

and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Dr. Diez was issued a 5-year permit to provide information on the ecology and population dynamics of hawksbill and green turtles inhabiting the waters surrounding Puerto Rico and the adjacent islands including Mona, Monito, Desecheo, Caja-de-Muertos, Vieques, the Culebra Archipelago, and the Tres Palmas reserve. In addition, researchers would monitor the prevalence of fibropapillomatosis, a debilitating disease known to occur in green turtle foraging aggregations in Puerto Rico. Researchers may capture by hand, entanglement or cast net, transport, photograph, measure, weigh, flipper tag, passive integrated transponder tag, blood and tissue sample, ultrasound, attach satellite transmitters to and release sea turtles. A subset of up to 10 green turtles per year from the Culebra study sites may undergo fibropapillomatosis tumor removal surgery and subsequent rehabilitation.

Issuance of this permit, as required by the ESA, was based on a finding that such permit: (1) Was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: April 18, 2011.

**P. Michael Payne,**

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

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## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

[Docket No. PTO–C–2011–0011]

#### Trademark Trial and Appeal Board Participation in Settlement Discussions

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of inquiry.

**SUMMARY:** The United States Patent and Trademark Office (“USPTO” or “Office”) is seeking comments from stakeholders about the extent to which the Trademark Trial and Appeal Board (“TTAB” or “Board”) should become more directly involved in settlement discussions of parties to *inter partes* proceedings, including oppositions,

cancellations and concurrent use cases. The purpose of this notice of inquiry is to determine whether the involvement of an Administrative Trademark Judge (ATJ) or Board Interlocutory Attorney (IA) would be desirable by parties, and if so, how extensively and at what points in proceedings. In addition, to the extent stakeholders voice a preference for assistance in settlement discussions but prefer such assistance to be provided by mediators or individuals other than Board judges and attorneys, it will be useful for the Board to receive suggestions on this option.

**COMMENT DEADLINE DATE:** Written comments must be received on or before June 21, 2011.

**ADDRESSES:** Written comments should be sent by electronic mail message over the Internet addressed to [TTAB\\_Settlement\\_comments@uspto.gov](mailto:TTAB_Settlement_comments@uspto.gov). Comments may also be submitted by mail addressed to: Mail Stop Comments—TTAB, P.O. Box 1451, Alexandria, VA, 22313–1451, marked to the attention of Karen Kuhlke. Although comments may be submitted by mail, the Office prefers to receive comments electronically. Comments may also be submitted through the Federal eRulemaking Portal Web site at <http://www.regulations.gov>. Additional instructions on providing comments through the Federal eRulemaking Portal are available at <http://www.regulations.gov>. All comments submitted directly to the Office or provided on the Federal eRulemaking Portal should include the docket number (PTO–C–2011–0011).

The written comments will be available for public inspection at the Trademark Trial and Appeal Board, located in Madison West, Ninth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the Office’s Internet Web site (address: <http://www.uspto.gov>). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:**

Karen Kuhlke, Administrative Trademark Judge, Trademark Trial and Appeal Board, at (571) 272–4287.

**SUPPLEMENTARY INFORMATION:** Over time, representatives of the Board have engaged in discussions with the Trademark Public Advisory Committee (TPAC) concerning the average overall length of Board trial proceedings. These discussions have generated a number of suggestions for process improvements, including suggestions related to fostering settlement discussions. The

USPTO 2010–2015 Strategic Plan includes a commitment by the Office to assess the desirability among stakeholders, including trademark owners, intellectual property organizations, the trademark bar and others with an interest in defining Board procedures, for meaningful involvement of Board personnel in settlement discussions regarding *inter partes* proceedings (*i.e.*, trial cases). In general, the Office seeks comments from stakeholders on all aspects of this issue, and is now opening the discussion to stakeholders and will consider all comments and suggestions that address this subject as well as any others which may be pertinent to the discussion. Below, specific questions are posed to generate discussion, but it is useful to first consider some background information.

The Board estimates that two-thirds of all *inter partes* cases are disposed of without an answer being filed (*e.g.*, because of withdrawal, default, or settlement). This may suggest that it would not be resource-effective to have a judge, attorney or mediator routinely involved in settlement discussions prior to close of the pleadings. On the other hand, perhaps the two-thirds figure would be higher, or cases that do settle without an answer ever being filed would be disposed of more quickly, if judges, attorneys or mediators were involved in settlement discussions early on.

Most of the cases comprising the one-third that are not disposed of prior to an answer being filed still are disposed of without a full trial and do not require issuance of a final decision on the merits. While some of these are cases that a plaintiff fails to prosecute, or cases in which a defendant eventually abandons an application or surrenders a registration, *i.e.*, cases disposed of as the result of unilateral action (or inaction), many are cases that are settled by agreement of the parties. In informal discussions with Board personnel, some have suggested that more parties would be willing to discuss settlement, even of seemingly intractable disputes, if the Board required them to discuss settlement. Based on anecdotal reports and observations, it would appear that there are many cases in which settlement talks are most useful after the exchange of initial disclosures or after the exchange of discovery requests and responses. Thus, related to the inquiry about whether Board personnel should be involved in settlement discussions of the parties is the inquiry about the particular point (or points) in the chronology of a proceeding when Board involvement in discussions should be

initiated or resumed to be most effective.

In the Board's Notice of Final Rule Making published August 1, 2007, at 72 FR 42242, the Board introduced to its *inter partes* proceedings the requirement for a discovery conference, which includes a requirement for discussion of settlement or possible narrowing of claims and defenses. In that notice, and in response to concerns expressed by some who responded to the Notice of Proposed Rule Making, the Board stated that its involvement in settlement discussions would be rather limited. Subsequently, however, some stakeholders have suggested that the Board explore the possibility of more frequent Board-convened settlement conferences and consider the possibility of involving mediators on a routine basis.

Under current Board practice, if a party requests Board involvement in a discovery conference, Board personnel will first inquire whether the parties have initiated settlement discussions. To date, parties have infrequently invited Board personnel to participate in these conferences. Moreover, when Board personnel participate in discovery conferences, Board involvement in settlement discussions is only in the broadest context. There is no routine Board involvement in settlement discussions in cases in which the Board is not invited into the discovery conference or, for cases in which the Board is so invited, after the completion of the discovery conference.

Non-party involvement (through an ATJ, an IA, a USPTO mediator, or an outside mediator) in these settlement conferences could help the parties consider various means for resolution of the proceeding. For example, where parties are at an impasse because of difficulty resolving possible amendments to the identifications of goods or services, assistance could be provided to the parties in arriving at mutually agreeable amendments, and this is an area in which Board personnel could be particularly helpful. Or a mediator could be involved in discussions regarding possible restrictions on use of a mark, such as a requirement that it be used with a disclaimer or with a house mark. Also, in cases where pre-trial settlement is not possible, Board personnel or a mediator could be involved in discussions that would nonetheless narrow the issues for trial and encourage the parties to adopt an Accelerated Case Resolution procedure for their case. In other words, even if greater involvement by Board personnel or by mediators does not result in more frequent or faster

settlements, an alternative result may be faster, more focused trials.

Thus, the Office seeks responses to the following questions, as well as comments or suggestions on related topics (as these questions are illustrative of the discussion to be generated and not the exclusive issues to be discussed):

(1) Should the Board be routinely involved in settlement discussions of parties, or instead, be involved only in particular cases on an "as needed" basis?

(2) If you believe parties would benefit from involvement of a non-party, would it be preferable for settlement discussions to be handled by (a) an ATJ, (b) an IA, (c) a USPTO employee trained as a mediator but who is not an ATJ or IA, or (d) a third-party mediator?

(3) How would the involvement be triggered? For example, by stipulation of the parties, by unilateral request or by some other trigger? Examples of situations that might be used as triggers for required settlement discussions involving a non-party could include the use by the parties of multiple suspensions for settlement discussions which proved unsuccessful, or events such as the filing of an answer, the exchange of disclosures, the completion of some discovery, or the close of the discovery period.

(4) How many triggers should there be that would prompt Board or mediator involvement in settlement talks? For example, apart from the initial discovery conference, should there be a follow-up inquiry from the Board in the middle of discovery, at the end of discovery, or before pre-trial disclosures are made and commencement of trial is imminent? Should there be a required phone conference after the second or any subsequent request to extend or suspend discovery for settlement?

(5) To what extent should Board personnel involved in settlement discussions be recused from working on the case?

(6) Should motions for summary judgment, the vast majority of which are denied and do not result in judgment, be barred unless the parties have been involved in at least one detailed settlement conference? Should an exception to such a rule be made for motions based on jurisdictional issues or claim or issue preclusion?

(7) Should the parties be accorded only limited discovery until they have had a detailed settlement discussion with a Board judge, attorney or mediator, with the need for subsequent discovery dependent on the results of the discussion?

(8) Should the Board amend its rules to require that a motion for summary

judgment be filed before a plaintiff's pre-trial disclosures are due, and that the parties be required to engage in a settlement conference in conjunction with a discussion of plaintiff's pre-trial disclosures?

The potential benefits from facilitating more frequent and/or more detailed settlement discussions may include the following: (a) Increasing the number of settlements by having Board personnel or non-party mediators available to address parties' needs in *inter partes* cases with varying claims and complexity; (b) gaining efficiency for the Board and users of the Board's procedures by eliminating the cost and time of litigating through the full trial and briefing of all pleaded claims and defenses; and (c) increasing commercial stability by achieving faster and more cost-effective resolution to disputes, which provides for a more stable ownership platform.

#### Authority

Section 17 of the Trademark Act, 15 U.S.C. Section 1067, provides that the Trademark Trial and Appeal Board shall determine and decide the respective rights of registration of parties to various *inter partes* proceedings. Proposed amendments to any rules governing these proceedings, which may result from this notice of inquiry, would be announced in a Notice of Proposed Rule Making and be subject to public comment.

*Notice of Inquiry:* The Office is providing the public, including user groups, with an opportunity to comment on the procedures under consideration. The Office will consider the comments and decide whether to pursue suggestions for process improvements. If the Office decides to pursue implementation of suggestions, the Office will publish a notice to set forth the procedures and requirements. The Office appreciates any comments and feedback related to these subjects. Persons submitting written comments should note that the USPTO may not provide "comment and response" analysis, since notice and opportunity for public comment are not required for this notice under 5 U.S.C. 553(b) or any other law. The Board may further discuss this subject with stakeholders and user groups at a roundtable to be convened in the future.

Dated: April 8, 2011.

**David J. Kappos,**

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

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