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PATENT TRIAL AND APPEAL BOARD

STANDARD OPERATING PROCEDURE 2 (REVISION 10)

PRECEDENTIAL OPINION PANEL TO DECIDE ISSUES OF EXCEPTIONAL IMPORTANCE INVOLVING POLICY OR PROCEDURE

PUBLICATION OF DECISIONS AND DESIGNATION OR DE-DESIGNATION OF DECISIONS AS PRECEDENTIAL OR INFORMATIVE

This Standard Operating Procedure (SOP) addresses the designation of a Precedential Opinion Panel in adjudications before the Patent Trial and Appeal Board (Board) to decide issues of exceptional importance (e.g., involving agency policy or procedure). The SOP sets forth the composition of the Precedential Opinion Panel, describes the mechanisms for invoking Precedential Opinion Panel review of a Board decision recently issued in a pending case, and explains the Precedential Opinion Panel review process. Unless otherwise designated, Precedential Opinion Panel decisions will set forth binding agency authority.

This SOP further addresses the publication of Board decisions and the review procedure for designating Board decisions, other than Precedential Opinion Panel decisions, as precedential or informative authority for the Board. The review procedure includes a process by which an Executive Judges Committee evaluates decisions nominated for precedential or informative designation. As part of this process, the Executive Judges Committee also may solicit and evaluate comments from all members of the Board to determine whether to recommend the nominated decision for designation as precedential or informative.

Finally, this SOP includes a procedure for de-designating precedential decisions and informative decisions.

No decision will be designated or de-designated as precedential or informative without the approval of the Director. This SOP does not limit the authority of the Director to designate or de-designate decisions as precedential or informative, or to convene a Precedential Opinion Panel to review a matter, in his or her sole discretion without regard to the procedures set forth herein. Nor does this SOP limit the Director's authority to issue, at any time and in any manner,

policy directives that are binding on any and all USPTO employees, including policy directives concerning the implementation of statutory provisions. *See, e.g.*, 35 U.S.C. §3(a)(2)(A); *see also, e.g.*, 35 U.S.C. §§ 3(a)(1), 2(b)(2)(A), 316(a), 326(a).

This SOP sets forth internal norms for the administration of PTAB. It does not create any legally-enforceable rights. The actions described in this SOP are part of the USPTO’s deliberative process.

I. PURPOSE

A. Precedential Opinion Panel Review

The Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (Director), who is a statutory member of the Board (35 U.S.C. § 6(a)), is “responsible for providing policy direction and management supervision for the Office” (35 U.S.C. § 3(a)(2)(A)), and has “the authority to govern the conduct of proceedings in the Office” (35 U.S.C. § 2(b)(2)(A)). The Director has an interest in creating binding norms for fair and efficient Board proceedings, and for establishing consistency across decision makers under the Leahy-Smith America Invents Act (35 U.S.C. §§ 311-329; Section 18 of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 329 (2011)) and, to the extent applicable, for patent examination, for example, in *ex parte* appeals and reexamination appeals.

B. Publication of Decisions and Designation of Decisions as Precedential or Informative

The Administrative Procedure Act requires that “[e]ach agency shall make available to the public . . . final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.” 5 U.S.C. § 552(a)(2)(A). Since August 1997, Board decisions have been made available to

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