
PTO Issues Guidelines on New Patent Term Adjustment Calculations

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On January 7, 2010, the Federal Circuit held, in *Wyeth v. Kappos*, that the U.S. Patent and Trademark Office (PTO) had been improperly calculating patent term adjustments (PTA) due to PTO prosecution delay. (Further details on the *Wyeth* decision can be found [here](#).) On January 21, 2010, the PTO announced that it would not seek further review of the Federal Circuit decision.

Yesterday, the PTO posted, on its website, interim procedures for patentees to request recalculation of patent term adjustment in light of the Federal Circuit's decision and for addressing pending requests for reconsideration. The new procedure will become effective upon publication in the Federal Register, but that date is not provided in the PTO's announcement.

Under the interim procedure, the PTO will provide patentees one opportunity to request reconsideration of PTA determination for issued patents, without a fee, and without the need to file a formal petition complying with the requirements of 37 CFR 1.705(d). Instead, patentees need only file a single page, [SB/131 form](#), which was newly created for this procedure.

However, the interim PTA reconsideration procedure is not available for all patents; neither is it available for all PTA issues. The new procedure is applicable only to patents that issue prior to March 2, 2010. Further, this new procedure is available only for requests that are based solely on the PTO's pre-*Wyeth* interpretation of "overlap" of A and B periods.

Under the new procedures, a request for reconsideration of a prior PTO PTA calculation may be filed within 180 days of issuance of the patent, rather than having to seek reconsideration within two months of issuance.

The new guidelines also provide some recourse for patentees whose initial petitions for reconsideration of PTA were denied under the PTO's pre-*Wyeth* PTA framework. The PTO will consider a further request for reconsideration filed within two months of the PTO's prior reconsideration decision. Finally, pending petitions will be decided by the PTO in line with the *Wyeth* decision.

The March 2, 2010 date is based on a further PTO announcement that it is modifying the computer program it uses to calculate PTA to comply with the *Wyeth* decision. The modification to the PTA calculator is expected to be completed by March 2, 2010, after which the PTO expects that PTA calculations will comport with the *Wyeth* decision. The PTA information currently viewable through PAIR will also be updated accordingly; however, the revised PAIR screen is not expected to be ready until July, 2010.

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