

July 22, 2011

The Honorable David J. Kappos
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

**RE: AIPLA Recommendation Concerning Metrics for
Judging Timeliness of Interference Decisions**

Dear Under Secretary Kappos:

The American Intellectual Property Law Association (AIPLA) would like to call to your attention a matter of interest to patent interference practitioners and to their clients, the parties to patent interferences.

AIPLA is a national bar association with approximately 16,000 members who are primarily intellectual property lawyers and other patent practitioners in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Its members represent both owners and users of intellectual property.

AIPLA wishes to recommend to you and to the Board of Patent Appeals and Interferences the adoption of an additional metric for judging the timeliness of dispositions of interferences by the BPAI. In particular, the AIPLA Board of Directors recently adopted a resolution favoring an additional metric whereby credit would be given to the BPAI for minimizing the period between the panel hearing on the motions and the decision on the motions. This would supplement the metric that the PTO currently uses for judging the timeliness of the dispositions of all interferences, namely, that judgment be entered within two years of declaration.

The metric that the PTO currently uses to judge the timeliness of interference dispositions (and, hence, the achievements of the members of the Trial Section of the BPAI) is the percentage of all interferences in which judgment is entered in less than two years from their declarations. While useful, AIPLA believes that this should no longer be the sole metric and that a supplemental metric should be adopted for two different reasons.

First, many, if not most, interferences are settled rather than litigated to judgment. Including those interferences in the metric yields a misleading and, from a practical standpoint, essentially useless number. AIPLA members cannot use that number to give meaningful advice to their clients concerning how long an interference is likely to last.

Second, the current metric was adopted years ago, when the average pendency of fully litigated interferences was much longer than two years. At that time, the two-year metric was a worthy goal. However, due to many highly laudable changes in the procedures with which interferences are decided, what was once a worthy goal is no longer useful as the sole metric by which the timeliness of the disposition of interferences can be judged.

Today, many (probably most) interferences that are litigated to judgment terminate after the first phase—that is, after the members of the Trial Section decide the first round of motions. The panel hearing on the first round of motions typically takes place approximately one year after the interference is declared. That means that the members of the Trial Section have little incentive to decide the motions quickly after the panel hearing—whereas many parties to interferences are extremely desirous of getting to judgment as quickly as possible.

AIPLA believes that the average pendency of litigated interferences would drop dramatically if an additional metric for gauging the timeliness of the interference dispositions were adopted as proposed.

Thank you for your kind consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Q. Todd Dickinson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Q. Todd Dickinson
Executive Director