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In re Patent No. 4,875,154 :
Issue Date: October 17, 1989 :
Application No. 07/061,338 : ON PETITION
Filed: June 12, 1986 :
Patentee(s): Maurice Mitchell :

This is a decision on the third party petition under 37 CFR 1.182 filed January 28, 2000, requesting the Commissioner to "correct the record" which is being treated as an opposition to PTO acceptance of the maintenance fee by way of patentee's petition filed December 17, 1999, which petition was granted in the decision of January 13, 2000.

The petition is **denied**.[1]

BACKGROUND

The third party opposition was not before the PTO at the time of the above-noted decision, and, as such, third party opposer seeks that the Commissioner (1) consider the opposition, and (2) reconsider the decision on petition that reinstated the above-noted patent.

OPINION

A party to a proceeding in the Patent and Trademark Office has a right to petition, and may expect to receive a decision by either the Office official delegated authority to render the decision, or the delegating official. See In re Arnott, 19 USPQ2d 1049, 1052 (Comm'r Pat. 1991). While a higher level official, at the request of the party, may further review a decision rendered pursuant to delegated authority, such review is a matter which lies within the sound discretion of that higher level official, and is not a matter of right. Id.

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[1] This decision may be viewed as a final agency action for purposes of seeking judicial review pursuant to 5 USC § 704. See MPEP 1002.02. However, such may not confer jurisdiction on the third party. Califano v. Sanders, 97 S. Ct. 980, 984-85 (1977).

Rather, a decision rendered pursuant to delegated authority will not be reviewed by a higher level official except in unusual or exceptional circumstances. See In re Staeger, 189 USPQ 284 (Comm'r Pat. 1984). In this regard, decisions on petitions under 37 CFR 1.182, as well as on maintenance fee petitions under 37 CFR 1.378, have been delegated to the Office of Petitions in the Office of the Deputy Assistant Commissioner for Patent Policy and Projects, pursuant to MPEP 1002.02(b), ¶¶ 10 and 13, respectively. That petitioner does not agree with the decision of January 13, 2000 does not adequately demonstrate that such unusual or exceptional circumstances are present herein. Id. at 285. Inspection of the instant petition fails to reveal that petitioner is (or was) a party to a proceeding before the PTO in this patent, much less does it reveal a showing of such unusual or exceptional circumstances that would justify involvement by the Commissioner in light of the principles discussed above.

Third party petitioner should note that a mere assertion of a right to have the Office act in accordance with the statutes and regulations does not confer standing upon a third party. The Boeing Company v. Commissioner of Patents and Trademarks, 853 F.2d 878, 7 USPQ2d 1487 (Fed. Cir. 1988). Further, a third party does not have standing to challenge Office decisions made *ex parte*. See, e.g., Godtfredsen v. Banner, 503 F.Supp 642, 647, 207 USPQ 202, 207 (D.D.C. 1980), Syntex v. United States Patent and Trademark Office, 882 F.2d 1570, 1574-1575, 11 USPQ2d 1866, 1870 (Fed. Cir. 1989), Hitachi Metals Ltd. v. Quigg, 776 F.Supp 3, 20 USPQ2d 1920 (Fed. Cir. 1989). There is nothing in the patent statutes which gives rise to a right in nonapplicants to object to the way in which patent applications of others are treated by the Patent and Trademark Office. A third party has no right to intervene in a particular patent application, Animal Defense Fund v. Quigg, 932 F.2d 920, 930, 18 USPQ2d 1677, 1685 (Fed. Cir. 1991), much less in a particular patent. Hallmark Cards, Inc. v. Lehman, 959 F. Supp. 539, 42 USPQ2d 1134 (D.D.C. 1997). Rather, any third party complaints concerning the PTO's action(s) with respect to this patent must await an infringement action by the patentee against such third party. Hallmark at 544, 42 USPQ2d at 1139; cf. Laerdal Medical Corp. v. Ambu, Inc., 877 F.Supp. 255, 34 USPQ2d 1140 (D. Md. 1995).

It is acknowledged that the PTO has considered (albeit denied) a third party's (Centigram) *timely* petition under 37 CFR 1.182, filed in opposition to a patent holder's petition for reinstatement of the patent under 37 CFR 1.378. See Centigram Communications Corp. v. Lehman, 862 F.Supp. 113, 117, 32 USPQ2d 1346, 1349 (E.D. Va. 1994), *appeal dismissed,* 47 F.3d 1180 (Fed. Cir. 1995). Nevertheless, a party does not have a right to an adversary proceeding, as such is discretionary on the part of the PTO. Doyle v. Brenner, 383 F.2d 210, 154 USPQ 464 (D.D.C. 1967); American International PLC v. Corning Glass Works, 618 F.Supp. 507, 510, 226 USPQ 738, 740 (E.D. Mich 1984).

As such, it is immaterial that the opposition of January 28, 2000 was filed after the maintenance fee was accepted on petition, and cannot serve as a reasonable basis for requesting reconsideration of the favorable decision to patentee. Rather, "[t]he creation of a right or remedy in a third party to challenge a result favorable to a patent owner after *ex parte* prosecution would be unprecedented, and we conclude that such a right cannot be inferred." Syntex, supra. For the reasons noted above, the PTO does not wish to become embroiled in, much less become an alternate forum for, resolving a dispute between patentee and third party petitioner.

Lastly, a standard principle of statutory construction is: *expressio unius est exclusion alterius* (the mention of one thing implies exclusion of another thing). See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); see also Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929)("when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode"). As the patent statute (35 U.S.C. § 301) specifically states what submissions by third parties may be placed in the file of a patent, the patent statute implicitly excludes other third party submissions from being placed in the file of a patent. Accordingly, the third party papers are being returned herewith. Cf. Ex Parte Chambers et al., 20 USPQ 1470 (Comm'r Pat. 1991); In re Dubno, 12 USPQ2d 1153 (Comm'r Pat. 1989).

DECISION

For the reasons given above, the decision of January 13, 2000 will not be revisited. The petition is **denied** as to any consideration of the opposition and **denied** as to any reconsideration of the decision of January 13, 2000.

Telephone inquiries concerning this matter may be directed to Petitions Examiner Brian Hearn at (703) 305-1820.

M. A. Antonakas

Manuel A. Antonakas
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Enclosure for cc: Papers filed in Opposition