

## Federal Circuit Affirms Patent Term Adjustment Decision

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The Court of Appeals for the Federal Circuit recently affirmed the lower court's decision holding that the U.S. Patent and Trademark Office (USPTO) was misinterpreting the statute for calculating patent term adjustment (PTA) for which patentees may be entitled. *Wyeth and Elan Pharma Int'l Ltd. v. Kappos*, No. 2009-1120 (Fed. Cir. Jan. 7, 2010).

The American Inventors Protection Act (AIPA) of 1999 revised 35 U.S.C. § 154 to provide an adjustment, or restoration, of patent term on a day-by day basis when (A) the USPTO fails to meet certain examination deadlines in a timely manner (an A delay), and (B) when the USPTO fails to issue a patent within three years of filing (a B delay). See 35 U.S.C. § 154(b)(1). The statute, however, limits the length of PTA when the A and B delays overlap. The interpretation of this "overlap provision" was at the heart of the *Wyeth* decision.

The USPTO interpreted this overlap provision of the statute as providing a PTA that is the greater of the A delay or the B delay. *Wyeth* filed suit against the USPTO in the District Court for the District of Columbia, arguing that the USPTO was misinterpreting the statute, and that any A delay occurring after three-year mark is the "overlap." In other words, *Wyeth* argued that the correct interpretation of the statute provides that the A and B delays should be added to one another, except that any A delay occurring after the three-year mark would not be included in the PTA calculation. The difference in the two interpretations was not insignificant. For example, under *Wyeth's* interpretation of the PTA statute, one of the patents at issue in this case was entitled to an additional 756 days of patent term; whereas under the USPTO's interpretation, the patent was entitled to 462 days of additional patent term.

The district court ruled in favor of *Wyeth* on summary judgment, and the Federal Circuit affirmed this decision. In rendering its opinion, the Federal Circuit stated that it saw no ambiguity in the language of the statute; thus the plain language of the statute "must ordinarily be regarded as conclusive." *Wyeth*, slip op. at 7 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The court stated that, according to the plain language of the statute, "no 'overlap' happens unless the violations occur at the same time." *Id.* at 8. Put another way, the court stated that "[i]f 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)." Accordingly, patent applicants are now entitled to patent term adjustment when both A and B delays occur, except when an A delay occurs after the three-year mark.

The *Wyeth* decision should be kept in mind when making life cycle management decisions concerning your or your competitors' patent portfolio. For example, for products and patented inventions with

