Summary of PPAC Meeting
Thomas Stoll, Legislative Consultant – Nov. 9, 2017

Today, I attended the Patent Public Advisory Committee (PPAC) quarterly meeting. Acting Director Joe Matal started off the meeting stating that he had nothing new to share on the Department of Commerce’s (DoC) Shared Services Update. Committee Chair Marylee Jenkins noted that PPAC had sent a letter to the DoC and to PTO on shared services and that Commerce Secretary Ross had sent a response to PPAC which the PPAC will make public soon. It appears that the DoC is considering the concerns raised by the PTO and its request to exempt it from the program. Joe Matal also mentioned that the PTAB recently issued three decisions on whether a petition is improper because the issues presented by the petition have been previously considered by the PTO. He was confident that the PTO was going to win the *Oil States* case and that the Supreme Court will hold that PTAB proceedings are Constitutional. But even if the improbable would happen and they should lose, he said that the PTAB judges would be busy working on the huge stack of pending ex parte cases, which currently makes up two thirds of its docket. The good news from the official in charge of the patent examining corps, Andy Faile, the uniformly respected Commissioner for Patent Operations, is that the examiner attrition rate is way down and that the PTO is having great success in keeping more experienced examiners. Unfortunately, the PTO experienced lower than expected application filings, the application inventory is at a low not seen for decades, and the PTO last year collected lower than expected maintenance fee payments. They reported that the impacts of the Supreme Court’s decision in *Alice* have been mostly limited to the business methods area and that many of the statistics are coming back to long term norms, except the allowance rate and new application filings. The allowance rate is at half of the pre-*Alice* level, and new application filings in this area are down from 1300/month to 975/month. Below are additional details on the discussions had at the PPAC meeting that you might find interesting.

**PTO Quality Program: Application Readiness Survey:** Martin Rater, Chief Statistician, Office of Patent Quality Assurance
The PTO conducted a random review of applications to determine whether a sample of pending applications reflected certain attributes of a quality application (inventive concept clearly set forth, specification clearly describes the referenced features in the drawings, preferred embodiments described in detail, claims directed to inventive concept, claims not broader than inventive concept, etc.). 850 examiners reviewed applications for 29 identified quality attributes that the examiner thought would enhance the ability of examiners to efficiently examine.

**2017 End of the Year Statistics:** Andy Faile, Commissioner for Patent Operations
To sum up, the PTO experienced lower than expected application filings, lower than expected RCE filings, and lower use of overtime by examiners. All of this contributed to a first action pendency of 16.3 months, falling shy of the goal of 14.8 months. This delay was the result of many factors including the typical hiring freeze that takes place in a change of Administration (PTO hired only 144 out of 600 examiners they had hoped to hire), some examiners not working the maximum overtime they are allowed (examining corps is getting more senior and for many their salary combined with their overtime is quickly bumping into the federal employee salary cap), and that examiners are being given extra time to adjust to a new classification system (CPC). The PTO’s total pendency of 24.2 months to disposal exceeded its goal of 24.8.
The examiner attrition rate is very low, currently at 4.1%, so the PTO has excelled at keeping the most skilled examiners (good for quality and for moving cases). They experienced the typical attrition rate for new hires of 25%.

Application Filings: Serial filings are up 0.3%, RCE filing down 3.8% (across TCs, down 10% in business methods), Designs up 6.1%, and provisional down 0.3%. Unexamined patent application inventory is down to 526,579, as of Sept. 30, 2017.

Alice Impacts have been mostly limited to Business Methods area. Many of the statistics are coming back to long term norms, except the allowance rate and new application filings. The allowance rate is only now back up to half of the pre-Alice level. The new filing rate has dropped from 1300/month to 975/month. Track One-Pendency is very low, 1.4 months to petition grant, 2.1 months to first action, and average time to disposition is 6.5 months. FY17 filing were below the cap (which was reached in FY16). With respect to patent term adjustment, 56% of first actions are being completed after 14 months from filing. The PTAB affirmance rate of the examining corps is 56% for FY17 (ranging from 43% for 3700 to 68 % for 1600), with an additional 12% of ex parte appeals being affirmed-in-part.

The PTO conducted a study to rate examiner compliance with various statutory basis for rejections. They reported a success rate for each statutory basis as: §101 rejections had a “success rate” of 96.5%, §112 rejections scored a rate of 92.6%, §102 rejections at a rate of 94.5% and §103 rejections at a rate of 92.4%. Peter G. Thurlow (Pulcinellie) observed that there is a perception in the public that 101 impacts every case, but that’s true in only 15% of the cases.

International Outreach and Administration: Jessica Patterson
Collaborative Search Pilot Program involves multiple IP offices that collaborate to come up with the best prior art, each conduct parallel searches before any issue a first office action. The Pilot Access to Prior Art involves the PTO leveraging electronic resources to receive prior art and automatically import it into the file wrapper.

International, Karin Ferriter, Deputy Chief Policy Officer
The PTO has been working with the other federal agencies the UK-US discussions post Brexit, and NAFTA discussions. IP attaches will be attending a meeting with stakeholders at an event at the U.S. Chamber on December 14th.

PTO Working Group on Regulatory Reform, Nick Oettinger
There are currently two notices of proposed rulemaking in the clearance process at DoC, one concerns patent regulations and the other concerns OED.

Budget, Michelle Picard, Senior Advisor for Financial Management
The PTO collected 3,077.2M in FY17 (which ended Sept. 31st), but collections are down $69.3M or 2.4% below estimates. It collected less than the expected amount of maintenance fees by $214.2M or 7.2%. End of the year Operating Reserve is now at only $252,919,819, less than originally planned because fee rule has not gone into effect. House and Senate appropriations bills include an allocation of $3,500M, which is in turn $86.2M below the president’s budget request of $3,586.2M. The PTO is currently working with OMB to finalize language in the patent fee package. PTO fee setting authority is set to expire Sept. 16, 2018.
Chief Judge Ruschke started out by noting that outside data that they received indicates that defendants in district court cases are not the ones filing all the IPR petitions. He said that while it is true that 85% of all patents in IPRs have copending district court litigation, only a fifth of district court cases involve patents under review in an IPR. The PTAB has said that they have heard claims that petitioners are “gang tackling patents,” so they decided to investigate that. They conducted a “Multiple Petition Study” involving all 7,168 petitions filed before 6/30/17 (4,376 patents, 1,633 patent owners, 1,423 petitioners) to see if the data support this claim.

They discovered that 85% of patents (3711) for which a petition is filed are challenged by a single petitioner, 10% (424) were challenged by two petitioners, 3.0% (132) of patents faced three petitioners, 1.3% (59) patents faced four petitioners, 0.6% faced five petitioners, 0.4% faced 6 petitioners, and less than 0.1% faced seven (2) or eight (3) petitioners. As to the number of petitions filed per patent, they found that 67% of the patents were challenged by one petition, 87% of patents were challenged by two or less, 6% (256) face 3 petitions, 3.2% (142) face 4, 1.2% (54) face 5, 1.2% (52) face 6, and 1.3% (55) face 7 or more. The institution rate as measured by petition grant rate (64%) is similar to the rate when measured by the number of patents for which a petition is instituted (70%). He said that 58% of all patents for which a petition is sought are unchanged at the end of AIA proceedings (including those patents for which a trial is not instituted). One outlier case involved 26 petitions, but against a patent having 306 claims and where the district court judge allowed all of the claims to remain in the case.

Chief Judge Ruschke said that addressing multiple petitions has been a focus for the PTAB, and that they have begun addressing this issue by issuing several precedential opinions. He pointed to General Plastic v. Canon, which lays out seven factors for deciding when to institute follow on petitions. And in Unified Patents, Inc. v. Berman, Cultec, Inc. v. Stormtech LLC and Hospira, Inc. v. Genentech, the PTAB held that it will defer to the examiner’s decision to allow the claims and not institute when the petition involves prior art already considered by the examiner or merely cumulative of those prior art references.

He also noted that after the Federal Circuit’s remand in Aqua Products, the PTAB has invited all parties with a pending motion to amend to file additional briefing with the PTAB. He said that PTAB SOP 9 is being released today, which will set a goal of issuing a remand decision within 6 months of the mandate. He also noted that the PTO has opened up amicus brief filing in Mylan v. Saint Regis Mohawk Tribe on the issue of tribal immunity.

Dana noted that the PTO’s examiner telework pilot program, which allows examiners to work remotely, is set to expire on December 8, 2017. H.R. 4171, introduced by Reps. Gianforte and Connolly, would extend the pilot program through Dec. 31, 2020. The House Oversight and Government Reform passed the bill out of committee on November 2, 2017, and the bill is awaiting floor action.