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By E-mailRE: Comments on proposed Ex Parte Appeal Rules

Dear Sir:

Please consider the following comments relating to the July 19, 2007, proposed rule changes entitled "Rules of Practice Before the Board of Patent Appeals and Interferences in *Ex Parte* Appeals."

The proposed rule changes are asserted to enhance the Board's ability to resolve *ex parte* Appeals in a timely manner. The explanation of proposed changes goes on to assert that, in some instances, the rules are proposed to adopt practices similar to those of the Court of Appeals for the Federal Circuit. This summary indicates that the proposed rules seek to provide Examiners and Office Reviewers with a clear and complete statement of an Appellant's position at the time of filing an Appeal Brief so as to enhance the likelihood that appealed claims will be allowed without the necessity of further proceeding with the Appeal, minimize pendency of Appeals before the Office, and make the decision-making process more efficient. These changes are allegedly necessary in view of recent increases in the number of Appeals, a trend which is expected to continue over the next few years.

However, the solutions proposed by the rule changes, in some instances, lack statutory basis, are unclear, and generally place the onus of solving the alleged problem solely on Applicants. I will address these issues separately with respect to individual proposed rules, as discussed below.

(1) Proposed Bd.R. 41.33(d) appears to be inconsistent with the explanation provided in the Notice.

Proposed Bd.R. 41.33(d) provides, in part, that evidence filed after a Notice of Appeal is filed and before an Appeal Brief is filed may be admitted if the Examiner determines that the evidence overcomes "some or all" rejections under Appeal. However, the commentary on the proposed rule states that even where good cause is shown, if the evidence does not overcome all rejections, the evidence would not be admitted. This interpretation appears to be inconsistent with the plain language of the rule that would allow for admission of evidence that overcomes some, but not all, rejections under Appeal.

Further, the commentary about the proposed rule is inconsistent with the express intent of the proposed rules. While one of the stated purposes of the proposed rules is to make the decision-making process "more efficient," the commentary on Bd.R. 41.33(d) in fact makes the decision-making process less efficient. If additional evidence is available that overcomes some, but not all, of the rejections, and good cause is shown as to why the evidence was not earlier presented, the commentary indicates that such evidence may not be entered. This means that one or more rejections that otherwise could and should have been withdrawn by the Examiner will continue to be presented and contested on appeal. This result is counter-productive in that it means the Examiner and Board cannot consider evidence that would admittedly remove issues from appeal, but instead must consider less relevant evidence or arguments with respect to rejections that should have been withdrawn.

A better alternative to that proposed by the commentary would be to implement proposed Bd.R. 41.33(d) according to its literal wording. That is, the better approach would be to encourage the Examiner to enter any evidence that overcomes any rejection, so that those rejections need not be addressed on appeal. This would not only reduce the number of issues on appeal, but would also reduce the burden imposed on Appellants in providing an Appeal Brief and Record on Appeal that would need to address these otherwise moot issues, as well as on Examiners in answering such Briefs, and on the Board in deciding what should be moot issues.

(2) Proposed Bd.R. 41.37(c) should take into account that the period of time for filing the Appeal Brief will be the later of the two-month period set in 37 C.F.R. §41.37(a) or one month from the mail date of the decision on Pre-Appeal Brief Request for Review.

The following proposed rules levee, in one manner or another, additional requirements solely on Appellants, and prejudice Appellants by undercutting the Constitutional grant of authority "to promote the progress of science and useful arts" and the statutory direction "to recognize the public interest in continuing to safeguard broad access to the United States patent system." U.S. Constitution Article 1, Section 8; 35 U.S.C. §2 (2007).

(3) Proposed Bd.R. 41.30 unjustifiably designates the Appellant as responsible for establishing the Record on Appeal. Proposed Bd.R. 41.30 adds a definition of "Record on Appeal" which is alleged to "make it clear to any reviewing court what record was considered by the Board." This proposed rule is unnecessary, improper, and unduly burdensome.

First, proposed Bd.R. 41.30, in combination with proposed Bd.R. 41.37(e)(11) and 41.37(t), is specifically contrary to the intent of rule 1.4(b). Rule 1.4(b) states "[t]he filing of duplicate copies of correspondence in the file of an application, patent, or other proceeding should be avoided, except in situations in which the Office requires the filing of duplicate copies. The Office may dispose of duplicate copies of correspondence in the file of an application, patent, or other proceeding." Clearly, the intent of Rule 1.4(b) is to avoid the filing of duplicate

papers in a single application, particularly because the application file is now in the Image File Wrapper system and thus all papers are readily available in that application. However, the proposed rules would require Appellants to file duplicate copies of myriad documents, including copies of Office Actions issued by the Examiner, responses filed by Appellants, cited references, and the like.

This inconsistency is further evidenced by the statement in proposed Bd.R. 41.37(t)(3). That rule indicates that the evidence section of the Appeal Brief need not include copies of the specification, U.S. Patents, or published U.S. patent applications. Presumably, copies of the specification, U.S. Patents, and published U.S. patent applications need not be provided in the evidence section, because those documents are readily available in the application file (in the case of the specification) or through the Patent Office's electronic databases (in the case of U.S. Patents, and published U.S. patent applications). However, as stated above, all of the other evidence that is being relied upon in the Appeal Brief, including Office Actions, Appellants' responses, cited references, and the like, is also already readily available to Patent Office personnel through the electronic Image File Wrapper system. Requiring Appellants to resubmit this voluminous information, which will then be re-entered into the Image File Wrapper system, is unnecessary and burdensome to Appellants.

Second, this proposed rule would appear to restrict the Board from reviewing information that has already been properly made of record in the U.S. Patent Office, but is not specifically resubmitted by Appellant. This narrow definition does not comport with the Patent Office's, nor the Board of Patent Appeals and Interferences', responsibility under, for example, 35 U.S.C. §102, which states, "a person shall be entitled to a patent unless..." The proposed rule appears to be an effort to allow the Board to ignore evidence of record that is not specifically resubmitted by Appellants to the Board. The requirement for Appellants to resubmit reams of evidence, which have already been submitted to the Patent Office, as separately labeled and included appendices to the Appeal Brief is an overly burdensome and unnecessary requirement that does not serve a meaningful function in the Appeal process (see proposed Bd.R. 41.37(e)(11)).

Third, levying this responsibility solely on the Appellant, rather than at least sharing the responsibility with the Examiner or the Office, is inequitable. For example, the proposed rules allow the Examiner to introduce a new rejection in the Examiner's Answer (see proposed Bd.R. 41.39(b)), yet the Appellant is then responsible for not only addressing the new rejection, but also submitting all evidence relied upon by the Examiner in support of the new rejection (see proposed Bd.R. 41.41(h)). Why the Examiner, or the Patent Office, should not be responsible for making evidence relied upon in a new rejection of record is unclear. However, the net result of this, and virtually all of the other proposed rule changes, is to make the process more onerous on Appellant and unduly restrict an Appellant's ability to secure rights in their respective discoveries by increasing the time, effort and cost of preparing and filing an Appeal Brief, and permitting the Board to ignore evidence that has already been properly submitted to the Patent Office.

A better approach would be to simplify the proposed new definition of the Record on Appeal in Bd.R. 41.30, to not require Appellant to expressly form such a Record as part of the Appeal Brief and resubmit duplicate copies of papers already of record in the application file. For example, a proposed solution would be simply to make the record on Appeal consistent with the Patent Office's electronic file wrapper and any further information submitted on Appeal, *i.e.* to make it include each document that is part of the Image File Wrapper and mentioned in any brief, answer, request, order or decision on appeal.

(4) Proposed Bd.R. 41.37(e) mandates unreasonable requirements of Appellants which, as a whole, are overly burdensome.

As indicated in the Explanation of Proposed Changes, the number of *ex parte* Appeals is expected to increase from 3349 in FY 2006 to more than 4000 in FY 2007. Making the Appeals process more burdensome on Appellants is not a reasonable solution to this problem. Rather, the Office should be concerned with the root causes that are forcing Appellants to undergo the already expensive, extraordinary, Appeals process, rather than continue prosecution. At a minimum, proposed rules that are alleged to "clarify the issues" on Appeal should not be unilaterally imposed on Appellants but, rather, should be equally applied to the Patent Office. For example, although the Notice indicates that, in some instances, the rules are proposed to adopt practices similar to those of the Court of Appeals for the Federal Circuit, it does so in a one-sided manner. In other words, before a Federal Court, both parties are under similar obligations including generating the Record on Appeal. The proposed rules clearly impose more stringent and exhaustive requirements on Appellants, without placing any additional burden on the Examiner or the Office. As such, the proposed rules are not an equitable solution to the asserted problem.

The proposed rules fail to acknowledge the additional burden placed on Appellants in terms of the time and cost required to prepare the Appeal Brief. Preparing the additional sections of the Appeal Brief will require substantial additional time by Appellants' representatives, which will in turn increase the cost borne by Appellants in pursuing an appeal. The perceived problem of an increase in the number of appeals being taken to the Board of Patent Appeals and Interferences should not be addressed simply by increasing the cost of an appeal, which in some instances may simply make the appeal process too expensive for an Appellant to pursue his right to obtain a patent for his invention.

While the proposed rules indicate that they are paralleling some requirements for an appeal brief and record made by the Court of Appeals for the Federal Circuit, the proposed rules also fail to recognize the fact that an appeal to the Court of Appeals for the Federal Circuit is in most instances a much more important and expensive process for Appellants. Many Appellants already choose not to further appeal a rejection to the Federal Circuit after it has been upheld by the Board, in large part due to the cost of such an appeal. Applying the time- and cost-intensive

requirements of a Federal Circuit appeal to an appeal to the Board will only further prejudice Appellants' right and ability to contest improper rejections made by Examiners and should not be imposed without a significant and demonstrable benefit.

Some examples of proposed requirements that fail to suggest a benefit commensurate with their burden are including a table of authorities, jurisdictional statement and statement of timeliness. It is unclear how the extra burden in time and cost of preparing and submitting a table of authorities justifiably improves the appeal process. Even more so, providing the jurisdictional statement is unnecessary and yet another additional burden to the Appellant of repeating information that is already clearly of record. Does the Board really not know the statutes that establish the appeal process? The Board is not a court that deals with a multitude of different jurisdictional statutes. It does not hear Indian claims and veterans' appeals on a multiplicity of topics under a multiplicity of jurisdictional statutes. This requirement is just mandated busywork by a Patent Office that seems to have lost sight of its role and purpose under the Constitution and laws.

Further, the burden should be on the Examiner or the Office to confirm that the application is not abandoned. If the application is abandoned, then the Examiner or Office should issue a notice to Applicant accordingly, rather than the Examiner issuing an Examiner's Answer. The same goes for the statement of timeliness, which is already easily addressed, and readily known, by the Patent Office's own automated docketing system.

(5) The claims support section and drawing analysis section of Proposed Bd.R. 41.37(q), (r) and (s) may unduly and unnecessarily limit claim scope and interpretation, while unnecessarily expanding the record and the burdens on Appellants, Examiners and the Board.

The requirements for the claims support section, drawing analysis section and means/step-plus-function section are particularly troublesome. For example, the claim support section requires "the page and line after each limitation where the limitation is described in the specification as filed." However, this requirement ignores the fact that it is the specification as a whole that must support the claims. A specification may be, and often is, written in such a manner to identify exemplary embodiments, yet cover more than merely the exemplary embodiments. Requiring an Appellant to identify specific words in the specification as support for every claim feature is an unduly narrow approach to interpreting the claims. This is particularly so in light of the fact that no formal claim construction procedure is proposed, or undertaken by the Board, in a manner that would allow Appellants to effectively establish an appropriate construction of each and every claim feature. Nor is there any need for such a burdensome process when, as in most appeals, the issues revolve around only one or a limited subset of claim elements that may or may not implicate various claim limitations, whether or not in a means/step-plus-function format.

In view of the foregoing, the requirements for the claim support section, drawing analysis section and means/step-plus-function section should be removed or, at a minimum, changed to exemplary descriptions of the features to which the arguments are directed.

(6) The statement of facts under Proposed Bd.R. 41.37(n) unnecessarily relies on the newly proposed Evidence section of the Appeal Brief.

Regarding the statement of facts, this section highlights the unreasonableness of the requirement to include as appendices all evidence relied upon in the Appeal Brief. A statement of fact should be derived from the prosecution history of the application. All of this information should be readily available in the Image File Wrapper. The statement of facts should be able to reference these documents without separately submitting the "portions of documents" relied upon. Further, the requirement that Appellants renumber all of the pages resubmitted in the appendices and, if practical, include line numbers, highlights the useless burden directed to Appellants, with no corresponding responsibility on the part of Examiners or the Office.

Further, requiring Appellants to present numbered statements of facts in the Appeal Brief may require Appellants to make numerous claim construction and/or reference interpretation statements of record, when such issues have not been fully and adequately considered, and may be irrelevant to the issues up for decision by the Board. For example, in the case of a prior art rejection, many issues on appeal can turn on whether or not one claim element is or is not taught or suggested by the cited reference(s). If this one point is dispositive of the rejection, then other possible dispositive arguments need not be presented and considered. Accordingly, Appellants may not have fully considered whether or not every other claim element is present in the reference(s), and may not have considered other arguments against the reference(s). Requiring Appellants to provide a full statement of facts addressing all possible issues may thus require Appellant to either make statements that have not been fully considered, or present for consideration on appeal every possible contested issue so as not to waive any possible issues. Much more time will also have to be spent on the Examiner's Answer and on analysis by the Board to sort out all of the unnecessary peripheral information. This clearly thus runs counter to the objective of making the decision-making process "more efficient."

(7) The requirements and presumptions of the proposed Argument Section set forth in Proposed Bd.R. 41.37(o) are inequitable and unduly restrictive, particularly in light of Proposed Bd.R. 41.37(v)(5) and 41.37(v)(4) that would limit the Brief to 25 pages and at least 14 point font.

The proposed rule would require any argument to address all points made by an Examiner with which the Appellant disagrees, and must identify where the argument was made in the first instance to the Examiner or state that the argument has not previously been made to the Examiner. The rule also purports to establish that any finding made or any conclusion reached by the Examiner that is not challenged will be presumed to be correct, and that only

those arguments which are presented in the Argument section of the Appeal Brief and that address claims set out in the Claims Support section of the Appendix will be considered. The proposed rules provide that Appellant waives all other arguments. Such rules are not consistent with the quasi-judicial rule of the Board and do not serve the purpose of fully evaluating an Applicant's claims for patentability. In this case, the alleged efficiency of such presumed waiver does not outweigh an Appellant's rights. This concern is particularly acute in light of the further proposed rule that would limit the Brief to 25 pages.

The proposed rule limiting the Appeal Brief to 25 pages, and prohibiting incorporations by reference, indicates that this practice is similar to practice that has been in place for interferences. However, this comparison omits the fact that interference papers typically focus on only one issue. For example, if a party in an interference alleges that the other party's claims are unpatentable, the moving party can file several motions where the separate bases for unpatentability are separately presented. While each specific paper may be limited in length, the effect is that there is no overall page limit to fully address all issues.

Limiting the Appeal Brief to only 25 pages fails to acknowledge that there are many cases on appeal in which multiple issues are raised. For example, an appeal may raise one or more rejections under 35 U.S.C. 112, first and/or second paragraphs, one or more rejections under 35 U.S.C. 102, and one or more rejections under 35 U.S.C. 103. Clearly, requiring Appellants to address all possible appealable issues, in the increased and unnecessary detail required by the proposed rules, and within the arbitrary proposed page limit, is unduly burdensome on Appellants. This is compounded by the 14-point font requirement, which is overly large. It is unreasonable to first require that Appellant address or waive any and all points made by an Examiner, and then arbitrarily limit the Brief to 25 pages of extra-large font. It is further compounded by the limitations on continuation practice and after-final practice that prevent Applicants from narrowing the issues on Appeal.

It is unclear what basis the Office has in weighing the findings exclusively against the Appellant and presuming that the Examiner is correct; an assumption that is clearly erroneous. As with the other proposed rules, there is no reciprocity, wherein, if an Examiner failed to rebut a point made by Appellant, the point would be presumed in Appellant's favor.

The rule is also unclear in its breadth. For example, Examiners often issue a general rejection over a reference that does not identify what disclosures of the reference are considered to correspond to or teach specific claim features. In fact, it is often these broad, general rejections, or improperly supported rejections, coupled with an Examiner's refusal to properly consider Applicants' responses, that force Appellants to appeal rejections to the Board in the first place. Would such a finding require an Appellant to go through each and every claim feature with respect to the reference(s) as a whole, essentially doing the Examiner's job of particularly stating the rejections, and only then rebutting the general assertion of the Examiner, in order to avoid waiver? The rule appears to assume that "points made by the Examiner" will be

sufficiently clear-cut to allow for precise rebuttal. However, this assumption is at odds with the reality of patent prosecution, in which rejections are often ambiguous with respect to which facts are alleged to support which conclusions. Applying a presumption and/or waiver on either side of this process would be inappropriate and not further the goals of the Patent Office in effective prosecution, but applying the presumption and/or waiver only against Appellants is manifestly unfair.

Further, the rule would apparently and unjustifiably preclude the Board from considering arguments not specifically presented by the Appellant. For example, were the Board to determine, *sua sponte*, that a combination of references was unreasonable for reasons not specifically argued by an Appellant, should the Board be precluded from overturning a rejection on those grounds? If so, it is again a non-reciprocal rule weighted against Appellants in view of the fact that Bd.R. 41.50(d) allows the Board to enter its own rejections.

This type of preclusion does not serve the public interest or the specific objectives of the Patent Office to grant patents in appropriate situations.

(8) Taken as a whole, the proposed rules are unduly onerous and substantially impact Appellants' rights.

Generally, the additional requirements placed on Appellants of (1) establishing the record on Appeal, (2) providing a jurisdictional statement, (3) table of authorities, (4) claim support section, (5) drawing analysis section, (6) means or step plus function analysis section, (7) an expanded evidence section to include a table of contents, the Office Action setting out the rejection on Appeal, any other Office Action incorporated by reference, all evidence relied upon by the Examiner in support of the rejection on Appeal (except the specification, drawings, U.S. Patent or Published U.S. Applications), relevant portions of papers filed by the Appellant before the Examiner which show that an argument being made on Appeal was made in the first instance to the Examiner, affidavits and declarations, if any, and attachments to the declarations, relied upon by the Appellant before the Examiner, other evidence, if any, relied upon by the Appellant before the Examiner, (8) supplemental appendices with similar information, (9) supplying a list of technical terms and other unusual words at the time of confirmation of the Oral Hearing to aid in transcription at the Oral Hearing, all amount to what can only be considered as a substantial and unjustified increase in the burden on Appellants in prosecuting an Appeal before the Board of Patent Appeals and Interferences.

I believe that these additional rules will retard the appeals process, rather than make it more efficient. It appears quite obvious that these lengthy, technical, and, in many instances, irrelevant and subjective requirements will increase the number of notices the Office sends out for non-compliant appeal briefs, further aggravating the increased time and cost required for an appeal. For example, the Office already sends out notices for technicalities in the claims appendix, and summary of the invention section. The proposed rules will only increase such

notices, for example, where the Examiner believes the statement of facts are not "objective and non-argumentative" or where the Examiner disagrees with the detail in the claims and drawings analysis sections. These delays may not be readily apparent if the "time on appeal" is not started until after Appellant files the reply brief (see proposed Bd.R. 35(a)), but they are just as prejudicial to Appellants as delays "on appeal."

The Notice concedes that these proposed rules "may" require the Appellant to spend additional time in preparing a compliant Brief. This is at least misleading in that the proposed rules certainly will require the Appellant to spend additional time and resources in preparing a compliant Brief.

The Notice also suggests that nearly 22 percent of the total Appeals filed were by small entities. The Notice somewhat obscures this fact by noting that this is only .9 percent of the total patent applications filed in 2006. However, rules that are admittedly more burdensome on Appellants, and require no corresponding effort by the Patent Office, and directly impact approximately 4,000 small entity appeals, have a significant economic impact on a substantial number of small entities. The additional costs related to 4,000 small entity appeals, and the thousands of small entities filing those appeals, cannot be considered to be insignificant or insubstantial.

In response to the invitation for comments on whether the collection of information is necessary for proper performance of the functions of the agency, as well as the accuracy of the agency's estimate of the burden, it is respectfully submitted that a study should indeed be conducted to estimate the likely costs of the additional rules. The additional requirements appear, at first blush, to increase the time, cost and effort associated with preparing a compliant brief, and any subsequent briefs, by at least a third, if not more. Much of the information required is not germane to the particular issues in any given Appeal and is thus not necessary for the proper performance of the agency. While the Board may have an interest in making appeals more efficient, and may have a desire to reduce the number of appeals, such results will not be achieved by the proposed rules, and, in any event, such objectives should not be pursued solely by making the appeal process more expensive. The appeal rules and procedures should not be stretched to the point where Appellants, whether large entity or small entity, are effectively priced out of their ability to contest improper rejections made by Examiners.

The proposed rules appear designed to have the effect of unduly narrowing, restricting, waiving and/or abandoning claim scope, patentable subject matter, arguments and applications *in toto*. This is not consistent with the Constitutional mandate under which the Patent Office exists "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is also inconsistent with the statutory right that "a person shall be entitled to a patent unless..."

The additional burdens that would be imposed by the proposed rules are particularly inappropriate now, when applicants will be making significant adjustments in their application examination procedures to account for the new rules package limiting the numbers of available continuing applications and Requests for Continued Examination that have previously been available for Applicants to avoid the cost and burden of Appeals.

(9) Proposed Bd.R. 41.56 would provide for sanctions not authorized by 35 U.S.C. §2 and that do not further the goals of the Patent Office.

As proposed, Bd.R. 41.56 would provide that sanctions could be imposed against an Appellant for "misconduct." These sanctions are myriad and may tread directly on an Appellant's rights in an invention. These sanctions include, for example, precluding an Appellant from presenting or contesting a particular issue, excluding evidence, requiring a Terminal Disclaimer of patent term, holding an application on Appeal to be abandoned, and dismissing an Appeal. Such sanctions go beyond altering "the manner in which parties present themselves" and impermissibly "trenches on substantial private rights and interests" of Appellants. *Batterton v. Marshall*, 648 F.2d 694, 707-708 (D.C. Cir. 1980).

These dispositive matters cannot reasonably be considered to fall within a rule of agency organization, procedure, or practice, or the grant in 35 U.S.C. §2 to establish regulations governing the conduct of proceedings in the office, or governing the recognition and conduct of agents, attorneys, or other persons representing Applicants. In other words, the proposed sanctions appear to go beyond mere procedural rules and are, rather, substantive rules not authorized to the U.S. Patent and Trademark Office. "[T]he broadest of the PTO's rulemaking powers...authorizes the Commissioner to promulgate regulations directed only to 'the conduct of proceedings in the [PTO]'; it does not grant the Commissioner the authority to issue substantive rules." *Merck v. Kessler*, 80 F.3d 1543, 1549 (Fed. Cir. 1996); *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 930 (Fed. Cir. 1991). See also *Abbs vs. Sullivan*, 756 F.Supp. 1172, 1189 (W.D.Wis. 1990) (reversed on other grounds).

As such, Proposed Bd.R. 41.56 should be discarded.

In accordance with the previous Patent and Trademark Office Commissioner's openness to "trash" a proposal altogether, I suggest that this is precisely what should be done with these proposed rules based on their broad, substantial and unbalanced impact on Appellants and the Office. At a minimum, further analysis is required to more specifically determine the likely impact of such rules, particularly on small entities, and, ideally, coordinating an effort to review the rules applicable to the Patent Office itself, so that, through coordination and development of synergistic rules, the Appeal process may truly be enhanced and, moreover, set conditions during prosecution that will actually have a chance of reducing the number of Appeals filed and reducing and clarifying the issues, before Appeal Briefs and Answers are required.

In summary, I am greatly concerned regarding the proposed rule changes imposing additional, unwarranted, and significantly prejudicial burdens on Appellants exclusively when any potential benefit of the imposition of such additional burdens is purely speculative and does not serve the purposes that the Patent Office exists to fulfill.

I appreciate the opportunity to express my concerns, and the rationale behind these concerns, as outlined above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JEG II', is written over the typed name. The signature is stylized and cursive.

James E. Golladay, II