(2) Persons desiring to transit the area of a security zone may contact the Captain of the Port at telephone number 415–399–3547 or on VHF–FM channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representative.

(c) Enforcement. All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. Patrol personnel comprise commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, local, state, and federal law enforcement vessels. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.


Gerald M. Swanson,
Captain, U.S. Coast Guard, Captain of the Port, San Francisco Bay, California.

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DEPARTMENT OF COMMERCE
Patent and Trademark Office

37 CFR Part 1

[Docket No. 2004–P–036]

Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. 154(b)(2)(A)


ACTION: Interpretation.

SUMMARY: The United States Patent and Trademark Office (Office) recently published a final rule revising the patent term extension and patent term adjustment provisions of the rules of practice. This document further explains the Office’s policy since 2000 concerning one of the patent term adjustment provisions of the rules of practice.

DATES: Applicability: The patent term adjustment provisions of the rules of practice apply to all original (non-reissue) applications, other than for a design patent, filed on or after May 29, 2000, and to patents issued on such applications.

FOR FURTHER INFORMATION CONTACT: Kery A. Fries, Legal Advisor, Office of Patent Legal Administration, by telephone at (703) 305–1383, by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or by facsimile to (703) 746–3240, marked to the attention of Kery A. Fries.

SUPPLEMENTAL INFORMATION: The Office recently published a final rule revising the patent term extension and patent term adjustment provisions of the rules of practice in title 37 of the Code of Federal Regulations (CFR). See Revision of Patent Term Extension and Patent Term Adjustment Provisions, 69 FR 21704 (Apr. 22, 2004), 1282 Off. Gaz. Pat. Office 100 [May 18, 2004] (final rule). The primary purpose of this final rule was to revise the rules of practice in patent cases to indicate that under certain circumstances a panel remand by the Board of Patent Appeals and Interferences shall be considered “a decision in the review reversing an adverse determination of patentability” for purposes of patent term extension or patent term adjustment. See 69 FR at 21704, 1282 Off. Gaz. Pat. Office at 100. This final rule, however, also adopted other miscellaneous changes to the patent term adjustment regulations. See 69 FR at 21704, 1282 Off. Gaz. Pat. Office at 100. One such miscellaneous change was a slight revision to 37 CFR 1.703(f) so that its language would more closely track the corresponding language of 35 U.S.C. 154(b)(2)(A). The explanatory text concerning 37 CFR 1.703(f) indicated that:

The language of former § 1.703(f) misled applicants into believing that delays under 35 U.S.C. 154(b)(1)(A) (§§ 1.702(a) and 1.703(a)) and delays under 35 U.S.C. 154(b)(1)(B) (§§ 1.702(b) and 1.703(b)) were overlapping only if the period of delay under 35 U.S.C. 154(b)(1)(A) occurred more than three years after the actual filing date of the application. If an application is entitled to an adjustment under 35 U.S.C. 154(b)(1)(B), the entire period during which the application was pending before the Office (except for periods excluded under 35 U.S.C. 154(b)(1)(B)(i)(iii)), and not just the period beginning three years after the actual filing date of the application, is the period of delay under 35 U.S.C. 154(b)(1)(B) in determining whether periods of delay overlap under 35 U.S.C. 154(b)(2)(A).

3 Another way of explaining this is: Based upon the contentsions presented in a number of patent term adjustment petitions under 37 CFR 1.705, it has become apparent to the Office that some applicants did not fully appreciate that delays under 35 U.S.C. 154(b)(1)(A) (§§ 1.702(a) and 1.703(a)) and delays under 35 U.S.C. 154(b)(1)(B) (§§ 1.702(b) and 1.703(b)) may still be overlapping delays under 35 U.S.C. 154(b)(2)(A), even if the period of delay under 35 U.S.C. 154(b)(1)(A) did not occur more than three years after the actual filing date of the application.

See 69 FR at 21706, 1282 Off. Gaz. Pat. Office at 101. The Office has subsequently determined that there is a need for further explanation of the meaning of this statement.

35 U.S.C. 154(b)(2)(A) provides that: “[t]o the extent that periods of delay attributable to grounds specified in paragraph (1) [i.e., 35 U.S.C. 154(b)(1)] overlap, the period of any adjustment granted under this subsection shall not exceed the actual number of days the issuance of the patent was delayed.” See 35 U.S.C. 154(b)(2)(A). The Office revised 37 CFR 1.703(f) in this final rule to read “[t]o the extent that periods of delay attributable to the grounds specified in § 1.702 overlap, the period of adjustment granted under this section shall not exceed the actual number of days the issuance of the patent was delayed.” See 69 FR at 21711, 1282 Off. Gaz. Pat. Office at 106. Therefore, the change to 37 CFR 1.703(f) in this final rule makes its language track the language of 35 U.S.C. 154(b)(2)(A).

The change to 37 CFR 1.703(f) in this final rule and the accompanying explanatory text in the supplementary information section of this final rule was not a substantive change to 37 CFR 1.703(f) or a change to the Office’s interpretation of 35 U.S.C. 154(b)(2)(A). This change was simply a restatement of the position taken by the Office when implementing the patent term adjustment provisions of the American Inventors Protection Act of 1999 (AIPA) in 2000. Specifically, the Office has consistently taken the position that if an application is entitled to an adjustment under the three-year pendency provision of 35 U.S.C. 154(b)(1)(B), the entire period during which the application was pending before the Office (except for periods excluded under 35 U.S.C. 154(b)(1)(B)(i)(iii)), and not just the period beginning three years after the actual filing date of the application, is the relevant period under 35 U.S.C. 154(b)(1)(B) in determining whether periods of delay “overlap” under 35 U.S.C. 154(b)(2)(A).

The position set forth in the supplementary information section of this final rule is also consistent with the section-by-section analysis of 35 U.S.C.


The AIPA is title IV of the Intellectual Property and Communications Omnibus Reform Act of 1999 (S. 1948), which was incorporated and enacted into law as part of Pub. L. 106–113. The Conference Report for H.R. 3194, 106th Cong., 1st Sess. (1999), which resulted in Pub. L. 106–113, does not contain any discussion (other than the incorporated language) of S. 1948. A section-by-section analysis of S. 1948, however, was printed in the

Continued
AIPA in 2001 which included an adjustment of two months due to the Office's failure to issue a patent within the three-year time frame specified in 35 U.S.C. 154(b)(1)(B) because not all application pendency time is counted toward this three-year period. See 35 U.S.C. 154(b)(1)(B)(i)–(iii). This situation is illustrated by an example in which: (1) The Office meets the "fourteen-four-four-four" time frames specified in 35 U.S.C. 154(b)(1)(A) but does not mail a final rejection until thirty-seven months after the application’s filing date; (2) a RCE is filed at forty months after the application’s filing date; (3) the Office issues a notice of allowance under 35 U.S.C. 151 at forty-four months after the application’s filing date; (4) the issue fee is paid at forty-seven months after the application’s filing date; and (5) the Office issues the patent at fifty-three months after the application’s filing date. In this example, the applicant would be entitled to a patent term adjustment of four months due to the Office’s failure to issue a patent within three years, plus a patent term adjustment of two months due to the Office’s failure to issue a patent within four months after the issue fee has been paid and all outstanding requirements have been met, for a total patent term adjustment of six months. The delay due to the Office’s failure to issue a patent after the issue fee has been paid and all outstanding requirements have been met within the three-year time frame specified in 35 U.S.C. 154(b)(1)(A)(iv) does not “overlap” with the three-year time frame specified in 35 U.S.C. 154(b)(1)(B) because the period subsequent to the filing of the RCE is not included in the three-year time frame specified in 35 U.S.C. 154(b)(1)(B). See 35 U.S.C. 154(b)(1)(B)(i). Thus, the Office does not interpret 35 U.S.C. 154(b)(2)(A) as permitting either patent term adjustment under 35 U.S.C. 154(b)(1)(A)(i)–(iv), or patent term adjustment under 35 U.S.C. 154(b)(1)(B), but not as permitting patent term adjustment under both 35 U.S.C. 154(b)(1)(A)(i)–(iv) and 154(b)(1)(B).

This document involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The collection of information involved in this notice has been reviewed and previously approved by OMB under OMB control number 0651–0020. The United States Patent and Trademark Office is not resubmitting an information collection package to OMB for its review and approval because this document does not affect the information collection requirements associated with the information collection under OMB control number 0651–0020.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

Authority: 35 U.S.C. 154(b).


Jon W. Dudas,

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