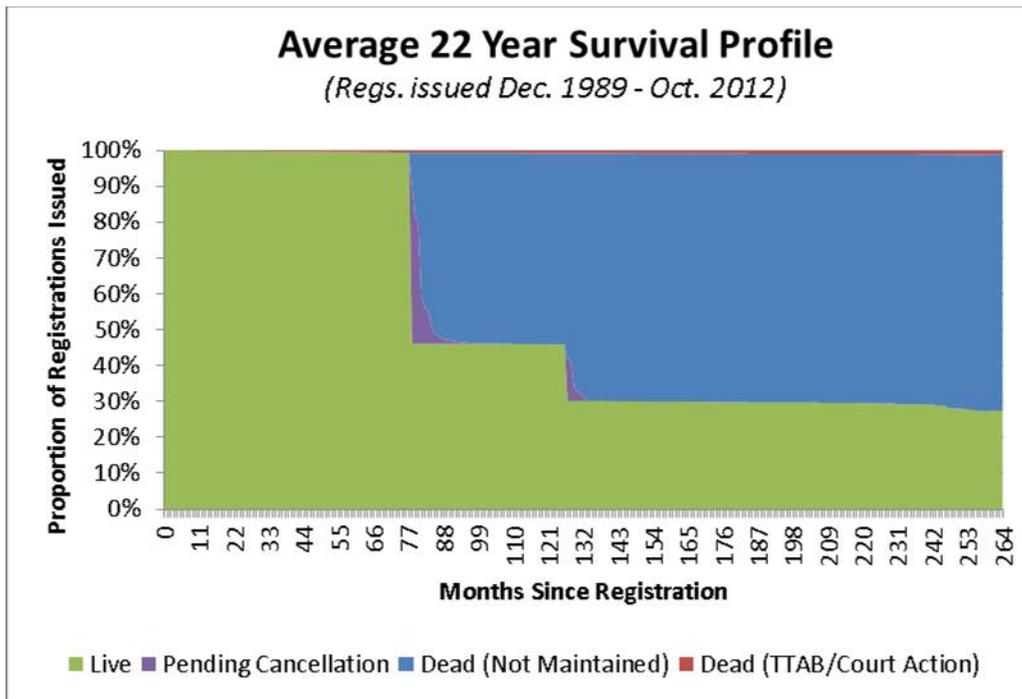
Analysis of the Trademark Registration Lifecycle

For the purpose of this analysis, we collected registration status information for a representative sample of 10% of all registrations issued between January 1, 1975, and October 17, 2012. Thus, our data set consists of more than 322,000 registrations issued over nearly 38 years.

We grouped the registrations by the month and year that each issued, and we estimated the proportion of registrations that "survive" (or remain registered) through each successive month since registration. We found that survival rates were very consistent from year to year and month to month. Those registrations issued in the months before November 1989 initially enjoyed a 20 year registration term and followed the survival profile in the first chart below.



Registrations issued after November 1989 enjoyed only a 10 year term, and therefore they follow the profile shown in the second chart.



In both charts, the green area represents the proportion of registrations that remain “live” (not cancelled) as the months since registration increase. The thin red region along the top represents the proportion of registrations that are cancelled as a result of TTAB or civil court actions. The blue region represents registrations that were cancelled for failure to file required maintenance documents, such as declarations of continued use or excusable non-use pursuant to §§ 8 or 71.

Finally, the purple regions represent registrations for which no required maintenance documents were filed and, therefore, were awaiting formal cancellation by the USPTO.¹

Several important features of the registration lifecycle are apparent from these charts. For example, TTAB and court actions account for a miniscule proportion of cancellations. Instead, the scheduled maintenance deadlines, such as those at issue in the USPTO's proposed changes, are practically the only means through which unused "deadwood" registrations are culled from the register. Only 46-47% of registrations survive the first deadline and 6 month grace period, which currently expires after month 78. Approximately 30% of registrations survive the second deadline at month 126, and survival drops further to 17-18% after the third deadline at month 246.

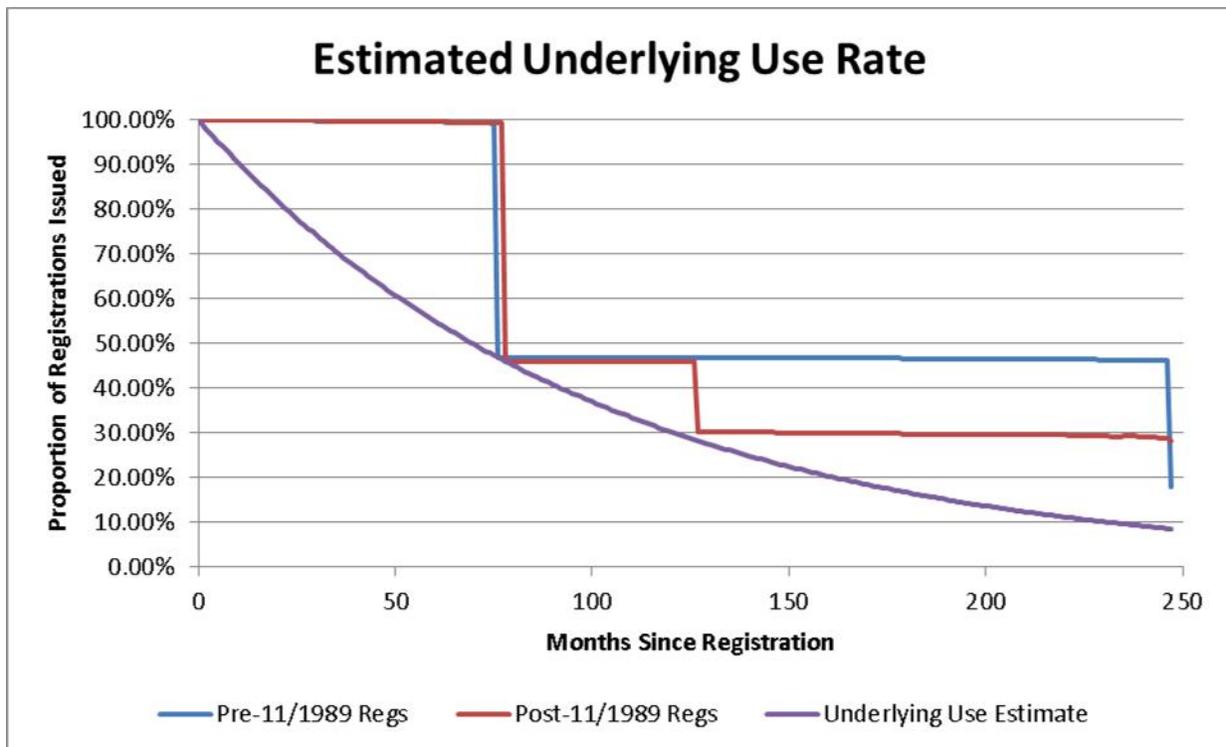
It is also important to recognize that the vast majority of the many marks that are cancelled after each deadline were not renewed because the marks themselves had already fallen out of use, often many months or even years before the deadline. Of course, there will always be some registrations that are cancelled because the registrant cannot afford the maintenance fees or overlooks the deadline. There can be little doubt, however, that the benefits of registration far outweigh the modest and infrequent expense and effort required to maintain the registration, at least, if the mark is still genuinely in use. Therefore, we assume that (i) when a mark is registered, the mark is (typically) in use; (ii) while the mark remains in use, the registrant submits the required maintenance filings; (iii) eventually the mark falls out of use; and (iv) after the mark is no longer in use, the registrant fails to satisfy the next maintenance deadline, resulting in cancellation. In essence, we assume most registrants conduct their business and use of their marks in good faith, and the maintenance deadlines merely serve as periodic opportunities for the USPTO to sample registrants to see which of them still deserve registrations.

Estimating Underlying Use Rates and Deadwood Volume

In light of above observations and assumptions, we make a cautious estimate about the proportion of registered marks that have fallen out of use over time. This estimate can be used to quantify the total amount of deadwood that accumulates on the register between maintenance deadlines. We also compare alternative maintenance schedules to determine how the USPTO's proposed schedule would affect deadwood.

We have consolidated elements of the first two charts into the third chart shown below. In particular, the blue and red lines correspond to the green areas of live, uncanceled registrations shown in the first two charts. Note how the blue and red lines are virtually identical, but for the divergence after the 10 year deadline that only affected the Post-11/1989 registrations shown in red. This region between the blue and red lines in the interval between the 10-year and 20-year deadlines corresponds to the volume of deadwood registrations that would have remained on the register if the renewal term had not been reduced from 20 years to 10 in 1989.

¹ Note that the second chart does not show the expected sharp reduction in registrations after the expiration of the 20 year renewal deadline. We suspect many of these overdue registrations will be cancelled in the coming weeks. Shortly before we began collecting data for our analysis, the USPTO issued a notice advising the public of the following: "Due to a technical problem, the status of many trademark registrations was not automatically updated in the USPTO's database to reflect that the registrations were cancelled and expired for failure to file the post-registration maintenance and renewal documents and fees required by Trademark Act Sections 8 and 9. 15 U.S.C. §§ 1058, 1059. This technical problem has been corrected. As a result, the TMOG will be publishing a larger than usual number of cancelled/expired registrations over the next few weeks." The notice is available here (http://www.uspto.gov/trademarks/notices/tmog_notice.jsp).

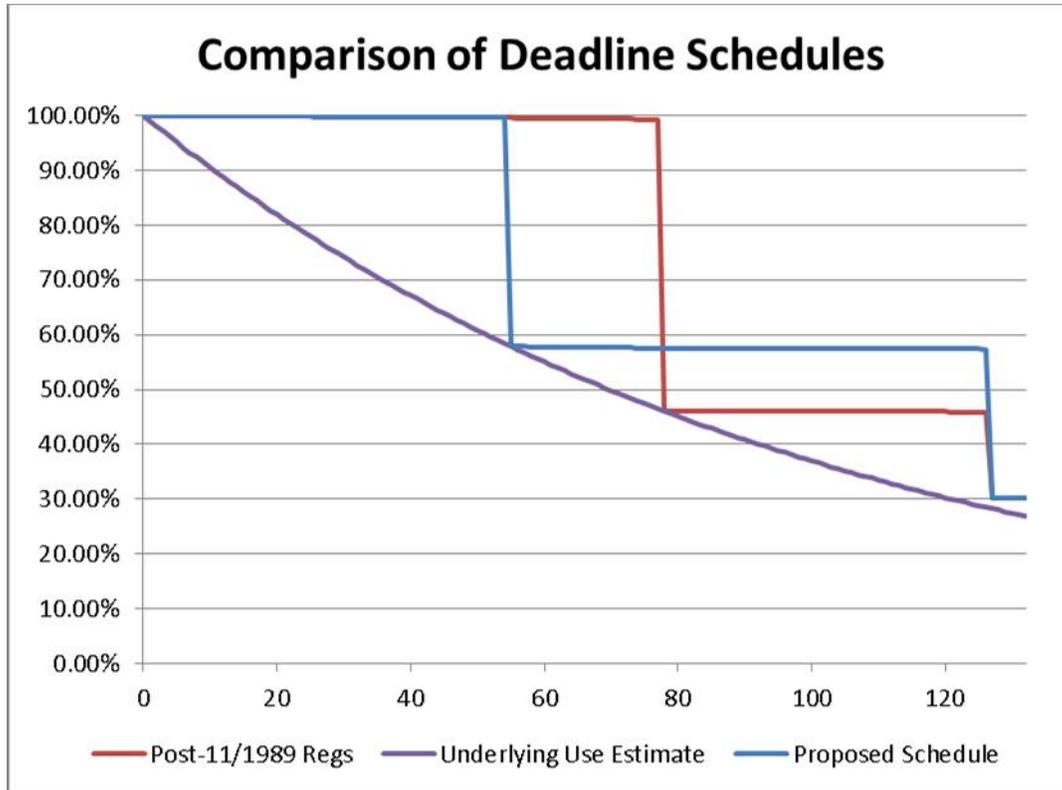


This difference can also be quantified in terms of the amount of deadwood registration-years that were prevented, *i.e.*, the total amount of years the deadwood registrations would have remained on the register had they not been cancelled after the 10th year. In the example above, the amount of deadwood registration-years saved between years 10 and 20 would be 1.6 times the total number of registrations issued at month=0. For example, for the population of 55,381 registrations issued in 1990 alone, the amended renewal term prevented deadwood registrations from staying on the register a combined additional 88,609 years. Clearly this change had a significant impact on the volume of deadwood on the register.

The same calculation can be applied to measuring the expected effect of the changes currently proposed. Note the purple line in the chart above. This represents a simple exponential function with a continuous annual decay of 11.94% per year. Various exponential decay functions are commonly used in the field of Survival Analysis to model the survival rates of large populations of people, biological processes, and machines, in which the likelihood that each individual survives a given time interval is independent of the survival of the other individuals in the population. The annual decay rate was selected because it provides the best fit to the average 6-year deadline survival rates for both populations of pre- and post-11/1989 registrations, missing each by no more than 0.02%.

We believe a simple exponential decay model like the one proposed above provides a suitable and conservative approximation of the proportion of registered marks that remain in use over a given period of time. Based on this model, we estimate that the volume of deadwood allowed to remain on the register over the first 10 years of the registration lifecycle is approximately 2.32 times the number of registrations issued at the start of the relevant period. For example, 182,708 registrations were issued in the year ending 9/30/2012. Over the next 10 years, the current schedule of deadlines will allow deadwood registrations from this group to remain registered for a combined 423,882 years.

We stress that this simple model is “conservative” because survival rates at subsequent maintenance deadlines are progressively higher than our simple model. This suggests that the rate of decay *declines* or becomes slower over the life of a trademark registration. That is, the longer a mark remains registered and in use, the less likely it is to fall out of use in each successive year. Thus, it is likely that our model, which has a constant rate of decay, underestimates the number of registrations that fall out of use in the early years of the first 6 year period.



In the chart above, we compare the current survival profile of the Post-11/1989 registrations (in red) with the estimated survival profile under the USPTO’s proposed amendments (in blue). According to this estimate approximately 57-58% of issued registrations will survive the first deadline and grace period, which would close after the first 4 years and 6 months. Although this would cull many deadwood registrations two years earlier than the current schedule of deadlines, the proposed schedule would let a larger number of deadwood registrations persist until the 2nd deadline closes at 10 years and 6 months.

Fortunately, the benefits far outweigh the costs. Under the proposed schedule, we estimate the total volume of deadwood years to be approximately 1.99 times the total number of registrations initially issued, which is 14.3% less than the volume of deadwood tolerated under the current schedule (2.32x vs. 1.99x). Thus, if the proposed deadline schedule were implemented within the next few years, the 182,708 registrations issued in the year ending Sept. 30, 2012, would lead to 60,293 fewer years of deadwood registrations than the current schedule. Notably, this is a recurring advantage that will persist year after year, for the entire time we continue with the proposed schedule. In addition, because our estimate is conservative, even larger benefits will be realized if marks are more likely to fall out of use in the first three years of registration than in later years. Finally, the proposed timing is nearly optimal under the assumptions of our simple exponential model. We do not believe any other placement of the first deadline could further reduce the volume of deadwood to any significant degree.

Therefore, we strongly favor the proposed schedule of deadlines because it results in a nearly optimal reduction in the volume of deadwood during the first 10 years of the registration lifecycle without adding new maintenance deadlines or changing the term of a registration. Thus, it will create a tangible, meaningful, and measurable benefit with no significant increase to the maintenance burden of registrants.

Thank you for the opportunity to comment. If additional information would be helpful to the USPTO, we would be happy to supplement our findings as we continue our research.

If you have any questions, please contact the undersigned at 703-525-8009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Erik M. Pelton', with a stylized, cursive script.

Erik M. Pelton
ERIK M. PELTON & ASSOCIATES, PLLC

A handwritten signature in black ink, appearing to read 'Mark L. Donahey', with a stylized, cursive script.

Mark L. Donahey, JD, MS