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Hon. David J. Kappos
Under Secretary of Commerce for Intellectual Property
and Director, U.S. Patent and Trademark Office
via email: David.Kappos@uspto.gov
cc: IP.Policy@uspto.gov; elizabeth.shaw2@uspto.gov

Re: Patent Cooperation Treaty Task Force; Notice of Public Meeting
74 Federal Register 65101 (December 9, 2009)

Dear Mr. Under Secretary:

This letter is responsive to the captioned notice concerning “establish[ment of] a PCT Task Force to consider the perspectives of interested parties concerned with improving the USPTO's activities ... [including] the PCT System as a whole”.

My comments are *pro bono* and do not necessarily reflect the view of my employer, Foley & Lardner LLP, nor any colleague, organization nor client thereof.

The submission is concerned with United States compliance with its treaty obligations: For the United States to take a leadership role in having the emerging countries of Asia and elsewhere fully comply with *their* treaty obligations to the United States, the United States should be a good citizen and be sure that we are not ourselves in violation of treaty obligations to the rest of the world.

The starting point is a violation of the PCT in terms of denying a Patent Term Adjustment (PTA) “B” period calculated from the PCT filing date, a clear and obvious violation of PCT Article 11(3). This violation now celebrates its tenth anniversary in practice and may be considered more egregious than the parallel PTA violation just struck down in *Wyeth v. Kappos*, ___ F.3d ___ (Fed. Cir. 2010) (Rader, J.).

The Patent Cooperation Treaty requires that “the [international filing] date *shall* be considered to be the actual filing date.” PCT Article 11(3); emphasis added. More completely, the treaty provides that “any international application fulfilling [certain] requirements ... and accorded an international filing date shall have the effect of a regular national application in each designated State as of the international filing date, which [international filing] date shall be considered to be the actual filing date in each designated State.” *Id.* (To be sure, there is an exception provided under Article 64(4) which, however, has no applicability here.)

The PTA calculation of the start of the “B” period should be the *actual PCT filing date* and not the much later national stage entry date that was introduced at the end of the Clinton Administration and is still in effect today.

The final rulemaking was part of a rules package signed on September 5, 2000, by your predecessor, the Hon. Q. Todd Dickinson. *Changes To Implement Patent Term Adjustment Under Twenty-Year Patent Term* (final rule), 65 Federal Register 56366 (2000). The rules package was implemented despite the full knowledge by the Office of the violation, which makes this a particularly egregious situation.

Thus, there was testimony to the Office about this specific problem, yet notwithstanding this testimony the violation was put into practice. *See Id.*, “Comment 31” and the “Response”, 65 Federal Register at 56382-84.

There were “several comments” that apparently took the same position as this writer, but they are not spelled out in detail in the *Federal Register*. It would be useful if the Office were to publish *in toto* the “[s]everal comments” that are apparently consistent with my concerns, because there is nothing in the *Federal Register* discussion about the reasoning given by the commentators. *Id.*

The *Federal Register* discussion simply says that the comments “argued that the provisions [which] unfairly discriminated against PCT applicants” and “ignored the legislative history”. *Id.* It would be useful if the Office were to publish the “[s]everal comments” that are apparently consistent with my concerns, because there is nothing in the *Federal Register* discussion about the reasoning given by the commentators. The *Federal Register* discussion says that the commentary “argued that the provisions [which] unfairly discriminated against PCT applicants” and “ignored the legislative history”. *Id.*

I shall be pleased to elaborate further and in detail as to this violation of the treaty. To facilitate an expeditious consideration of this matter, it is requested as noted above that this writer (and the public) be provided with the full text of the “several comments”.

Thank you very much for considering these comments.

Respectfully submitted,

Harold C. Wegner

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HCW:scm