

applications in a series to require all divisional applications to be filed within a set period of time after the restriction requirement is made final and after any petition for review has been resolved?

g. make changes to the rejoinder practice after a final rejection has been made, such as giving applicants a certain time period after final rejection to provide appropriate claims for rejoinder?

h. limit or change non-statutory double patenting practice, including requiring applicants seeking patents on obvious variations to prior claims to stipulate that the claims are not patentably distinct from the previously considered claims as a condition of filing a terminal disclaimer to obviate the rejection; rejecting such claims as not differing substantially from each other or as unduly multiplied under 37 CFR 1.75; and/or requiring a common applicant or assignee to include all patentably indistinct claims in a single application or to explain a good and sufficient reason for retaining patentably indistinct claims in two or more applications? See 37 CFR 1.78(f).

5. Please provide any other input on any of the proposals listed under initiatives 2(a)–2(i) of the USPTO Letter, or any other suggestions to achieve the aims of fostering innovation, competition, and access to information through robust and reliable patents.

The USPTO also invites public input on the following questions, which are presented verbatim (except for minor changes to internal citation format) as they appeared in the June 8 letter from Members of Congress. Any comments relating to fee setting will be taken into consideration when the USPTO takes up fee setting more broadly.

6. Terminal disclaimers, allowed under 37 CFR 1.321(d), allow applicants to receive patents that are obvious variations of each other as long as the expiration dates match. How would eliminating terminal disclaimers, thus prohibiting patents that are obvious variations of each other, affect patent prosecution strategies and patent quality overall?

7. Currently, patents tied together with a terminal disclaimer after an obviousness-type double patent rejection must be separately challenged on validity grounds. However, if these patents are obvious variations of each other, should the filing of a terminal disclaimer be an admission of obviousness? And if so, would these patents, when their validity is challenged after issuance, stand and fall together?

8. Should the USPTO require a second look, by a team of patent quality specialists, before issuing a continuation patent on a first office action, with special emphasis on whether the claims satisfy the written description, enablement, and definiteness requirements of 35 U.S.C. 112, and whether the claims do not cover the same invention as a related application?

9. Should there be heightened examination requirements for continuation patents, to ensure that minor modifications do not receive second or subsequent patents?

10. The Patent Act requires the USPTO Director to set a “time during the pendency of the [original] application” in which continuation status may be filed. Currently there is no time limit relative to the original application. Can the USPTO implement a rule change that requires any continuation application to be filed within a set timeframe of the ultimate parent application? What is the appropriate timeframe after the applicant files an application before the applicant should know what types of inventions the patent will actually cover? Would a benchmark (*e.g.*, within six months of the first office action on the earliest application in a family) be preferable to a specific deadline (*e.g.*, one year after the earliest application in a family)?

11. The USPTO has fee-setting authority and has set [fees] for filing, search, and examination of applications below the actual costs of carrying out these activities, while maintenance fees for issued patents are above the actual cost. If the up-front fees reflected the actual cost of obtaining a patent, would this increase patent quality by discouraging filing of patents unlikely to succeed? Similarly, if fees for continuation applications were increased above the initial filing fees, would examination be more thorough and would applicants be less likely to use continuations to cover, for example, inventions that are obvious variations of each other?

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2021–0042]

Extension of the Patent Trial and Appeal Board Motion To Amend Pilot Program

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO) is extending the Motion to Amend (MTA) Pilot Program, initiated on March 15, 2019, and first extended on September 16, 2021. The MTA Pilot Program provides additional options for a patent owner who files an MTA in an America Invents Act (AIA) trial proceeding before the Patent Trial and Appeal Board (PTAB). In particular, the program provides a patent owner who files an MTA with options to request preliminary guidance from the PTAB on the MTA and to file a revised MTA. The MTA Pilot Program also provides timelines for briefing to accommodate these options.

DATES: *Applicability Date:* October 4, 2022. *Duration:* The MTA Pilot Program will run until September 16, 2024 (or it may end sooner if replaced by a permanent program after notice-and-comment rulemaking). The USPTO may further extend the MTA Pilot Program (with or without modification) on either a temporary or a permanent basis, or may discontinue the program after that date.

FOR FURTHER INFORMATION CONTACT:

Miriam L. Quinn, Acting Vice Chief Administrative Patent Judge; or Melissa Haapala, Vice Chief Administrative Patent Judge; at 571–272–9797 (*Miriam.Quinn@uspto.gov* or *Melissa.Haapala@uspto.gov*, respectively).

SUPPLEMENTARY INFORMATION: A patent owner in an AIA trial proceeding may file an MTA as a matter of right. See 35 U.S.C. 316(d)(1), 326(d)(1). After receiving public feedback about the PTAB’s MTA practice, in October 2018 the USPTO published a Request for Comments in the **Federal Register** seeking written public comments on a proposed amendment process in AIA trials that would involve preliminary guidance from the PTAB on the merits of an MTA and an opportunity for a patent owner to file a revised MTA. See Request for Comments on MTA Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board, 83

FR 54319 (Oct. 29, 2018). The majority of comments supported the PTAB issuing preliminary guidance in cases involving an MTA, and commenters were almost evenly mixed in supporting or opposing the opportunity for a patent owner to file a revised MTA.

On March 15, 2019, in response to these public comments, the USPTO issued a **Federal Register** Notice detailing the MTA Pilot Program. See Notice Regarding a New Pilot Program Concerning Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board, 84 FR 9497 (Mar. 15, 2019). The MTA Pilot Program provides a patent owner with two options not previously available: (1) a patent owner may choose to receive preliminary guidance from the PTAB on its MTA; and (2) a patent owner may choose to file a revised MTA after receiving a petitioner's opposition to the original MTA and/or the PTAB's preliminary guidance (if requested). If a patent owner does not elect either option, then AIA trial practice, including MTA practice, is essentially unchanged from the practice prior to the implementation of the MTA Pilot Program.

The USPTO subsequently extended the MTA Pilot Program on September 16, 2021, to run through September 16, 2022. The USPTO presented the results of the MTA Pilot Program through March 31, 2022, in Installment 7 of the Motion to Amend Study. The most recent information and statistics related to MTAs are available on the USPTO's website at www.uspto.gov/patents/ptab/motions-amend-study.

Now that stakeholders have had experience with the MTA Pilot Program, as well as access to the results of the Motion to Amend Study, the USPTO plans to issue a Request for Comments regarding the MTA Pilot Program to gather stakeholder feedback and suggestions on the program and on amendment practice generally and to determine whether to make the program permanent through notice-and-comment rulemaking. The USPTO is extending the MTA Pilot Program for a second time, through September 16, 2024, while it gathers public input. The requirements for the program remain as set forth in the original notice without modification.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO-P-2020-0027]

Extension of the Fast-Track Appeals Pilot Program

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO) is extending the Fast-Track Appeals Pilot Program, initiated on July 2, 2020, and previously extended on July 12, 2021. The Fast-Track Appeals Pilot Program permits appellants with a docketed *ex parte* appeal before the Patent Trial and Appeal Board (PTAB or Board) to file a petition to expedite the review of the appeal. The Fast-Track Appeals Pilot Program sets a target of reaching decisions on *ex parte* appeals within six months from the date they enter the program.

DATES: *Applicability Date:* October 4, 2022. *Duration:* The Fast-Track Appeals Pilot Program will run until July 2, 2024. After that date, the USPTO may temporarily or permanently extend the Fast-Track Appeals Pilot Program (with or without modification) or discontinue the program.

FOR FURTHER INFORMATION CONTACT: Steven Bartlett, PTAB, by telephone at 571-272-9797 or by email at fasttrackappeals@uspto.gov.

SUPPLEMENTARY INFORMATION: *Ex parte* appeals to the Board are normally taken up for decision in the order in which they are docketed. See USPTO Standard Operating Procedure 1, Assignment of judges to panels (Sept. 20, 2018), available at www.uspto.gov/patents/ptab/resources. Currently, the average appeal pendency is about 12 months, down from 15 months in 2020, and 30 months in 2015. See the PTAB statistics available at www.uspto.gov/patents/ptab/statistics. A small number of *ex parte* appeals are advanced out of turn, for example, because the appealed case is a reissue application or a reexamination proceeding, or because the appealed case was accorded special status in light of an inventor's advanced age or poor health.

On July 2, 2020, the PTAB adopted, on a temporary basis, the Fast-Track Appeals Pilot Program, under which appellants may have an *ex parte* appeal to the Board advanced out of turn by filing a petition under 37 CFR 41.3 and paying the petition fee specified in 37 CFR 41.20(a). See Fast-Track Appeals

Pilot Program (85 FR 39888, July 2, 2020) (Fast-Track Notice). The PTAB extended the Fast-Track Appeals Pilot Program on July 12, 2021. See Extension of the Fast-Track Appeals Pilot Program (86 FR 36530, July 12, 2021) (First Extension). The Fast-Track Appeals Pilot Program permits appellants to accelerate the Board's decision on an *ex parte* appeal, hastening patentability determinations and the potential for commercialization of products or services embodying those patented inventions. This helps spur follow-on innovation, economic growth, and job creation. The USPTO's form for the Fast-Track petition, Form PTO/SB/451, is available at www.uspto.gov/patents/apply/forms/forms-patent-applications-filed-or-after-september-16-2012.

The original Fast-Track Notice required, among other things, that appellants file a petition before July 2, 2021, to participate in the program. The Fast-Track Notice also set a maximum number of 500 appeals that may be advanced through Fast-Track petitions. The First Extension required that a petition be filed before July 2, 2022, to participate in the program. The First Extension removed the maximum number of 500 appeals, but it maintained a maximum number of 125 Fast-Track petitions granted per quarter.

The Fast-Track Appeals Pilot Program is hereby extended to accept petitions for advancing out of turn (*i.e.*, providing "Fast-Track status") to *ex parte* appeals through July 2, 2024. The requirements for the program remain the same as those established in the original notice (*see* Fast-Track Notice, 85 FR 39888), with the following modification regarding the petition limit.

Consistent with the First Extension, there is no upper limit of 500 total granted Fast-Track petitions. However, to maintain the Board's ability to provide this faster appeal option while timely resolving other appeals, the number of granted petitions in the Fast-Track Appeals Pilot Program remains limited to 125 granted petitions per quarter. If a quarterly limit is reached, the PTAB retains the flexibility to accept additional petitions, either for consideration in that quarter or in the next quarter.

The USPTO tracks the number of petitions it grants, the average time it takes to answer petitions, and the average time for the Board to render a decision on the merits of the *ex parte* appeal after a petition grant. These