

## Federal Circuit Rejects USPTO's Formula for Calculating PTA

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Today the Court of Appeals for the Federal Circuit rejected the United States Patent and Trademark Office (USPTO)'s position regarding how to determine patent term adjustment (PTA). The Federal Circuit affirmed the district court's decision in *Wyeth v. Dudas*, 580 F. Supp. 2d 138 (D.D.C. 2008), which held that under 35 U.S.C. § 154 the "period of delay" for issuing a patent more than three years after filing begins three years after the application has been filed. The USPTO argued that the same "period of delay" begins when an application is filed. The Federal Circuit unequivocally rejected the USPTO's interpretation. The Federal Circuit stated:

"The 'period of delay' under the express language of the B clause therefore runs from the three-year mark after filing until the application issues. ... Before the three-year mark, no "overlap" can transpire between the A delay and the B delay because the B delay has yet to begin or take any effect. If an A delay occurs on one day and a B delay occurs on a different day, those two days do not 'overlap' under section 154(b)(2) ... Under the PTO's strained interpretation, B delay can occur *anytime* after the application is filed. To the contrary, the language of section 154(b) does not even permit B delay to start running until three years *after* the application is filed. The PTO's position cannot be reconciled with the language of the statute." (emphasis in original.)

The USPTO has been ignoring the district court decision. It remains to be seen whether the USPTO will now follow this decision or take other action in an attempt to overturn the Federal Circuit's decision. In view of this decision, patentees should take appropriate action to preserve their rights to the additional patent term to which they may be entitled.

The complete decision can be found at <http://www.cafc.uscourts.gov/opinions/09-1120.pdf>.

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