

**UNITED STATES  
PATENT AND TRADEMARK OFFICE**



# Patent Trial and Appeal Board (PTAB) update

Scott R. Boalick, Chief Administrative Patent Judge

Jacqueline W. Bonilla, Deputy Chief Administrative Patent Judge

Michael W. Kim, Acting Vice Chief Administrative Patent Judge

August 13, 2020

Patent Public Advisory Committee quarterly meeting

UNITED STATES  
PATENT AND TRADEMARK OFFICE



# Agenda

- Ex parte appeals pendency
- Fast Track Appeals Pilot Program
- PTAB updates

**Ex parte appeals pendency**

# Ex parte appeals pendency goals

- Allow stakeholders to make informed decision on whether to appeal, regardless of technology.
- Twelve-month average pendency for decided appeals, with maximum pendency, regardless of technology.
  - Pendency measured from received date at PTAB (appeal number assigned) to mailed decision date.

# Overview of pendency management tools

- Technology rebalancing
- Quarterly Appeals Closeouts (QAC)
- Just-in-time docketing

# Technology rebalancing

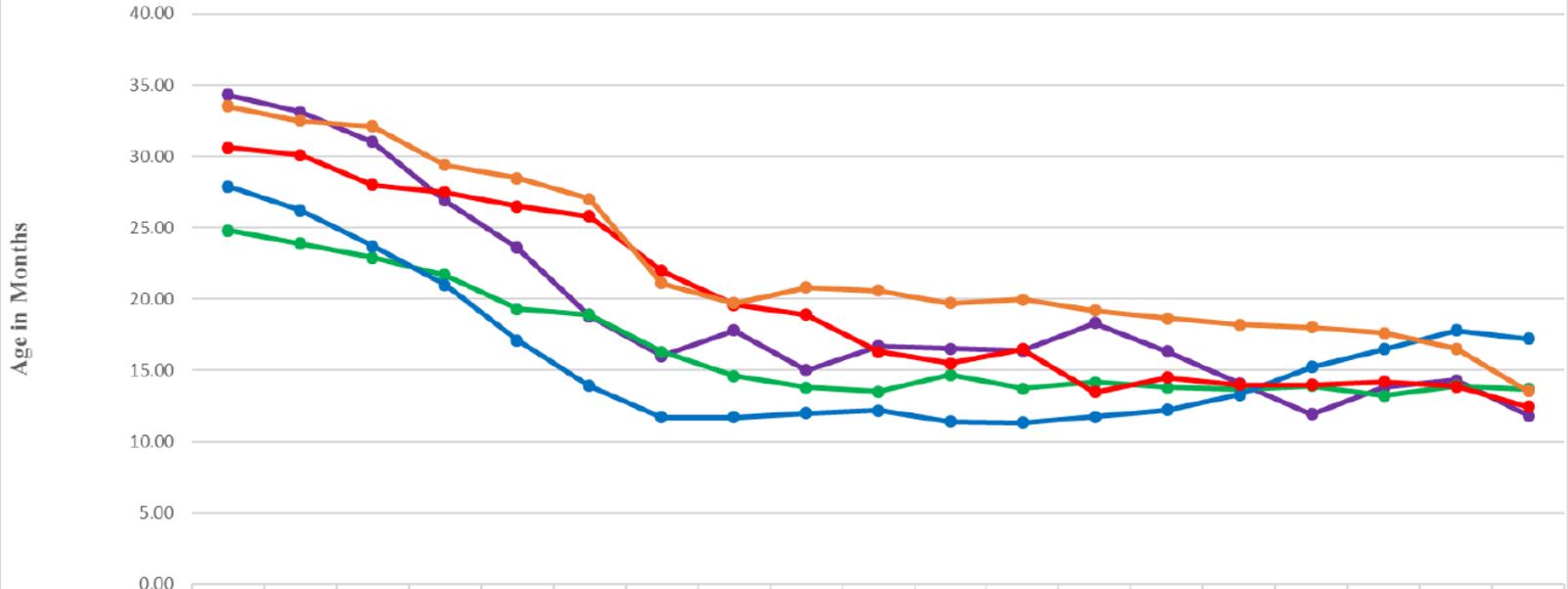
- Judges self-identify into technology clusters that correspond to technology centers in Patents (see SOP 1 § III.E.3):
  - Biotech (TC1600);
  - Chemical (TC1700, TC2800);
  - Electrical (TC2100, TC2400, TC2600);
  - Mechanical/Business Methods (TC3600; TC3700); and
  - Mechanical (TC3600 except class 705; TC3700).

# Technology rebalancing

- **SOP1 § III.E.3.c:**
  - “Designee(s) assign each case to a panel of judges having the appropriate technology preferences, as practicable. ... [T]he designee(s) should attempt to fill a given judge’s docket with cases from his or her primary technology preference.”
- **SOP1 § III.E.3.d:**
  - “If Board needs dictate, however, a judge may be assigned to a case relating to any technology or cluster.”
- **SOP1 § III.E.3.e:**
  - “Designee(s) will attempt to assign ex parte appeals with three judges in the same technology cluster.”

# Technology rebalancing

BPAI Received date - Final Decision Date  
For Appeal Decisions from FY16Q1 to FY20Q3



	FY16Q1	FY16Q2	FY16Q3	FY16Q4	FY17Q1	FY17Q2	FY17Q3	FY17Q4	FY18Q1	FY18Q2	FY18Q3	FY18Q4	FY19Q1	FY19Q2	FY19Q3	FY19Q4	FY20Q1	FY20Q2	FY20Q3
BioTech	34.30	33.10	31.00	26.90	23.60	18.80	16.00	17.80	15.00	16.70	16.50	16.37	18.30	16.32	14.09	11.94	13.79	14.32	11.82
Chemical	24.80	23.90	22.90	21.70	19.30	18.90	16.30	14.60	13.80	13.50	14.70	13.72	14.17	13.80	13.70	13.93	13.21	13.91	13.68
Electrical	27.90	26.20	23.70	21.00	17.10	13.90	11.70	11.70	12.00	12.20	11.40	11.35	11.76	12.22	13.29	15.24	16.48	17.79	17.20
Mech	30.60	30.10	28.00	27.50	26.50	25.80	22.00	19.60	18.90	16.30	15.50	16.47	13.47	14.50	13.98	13.97	14.20	13.85	12.44
Busi_method	33.50	32.50	32.10	29.40	28.50	27.00	21.10	19.70	20.80	20.60	19.70	19.96	19.19	18.65	18.22	18.01	17.61	16.51	13.53

# Technology rebalancing

- FY 17 Q2 average pendency by technology:
  - Electrical: 13.9 months
  - Business methods: 28.5 months
  - Mechanical: 25.8 months
- FY 17 Q2: shifted some business methods and mechanical appeals to electrical clusters.
- Provided resources and training to electrical clusters.

# Technology rebalancing

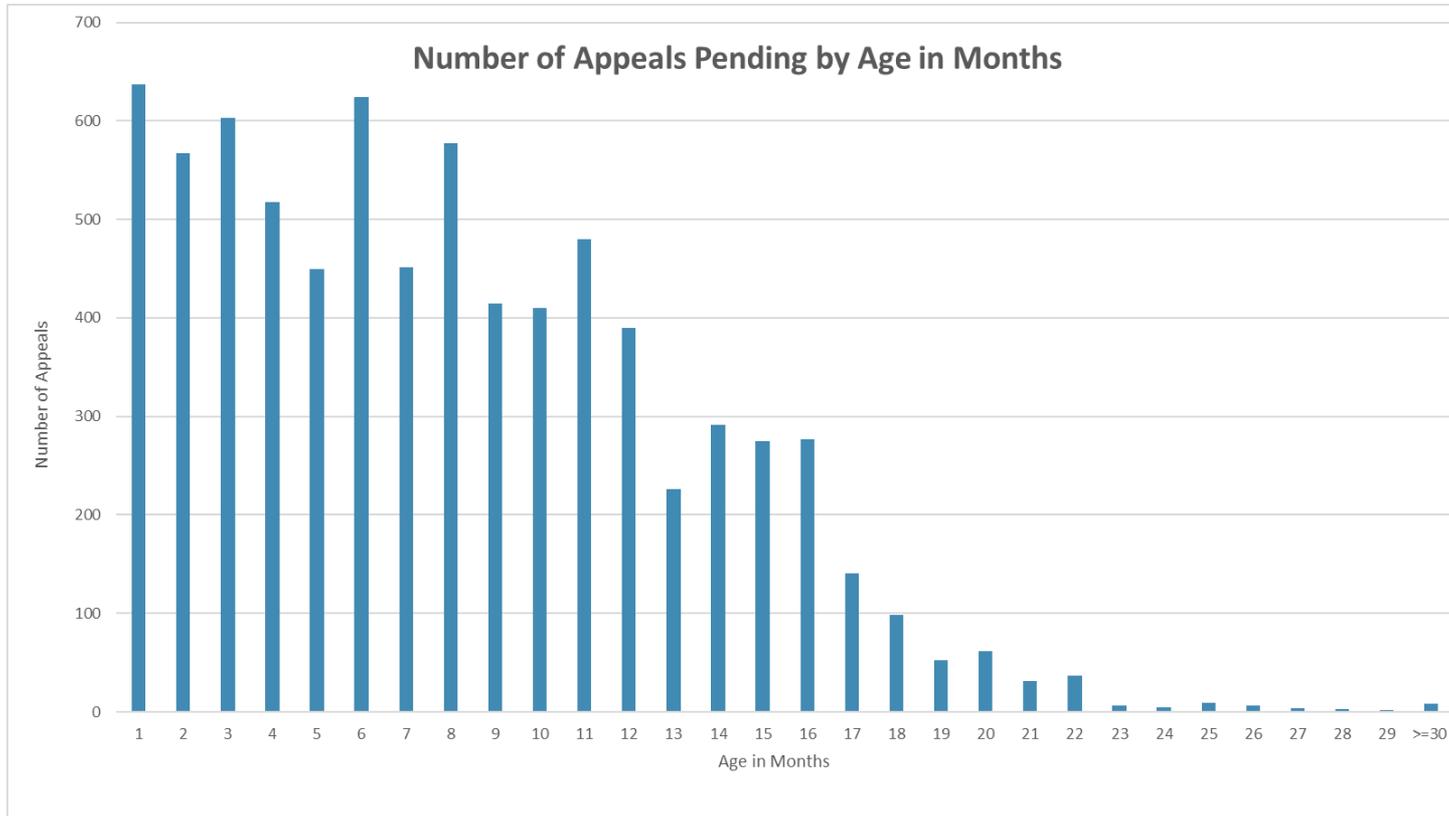
- Reevaluated quarterly.
- For Q4 FY20:
  - Reducing number of business methods appeals decided by electrical clusters.
  - Maintaining having some business methods appeals decided by biotech cluster.



# Quarterly Appeals Closeouts (QAC)

- Maintain or reduce maximum pendency.
- Each quarter, set maximum pendency target and decide all appeals older than target:
  - End of Q2 FY18: ~27 mos. maximum pendency.
  - End of Q3 FY20: ~22 mos. maximum pendency.

# Maximum pendency shrinking



- Data from June 2020.

# Just-in-time docketing

- SOP1 § III.D.1:
  - “For judges assigned to be paneled only on ex parte appeals, designee(s) will automatically assign ex parte appeals to a judge’s docket on a regular, periodic basis, with the goal of maintaining a given judge’s docket size at a target level.”
- SOP1 § III.D.2.a:
  - “To request ex parte appeals to be added to his or her docket, a judge who is assigned to be paneled on cases in other jurisdictions of the Board should contact the designee(s) to request a certain number of additional ex parte appeals, up to a designated maximum, and also notify the judge’s supervisor.”

# Just-in-time docketing

- Q2 FY20:
  - For judges automatically paneled on appeals, target reduced from 20 to 12.
  - For judges not automatically paneled on appeals, maximum set at six.

# **Fast Track Appeals Pilot Program**

# Overview

- One-year pilot starting July 2, 2020.
- \$400 fee.
- Six month pendency goal.
- 125-granted-petition limit per quarter (500 total)
- Hearings permitted, with some restrictions.

# What the program is not

- No impact on procedures before docketing notice is issued.
- No change in briefing before the examiner.

# What appeals qualify?

- Pending appeal (docketing notice issued).
  - Not limited to “new” appeals, i.e., a petition may be submitted for any currently pending appeal.
- Appeal not already being treated as special under MPEP 708.01.
  - E.g., not already special due to age or health of inventor.

# Requirements of petition to Chief APJ

- Application and appeal numbers.
- Certifications that the appeal qualifies.
  - Pending appeal, not currently treated as special.
- \$400 fee under 37 C.F.R. 41.20(a).
  - Non-refundable, even if petition denied.

# Petitioning Chief APJ

- Submit by EFS-Web, Patent Center, or Postal Service.
  - Electronic submission is preferred.
- Form PTO/SB/451 recommended, but not required.
- Petitioner notified of grant or denial.
- May petition again if denied, but will not get the filing date of a denied petition.

# Fast-track webpage

Fast-Track Appeals Pilot Program

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## Fast-Track Appeals Pilot Program

Need an expedited decision on your appeal? Use the Fast-Track Appeals Pilot Program.

### What is the Fast-Track Appeals Pilot Program?

Under the Fast-Track Appeals Pilot Program, appellants can have their ex parte appeals advanced out of turn. Appellants simply file a petition to request fast-track review of their their ex parte appeal and pay a \$400 petition fee. The Patent Trial and Appeal Board (PTAB or Board) has set a target of issuing a decision within six months from the date the petition is granted and the ex parte appeal is entered into the pilot program.

The Fast-Track Appeals Pilot Program is effective on July 2, 2020. This means an appellant may file a petition for inclusion of an ex parte appeal in the pilot program starting on July 2, 2020.

Read the [Federal Register Notice here](#).

[www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/fast-track-appeals-pilot-program](http://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/fast-track-appeals-pilot-program)

# Petition form

Doc Code: PET\_41.3  
 Document Description: Petition under Rule 41.3 to Chief Admin Patent Judge PTO/SB/451 (07-20)

PETITION Fast-Track Appeals Pilot Program	
<b>PART I. IDENTIFICATION OF THE APPEAL TO ACCORD FAST-TRACK STATUS</b>	
Appeal No.:	Application Number:
First Named Inventor:	Filing Date:
Title of Invention:	
<b>PART II. CERTIFICATION:</b> Appellant hereby certifies the following and petitions to participate in the Fast-Track Appeals Pilot Program for the above-identified appeal.	
<ol style="list-style-type: none"> <li>Appellant files this certification and petition under 37 CFR 41.3 to include the appeal in the application identified in Part I (above) in the Fast-Track Appeals Pilot Program.</li> <li>The above-identified appeal is pending before the Patent Trial and Appeal Board (PTAB) and a docketing notice <u>has been issued</u>.</li> <li>The petition fee for filing a petition under 37 CFR 41.3 accompanies this petition.</li> <li>The above-identified appeal <u>is currently not treated</u> as special under MPEP 708.01 (e.g., age or health of the inventor).</li> <li>The registered practitioner submitting this certification and petition has a power of attorney (37 CFR 1.32), or has authority to act (37 CFR 1.34), for the above-identified application, or the appellant is prosecuting the appellant's own case (37 CFR 1.31).</li> </ol>	
<b>PART III. ORAL HEARING:</b> For informational purposes, please indicate whether Appellant has filed a <u>compliant</u> Request for Oral Hearing per 37 CFR 41.47 for the above-identified appeal.	
Yes <input type="checkbox"/> No <input type="checkbox"/>	
<input type="checkbox"/> If yes, Appellant hereby waives the Oral Hearing. (Appellant is not required to waive an Oral Hearing to participate in the Fast-Track Patent Appeal Pilot.)	
Signature	Date
Name (Print/Typed)	Practitioner Registration Number
<p><b>Note:</b> This form <u>must be signed</u> in accordance with 37 CFR 1.33 and consistent with Certification 5 above. See 37 CFR 1.4(d) for signature requirements and certifications.          Submit multiple forms if more than one signature is required.*          *Total of _____ forms are submitted</p>	

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Read the [Federal Register Notice here](#).

**Eligibility requirements**

To qualify for fast-track status, the following four conditions must be met:

- Application type:** The application must be an original utility, design, or plant nonprovisional application.
- Status of appeal:** The appeal for fast-track status must be an ex parte appeal for which a notice of appeal has been filed and a PTAB docketing notice has been issued by the USPTO (i.e., the appeal is pending before the PTAB).
- Petition:** The appellant must file a petition under 37 CFR 41.3 via the [USPTO's electronic filing system](#) identifying the application and appeal by application number and appeal number, respectively, for which fast-track review is sought.
  - Form: Petition—Fast-Track Appeals Pilot Program (Form PTO/SB/451)
- Fee:** The appellant must pay a \$400 fee under 37 CFR 41.206.

[USPTO Fee Schedule](#)

**Granted petition limits**

The USPTO has limited the number of granted petitions to 125 per quarter for the duration of the Fast-Track Appeals Pilot Program, which is expected to run for one year.

The table shows the status of the number of granted petitions per quarter and total for the pilot duration, as well as open slots available during each time period. A "quarter" under this pilot program is defined as a three-month period measured from the start date of the pilot program. For example, if the pilot program has a start date of June 1, then a "quarter" spans the three months from June 1 to August 31.

	As of date	Petitions received in quarter	Petitions granted in quarter	Available petition slots in quarter	Petitions held in abeyance	Total granted petitions
Quarter 1 (starting 7/2/2020)	7/10/2020	11	10	115	0	10

The PTAB may exercise discretion to grant a small number of petitions above the 125-petition limit. Should a significant number of petitions exceeding the limit be filed in a quarter, such petitions will be held in abeyance and decided, in order of receipt, in a subsequent quarter.

Form-fillable PDF also available at: [www.uspto.gov/patent/forms/forms-patent-applications-filed-or-after-september-16-2012](http://www.uspto.gov/patent/forms/forms-patent-applications-filed-or-after-september-16-2012)

# Program limits

- 125 granted petitions per quarter and 500 total.
  - Quarter is a 3-month period and first quarter started July 2 (day the Federal Register Notice published).
  - If 125 granted petitions in a quarter, additional petitions may be held in abeyance and considered in the following quarter.

# Program limits

- Limits chosen to provide robust participation while not compromising other PTAB goals, such as pendency.
- Track progress toward limits on Fast-track webpage.

# Routine updates of progress toward limits

- Check website to gauge how close we are to limits.

The screenshot shows the top navigation bar of the USPTO website. It includes the USPTO logo, the text 'UNITED STATES PATENT AND TRADEMARK OFFICE', and links for 'About Us', 'Jobs', 'Contact Us', and 'MyUSPTO'. A search bar is located on the right. Below the navigation bar is a secondary menu with 'Patents', 'Trademarks', 'IP Policy', and 'Learning and Resources', along with a 'Find It Fast' button. A breadcrumb trail at the bottom of the navigation bar reads: 'Home > Patents: Application Process > Patent Trial and Appeal Board > Fast-Track Appeals Pilot Program'. There are also 'Share' and 'Print' icons.

- Main menu
- Patents
  - Trademarks
  - IP Policy
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  - Form: Petition—Fast-Track Appeals Pilot Program ([Form PTO/SB/451](#))
- Fee:** The appellant must pay a \$400 fee under 37 CFR 41.20(a) with the petition.
  - [USPTO Fee Schedule](#)

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	As of date	Petitions received in quarter	Petitions granted in quarter	Available petition slots in quarter	Petitions held in abeyance	Total granted petitions
Quarter 1 (starting 7/2/2020)	8/03/2020	34	32	93	0	32

	As of date	Petitions received in quarter	Petitions granted in quarter	Available petition slots in quarter	Petitions held in abeyance	Total granted petitions
Quarter 1 (starting 7/2/2020)	8/03/2020	34	32	93	0	32

# Hearings

- Yes, heard cases can be fast-tracked.
- Hearing requests can include time and location preferences.
  - Hearings team will do best to accommodate.
  - But, may be scheduled in any available hearing room in any office location, by video, or by telephone.

# Hearings

- No rescheduling of hearings and staying in the pilot program.
  - May opt out of fast track and reschedule hearing.
  - May request video/telephone if office location is inconvenient.
  - May waive hearing and continue on fast-track.
- Right now, default for all appeals hearings (including fast-track) is telephonic.
  - [www.uspto.gov/coronavirus](http://www.uspto.gov/coronavirus)

# Further information

- Federal Register notice:
  - [www.federalregister.gov/documents/2020/07/02/2020-14244/fast-track-appeals-pilot-program](https://www.federalregister.gov/documents/2020/07/02/2020-14244/fast-track-appeals-pilot-program)
- Frequently asked questions:
  - [www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/fast-track-appeals-pilot-program](https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/fast-track-appeals-pilot-program)

**PTAB updates**

# PTAB accomplishments and initiatives

- Fast-Track Appeals Pilot Program
- Legal Experience and Advancement Program (LEAP)
- Motions to Amend (MTA) Pilot Program
- Notice of Proposed Rulemaking to allocate the burden of persuasion on MTA in trial proceedings
- Notice of Proposed Rulemaking on AIA trial institution and responsive briefing

# PTAB accomplishments and initiatives

- Extended deadlines under the CARES Act
- POP issued notable precedential decisions including:
  - *Hunting Titan, Inc. v. DynaEnergetics Europe GmbH*, IPR2018-00600, Paper 67 (July 6, 2020)
  - *Hulu, LLC, v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 (Dec. 20, 2019)
- Issued important precedential and informative decisions
- Updates to Trial Practice Guide (consolidated in Nov. 2019)
  - E.g., factors considered at institution

# Legal Experience and Advancement Program (LEAP)

- Announced May 15, 2020.
- Applies to both ex parte appeals and AIA trials.
- Designed to foster the development of the next generation of patent practitioners.
- Targets attorneys and agents new to the practice of law or new to practice before the PTAB.
- Provides webinar trainings for LEAP practitioners.
- Oral Argument Practicum held on August 7, 2020.

# MTA Pilot Program

- Notice published in Federal Register at 84 FR 9497.
- Applies to all AIA trials instituted on or after March 15, 2019.
- First MTA requesting preliminary guidance filed June 25, 2019.
- First revised MTA filed October 30, 2019.
- Statistics (as of June 30, 2020)
  - MTAs under pilot program=77
  - Requests for preliminary guidance=67
  - Board issuance of preliminary guidance=39
  - Revised MTAs=26

# Notice of Proposed Rulemaking to allocate the burden of persuasion on MTA in trial proceedings

- Published October 22, 2019.
- Comments closed December 23, 2019;
  - 18 comments received.
- Comments expressed varying viewpoints.
- The office is carefully considering all comments.

# Notice of Proposed Rulemaking on AIA trial institution and responsive briefing

- Published May 27, 2020.
- Comments closed June 26, 2020.
  - 40 comments received.
- Comments expressed varying viewpoints.
- The office is carefully considering all comments.

# POP decisions and orders

Case/appeal name	Case/appeal number	Topic	Status	Date decided
<i>Proppant Express Invs., LLC v. Oren Techs., LLC</i>	IPR2018-00914, Paper 38	AIA - Joinder - 315(c)	Decided (POP)	3/13/2019
<i>GoPro, Inc. v. 360Heros, Inc.</i>	IPR2018-01754, Paper 38	AIA - 315(b) - Time Bar	Decided (POP)	8/23/2019
<i>Hulu, LLC v. Sound View Innovations, LLC</i>	IPR2018-01039, Paper 29	AIA - Printed Publications	Decided (POP)	12/20/2019
<i>Hunting Titan, Inc. v. DynaEnergetics GmbH &amp; Co. KG</i>	IPR2018-00600, Paper 67	AIA - Motion to Amend	Decided (POP)	7/6/2020

# ***Hunting Titan, Inc. v. DynaEnergetics GmbH & Co. KG***

- IPR2018-00600 (PTAB July 6, 2020) (Paper 67) (Precedential)
- Precedential Opinion Panel (POP) ordered review to address the following issues:
  - Under what circumstances and at what time during an inter partes review proceeding may the Board raise a ground of unpatentability that a petitioner did not advance or insufficiently developed against substitute claims proposed in a motion to amend?
  - If the Board raises such a ground of unpatentability, whether the Board must provide the parties notice and an opportunity to respond to the ground of unpatentability before the Board makes a final determination.
- The POP accepted additional briefing from the parties and amici until and held an oral hearing on February 18, 2020. The POP issued a precedential decision on July 6, 2020.

# ***Hunting Titan, Inc. v. DynaEnergetics GmbH & Co. KG***

- IPR2018-00600 (PTAB July 6, 2020) (Paper 67) (Precedential)
- The POP concluded:
  - The Federal Circuit’s opinion in *Nike, Inc. v. Adidas AG*, 955 F.3d 45 (Fed. Cir. 2020) resolves that the Board may, in certain rare circumstances, raise a ground of unpatentability that a petitioner did not advance, or insufficiently developed, against substitute claims proposed in opposing a motion to amend.
    - Circumstances are limited to situations in which the adversarial process fails to provide the Board with potential arguments of patentability with respect to the proposed substitute claims.
    - Examples of such rare circumstances include:
      - Where the petitioner has ceased to participate in the proceeding; or
      - Where certain evidence of unpatentability has not been raised by petitioner, but is readily identifiable and so persuasive that the Board should take it up in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings.

# ***Hunting Titan, Inc. v. DynaEnergetics GmbH & Co. KG***

- IPR2018-00600 (PTAB July 6, 2020) (Paper 67) (Precedential)
- The POP further concluded:
  - Due process requires that
    - Patent owner receive notice of how the prior art allegedly discloses the newly-added limitations of each proposed substitute claim, as well as a theory of unpatentability asserted against those claims; and
    - Patent owner has the opportunity to respond.
  - Nike gave two examples of procedures sufficient to provide notice and opportunity to respond:
    - The Board could request “supplemental briefing from the parties regarding its proposed ground for unpatentability;” or
    - The Board could “request that the parties be prepared to discuss” the prior art in connection with the substitute claim at an oral hearing.

# Decisions designated precedential FY2020

Case/appeal name	Case/appeal number	Topic	Date issued	Date designated
<i>Apple Inc. v. Fintiv, Inc.</i>	IPR2020-00019, Paper 11	AIA - Institution - 314(a)	3/20/2020	5/5/2020
<i>Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH</i>	IPR2019-01469, Paper 6	AIA - Institution - 325(d)	2/13/2020	3/24/2020
<i>Oticon Medical AB v. Cochlear Limited</i>	IPR2019-00975, Paper 15	AIA - Institution - 325(d)	10/16/2019	3/24/2020
<i>DTN, LLC v. Farms Technology, LLC</i>	IPR2018-01412, Paper 21	AIA - Collateral Agreements - 317(b)	6/14/2019	6/11/2020
<i>Lectrosonics, Inc. v. Zaxcom, Inc.</i>	IPR2018-01129, Paper 33	Secondary Considerations - 103	1/24/2020	4/14/2020
<i>Ex parte Grillo-López</i>	Appeal 2018-006082	Printed Publications	1/31/2020	4/7/2020



# Decisions designated informative FY2020

Case/appeal name	Case/appeal number	Topic	Date issued	Date designated
<i>Argentum Pharmaceuticals LLC v. Research Corporation Technologies, Inc.</i>	IPR2016-00204, Paper 19	AIA - Printed Publication - 311(b)	5/23/2016	4/7/2020
<i>Seabery North America Inc. v. Lincoln Global, Inc.</i>	IPR2016-00840, Paper 11	AIA - Printed Publication - 311(b)	10/6/2016	4/7/2020
<i>Sandoz Inc. v. AbbVie Biotechnology Ltd.</i>	IPR2018-00156, Paper 11	AIA - Printed Publication - 311(b)	6/5/2018	4/7/2020
<i>In-Depth Geophysical, Inc. v. ConocoPhillips Company</i>	IPR2019-00849, Paper 14	AIA - Printed Publication - 311(b)	9/6/2019	4/7/2020
<i>Apple Inc. v. Fintiv, Inc.</i>	IPR2020-00019, Paper 15	AIA - Institution - 314(a)	5/13/2020	7/13/2020
<i>Sand Revolution II, LLC v. Continental Intermodal Group – Trucking LLC</i>	IPR2019-01393, Paper 24	AIA - Institution - 314(a)	6/16/2020	7/13/2020
<i>Kokusai Electric Corp. v. ASM IP Holding B.V.</i>	IPR2018-01151, Paper 38	AIA - MTA - 316(d)	8/20/2019	6/11/2020
<i>Sattler Tech Corp. v. Humancentric Ventures, LLC</i>	PGR2019-00030, Paper 9	AIA - Institution - 324(a)	7/26/2019	6/11/2020
<i>PUMA North America, Inc. v. NIKE, Inc.</i>	IPR2019-01042, Paper 10	AIA - Institution - 325(d)	10/31/2019	3/24/2020

# Decisions designated informative FY2020

Case/appeal name	Case/appeal number	Topic	Date issued	Date designated
<i>Curt G. Joa, Inc. v. Fameccanica.data S.P.A.</i>	IPR2016-00906, Paper 61	AIA - Confidential Information	6/20/2017	6/11/2020
<i>Ex parte Hannun</i>	Appeal 2018-003323	101	4/1/2019	12/11/2019
<i>Ex Parte Maeda</i>	Appeal 2010-009814	Design Choice - 103	10/23/2012	10/15/2019
<i>Ex Parte Spangler</i>	Appeal 2018-003800	Design Choice - 103	2/20/2019	10/15/2019
<i>Hulu, LLC v. Sound View Innovations, LLC</i>	IPR2018-00582, Paper 34	Rationale - 103	8/5/2019	12/11/2019
<i>Johns Manville Corp. v. Knauf Insulation, Inc.</i>	IPR2018-00827, Paper 9	Rationale - 103	10/16/2018	12/11/2019
<i>Ex parte Whirlpool Corporation</i>	Appeal 2013-008232	Secondary Considerations - 103	10/30/2013	4/14/2020
<i>Ex parte Thompson</i>	Appeal 2011-011620	Secondary Considerations - 103	3/21/2014	4/14/2020



# Consolidated Trial Practice Guide

- Published November 20, 2019.
- Incorporates the Practice Guide updates released in August 2018 and July 2019 into the original August 2012 Practice Guide.
- Includes additional revisions for greater consistency across all sections of the newly consolidated guide.

