

USPTO BOARD APPEALS MORE THAN DOUBLED IN FISCAL YEAR 2009

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Based on recently published U.S. Patent and Trademark Office (USPTO) data for the USPTO fiscal year ending September 30, 2009, the Board of Patent Appeals and Interferences (BPAI) had seen a 143% upswing in its appeal docket. There were 15,483 ex parte appeal cases filed in FY 2009, as compared with 6,385 cases in FY 2008. The number of cases filed in 2008 also represented a 37.6% increase from 4,639 cases in FY 2007, which is also compared with around 3,000 cases per year from FY 2002 through FY 2006.

Practitioners have noted possible reasons for the tremendous increase in appeal case filings. Some have noted that the recently rescinded proposed USPTO rules that place limitations on requests for continued examination (RCE) was a contributing factor. Others have indicated that the reason traces back to the rejection trend at the examiner level; the USPTO allowance rate has been the lowest in over a decade.

The BPAI will not be able to handle to increased caseload in its current form. While the BPAI disposed of 6,862 cases in FY 2009, representing a 39% increase from FY 2008, it will carry-over 12,577 pending cases to the next fiscal year. Further, the BPAI expects an even greater number of appeals filings in FY 2010, projected at 16,000. Therefore, the projected pendency to resolution of appeals cases will increase to 37 months from 21 months currently, and compared with 9.6 months in FY 2008.

The USPTO is undergoing a number of initiatives to resolve the appeal caseload. The new initiatives include hiring new judges and patent attorneys to the BPAI. It is expected 9 new judges and 24 attorneys will report in November 2009, and 12 more judges and 5 more attorneys will report in June 2010. The USPTO also plans to improve the speed and quality of the BPAI process in order to facilitate timely decisions. With the new hires and improvement to the appeal process, the USPTO hopes to reduce the caseload and pendency to the FY 2008 level by FY 2012.