

IPO PTO Day 2014

Patent Law Case Update

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- **Mollybeth (“Molly”) Kocialski**, Senior Patent Counsel, Oracle America, Inc.
- **Jennifer Knight**, Senior Counsel, Intellectual Property, Eastman Chemical Company
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Patent Law Case Update

- **Overview of Supreme Court Patent Cases 2013-2014**
- **Unexpected results and Obviousness** - *Sandoz v. Allergan*
- **Patent exhaustion** - *Bowman v. Monsanto*
- **Pay-for-delay Pharmaceutical Settlements** - *FTC v. Actavis*
- **Patentable Subject Matter** - *AMP v. Myriad*
- **USPTO *Myriad* Guidelines**
- **Patentable Subject Matter** – *Alice Corp. v. CLS Bank*
- **Standard of Review for Claim Construction**
- **USPTO Guidance on Functional Claiming**
- **Q&A**

Overview of Supreme Court Patent Cases 2013-2014

Erika Arner

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& Dunner, L.L.P.

Supreme Court Patent Cases 2013-2014

- Patent cases decided this term
 - *Medtronic v. Mirowski Family Ventures* (decided 1/22/2014)
 - **Held:** When a licensee seeks a declaratory judgment against a patentee that its products do not infringe the licensed patent, the patentee bears the burden of persuasion on the issue of infringement.

Supreme Court Patent Cases 2013-2014

- Patent cases pending this term
 - *Alice Corp. v. CLS Bank Int'l* (argument 3/31/2014)
 - **Question presented:** Whether claims to computer-implemented inventions-including claims to systems and machines, processes, and items of manufacture-are directed to patent-eligible subject matter within the meaning of 35 U.S.C. § 101 as interpreted by this Court?
 - *Nautilus v. Biosig Instruments* (argument 4/28/2014)
 - **Questions presented:** (1) Whether the Federal Circuit's acceptance of ambiguous patent claims with multiple reasonable interpretations – so long as the ambiguity is not “insoluble” by a court – defeats the statutory requirement of particular and distinct patent claiming; and (2) whether the presumption of validity dilutes the requirement of particular and distinct patent claiming.

Supreme Court Patent Cases 2013-2014

- Patent cases pending this term
 - *Limelight Networks v. Akamai Tech.* (argument 4/30/2014)
 - **Question presented:** Whether the Federal Circuit erred in holding that a defendant may be held liable for inducing patent infringement under 35 U.S.C. § 271(b) even though no one has committed direct infringement under Section 271(a).
 - *Highmark Inc. v. Allcare Health Management Systems* (argued 2/26/2014)
 - **Question presented:** Whether a district court's exceptional-case finding under 35 U.S.C. § 285 (which permits the court to award attorney's fees in exceptional cases), based on its judgment that a suit is objectively baseless, is entitled to deference.

Overview of Select Patent Cases

Jennifer Knight

Senior Counsel, Intellectual Property

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Unexpected Results and Obviousness

– *Sandoz v. Allergan*

- ANDA seeking approval to market a generic form of Allergan's Combigan®
- Lawsuit - patent infringement / invalidity counterclaim
 1. A composition comprising about 0.2% timolol by weight and about 0.5% brimonidine by weight as the sole active agents, in a single composition.
- Obviousness analysis
 - Scope and content of the prior art
 - Differences between the prior art and claimed invention
 - Level of ordinary skill in the art
 - Relevant secondary considerations (commercial success, long-felt but unsolved needs, failure of others, and **unexpected results**)

Unexpected Results and Obviousness

– *Sandoz v. Allergan*

- Prior Art – US 5,502,052
 - Fixed combinations of α_2 -agonists and beta-blockers for treating glaucoma
 - Expressly teaches timilol as a beta-blocker but not brimonidine as one of the α_2 -agonists (incorporated by reference)
 - Multiple doses of individual medicines space apart in time reduces patient compliance
- Other Prior Art –
 - Common to dose brimonidine then timilol twice per day rather than brimonidine 3 times per day
 - At least 4 other combination products for treatment of glaucoma on the market
 - Other fixed combination drugs could decrease treatment from 3 to 2 times per day
 - Only 3 known pharmaceutical acceptable α_2 -agonists for treating glaucoma

Unexpected Results and Obviousness

– *Sandoz v. Allergan*

- Clear motivation in prior art to develop a fixed combination brimonide/timolol product
- Reasonable expectation of success
 - General unpredictability in art not sufficient
 - Particularized difficulties of Allergan irrelevant to the claimed invention
- Unexpected results – increased efficacy and reduction of side effects
 - Unexpected results do not outweigh other evidence of obviousness
 - Whether the combination unexpectedly increased efficacy
 - motivation to combine drugs was real

Patent exhaustion –

Bowman v. Monsanto

- Monsanto sold Roundup Ready® soybean seeds – genetically modified to survive exposure to glyphosate
- Roundup Ready® seeds sold under license agreement
 - Grower may plant the purchased seed in one (and only one) season
 - Grower may not save any of the harvested soybeans for replanting, nor may he supply them to anyone else for that purpose
- Bowman first planting each year
 - Purchased Roundup Ready® soybean seeds
- Bowman second planting each year
 - Purchased “commodity soybeans” from grain elevator (first year)
 - Planted harvested soybeans from the second planting of the previous year (thereafter for 8 years)

Patent exhaustion –

Bowman v. Monsanto (9-0)

- Limits a patentee's right to control what others can do with an article embodying an invention. The purchaser has the right to use or sell the thing as he sees fit.
- Applies only to the particular item sold, and not to reproductions.
- Does not enable Bowman to make additional patented soybeans without Monsanto's permission (either express or implied).
- Holding limited – not intended for every self-replicating product.

Pay-for-delay Pharmaceutical Settlements – *FTC v. Actavis*

- 1999 – FDA approval of AndroGel®
- 2003 – Solvay patent issued
- 2003 – Actavis filed ANDA
- Lawsuit ensued
- 2006 – Parties settle
 - Generics agreed to delay market entry
 - Generics agreed to promote AndroGel®
 - Solvay paid millions of dollars to each Generic

Pay-for-delay Pharmaceutical Settlements – *FTC v. Actavis* (5-3)

- 11th Circuit
 - Affirmed DC dismissal - settlement within the scope of the patent coverage
- Supreme Court strongly divided
 - Majority (Breyer)
 - Whether a “reverse payment” settlement can sometimes unreasonably diminish competition in violation of the antitrust laws.
 - Dissent (Roberts)
 - Whether the settlement gives the patentee monopoly power beyond what the patent already gave it.

Pay-for-delay Pharmaceutical Settlements – *FTC v. Actavis* (5-3)

Majority

- Reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effect
- “rule of reason” applies

Minority

- A patent carves out an exception to the antitrust law
- Within the scope of the patent, the patent holder may operate without facing antitrust liability

Patentable Subject Matter – *AMP v. Myriad*

- Myriad discovered the precise location and sequence of BRCA1 and BRCA2 genes – mutations can dramatically increase risk of breast and ovarian cancer
- Claims, for example, on the **DNA** code and the **cDNA** code that tell a cell to produce the string of BRCA1 amino acids
- Myriad – the only entity providing BRCA testing
- Lawsuit filed seeking declaration that claims were invalid under 35 U.S.C. § 101

Patentable Subject Matter – *AMP v. Myriad*

35 U.S.C. § 101

Whoever invents or discovers any new and useful . . . composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

- A naturally occurring DNA segment is a product of nature and not patent eligible merely because it is isolated
- cDNA is patent eligible because it is not naturally occurring

Patentable Subject Matter – *AMP v. Myriad*

What is **not** implicated by the decision

- Method of isolating genes claims
- New applications of knowledge about the BRCA1 and BRCA2 genes claims
- Consideration of DNA claims in which the order of the naturally occurring nucleotides has been altered

Patentable Subject Matter – USPTO *Myriad Guidelines*

Raul Tamayo

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IPO Patent and Trademark Office Day

March 25, 2014

Evaluating Subject Matter Eligibility Under 35 USC § 101: March 2014 Update



Raul Tamayo
Office of Patent Legal Administration



Existing Guidance

- Current USPTO examination guidance directed to three recent Supreme Court decisions:
 - Process claims involving Abstract Ideas
(2010 *Bilski* Guidance; MPEP 2106)
 - Process claims involving Laws of Nature
(2012 *Mayo* Guidance; MPEP 2106.01)
 - Product claims reciting nucleic acids
(6/13/2013 *Myriad* preliminary memo)
- Replaced by
New
Guidance



Scope of New Guidance

- Applies to all types of claims (i.e., machine, composition, manufacture and process claims) that recite or involve:
 - Laws of nature/natural principles,
 - Natural phenomena, and/or
 - Natural products.



What About Abstract Ideas?

- No change to examination of claims reciting abstract ideas.
 - Continue to analyze claims reciting abstract ideas for subject matter eligibility using only the existing guidance in MPEP § 2106(II), even if claim also recites other judicial exceptions.
- Why?
 - Law is unsettled.
 - Supreme Court is scheduled to hear at least one case in 2014 (*Alice v. CLS Bank*) involving the abstract idea judicial exception.

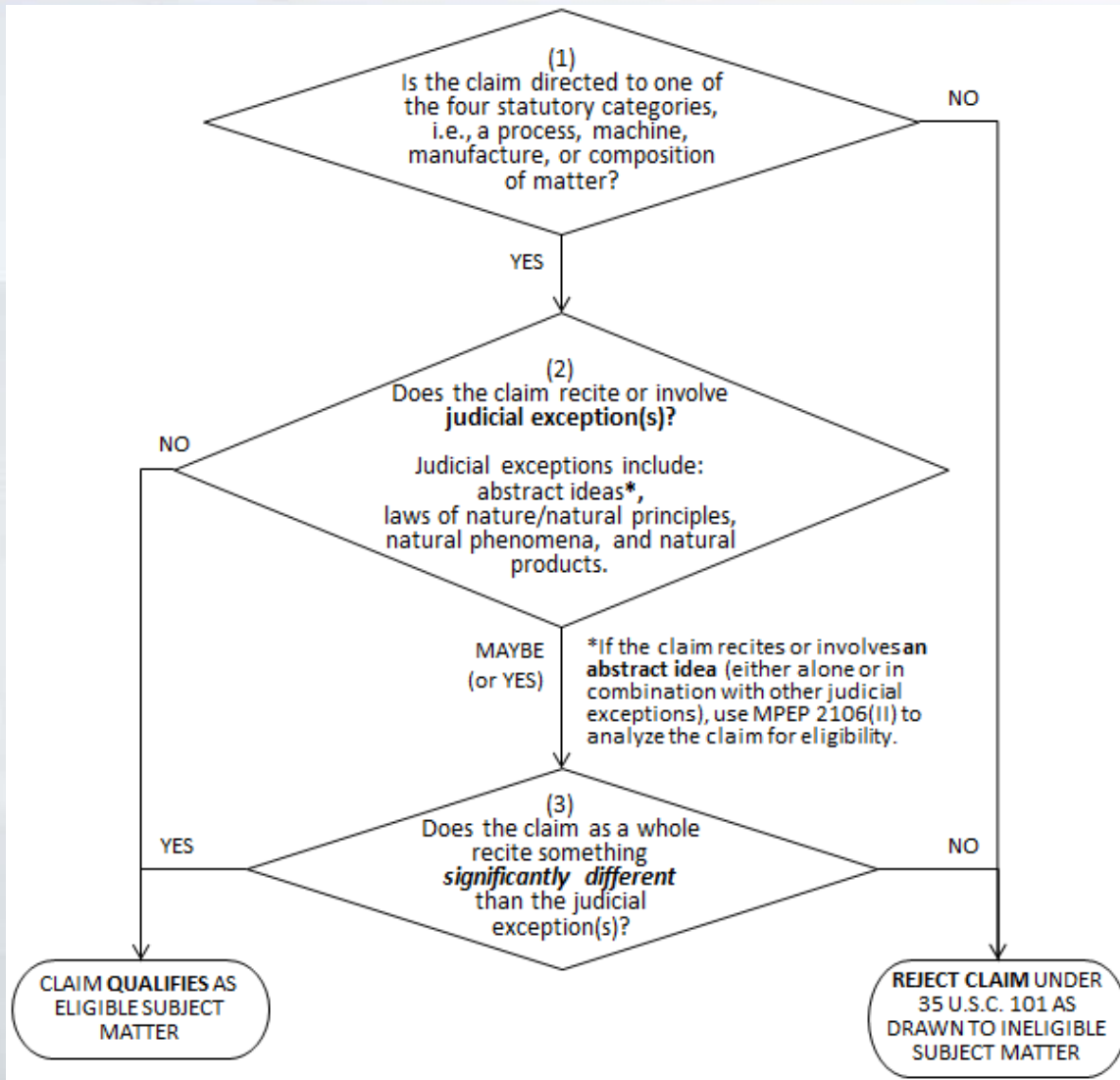


Limited To Utility Patent Applications

- Guidance applies only to utility patent applications.
 - Because guidance concerns subject matter eligibility under 35 U.S.C. § 101.
- No effect on design or plant patent applications, because their eligibility is determined by different statutory sections.



Overall Process: Flowchart





Overall Process: Summary

- New guidance uses the same essential approach to eligibility as the existing guidance:
 - The claim as a whole is given its **broadest reasonable interpretation** (BRI)
 - Using the BRI, the claim is evaluated to determine whether it falls within at least one of the **statutory categories** of invention (Flowchart Question 1)
 - If it falls within an eligible category, the claim is evaluated to determine whether it wholly embraces a **judicial exception** (Flowchart Questions 2 & 3)



Why Go To Question 3 When “Hand of Man” Is Apparent?

- Eligibility requires more than the “hand of man”.
 - To be eligible, claimed product must be both non-naturally occurring and markedly different from naturally occurring products.
- Do not make conclusory judgments based on the mere recitation of particular words in the claim.
 - E.g., words such as “cDNA”, “composition”, “isolated”, “primer”, “purified”, “recombinant”, “synthetic”, and “vector”.
 - These words may reflect “hand of man” but are not necessarily determinative of eligibility.



Supreme Court & Natural Products

- Why are we talking about natural products that are not nucleic acids?
- Supreme Court has made it clear that “natural products” include a wide variety of things:
 - *Funk Brothers* – “patents cannot issue for the discovery of phenomena of nature” such as bacterial properties, the heat of the sun, electricity, or the properties of metals
 - *Chakrabarty* – “a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity.”
 - *Myriad* – there is a “rule against patents on naturally occurring things”



Myriad & Natural Products

- *Myriad* relies on earlier precedent:
 - *Myriad* relies on *Chakrabarty* and serves as a reminder that *Chakrabarty*'s markedly different criterion is the eligibility test across all technologies for product claims reciting natural products.
 - *Myriad* explains that *Funk Brothers*' combination of bacteria was not eligible because the patentee "did not alter the bacteria in any way".
- *Myriad* provides guideposts for determining when an "isolated" nucleic acid is markedly different.



“Significantly Different”

- Focus is on whether the claim *as a whole* recites something **significantly different** than a judicial exception (e.g., natural product or law of nature).
- “Significantly Different” addresses two pathways to eligibility:
 1. Product claim involving or reciting a natural product includes features or steps demonstrating a **marked difference** from what exists in nature; or
 2. Claim involving or reciting a judicial exception must also recite meaningful limitations that **add something of significance** to the judicial exception



Evaluate “Significantly Different” By Weighing Factors

- New guidance follows the common theme from previous guidance of evaluating factors that weigh for, or against, eligibility
 - There are no bright line rules
 - The factors have been culled from precedent
 - The tests are designed to be flexible to accommodate judicial developments and technological advancements
- Examiners are accustomed to weighing evidence (*e.g.*, *Wands* factors for enablement)



Summary of Factors

Factors that weigh toward eligibility (significantly different)

- a) Product claim recites something that initially appears to be a natural product, but after analysis is determined to be non-naturally occurring and markedly different in structure from naturally occurring products.

Claim recites elements/steps in addition to the judicial exception(s) that:

- b) Impose meaningful limits on the claim scope.
- c) Relate to the judicial exception(s) in a significant way, e.g., they are more than insignificant extra-solution activity.
- d) Do more than describe the judicial exception(s) with general instructions to apply/use it.
- e) Include a particular machine or particular transformation, which implements or integrates the judicial exception(s).
- f) Add a feature that is more than well-understood, purely conventional or routine.

Factors that weigh against eligibility (not significantly different)

- g) Product claim recites something that appears to be a natural product that is not markedly different in structure from naturally occurring products.

Claim recites elements/steps in addition to the judicial exception(s) that:

- h) Are recited at a high level of generality.
- i) Must be used/taken by others to apply the judicial exception(s).
- j) Are well-understood, purely conventional or routine.
- k) Are insignificant extra-solution activity, e.g., are merely appended to the judicial exception(s).
- l) Amount to nothing more than a mere field of use.



Factors Fall Into Two Groups

- Group One: Two factors applicable only to product claims
 - Factors a) and g)
 - Concern the structure of natural products and things that appear to be natural products
 - Represent *Chakrabarty*'s "markedly different" pathway to eligibility
- Group Two: Ten factors applicable to all claims
 - Factors b)-f) and h)-l)
 - Concern whether the claim recites elements or steps in addition to the judicial exception(s), and whether those elements/steps add significantly more to the judicial exception(s)
 - Represent *Mayo*'s "significantly more" pathway to eligibility



Focus Remains On Product, Not How It Was Made

- “Markedly Different” inquiry focuses on the structural characteristics of the product, not how it was made:
 - Don’t have to use new techniques.
 - Don’t have to use laboratory or engineering techniques.
 - Extent of effort required to make product is not relevant.
- Examples:
 - A cDNA with an altered sequence can be eligible, even though creating cDNA is routine in the biotechnology art.
 - A hybrid plant can be eligible, even if it was created via manipulation of natural pollination and fertilization processes.



Examiner Must Provide Supporting Rationale or Evidence

- Initial burden is on the examiner to establish a *prima facie* case of ineligibility.
- When rejecting claim, examiner must provide rationale or evidence to reasonably support a determination that a product is not markedly different from what exists in nature.
 - Evidence is not limited by filing date of application.
 - Speculation about hypothetical products is not reasonable support.
- Example:
 - A theoretical possibility that nature *might* have randomly created a hybrid plant similar to the claimed hybrid plant is not enough to negate eligibility.



Must Balance Totality of Factors

- The examiner's analysis should carefully consider every relevant factor and related evidence before making a conclusion.
 - No one factor is controlling.
 - The determination of eligibility is not a single, simple determination, but is a conclusion reached by weighing the relevant factors, keeping in mind that the weight accorded each factor will vary based upon the facts of the application.
- Must balance the totality of the relevant factors.
 - If the totality of the relevant factors weigh toward eligibility, the claim qualifies as eligible subject matter.
 - If the totality of the relevant factors weighs against eligibility, the claim should be rejected.



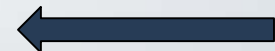
USPTO Guidance

- All training given to examiners is publicly available
 - Examiner Training is posted at <http://www.uspto.gov/patents/law/exam/examguide.jsp>
 - Also accessible from the USPTO.gov main page using the radio button on lower left



Patent Examiner Guidance

Updated guidance and training materials



Thank You



Patentable Subject Matter – *Alice Corp. v. CLS Bank*

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Recent Patent Case Law Update under 35 USC §101 Electrical/Mechanical Cases

IPO PTO Day
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Patenting Computer-Related Inventions Under 35 USC 101

Recent Federal Circuit Cases

- 35 USC 101 Patentable Subject Matter Includes:
 - 1980 ~ the infancy of computers
 - “[A]nything under the sun that is made by man” *Diamond v. Chakrabarty*, U.S. Supreme Court
 - >30 years later. . .
 - Machines (established definition)
 - Articles of Manufacture (established definition)
 - Compositions of Matter (mostly established definition)
 - Processes, including methods (evolving interpretation)

Patenting Computer-Related Inventions Under 35 USC 101

Recent Federal Circuit Cases

Unsettled Subject Matter Eligibility

- Ultramerical v. WildTangent (2011)
- Bancorp v. Sun Life (2012)
- Accenture v. Guidewire (2013)
- CLS Bank v. Alice Corporation (2013)

Patenting Computer-Related Inventions Under 35 USC 101

Recent Federal Circuit Cases

- Ultramercial v. WildTangent (2011)(Petition for Cert filed)
- The claim: U.S. 7,346,545

A method for distributing products over the Internet via a facilitator, said method comprising the steps of:

- . . . receiving, from a content provider, media products that are covered by intellectual property rights protection and are available for purchase . . . ;
- . . . selecting a sponsor message to be associated with the media products . . . ;
- . . . providing the media product for sale at an Internet website;
- . . . restricting general public access to said media product;

- Federal Circuit: patentable

This is a specific and non-abstract, practical application that claims a specific method for sharing information with consumers via an Internet website.

Patenting Computer-Related Inventions Under 35 USC 101

Recent Federal Circuit Cases

- Bancorp v. Sun Life (2012)(Petition for Cert filed)
- Representative claim: U.S. 7,249,037 & 5,926,792

A method for managing a life insurance policy comprising:

generating a life insurance policy including a stable value protected investment . . . ;
calculating fees . . . ;calculating credits . . . ;determining an investment value . . . /
calculating a policy value and a policy unit value . . . ;storing the policy unit value
. . . ; and removing a value of the fees for members . . . which manage the . . . policy.

- Federal Circuit: unpatentable

These systems and methods for administering and tracking the value of life insurance are unpatentable abstract ideas that are mathematical computations that could be performed entirely in the human mind.

Patenting Computer-Related Inventions Under 35 USC 101

Recent Federal Circuit Cases

- Accenture v. Guidewire (2013)(Petition for Cert filed)
- Representative claim: U.S. 7,013,284

A system for generating tasks to be performed in an insurance organization, the system comprising:

an insurance transaction database for storing information . . . ; a task library for storing rules. . . ; a client component in communication with the insurance transaction database . . . ; and a server component in communication with the client component . . . the server component including an event processor, a task engine and a task assistant; . . . wherein the event processor . . . sends . . . the task engine identifies . . . applies . . . populates . . . , wherein the task assistant transmits the determined tasks to the client component.

- Federal Circuit: unpatentable

This is an abstract idea. “simply implementing an abstract concept on a computer, without meaningful limitations to that concept, does not transform a patent ineligible claim into a patent-eligible one.”

Patenting Computer-Related Inventions Under 35 USC 101

Recent Federal Circuit Cases

- CLS Bank v. Alice Corporation – en banc (2013)
(Petition for Cert granted, Oral Arguments 3/31/2014)
 - U.S. 5,970,479; 6,912,510; 7,725,375; & 7,725,375
 - The method, computer-readable media, and system claims relate to:

“the management of risk relating to specified, yet unknown, future events” for a computerized trading platform that enables a trusted third party to settle obligations between first and second parties in a way that eliminates a “settlement risk” for the transaction. For example, claim 33 of the ‘479 patent relates to a method for facilitating a previously arranged exchange between two parties requiring the use of “shadow records” maintained by a third-party “supervisory institution.”
- Claim 33 does not specifically require computer based-steps, but the parties agreed that the recited shadow records and transactions required computer implementation.

Patenting Computer-Related Inventions Under 35 USC 101

Recent Federal Circuit Cases

- CLS Bank v. Alice Corporation – en banc (2013)
 - Per Curiam Opinion; No majority on legal rationale
 - Method of Exchanging obligations between parties, unpatentable
 - Computer-readable medium containing program code for directing an exchange of obligations, unpatentable
 - Data processing system, court evenly split, unpatentable

Abstract ideas are being struck down by the courts

Patenting Computer-Related Inventions Under 35 USC 101

Recent Federal Circuit Cases

- What we do...
 - Rarely file purely business method applications, but often file computer-related/controls type applications
 - Describe the method, computer-readable medium, or data processing system with sufficient physical structure so as to not be completely abstract
 - File claims that have some tie to the thing (e.g., machine) that the computer controls

Patenting Computer-Related Inventions Under 35 USC 101

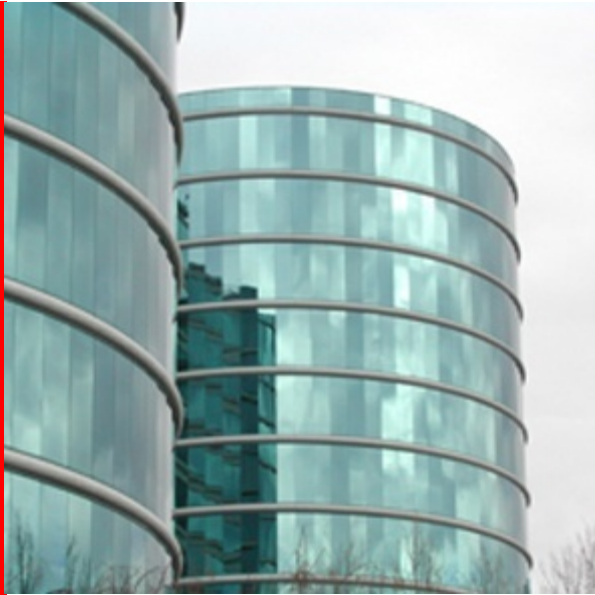
Recent Federal Circuit Cases

- Problem...
 - Statutes and case law not keeping pace with technology
 - USPTO not making a 35 USC 101 rejection in an abstract case, but then the court finds the case patent ineligible
- What is needed. . .
 - Better guidance and definition from the courts and/or Congress as to what is eligible subject matter for computer related claims

Standard of Review for Claim Construction

Mollybeth “Molly” Kocialski

Senior Patent Counsel, Oracle America, Inc.



Standard of Review for Claim Construction

Mollybeth (“Molly”) Kocialski
Senior Patent Counsel
Oracle America, Inc.

Standard of Review Tensions

PTAB v. Federal Circuit/District Courts

Broadest reasonable interpretation vs. Clear and Convincing Evidence

Federal Circuits v. District Courts

Substantial Evidence vs. De novo review

PTAB/Federal Circuit Standards

PTAB uses broadest reasonable interpretation

37 C.F.R. § 42.100(b)

Idle Free v. Bergstrom, IPR 2012-00027

Ability of patent owner to amend is illusory.

Legislation proposed to harmonize claim construction
standard used by PTAB with claim construction
standard used by district courts

Clear and convincing evidence standard of 35 U.S.C. § 282.

PTAB/Federal Circuit

Substantial Evidence

The Federal Circuit will uphold the factual findings of the board unless such findings are found to be unsupported by substantial evidence. In re Becton, Dickinson and Company, 675 F.3d 1368, 1373 (Fed. Cir. 2012). Evidence is substantial if a reasonable person might find that the evidentiary record supports the agency's conclusion.

The Federal Circuit will affirm a PTAB conclusion if the fact finding is deemed sufficient, even if the individual judges of the court do not necessarily agree with the conclusion of the agency

PTAB/Federal Circuit

Smith & Nephew v. Rea, 721 F.3d 1371 (Fed. Cir. 2013)

PTAB reversed examiner's rejections of the claims and confirmed patentability of the claims.

Federal Circuit reverses PTAB and finds claims unpatentable.

"We recognize, of course, that the "substantial evidence" standard of review requires a deferential approach to the Board's findings. In re Gartside, 203 F.3d 1305, 1316 (Fed. Cir. 2000). In this case, however, the facts are largely undisputed, and the Board's decision regarding the obviousness of including only threaded holes in the head portion of the condylar plate was mainly the result of the analytical errors discussed above, not the Board's resolution of factual questions. Accordingly, we conclude that the Board erred in ruling that removing the non-threaded holes from the head portion of the prior art plates would not have been expected to allow the plates to impart compression between the head portion and the bone."

PTAB/Federal Circuit Standard

Case:

Soverain Software v. Newegg, U.S. Supreme Court, 13-477
Cert. petition denied Jan. 13, 2014

In *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1966), this Court held that “[w]hile the ultimate question of patent validity is one of law,” that question is premised on “several basic factual inquiries.” Those inquiries include “the scope and content of the prior art” and the “differences between the prior art and the claims at issue.” *Id.* In *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 407 (2007), this Court reaffirmed that the *Graham* factual questions “continue to define the inquiry that controls” the determination of obviousness. The Federal Circuit in this case resolved disputes about these “basic factual inquiries” under the guise of determining the ultimate legal question. Cert. Petition

De Novo Review

Lightning Ballast v. (2013, panel, 2014, en banc)

Re-affirmed Cybor Corp.

“For the reasons we shall discuss, we apply the principles of *stare decisis*, and confirm the *Cybor* standard of *de novo* review of claim construction, whereby the scope of the patent grant is reviewed as a matter of law. After fifteen years of experience with *Cybor*, we conclude that the court should retain plenary review of claim construction, thereby providing national uniformity, consistency, and finality to the meaning and scope of patent claims. The totality of experience has confirmed that *Cybor* is an effective implementation of *Markman II*, and that the criteria for departure from *stare decisis* are not met.”

De Novo Review

Case to watch

Teva v. Sandoz – U.S. Supreme Court, 13-854

“The Federal Circuit’s wrongheaded rule has imposed billions of dollars in litigation costs on patentees and infringement defendants alike, who must litigate to final judgment in district court, only to be sent back for new proceedings once the Federal Circuit reverses the claim construction based on its own reading of the underlying factual record” – Teva cert. petition

USPTO Guidance on Functional Claiming

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IPO Patent and Trademark Office Day

March 25, 2014

35 U.S.C. 112(f) Functional Claiming



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Office of Patent Legal Administration



Topics

- “Means-plus-function” claim issues at the Federal Circuit
 - Recurring themes this past year
- USPTO efforts to tighten functional claiming
 - White House Executive Actions
 - Software Partnership
 - Training



Recent Federal Circuit Cases on § 112(f)

Over the past year, about a dozen cases at the Federal Circuit have addressed 35 U.S.C. § 112(f) claim limitations

- Various disciplines, but mainly mechanical (2/3) and computer implemented (1/3)
- Cases can be sorted into three basic themes



Three Basic Themes at the Federal Circuit

1. Has § 112(f) been invoked?
2. Is the corresponding disclosure of structure sufficient to support the § 112(f) limitation?
3. What is an appropriate equivalent to the § 112(f) limitation?



Theme 1 – §112(f) invoked?

- *EnOcean GmbH v. Face Int'l Corp.*
- *Vistan Corp. v. Fadei USA, Inc.*
(Unpublished)
- *TecSec, Inc. v. IBM Corp.*
- *Power Integrations Inc. v. Fairchild Semiconductor International Inc.*



Theme 2 – Sufficient Disclosure of “Structure”?

- *Elcommerce.com, Inc. v. SAP AG*
- *EnOcean GmbH v. Face Int'l Corp.*
- *Vistan Corp. v. Fadei USA, Inc.* (Unpublished)
- *Ibormeith IP, LLC v. Mercedes-Benz USA, LLC*
- *Bennett Marine, Inc. v. Lenco Marine, Inc.* (Unpublished)
- *Saffran v. Johnson & Johnson*
- *Function Media LLC v. Google Inc.*



Theme 3 – Equivalents?

- *Ring & Pinion Serv. Inc. v. ARB Corp.*
- *Otto Bock Healthcare LP v. Össur HF*
(Unpublished)
- *Regents of the University of Minnesota v. AGA Medical Corp.*



Addressing Functional Claiming at the USPTO

- These themes are similar to the themes flagged by the USPTO in the effort to improve claim clarity
- Goal is to ensure that claims with functional language have clearly defined boundaries
 - Claims with § 112(f) limitations are one type of functional claims that the USPTO is currently addressing



Claim Clarity

- Critical initiative at the Office is improving claim clarity through:
 - Ensuring that the boundaries of the claim are easily understood
 - Providing a clear record of the prosecution
 - Goal:
 - Improve public notice function of claims
 - Address issues with functional claiming
 - Reduce litigation involving over-assertion of patents



White House Executive Actions

- White House issued legislative recommendations & executive actions “designed to protect innovators from frivolous litigation and ensure the highest-quality patents in our system” (June 2013)
- Executive Action 2 addresses **claim clarity**:
 - Tightening functional claiming
 - Targeted examiner training on scrutiny of functional claims
 - Develop strategies to improve claim clarity, e.g., use of glossaries in patent specifications to assist examiners in the software field



Software Partnership

- USPTO announced a partnership with the software community in January 2013 to:
 - Enhance the quality of software-related patents
 - Open dialog with software community by bringing stakeholders together to share ideas, feedback, experiences, and insights
- Partnership plays a key role in accomplishing Executive Action 2 on claim clarity by providing a forum for ideas
 - First two meetings focused on functional claiming



Clarity Action Plan

- Training program
 - Uses ideas gleaned from the Software Partnership to focus training, particularly for functional claiming
 - § 112(f) training, clarifying the record \Rightarrow *initial phase completed; definiteness of § 112(f) limitations in progress*
 - Claim interpretation and § 112(a)-(b) \Rightarrow *next phase*
- Exploring strategies to improve claim clarity
 - Pilot program using glossaries to improve claim clarity in response to White House EA 2
 - Investigating ways to clarify the prosecution record



Training

- Two recent examiner training modules
 - Identifying § 112(f) limitations
 - Recognizing § 112(f) limitations that do not use classic “means for” phrasing
 - Interpreting “generic placeholders” that serve as substitutes for means (e.g., unit, mechanism)
 - Clarifying the record to place remarks in the file regarding when § 112(f) is, or is not, invoked
 - Establishing presumptions based on use of “means”
 - Providing explanatory remarks when presumptions are rebutted



Training – Next Steps

- Continued focus on 35 U.S.C. § 112(f)
 - How to interpret § 112(f) limitations under the broadest reasonable interpretation (BRI) standard
 - Evaluating equivalents
 - Determining whether a § 112(f) limitation is definite under § 112(b)
- Computer-implemented (software) § 112(f) limitations
 - Determining whether a sufficient algorithm is provided to support a software function



Training - Looking Ahead

- Training focus on 35 U.S.C. § 112
 - § 112(b) definite boundaries for functional claim limitations that do not invoke § 112(f)
- Exploring techniques for making record clear
 - E.g., providing tools for examiners to easily add clarifying remarks, such as form paragraphs
 - E.g., explaining claim construction on the record



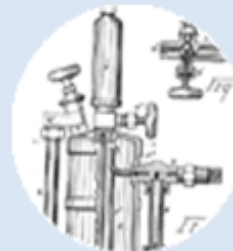
USPTO Guidance

- All training given to examiners is publicly available
 - Examiner Training is posted at <http://www.uspto.gov/patents/law/exam/examguide.jsp>
- Also accessible from the USPTO.gov main page using the radio button on lower left



Patent Examiner Guidance

Updated guidance and training materials





Resources

- Find more information at www.USPTO.gov
 - White House Task Force on High-Tech Patent Issues
 - Links to the Fact Sheet and report on Patent Assertion and U.S. Innovation
 - Software Partnership

Thank You



Questions?

- **Caroline Dennison**, Deputy Director, Office of Patent Legal Administration, USPTO
- **Raul Tamayo**, Senior Legal Advisor, Office of Patent Legal Administration, USPTO
- **Dennis Skarvan**, Assistant General Patent Counsel, Intellectual Property Department, Caterpillar
- **Mollybeth (“Molly”) Kocialski**, Senior Patent Counsel, Oracle America, Inc.
- **Jennifer Knight**, Senior Counsel, Intellectual Property, Eastman Chemical Company
- **Erika Harmon Arner**, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP

IPO Education Foundation

Patent and Trademark Office Day

March 25, 2014



Peggy Focarino

Commissioner for Patents

United States Patent and Trademark Office

Margaret.Focarino@USPTO.GOV



Welcome

- **Best Places to Work in the Federal Government®**
- **Training / Guidance Update**
- **White House Executive Actions**
- **Patent Operations Update**
 - **Patent Application Initiatives**
- **International Patent Cooperation**

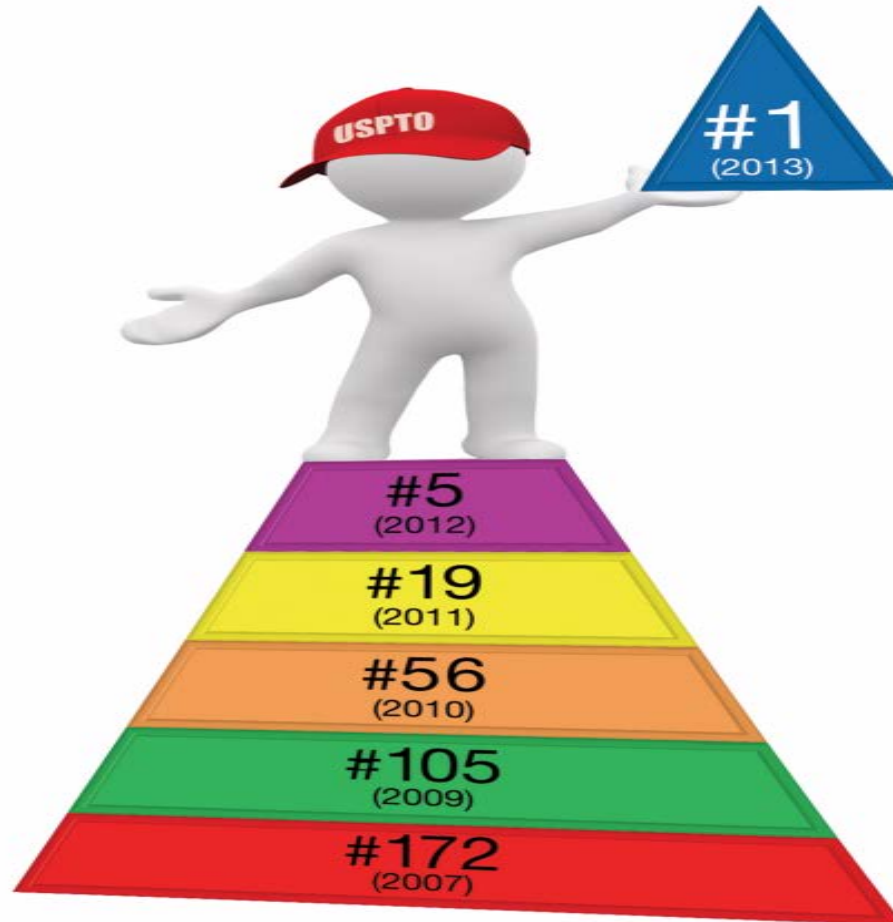


#1 Best Place to Work in the Federal Government





Our Journey to the Best Places to Work in the Federal Government®





Training/Guidance Update

uspto.GOV
The United States Patent and Trademark Office
an agency of the Department of Commerce

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USPTO Ranks #1 in Best Places to Work in the Federal Government Report

Of 300 federal agency subcomponents, the USPTO was named the best place to work in the federal government's Best Places to Work in 2013 by the non-profit Partnership for Public Service. The USPTO's rise to #1 follows a steady climb from #172 in 2007 to #5 in 2012.

The Best Places to Work IN THE FEDERAL GOVERNMENT.

The Director's Forum

A blog from USPTO's leadership

America Invents Act

Your guide to the law

Patent Examiner Guidance

Updated Myriad/Mayo Guidance

USPTO Track One

Prioritized patent examination

IP Awareness Assessment Tool

Patent Litigation Online Toolkit

POPULAR LINKS

- Patent Search
- Patents: File Online [EFS-Web]
- Patents: Check Application Status [PAIR]
- Patents Online Services
- Patents Ombudsman
- Trademark Search [TESS]
- Trademarks: File Online [TEAS]
- Trademarks: Check Status/Documents [TSDR]
- Trademark Basics
- Official Gazette for Trademarks
- Forms
- Fees
- Manuals (incl. MPEP and TMEP)

>> patents

>> trademarks

>> iplaw&policy

USPTO NEWS

- USPTO to Host Additive Manufacturing Partnership Meeting
- USPTO to Host First-Inventor-to-File Anniversary Forum
- USPTO To Host Forum To Discuss Proposed Changes To Implement Patent Law Treaties Implementation Act of 2012 – Title I The Hague Agreement
- U.S. Patent and Trademark Office Ranks #1 in Best Places to Work in the Federal Government
- U.S. Secretary of Commerce Penny Pritzker Names Michelle K. Lee as Next Deputy Director of the U.S. Patent and Trademark Office

<http://www.uspto.gov>



White House Executive Actions

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an agency of the Department of Commerce

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• [Biotechnology / Chemical / Pharmaceutical Conferences](#)

• [Patent Cooperation Treaty](#)

• [Patent Prosecution Highway](#)

• [Patents for Humanity](#)

[International Protection](#)

USPTO-led Executive Actions on High Tech Patent Issues



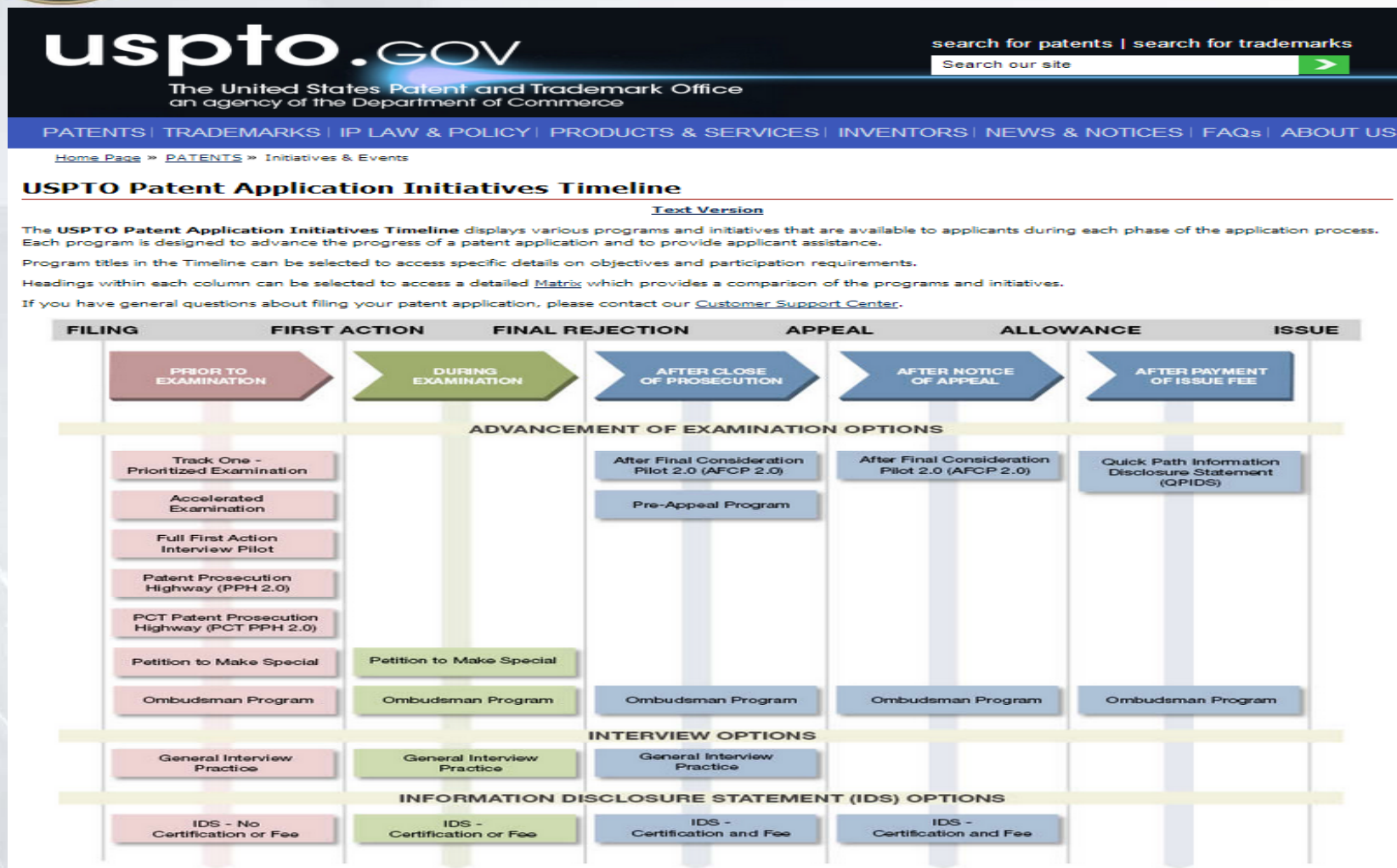
On June 4, 2013, President Obama [announced](#) five executive actions "to help bring about greater transparency to the patent system and level the playing field for innovators." Four of these actions were undertaken by the USPTO. On February 20, 2014, the President [announced](#) three new initiatives aimed at encouraging innovation and strengthening the "quality and accessibility of the patent system." Below is a summary of the initiatives that the USPTO has implemented to realize the President's vision.

- [Announcements](#)
- [Executive Action 1: Attributable Patent Ownership \(formerly "Real Party in Interest"\)](#)
- [Executive Action 2: Clarity in Patent Claims \(formerly "Tightening Functional Claiming"\)](#)
- [Executive Action 3: Empowering Downstream Users](#)
- [Executive Action 4: Expanded Outreach and Focused Study](#)
- [Executive Action 5: Crowdsourcing Prior Art](#)
- [Executive Action 6: More Robust Technical Training and Expertise](#)
- [Executive Action 7: Patent Pro Bono and Pro Se Assistance](#)
- [Further Information](#)
- [Contact Us](#)

http://www.uspto.gov/patents/init_events/executive_actions.jsp

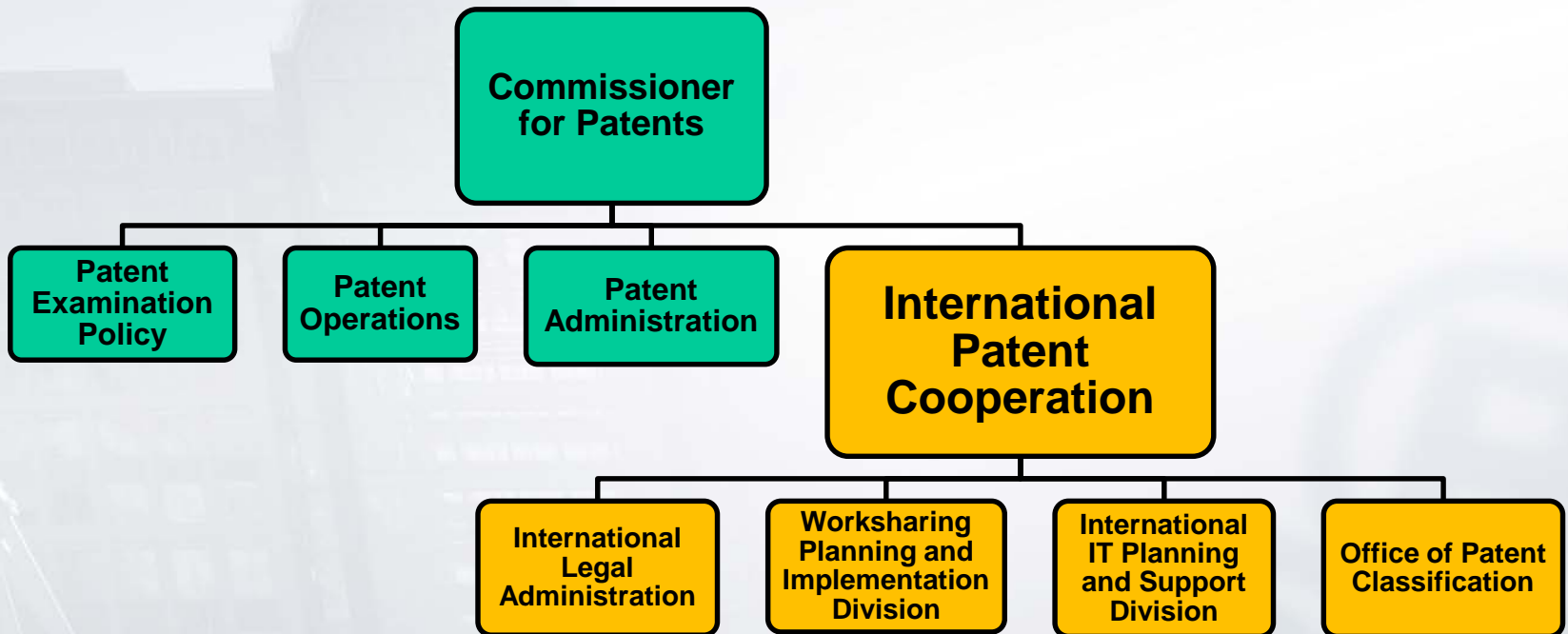


Patent Application Initiatives





Office of International Patent Cooperation





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***Deputy Commissioner for
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Mark.Powell@USPTO.GOV



Training/Guidance Update

- **Updated Myriad/Mayo Guidance (March 4, 2014)**
 - Training for Biotechnology/Chemical areas have been completed
 - Eligibility Guidance and Training Webpage
- **112 Training**
 - Identifying limitations that invoke 112(f) (August 2013)
 - Making the record clear (August 2013)
 - BRI Definiteness of 112(f) (March/April 2014)

****Training and guidance material available online at www.uspto.gov**



MPEP Update

- **MPEP updated to reflect changes resulting from America Invents Act (AIA)**
 - **17 Chapters revised**

AIA Revision to the MPEP Schedule





MPEP Update

- **Future MPEP Updates:**
 - Patent Law Treaty Implementation (PLT) – Spring/Summer 2014
 - Hague Agreement Implementation – Fall/Winter 2014
- **MPEP Online Discussion Tool – MPEP Idea Scale**



White House Executive Actions

- **Four USPTO-related Executive Actions announced on June 4, 2013**
 - EA 1: Attributable Patent Ownership**
 - EA 2: Clarity in Patent Claims**
 - EA 3: Empowering Downstream Users**
 - EA 4: Expanded Outreach and Focused Study**
- **Three additional USPTO-related Executive Actions announced on February 20, 2014**
 - New EA 1: Crowdsourcing Prior Art**
 - New EA 2: Robust Technical Training and Expertise**
 - New EA 3: Patent Pro Bono and Pro Se Assistance**

http://www.uspto.gov/patents/init_events/executive_actions.jsp



EAs: Attributable Owner NPRM

- **Notice of Proposed Rulemaking on Attributable Owner - January 2014**
 - Public comment period ends April 24, 2014
- **Two public hearings:**
 - March 13, 2014 (USPTO Alexandria Headquarters)
 - March 26, 2014 (UC Hastings College of Law)

See www.uspto.gov/patents/init_events/attributable_ownership.jsp



EAs: Glossary Pilot

- **Glossary Pilot**
 - Details of the Pilot will be announced in upcoming FR Notice
 - Glossary Pilot will become effective Summer 2014



EAs: Patent Pro Bono and Pro Se Assistance

- **Patent Pro Bono and Pro Se Assistance**
 - **Pre-filing Assistance for Pro Se Applicants**
 - **Pro Se Examination Pilot**
 - **Expansion of the Pro Bono Program**

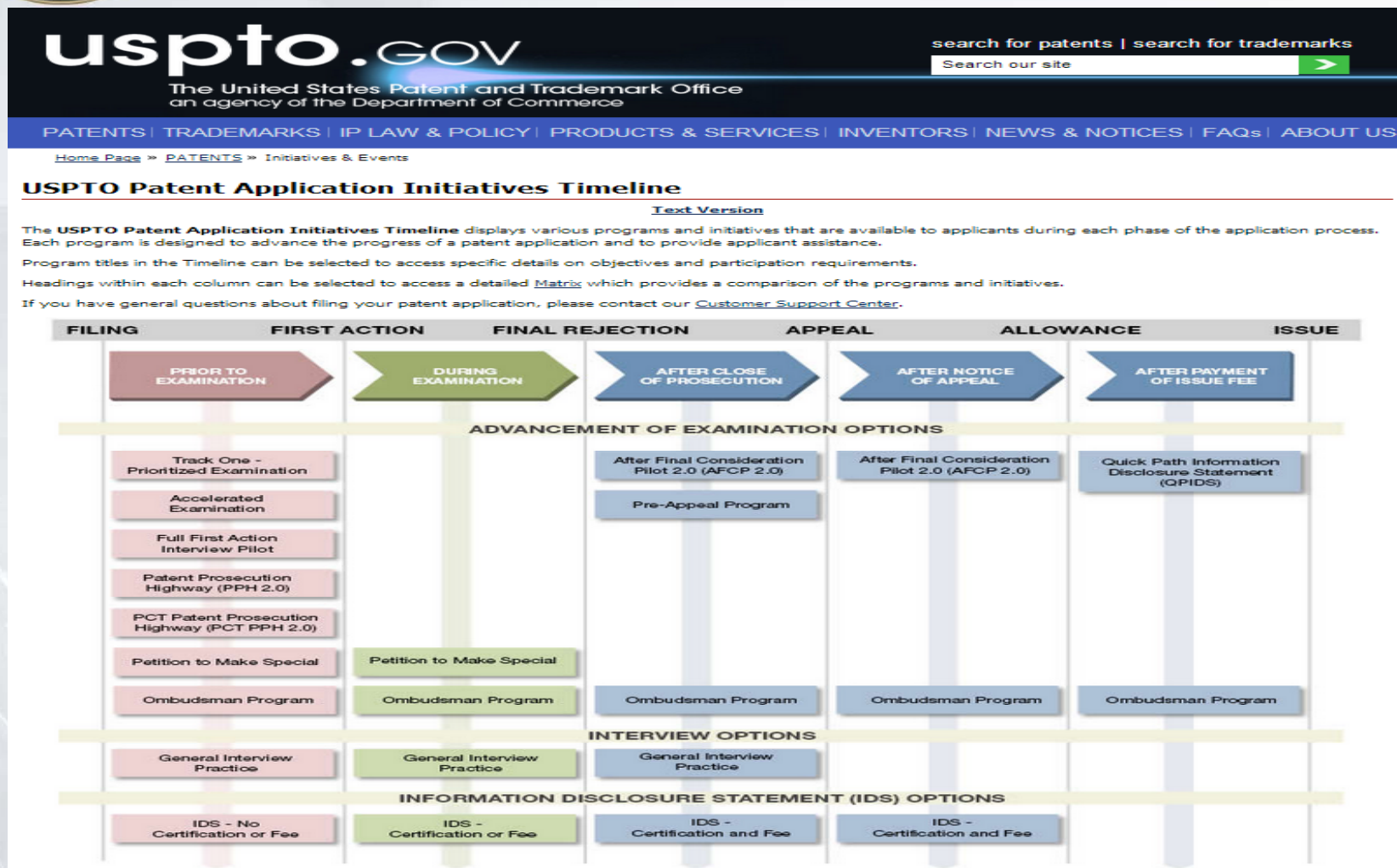


EAs: Crowdsourcing & Robust Technical Training

- **Crowdsourcing**
 - Refining the Third-Party Submission Process
 - Roundtable on Crowdsourcing Prior Art – April 10, 2014 at USPTO Alexandria Headquarters
 - Examiner Guidance on the Use of Crowdsourcing
 - Presidential Innovation Fellow (PIF)
- **More Robust Technical Training and Expertise**
 - Making it easier for experts from industry and academia to provide relevant technical training

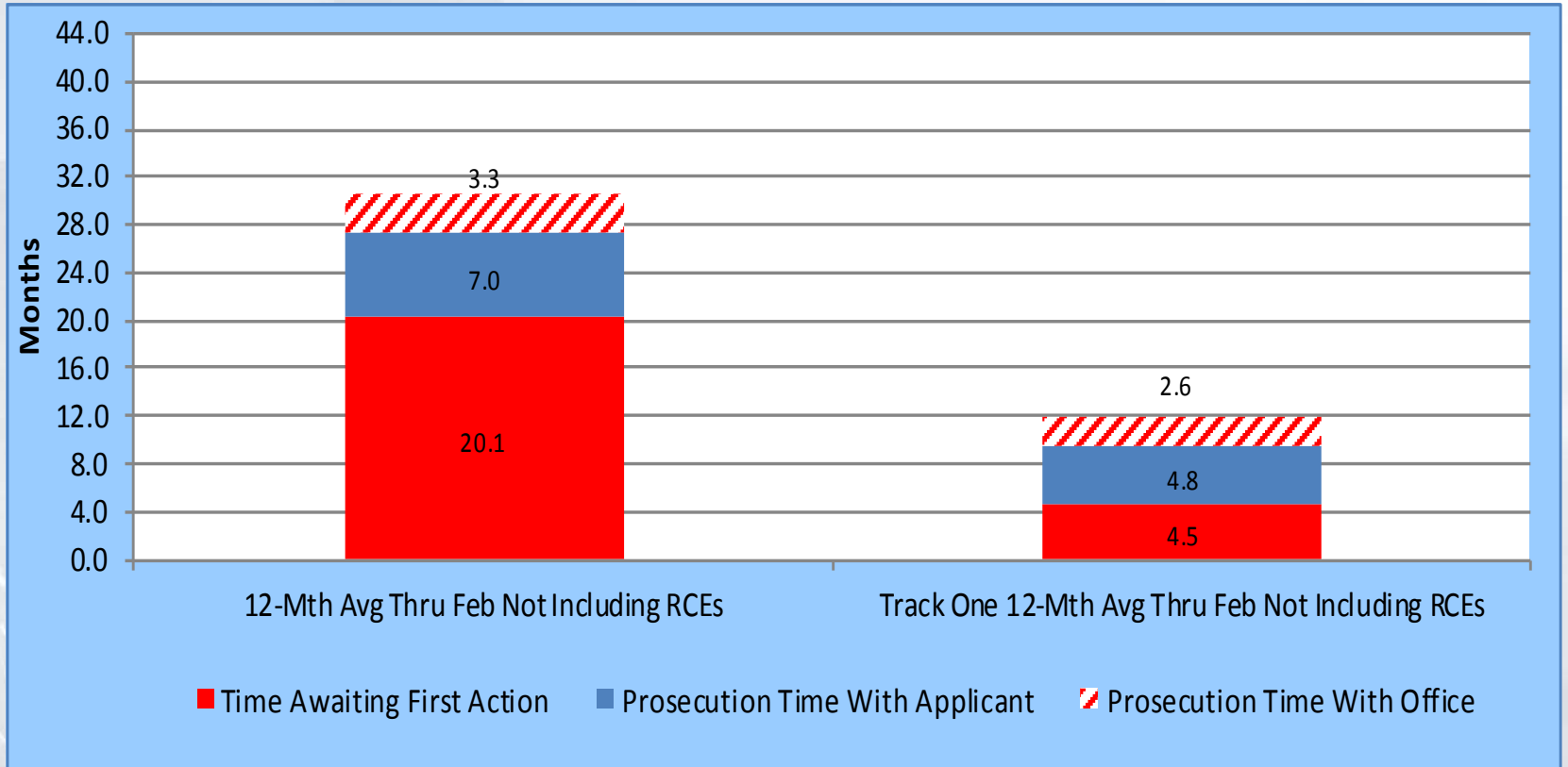


Patent Application Initiatives



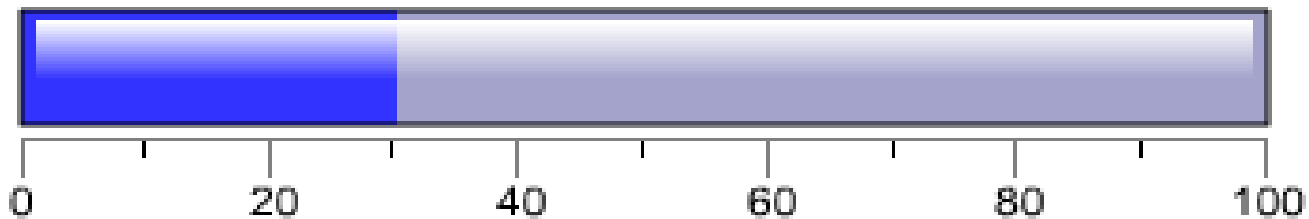


Track One

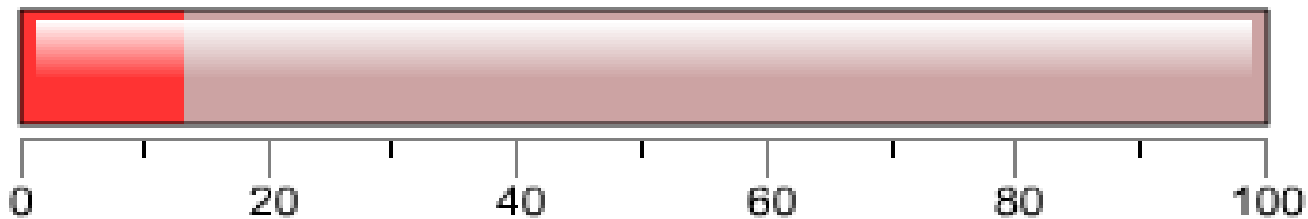




First Action Interview Pilot



FAIP First Action allowance rate = 30.3%



First Action allowance rate in new, non-continuing applications = 13.0%

February 2014



Interview Webpage

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[Home Page](#) » [PATENTS](#) » [Patent Laws, Regulations, Policies & Procedures](#) » Interview Practice

Patent Process

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Patent Laws, Regulations, Policies & Procedures

- Examination Policy
- Patent Related Notices
- Comments from the Public
- **Interview Practice**
- Power of Attorney and Assignment
- Revised Amendment Practice under 37 CFR 1.121

Resources and Guidance

Office of Data Management

Announcements

Initiatives & Events

Interview Practice

The following is a collection of policies, procedures, training, and guidance on effective interview practice.

The USPTO encourages examiners to take a proactive approach to examination by reaching out and engaging our stakeholders in an effort to resolve issues and shorten prosecution. The training and guidance below emphasize interviews as a tool that can create an open dialog with Applicants and enhance the quality and efficiency of examination.

- [Director's Forum: David Kappos' Public Blog](#)
- [Interview Best Practices Whitepaper on examiner-practitioner interview best practice](#) [PDF]- The collaborative effort between AIPLA and the USPTO identifies interview best practices that can be followed by examiners and practitioners. The Best Practices paper identifies accessibility, preparation, substance, and recordation as some of the useful tools and techniques that allow interviews to be used to proactively resolve issues and move applications towards resolution.
- [MPEP Chapter 700 - 713 Interviews](#)
- [MPEP Chapter 700-713 Interviews](#) [Searchable MPEP]
- [Application Initiated Interview Request form](#) [PDF]
- [Recent Examination Guidance and Training Materials](#)
- [Effective Interview Practice Training Summary](#) [PDF] - The document summarizes effective interview practice training disseminated to the patent corps in FY2009. The training addressed why interviews are an important examination tool, identified a number of key components needed to conduct an effective interview and discussed some frequently asked questions regarding interview topics such as, handling interview requests, potential interview topics, interview sequence, grant/denial of an interview, what to do if the attorney is not of record and documentation of interviews.
- [First Action Interview Pilot Program](#) [PPT]
- [MPEP Chapter 500 - 502.03 Communication via Internet \(e.g., e-mail\)](#)
- [MPEP Chapter 500-502.03 Communication via Internet \(e.g., e-mail\)](#) [Searchable MPEP]
- [Web Conferencing and Virtual Interviews](#)





Office of International Patent Cooperation

Mission: Improve the international patent system in terms of increased certainty of IP rights and reduced costs for stakeholders



OIPC: Initial Structural Elements

- **Office of International Legal Administration**
- **IT Business Services Development Team**
- **Worksharing Planning and Implementation Group**
- **Classification Division**
- **Expansion towards program objectives**



OIPC: Immediate Priorities

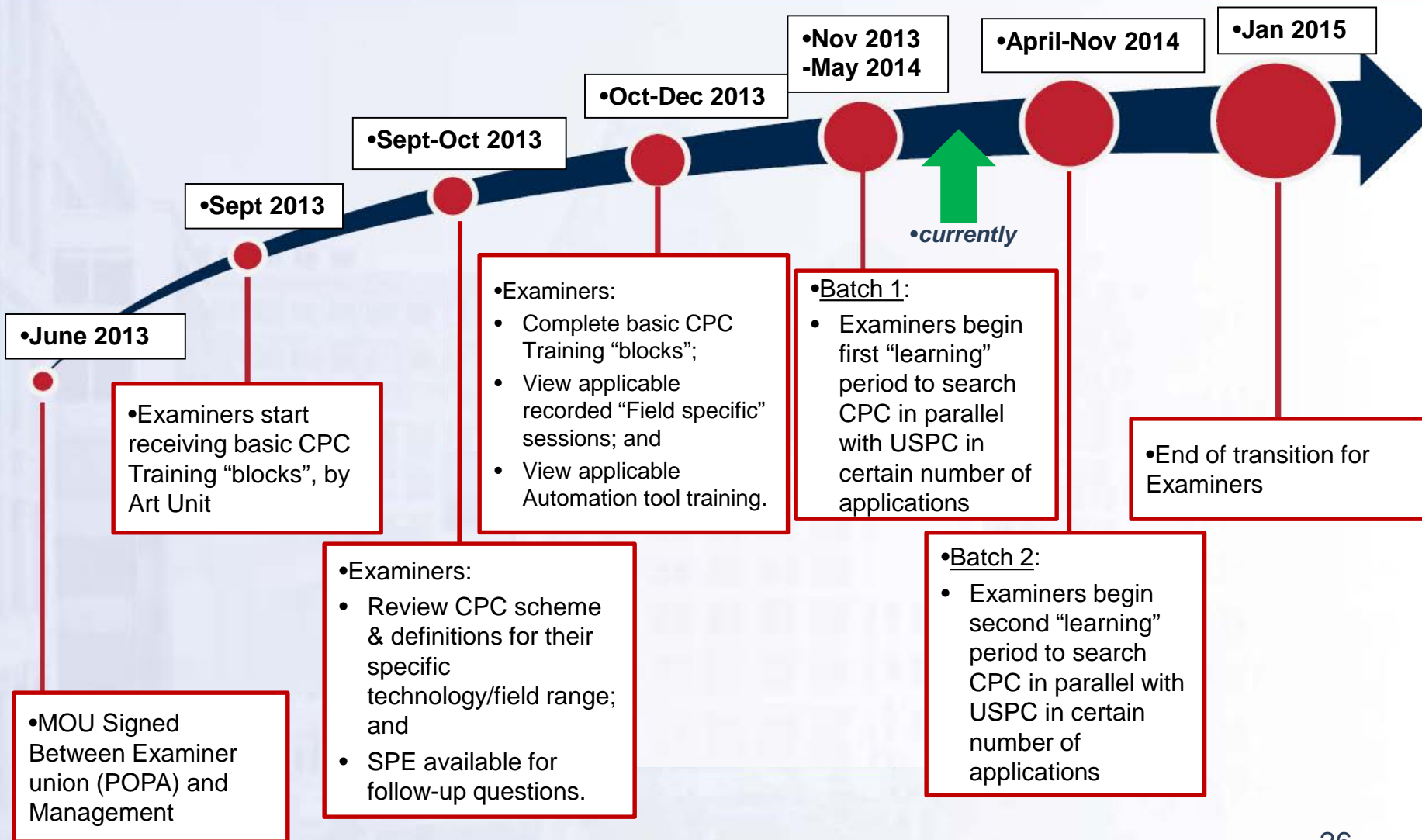
- **Global Dossier services deliverables**
 - Examiner and public access to dossier information
 - Expansion beyond IP5 Offices
- **Implementation of Hague agreement processes; IT and procedural**
- **Continue CPC Implementation**
- **Global PPH—finalization of parameters for the new, unified system**
- **Improvement of the overall PCT system**
- **Much more; new office to garner resources in view of the many challenges!**



CPC Milestones

- **October 2010 - The EPO and the USPTO jointly agreed to develop a patent classification system on the basis of the European Classification system (ECLA) including best practices of the USPC.**
- **January 2013 - EPO and USPTO launched CPC.**
- **August 2013 - All CPC Definitions became available on the Internet (626 CPC Definitions amounting to around 50 000 pages).**
- **September 2013 – December 2014 (*Underway*) – Training/transition for examiners.**
- **January 1, 2015 – USPTO fully implement CPC. All examiners will be expected to classify and search based on CPC.**

Patent Examiner CPC Transition





Benefits to USPTO and Users

- **CPC is used by more than 25 000 examiners in more than 45 Patent Offices around the world – and the user community is growing ...**
- **US, EPO, KR, CN collections classified into one classification system for search**
- **USPTO has one official detailed classification system for efficient search (more detailed than IPC)**
- **CPC based on IPC. USPTO on same footing as most of the world's IPOs.**
- **USPTO has a “dynamic” classification system (more revision/reclass projects).**
- **Many users around the world using the same patent collection classified in a harmonized way for classification search.**
- **MAJOR milestone reached in the CPC implementation and contribution towards harmonization efforts.**



CPC Resources

- **CPC Products via www.cpcinfo.org**
- **CPC training “e-learning” modules by**
 - **the USPTO**
(http://www.uspto.gov/patents/resources/classification/CPC_Training.jsp)
 - **the EPO European Patent Academy**
(<https://e-courses.epo.org/course/view.php?id=167>)
- **Questions - cpc@uspto.gov**

IPO 24th Annual Conference on Patent and Trademark Office Law and Practice

March 25, 2014



**Acting Vice Chief Judge Linda Horner
U.S. Patent and Trademark Office
Patent Trial and Appeal Board**



Scope of Presentation

- “Improving Patent Quality and After-Grant Reviews and Reducing Pendency”
- Focus on PTAB Quality and Pendency
- Snapshot of what can applicants can do to strengthen the record on appeal and improve appeal process
- Afternoon breakout session on Strategies for Success in Post-Grant Proceedings before the PTAB



PTAB Timeliness

- The PTAB must manage pendency for three different activities:
 - AIA proceedings which, by statute, must be adjudicated within one year of institution
 - Appeals in re-examination proceedings which, by statute, must be conducted with “special dispatch” (goal of 6 months from receipt at PTAB to decision)
 - Appeals in regular *ex parte* applications



PTAB Pendency Goals

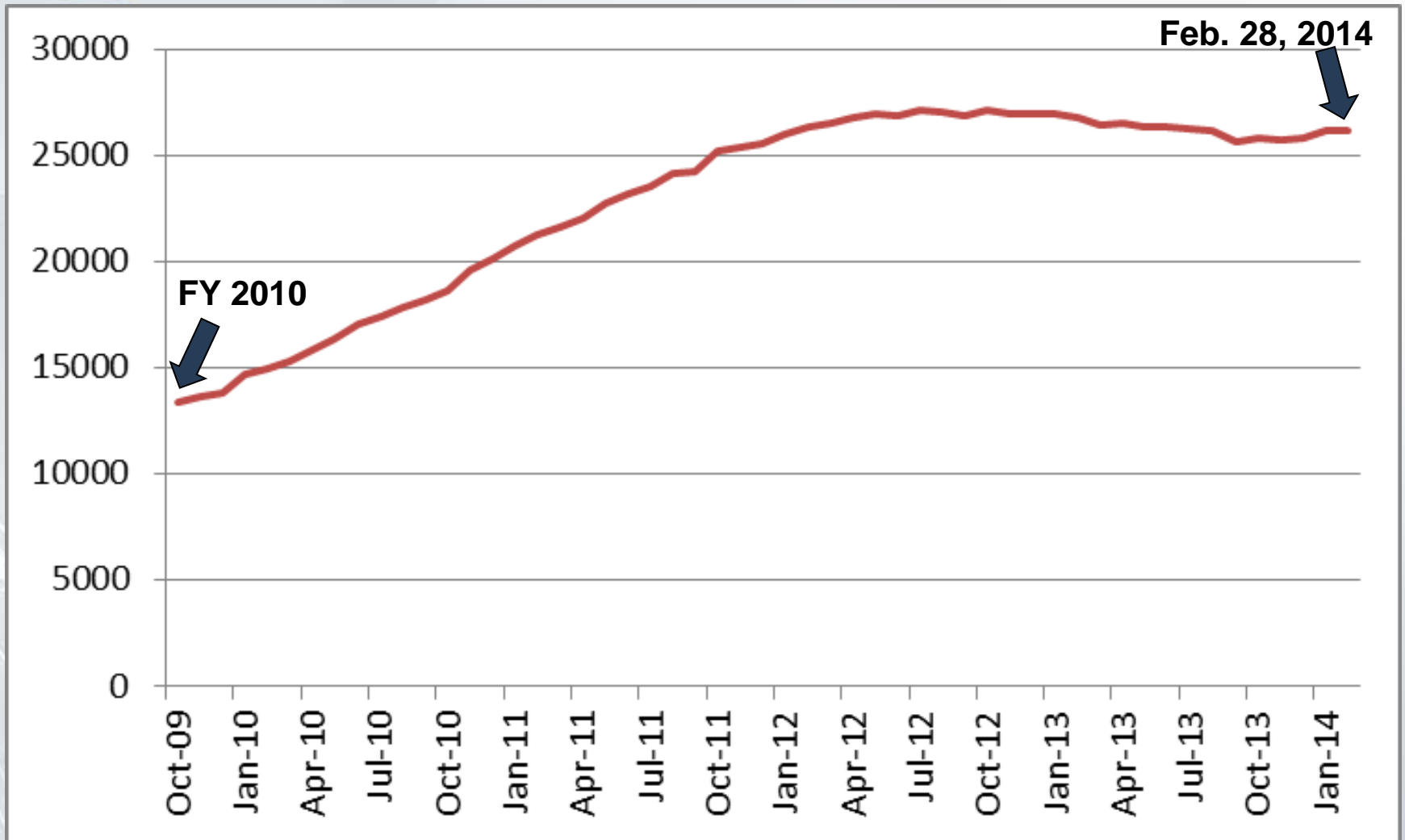
- Meet statutory timeliness requirements for AIA proceedings (one year from institution)
- Meet statutory timeliness requirements for appeals from reexamination proceedings (goal of 6 months from PTAB taking jurisdiction)
- Decide oldest cases, hire to reduce regular *ex parte* inventory, reassign judges according to greatest need.



Appeal Statistics



Appeals in PTAB Inventory





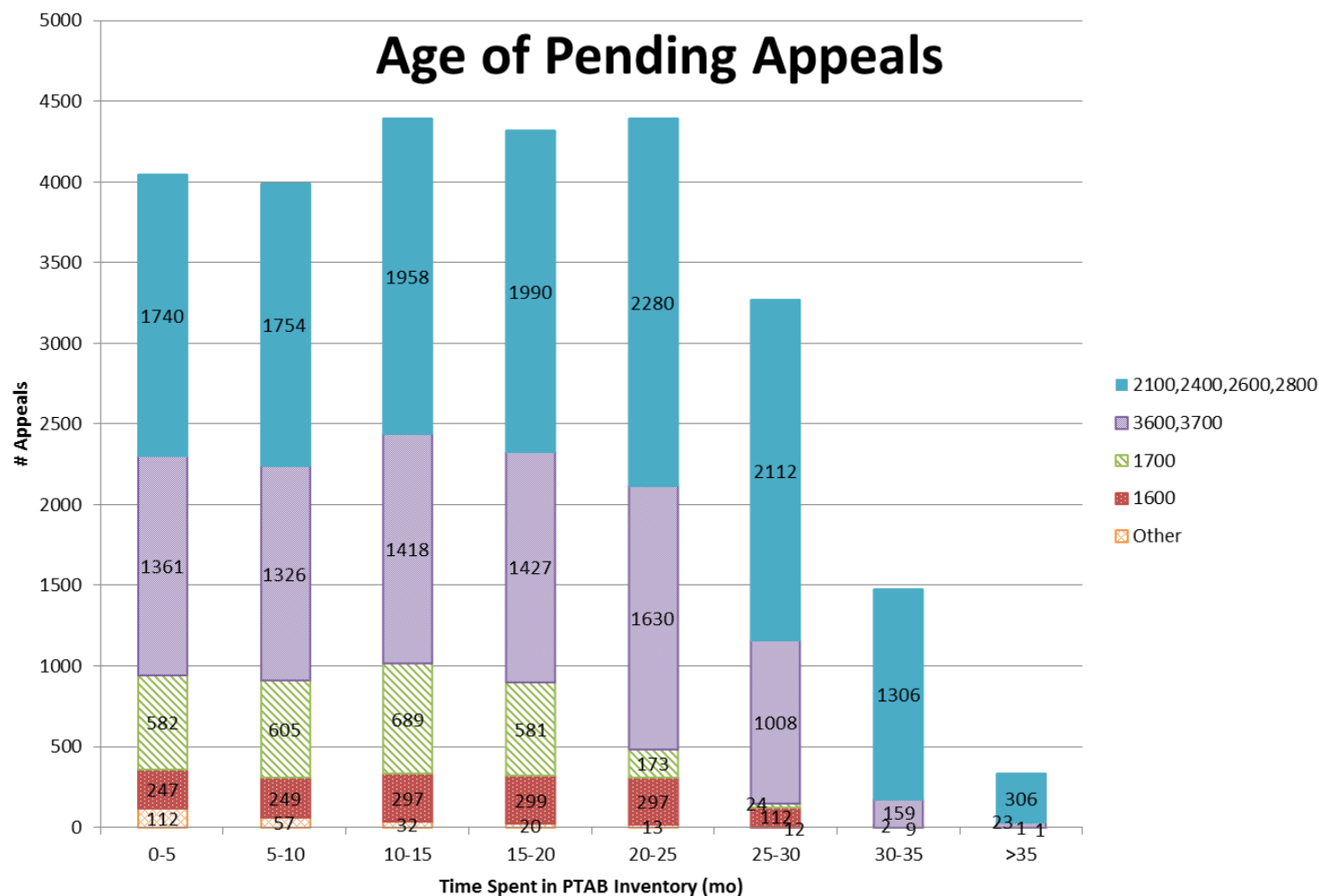
Appeals in PTAB Inventory

(as of February 28, 2014)

Type of Appeal	Total
Ex parte and reissue applications	25,885
Ex parte reexamination proceedings	76
Inter partes reexamination proceedings	156
TOTAL	26,117



Pending Ex Parte Appeal Age and Technology Center Origin (as of Feb. 26, 2014)

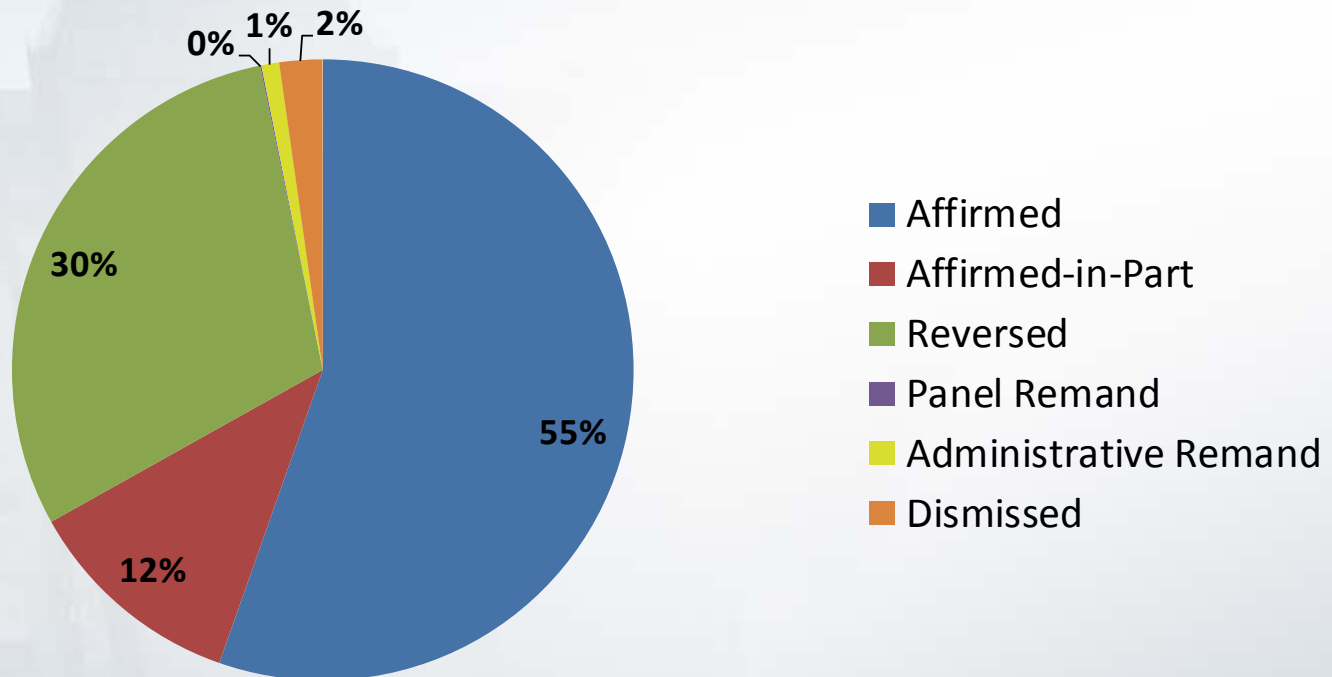


Elec-Comp	13,446
Mech-Biz	8,352
Chem	2,654
Bio	1,504
Other	256
Grand Total	26,212



Decisions by Type: FY2013

Decisions

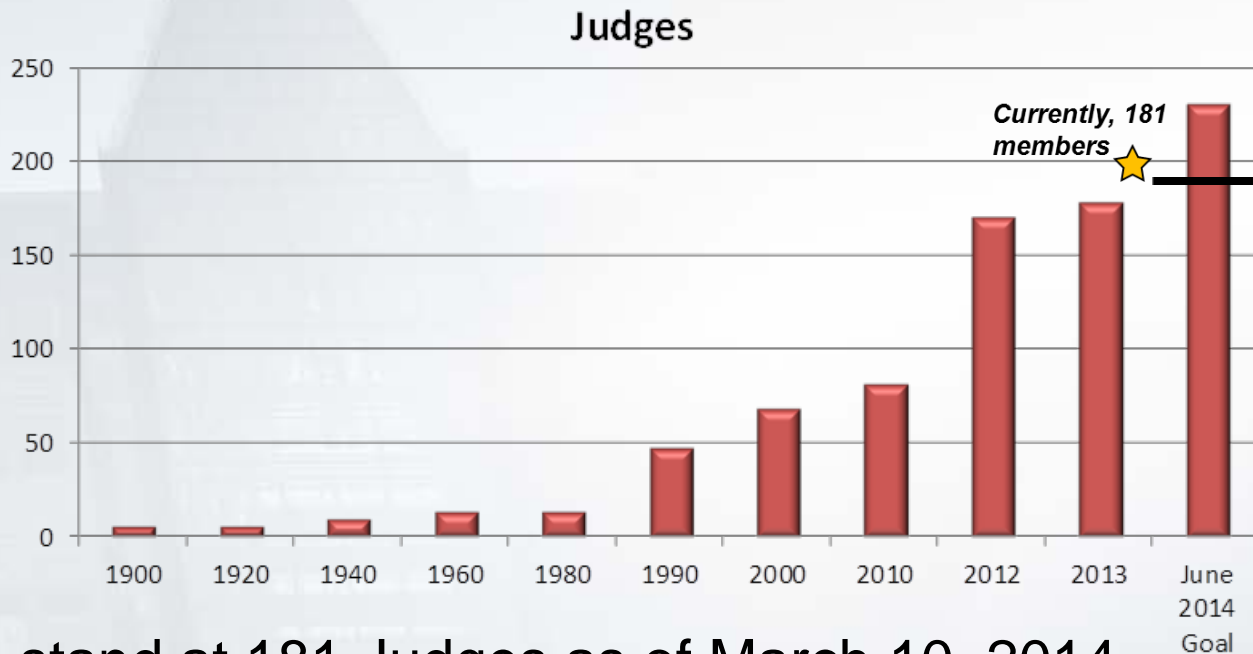




APJ Staffing



Board Expansion



- We stand at 181 Judges as of March 10, 2014.
- Opportunities exist at Alexandria and at the Detroit/Denver/Dallas/Silicon Valley Satellite Offices (www.usajobs.gov)

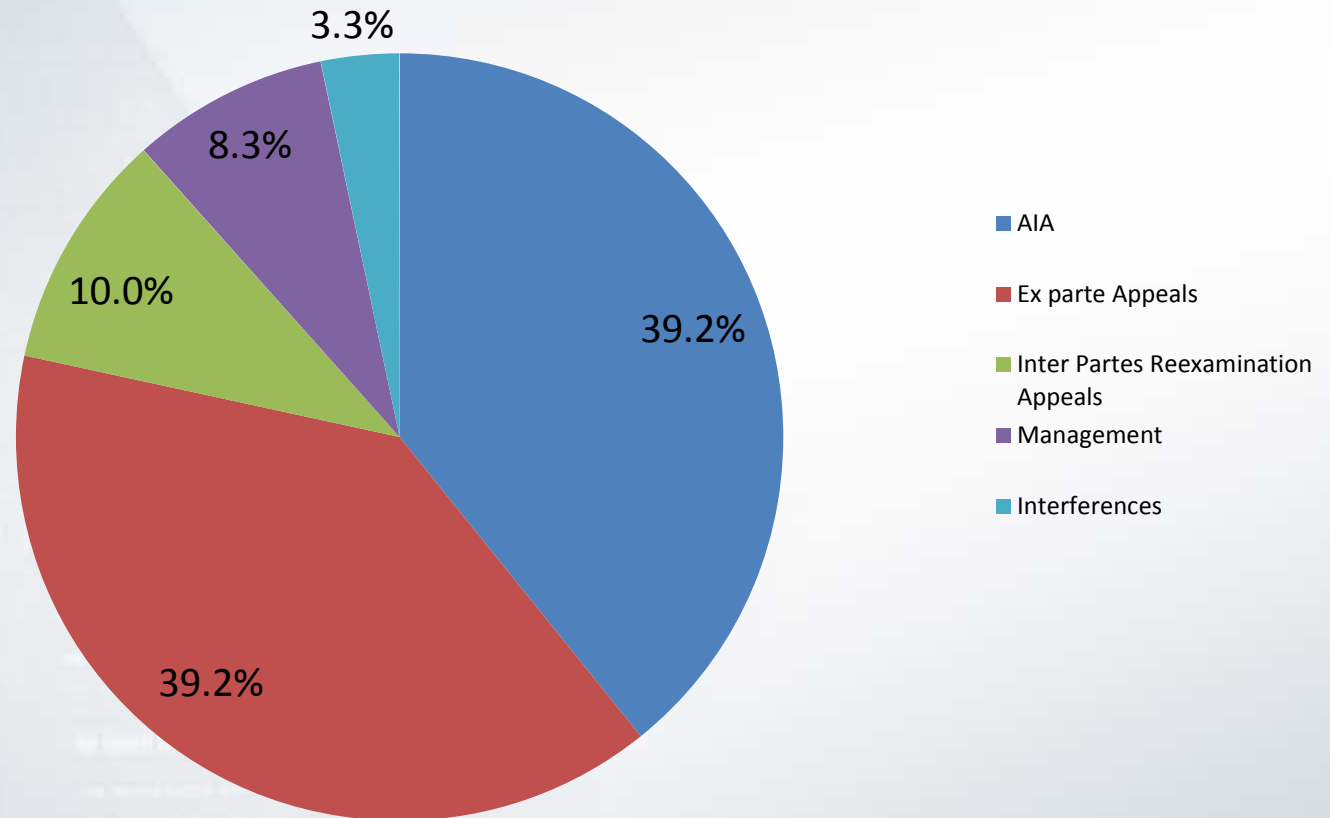


Board Expansion

- Selectees have come from the following:
 - USPTO Patent Examining Corps, Office of the General Counsel, and the PTAB
 - International Trade Commission and Department of Justice
 - Private Practice (solo to very large)
 - All types of industries



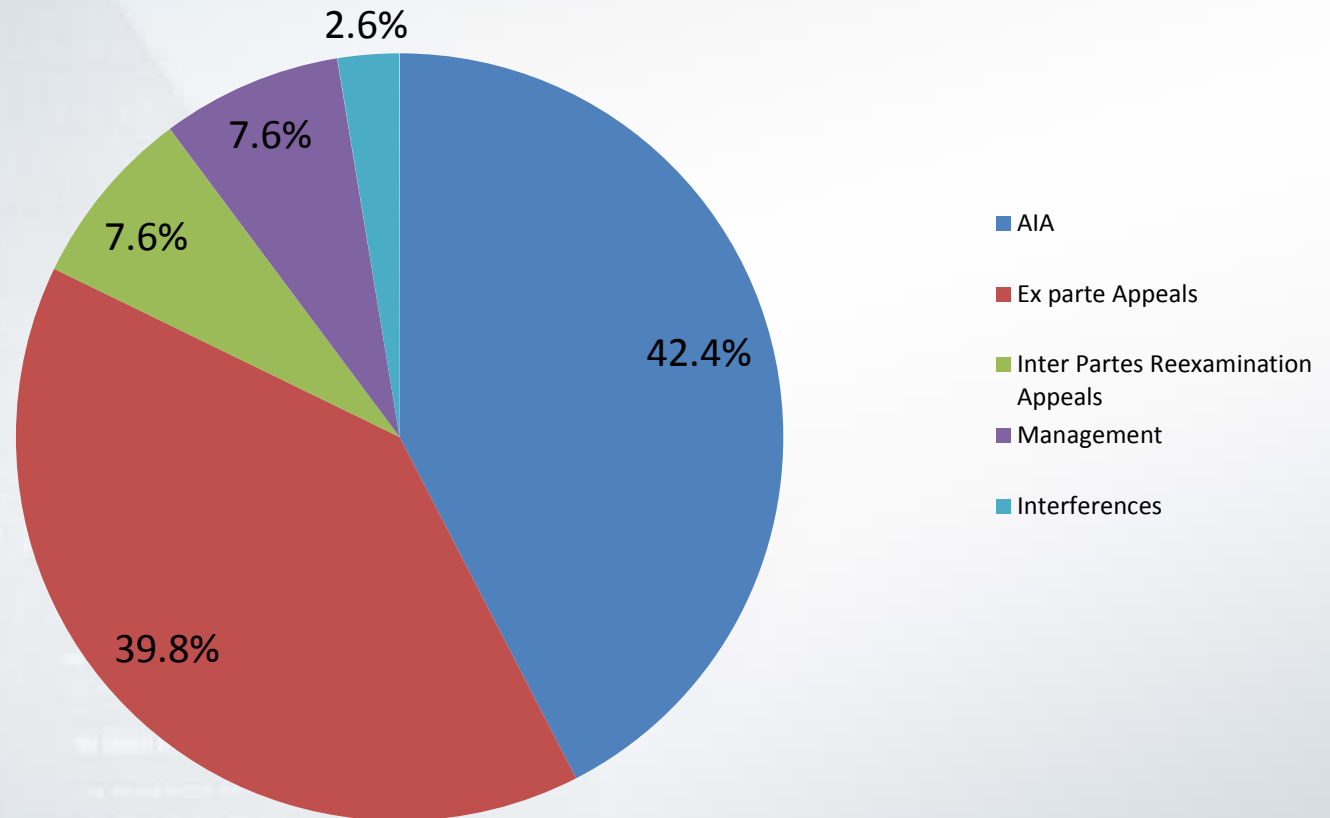
Current Judge Staffing



* As of March 10, 2014 (181 judges)



Expected Judge Staffing (October 1, 2014)



* Hiring 54 additional judges in FY 2014, for a total of 235 judges



PTAB Quality

- During unparalleled growth, it is critical for the PTAB to ensure consistency in its decisions through training and designation of precedential and informative decisions.



APJ Training



APJ Training

New Judge Orientation

- All new judges participate in a one-week orientation training session.
- Topics covered include: internal Board procedures, Board organization/infrastructure, and Board resources.

Training Committee

- The Board has a Training Committee that conducts formal training for all members of the Board.

Mentoring Program

- The Board has a Mentoring Program that matches new judges with senior judges.



APJ Training

For newer judges

- initial guidance to ease the transition to the Board's unique mission and culture
- discussion of issues we see on a regular basis.

For all judges

- discussions of case law
- training on new areas of jurisdiction

The training agenda is developing continually, based on judge input, as we constantly strive to look for new ways to more effectively and efficiently fulfill our mission.



What can applicants do to strengthen the record on appeal?

- Board's primary role in an appeal is to review the adverse decision of the examiner, not to conduct an examination.
- Arguments should address directly and concisely how the examiner allegedly erred.
- Strategically group claims to highlight the strongest arguments.
- Use reply briefs to respond to specific findings or arguments made by the examiner in the answer.



What can applicants do to strengthen the record on appeal?

- Avoid conclusory arguments and the overuse of “catch phrases” in arguments. Present fully developed arguments based on case law and facts.
 - If arguing the art is not analogous, develop the facts under both prongs of the test.
 - If arguing “teaching away,” provide arguments/evidence to show that a person, upon reading the reference, would be led in a divergent direction. Avoid using “teaching away” where the art simply describes a less preferable alternative. See *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007)(discussing teaching away in *United States v. Adams*, where prior art *warned against* path the inventor took).
 - If rebutting inherency, show the reference does not possess the claimed characteristic. Do not argue simply that reference fails to state characteristic expressly.



What can applicants do to strengthen the record on appeal?

- When a dispute turns on claim construction, explain why the examiner's interpretation is unreasonably broad in view of the specification.
- If a dispute turns on the level of ordinary skill in the art, provide the Board with evidence to establish that level.
- Do not ask the Board to review petitionable issues (e.g., decisions of the examiner that are of a discretionary, procedural, or non-substantive nature).

Thank You



Acting Vice Chief Judge Linda Horner
U.S. Patent and Trademark Office
Patent Trial and Appeal Board

Compact Prosecution 2.0

William Smith

Woodcock Washburn LLP

Joseph Mallon

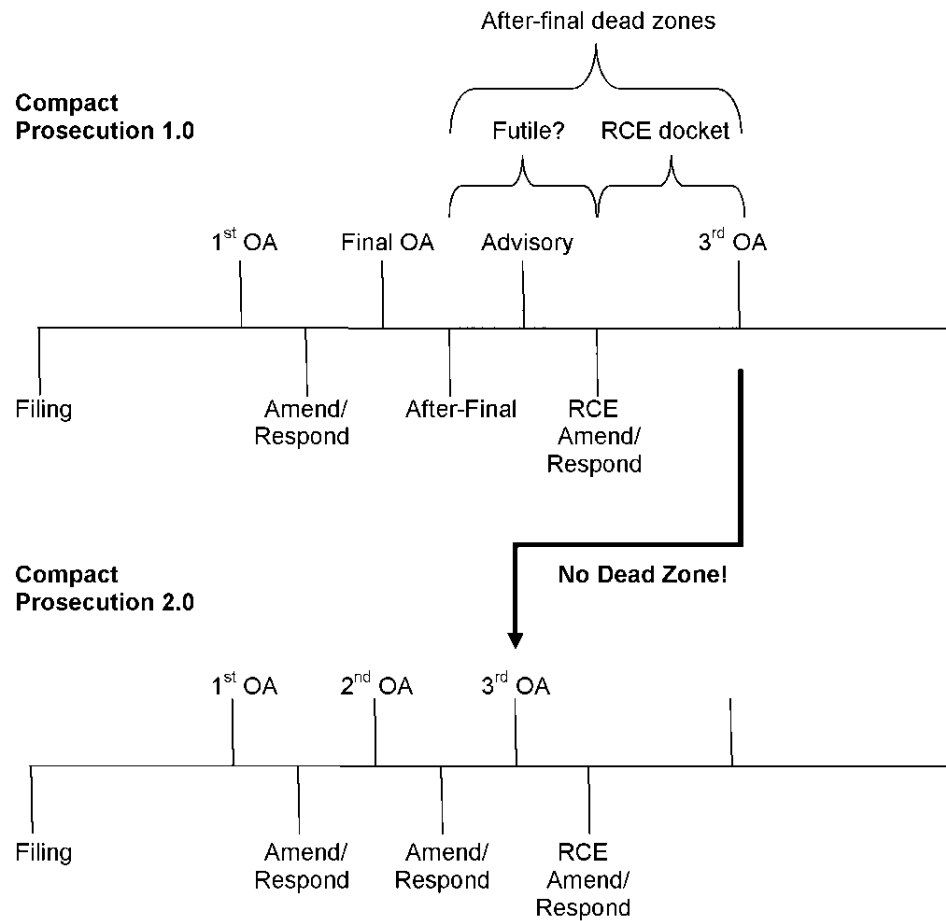
Knobbe Martens

Disclaimer

Views expressed herein are those of the authors and are not to be attributed to their clients, their firms, their firms' clients or IPO.

The patent examination process should be a collaborative and collegial effort to identify patentable subject matter that is conducted in an efficient, effective and transparent manner.

Eliminate “Dead Zones”



Goals

- Increased efficiency
 - Reduce unproductive activities
 - Eliminate final rejections
 - Reduce artificial pauses
 - Focus on final rather than interim objectives
 - Allowance, appeal and abandonment
 - Not Office Actions and final rejections
 - Bring increased resources to bear in stalled cases
 - Involve and empower supervisors, QAS and mediators
 - Continued focus on quality

Reduce unproductive activities

- Prosecute without pause to a final objective
 - Encourage interviews
 - Keep subject matter fresh in mind
 - Foster collaborative mindset
 - Encourage productive exchanges

Focus on Final Objectives

- Allowance, appeal or abandonment
 - Discourage short term focus

Additional resources can help stalled cases

- Supervisory approval for 3rd OA
 - Consistent with current policy - see MPEP § 707.02 (“The [SPEs] are expected to personally check on the pendency of every application which is up for the third or subsequent Office action with a view to finally concluding its prosecution.”)
- Supervisory approval for 2nd OA after RCE
- Option to request conference
 - Examiner and two neutral conferees (e.g., tQAS)
 - Authority to remove rejection
 - Decision to allow remains with examiner

Additional resources can help stalled cases

- Appeal
 - Retain current appeal option (after 2nd rejection)
 - Option to attend appeal conference
 - Option to request mediation after Exmr Answer
 - Option for Track I appeal

Quality

- Continue real time quality review
- Continue QIR system development
- Strengthen ombudsman program
- Increase transparency
 - Publish detailed performance data
 - Art unit-by-art unit basis

Compact Prosecution 2.0

William Smith

Woodcock Washburn LLP

Joseph Mallon

Knobbe Martens

IPO Education Foundation

Patent and Trademark Office Day

Working Together to Improve Patent Examination and Pendency - an Applicant's Perspective

March 25, 2014

Jason Reyes,
Assistant General Counsel, IP
EMC Corporation

Agenda

- EMC – who we are
- EMC patent leadership
- EMC patent program
- Applicant suggestions for PTO/Examiners

EMC – Who We Are

- EMC Corporation is a global leader in enabling businesses and service providers to transform their operations and deliver IT as a service. Fundamental to this transformation is cloud computing. Through innovative products and services, EMC accelerates the journey to cloud computing, helping IT departments to store, manage, protect and analyze their most valuable asset — information — in a more agile, trusted and cost-efficient way.
- Founded in 1979
- Headquartered in Hopkinton, MA
- ~60,000 employees worldwide

EMC Patent Leadership

- ~4,000 issued US patents, ~3,600 pending US applications, and more internationally
- Top 10 ranking for overall strength of patent portfolio*
- Highly ranked for technology impact of patent portfolio within EMC's industry*
- Thomson Reuters 2012 Top 100 Global Innovators
- Actively engaged with Congress in efforts to pass patent litigation reform legislation
- Met with USPTO senior staff, at their request, to comment on proposed executive branch actions directed by the President

*PatentBoard.com, WSJ Market Data Group, July 5, 2013

EMC Patent Program

- Patent committees are organized around business units, and include subject matter experts for pertinent technologies
- Inventors work with EMC patent professionals and outside counsel to prepare patent applications
- During prosecution, inventors assist patent practitioners as needed – usually to help analyze/distinguish complex prior art
- Inventors are awarded for patent filings and issuances

Applicant Suggestions for Examiners: Procedural

- Make After Final Consideration Pilot 2.0 permanent for all after-Final narrowing amendments
- Better align Examiner count system with goal of efficient end-to-end prosecution
- Enable ability to adjust Examiner time allotment or count depending on complexity of a given application or prosecution thereof
- Add formal process to enable Applicant to request transfer to another Technology Center/Art Unit when there is clear misalignment of application technology and Art Unit
- Further emphasize assigning applications to Examiners based on subject matter expertise of Examiners

Applicant Suggestions for Examiners: Procedural (cont'd)

- Be more proactive in proposing interviews
 - Prior to examination to allow Applicant to explain technology
 - Generally, to establish better understanding of Applicant's and Examiner's positions
 - For candid discussions; e.g., if Examiner believes that prior art is so crowded that there is little hope for an allowance
- For telephone interviews, let Applicant know *beforehand* if Examiner does not have authority to negotiate during interview

Applicant Suggestions for Examiners: Procedural (cont'd)

- Continue to support “another set of eyes” procedures such as Pre-Appeal Brief Conferences

Applicant Suggestions for Examiners: Substantive Examination

- Greater investment earlier in prosecution to understand invention and the substance of prior art, and articulation of same in arguments
 - Less reliance on keyword-based analysis
- Greater compliance with and PTO enforcement of laws and rules concerning precision and completeness of Office Action arguments

Applicant Suggestions for Examiners: Substantive Examination (cont'd)

- Encourage Examiners to provide interpretations of key claim terms
 - very helpful to Applicant; reduces churn
- Educate about practical limits of what is a “broadest reasonable interpretation”
- In Office Actions, be more proactive in suggesting changes to advance prosecution or put cases in condition for allowance

Applicant Suggestions for Examiners: IT investment

- On-line Examiner interview scheduling system
- On-line Examiner interview capability, with screen/application sharing (e.g., WebEx)

Thank You!

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Patent and Trademark Office Day



Remy Yucel

Director, Central Reexamination Unit (CRU)

United States Patent and Trademark Office

March 25, 2014



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http://www.uspto.gov/patents/init_events/patapp-initiatives-timeline.jsp





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USPTO Patent Application Initiatives Timeline

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The USPTO Patent Application Initiatives Timeline displays various programs and initiatives that are available to applicants during each phase of the application process. Each program is designed to advance the progress of a patent application and to provide applicant assistance. Program titles in the Timeline can be selected to access specific details on objectives and participation requirements. Headings within each column can be selected to access a detailed [Matrix](#) which provides a comparison of the programs and initiatives. If you have general questions about filing your patent application, please contact our [Customer Support Center](#).

FILING	FIRST ACTION	FINAL REJECTION	APPEAL	ALLOWANCE	ISSUE
PRIOR TO EXAMINATION	DURING EXAMINATION	AFTER CLOSE OF PROSECUTION	AFTER NOTICE OF APPEAL	AFTER PAYMENT OF ISSUE FEE	
ADVANCEMENT OF EXAMINATION OPTIONS					
Track One - Prioritized Examination		After Final Consideration Pilot 2.0 (AFCP 2.0)	After Final Consideration Pilot 2.0 (AFCP 2.0)	Quick Path Information Disclosure Statement (QPIDS)	
Accelerated Examination		Pre-Appeal Program			
Full First Action Interview Pilot					
Patent Prosecution Highway (PPH 2.0)					
PCT Patent Prosecution Highway (PCT PPH 2.0)					
Petition to Make Special	Petition to Make Special				
Ombudsman Program	Ombudsman Program	Ombudsman Program	Ombudsman Program	Ombudsman Program	
INTERVIEW OPTIONS					
General Interview Practice	General Interview Practice	General Interview Practice			
INFORMATION DISCLOSURE STATEMENT (IDS) OPTIONS					
IDS - No Certification or Fee	IDS - Certification or Fee	IDS - Certification and Fee	IDS - Certification and Fee		



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USPTO's Prioritized Patent Examination Program



Need to FAST track your patent? Use Track One!

Fast innovation is America's competitive edge. If you need to move your ideas quickly, USPTO's Track One prioritized examination will allow you to get a final disposition within about twelve months. The USPTO offers Track One for prioritized examination of your utility and plant patent applications. Track One gives your application special status with fewer requirements than the current accelerated examination program and without having to perform a pre-examination search.

Prioritized examination is available for a fee at the time of filing an original utility or plant application. A single request for prioritized examination may be granted for a Request for Continued Examination (RCE) in a plant or utility application.

Thousands of applicants have used Track One already. Join them on the prioritized examination FAST track!



What users are saying about Track One!

Statistics for prioritized examination are reported below.

- [Prioritized Examination Request Form PTO/AIA/424](#)
- [EFS-Web Quick Start Guide for Prioritized Examination \(Track One\)](#) (November 2013)
- [Prioritized Examination \(Track One\) Final Rule \(76 Fed. Reg. 59050, September 23, 2011\)](#)
- [Prioritized Examination \(RCE\) Final Rule \(76 Fed. Reg. 78566, December 19, 2011\)](#)
- [Prioritized Examination Frequently Asked Questions](#)



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FILING	FIRST ACTION	FINAL REJECTION	APPEAL	ALLOWANCE	ISSUE
PRIOR TO EXAMINATION	DURING EXAMINATION	AFTER CLOSE OF PROSECUTION	AFTER NOTICE OF APPEAL	AFTER PAYMENT OF ISSUE FEE	
ADVANCEMENT OF EXAMINATION OPTIONS					
Track One - Prioritized Examination		After Final Consideration Pilot 2.0 (AFCP 2.0)	After Final Consideration Pilot 2.0 (AFCP 2.0)	Quick Path Information Disclosure Statement (QPIDS)	
Accelerated Examination		Pre-Appeal Program			
Full First Action Interview Pilot					
Patent Prosecution Highway (PPH 2.0)					
PCT Patent Prosecution Highway (PCT PPH 2.0)					
Petition to Make Special	Petition to Make Special				
Ombudsman Program	Ombudsman Program	Ombudsman Program	Ombudsman Program	Ombudsman Program	
INTERVIEW OPTIONS					
General Interview Practice	General Interview Practice	General Interview Practice			
INFORMATION DISCLOSURE STATEMENT (IDS) OPTIONS					
IDS - No Certification or Fee	IDS - Certification or Fee	IDS - Certification and Fee	IDS - Certification and Fee		



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USPTO Patent Application Initiatives - Prior to Examination

Prior To Examination

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During Examination »

	Track One (Prioritized Examination)	Accelerated Examination	Full First Action Interview Pilot	Patent Prosecution Highway (PPH 2.0)	PCT Patent Prosecution Highway (PCT PPH 2.0)	Ombudsman Program
Description	The goal is to provide a final disposition within twelve months, on average, of prioritized status being granted. Learn about Track One statistics .	Accelerated examination provides applicant the opportunity to have final disposition of an application in 12 months. Learn about Accelerated Examination statistics .	Under this Program, an applicant is entitled to a first action interview, upon request, prior to the first Office action on the merits.	An applicant receiving a ruling from the Office of First Filing (OFF) that at least one claim in an application filed in the OFF is patentable may request that the Office of Second Filing (OSF). Learn about PPH Statistics .	European Patent Office (EPO) or the USPTO may request that the other office fast track the examination of corresponding claims in corresponding applications.	The Patents Ombudsman Program enhances the USPTO's ability to assist applicants or their representatives with issues that arise during patent application prosecution.
Program Start Date	09/2011 (AIA)	05/2006	10/2009	2006	01/2010	04/2010
Currently Active (accepting applications)	Yes	Yes	Yes, extended beyond 11/16/12	Yes	Yes	Yes
Petition / Request	Request	Petition	Request	Petition	Request	Request
Surcharge / Fee	Yes - \$4800 / \$2400 small entity; \$4000/\$2000 as of 3/19/13	Yes - \$130 ***	No	No	No	No

* if claims are in condition for allowance no interview is required

** if extension of time is filed, application is out of Track One

*** no fee if statement of claimed subject matter is directed to environmental quality, energy, or countering terrorism



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During Examination
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« Prior to Examination**After Close of Prosecution »**

	Petition to Make Special	Ombudsman Program	General Interview Practice
Description	Applications will not be advanced out of turn for examination or for further action except as provided by this part.	The Patents Ombudsman Program enhances the USPTO's ability to assist applicants or their representatives with issues that arise during patent application prosecution.	The USPTO encourages examiners to take a proactive approach to examination by reaching out and engaging our stakeholders in an effort to resolve issues and shorten prosecution.
Program Start Date	Circa 12/1959	04/2010	
Currently Active (accepting applications)	Yes	Yes	Yes
Petition / Request	Petition	Request	Request
Surcharge / Fee	No	No	No
Claim number limit(s)	No – may file 3 indep. & no more than 20 claims; or pay additional fees See earlier edits	N/A	N/A
Shortened Prosecution Time	Yes – due to earlier FAOM and placement on special amended docket	N/A	N/A
Special Status	Until final disposition	N/A	N/A
Examination Support Document	No	N/A	N/A
Shortened / Non extendable Response Times	No	N/A	N/A
Interview Required	No	N/A	Yes
Continuation Applications & RCEs eligible for	Yes	Yes	Yes



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USPTO Patent Application Initiatives - After Close of Prosecution

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	After Final Consideration Pilot 2.0 (AFCP 2.0)	Pre-Appeal Program	General Interview Practice	Quick Path Information Disclosure Statement (QPIDS)	Ombudsman Program
Description	AFCP 2.0 authorizes additional time for examiners to search and/or consider responses after final rejection.	An avenue to request that a panel of examiners formally review the legal and factual basis of the rejections in their application prior to the filing of an appeal brief.	The USPTO encourages examiners to take a proactive approach to examination by reaching out and engaging our stakeholders in an effort to resolve issues and shorten prosecution.	QPIDS eliminates the requirement for filing an RCE with an IDS filed after payment of the issue fee in order for the IDS to be considered by the examiner.	The Patents Ombudsman Program enhances the USPTO's ability to assist applicants or their representatives with issues that arise during patent application prosecution.
Program Start Date	05/2013	07/2005		05/2012	04/2010
Currently Active (accepting applications)	Yes	Yes	Yes	Yes	Yes
Petition / Request	Request	Request	Request	Submitted Via EFS-Web as e-petition	Request
Surcharge / Fee	No	Notice of Appeal Fee	No	Yes - IDS fee \$180	No
Claim Number Limit(s)	No	No	N/A	No	N/A
Shortened Prosecution Time	N/A	N/A	N/A	N/A	N/A
Special Status	N/A	No	N/A	N/A	N/A
Examination Support	No	No	N/A	No	N/A



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Quick Path IDS (QPIDS) Pilot

- http://www.uspto.gov/patents/init_events/qpids.jsp
- Requires certification under 37 CFR 1.97(e) and IDS fee
- Gives examiners up to 3 hours of other time to consider the submitted IDS
- When the issue fee has not yet been paid (or the IDS is submitted with the issue fee)—QPIDS has not changed requirements for applicants
 - No RCE is required to have the IDS considered
 - The only change is the other time given to examiners



Quick Path IDS (QPIDS) Pilot

- In situations where the issue fee has been paid before submission of the IDS, additionally applicant must also file:
 - An e-petition to withdraw the application from issue
 - Pay the RCE fee
- If the IDS submission does not change the patentability of the claims:
 - The examiner will complete a Corrected Notice of Allowability
 - The application reenters the publications cycle
 - The RCE fee is refunded



Quick Path IDS (QPIDS) Pilot

- If the IDS submission changes the patentability of the claims:
 - The examiner will complete the PTO 2300 form and have it mailed
 - The RCE is entered and the application proceeds as a RCE
 - The IDS fee is refunded



After Final Consideration Pilot 2.0 (AFCP)

- http://www.uspto.gov/patents/init_events/afcp.jsp
- Gives up to 3 hours of non-production time for the consideration of an after-final amendment under 37 CFR 1.116
- To participate, Applicant must:
 - Submit request (use PTO/SB/434 form)
 - Submit an amendment to at least one independent claim that does not broaden scope
 - Be available to participate in an examiner-initiated interview



After Final Consideration Pilot 2.0 (AFCP)

- Since the launch of AFCP 2.0 in May 2013, there have been more than 30,000 AFCP requests
- An interview is 3X more likely in an AFCP application than one without an AFCP request
- Internal and external surveys are being conducted currently to determine the effectiveness of the 2.0 pilot
- Survey results will be evaluated to determine next steps



Patent Prosecution Highway (PPH)

- http://www.uspto.gov/patents/init_events/pph/index.jsp
- The Patent Prosecution Highway (PPH) speeds up the examination process for corresponding applications filed in participating intellectual property offices
- PPH leverages fast-track examination procedures already in place among participating patent offices to allow applicants to reach final disposition of a patent application more quickly and efficiently than standard examination processing



Patent Prosecution Highway (PPH)

- As of December 2013:
 - First Action Allowance rate of 27.1%
 - Ave. pendency from PPH request to first action is 4.4 months
 - Ave. pendency from request to final decision is 14 months



Questions and Comments?

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