

# **PATENT REEXAMINATION: TRENDS AND TIPS**

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David's experience spans 25 years practicing intellectual property law, with emphasis on patent litigation and dispute resolution; patent drafting; administrative proceedings before the USPTO; licensing and technology transfer; and intellectual property diligence and agreement drafting for a wide variety of corporate investments, mergers & acquisitions.

Prior to joining Haynes and Boone in 1989, he served as in-house patent counsel for a diversified technology company located in Research Triangle Park, North Carolina, with a long history of developing breakthrough chemical/material science, diagnostic, robotics, and motion management technologies.

#### **Honors**

In *Chambers & Partners' America's Leading Business Lawyers* for 2003-2009, Mr. McCombs was named among Texas' leading intellectual property attorneys. Mr. McCombs has also been named as one of the "Best Lawyers in Dallas," by *D Magazine*, 2002-2009; a "Texas Super Lawyer," by *Texas Monthly Magazine* for 2003-2009; and one of "The Best Lawyers in America in Intellectual Property Law and Technology Law" by *Best Lawyers*, 2009.

# PATENT REEXAMINATION: TRENDS AND TIPS\*

## I. INTRODUCTION

Patent reexamination continues to be a frequently-used tool for challenging the validity of issued patents. We direct readers unfamiliar with patent reexamination to other articles that explain the fundamental concepts of reexamination.<sup>1</sup> This article provides a brief update on the latest patent reexamination trends and statistics, and then explores 10 practical tips for patent and litigation counsel actively engaged in reexamination proceedings.

## II. RECENT TRENDS

The Patent and Trademark Office reports that inter partes reexamination filings are on track to show another strong increase this year. Based on the first six months of fiscal year 2009, total filings for 2009 are expected to include 266 inter partes reexamination requests, up from 168 in 2008. Ex parte reexaminations will likely decline somewhat, with an expected total of 616 for 2009. An overview of the annual filing rates—including the rapid growth of inter partes reexamination—is shown in Figure 1, and additional details are provided in Table 1.<sup>2</sup>

The PTO's most recent statistics show that the average pendency of an

inter partes reexamination continues to increase and is now reported as 33.7 months. The PTO calculates the average pendency statistic based solely on reexaminations that have finally concluded, that is, after the issuance of a certificate of reexamination. No account is made for the reexaminations that are still on-going. Because inter partes reexamination is still relatively new, most of the cases—a total of 503 orders

Fig. 1. Reexamination Filings

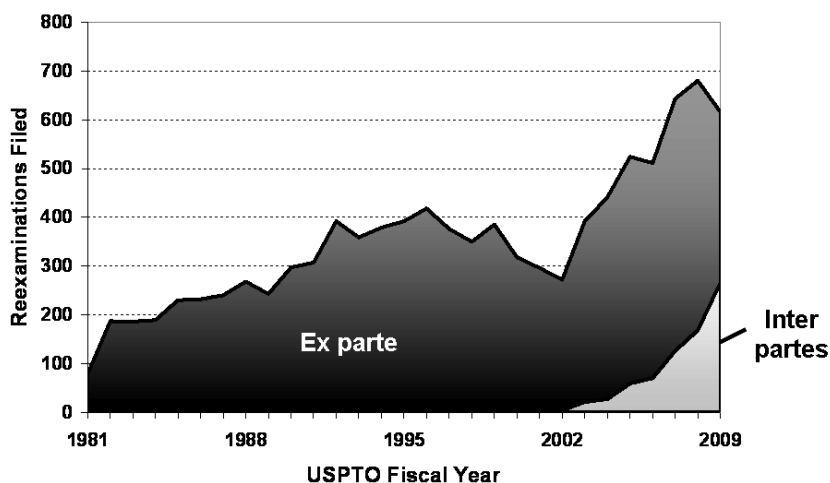


Table 1. Reexamination Statistics

	2005	2006	2007	2008	2009Q2
Ex Parte					
Average Pendency	21.9	22.9	23.7	24.5	24.8
Total Certificates Issued	5209	5537	5902	6457	6743
Inter Partes					
Average Pendency	29.5	27.9	28.6	32.6	33.7
Total Certificates Issued	3	7	11	33	55

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<sup>1</sup> See, e.g., David McCombs, Patent Reexamination with Litigation, Strategies, and Practice Tips, 6th Annual Rocky Mountain Intellectual Property & Technology Institute (June 5–6, 2008).

<sup>2</sup> The data were compiled from the PTO's statements of ex parte and inter partes reexamination filings for the fiscal years indicated. The PTO's most recent statistics from the second quarter of fiscal 2009 are included as appendices.

for reexamination—are still pending. Only 55 certificates have issued from inter partes reexamination proceedings, so the average pendency statistic is based on a relatively small sample set.

The pendency statistics for ex parte reexamination are also calculated based on all of the concluded proceedings, but because ex parte reexamination has existed since 1980, there are far more concluded cases. Thus, the reported average pendency of ex parte reexaminations is calculated based on cases stretching back over 25 years, making it difficult to assess whether the reported average pendency is reflective of current trends at the PTO. It is possible that neither of the reported official pendency statistics represent an accurate estimate of the expected pendency for new cases filed today.

### III. TEN TIPS

#### 1. Request Reexamination of Every Relevant Claim

With early inter partes reexamination requests, the PTO would often order reexamination of all of the patent claims, even if the request targeted only some of the claims.<sup>3</sup> More recently, the PTO's orders for reexamination have generally been limited to those claims specified in a request.<sup>4</sup> When reexamination is undertaken as part of an overall litigation strategy, consideration should be made of the scope of the request. Reexamination is sometimes requested of only those claims currently asserted in the litigation. If there is a possibility that additional claims will be added later in the litigation, consideration of that fact should be made in filing the request. This is especially true when requesting inter partes reexamination, since a requester cannot file a second inter partes reexamination request while a first reexamination is pending.<sup>5</sup> Also, there are no provisions in the reexamination regulations for bringing additional claims into a reexamination proceeding.

#### 2. Mind Your SNQ's

To be accorded a filing date, a reexamination request must—among other things—identify a substantial new question of patentability (“SNQ”). The most common reason for the PTO denying a request's filing date relates to the requester's statement of a substantial new question of patentability. The substantial new question must be fully explained and supported by the request, and the PTO treats the failure to do so as a failure to properly state a substantial new question.<sup>6</sup> Problems can arise for requesters when

using open-ended language, such as “anticipated by, or in the alternative, rendered obvious by....” This phrase asserts two independent patentability issues: novelty and obviousness. The PTO does not allow requesters to “lump together” rejections in this way.<sup>7</sup>

The PTO recommends that requesters refrain from using any open-ended language in stating the substantial new question. MPEP § 2617 provides several examples of open-ended assertions that the PTO considers to be inappropriate:

- anticipated by, or in the alternative, rendered obvious by...,
- obvious over Smith and/or Charles,
- obvious over Smith in view of Jones or Harvey, and
- obvious over Smith in view of Harvey, taken alone or further in view of Cooper.

Using any of these broad statements in a reexamination request creates a risk that the PTO will deny the request a filing date. Inter partes reexamination requesters should also refrain from using such statements in any comments filed during the reexamination. The PTO may refuse to enter third party comments that include “lumped” invalidity assertions. The PTO has in the past given a requester 30 days to correct noncompliant comments, but it is not clear that the rules actually the PTO to do so.

#### 3. Identify the Real Party in Interest

Although ex parte reexamination requests can be filed anonymously, an inter partes reexamination request must identify the real party in interest. A filing without this information is improper and will not be accorded a filing date. If the PTO suspects that the requester has not properly identified the real party in interest, it will issue an order to show cause why the identified party is correct.<sup>8</sup>

In one case, a reexamination requester called “Troll Busters” stated on its website that its purpose is to “secure freedom to operate for our customers.”<sup>9</sup> The PTO challenged the requester to show that it was the real party in interest, and not acting on behalf of

<sup>3</sup> See, for example, Reexamination Control No. 95/000,024 in which reexamination of claims 1-11 and 20-22 of U.S. 6,524,031 was requested, but reexamination of all claims 1-24 was ordered.

<sup>4</sup> And, in one noteworthy instance, to all of the claims requested *except one*. See Reexamination Control No. 95/000,179. The requester applied only one prior art reference to claim 12 of U.S. 6,405,669, but that reference was prior art only if the claim was ineligible to claim priority to a parent application. The examiner determined that claim 12 was supported by the specification of the parent application, so the submitted reference was not prior art to claim 12. The examiner ordered reexamination of all of the patent's claims except claim 12.

<sup>5</sup> 37 C.F.R. § 1.907(a).

<sup>6</sup> See MPEP §§ 2217, 2617.

<sup>7</sup> See MPEP §§ 2217, 2617 (“The explanation must not lump together the proposed rejections or proposed combinations of references.” (emphasis in original)).

<sup>8</sup> See Order to Show Cause, Reexamination Control No. 95/001,045 (Jun. 24, 2008).

<sup>9</sup> See Decision Vacating Filing Date at 1, Reexamination Control No. 95/001,045 (Aug. 25, 2008).

another.<sup>10</sup> The PTO ultimately determined that the requester's response was not sufficient, in large part because the requester failed to identify its source of funding.<sup>11</sup> The request's filing date was vacated, and the request was dismissed.<sup>12</sup>

#### **4. Consider Responding to an Ex Parte Reexamination Request with a Patent Owner's Statement**

After an ex parte reexamination request is filed, the patent owner has an opportunity to submit a statement in response to the request before the PTO decides whether to order reexamination. In the past, patent owners often declined to submit a statement, perhaps in part because doing so allows the requester to file comments in response. (This is the only time an ex parte requester is permitted to file comments on a patent owner submission.)

But some patent owners are re-thinking this approach and filing responses. If the patent owner can show that the requester's cited references are merely cumulative of art that the PTO has already considered, then the PTO might decline to order reexamination.

#### **5. Manage Defense Groups Carefully**

Since it is common for a patent holder to sue multiple defendants in a single action, it is also common for those defendants to pool their resources by entering into a joint defense agreement. Ideally the defendants will all agree on a single reexamination strategy, but of course in the real world their approaches may differ widely. Discussing potential issues early on can help streamline the coordination of resources later in both the litigation and any reexaminations that are filed.

One consideration when filing a reexamination for a group of defendants is the possibility that one or more defendants may settle separately. Since an inter partes reexamination cannot be terminated by the requester, a defendant listed as a requester cannot actually withdraw from the proceeding. One way to avoid potential problems is to name the patent attorney preparing the request as the requester (along with an appropriate identification of the real parties in interest if the request is for inter partes reexamination). If one

of the defendants settles, the reexamination proceeding can continue with the patent attorney requester continuing to advance the interests of the remaining defendants.

#### **6. Consider Court's History in Deciding Litigation Stays**

Defendants in a patent litigation often ask the court to stay the litigation while a reexamination of the subject patent goes forward. District courts have great latitude in deciding whether to stay litigation, but they generally review at least three factors in reaching a decision: 1) whether a stay will unduly prejudice one party, 2) whether a stay will simply issues for trial, and 3) how far advanced the litigation is (e.g., whether discovery is complete).<sup>13</sup> One of the most important factors, however, may be what court is hearing the case.<sup>14</sup> For that reason, consulting with local counsel familiar with the specific court's approach in past cases may be highly valuable.

#### **7. Take Care When Filing Serial Requests**

The PTO carefully reviews serial requests for reexamination filed for the same patent. When a reexamination request presents the same question of patentability as a previously filed reexamination request, the PTO may deny the second request on the grounds that the question of patentability is no longer "new." In some cases, the denial is of little consequence, since the PTO is already considering the asserted question of patentability. But the denial can be of concern when the second request is an inter partes request.

One common strategy in filing for patent reexamination is to file one or more ex parte reexamination requests as prior art references are discovered. Once the prior art search is completed, the accused infringer may file a follow-up inter partes request in an effort to obtain the benefits of participating in the reexamination process. All of the requests are usually filed over a period of a few months, so the earliest ex parte requests usually have

<sup>10</sup> See Order to Show Cause, Reexamination Control No. 95/001,045 (Jun. 24, 2008).

<sup>11</sup> See Decision Vacating Filing Date at 8, Reexamination Control No. 95/001,045 (Aug. 25, 2008).

<sup>12</sup> See *id.* at 9.

<sup>13</sup> See, e.g., *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 2d 404, 406 (W.D.N.Y. 1999).

<sup>14</sup> For example, it has been reported that courts in the Northern District of California is far more likely to grant a stay of litigation than in the Eastern District of Texas. See Katie Prescott, Patent Reexamination at 23 (Apr. 15, 2008), available at [http://www.fr.com/news/2008/April/Boalt\\_Reexamination2.pdf](http://www.fr.com/news/2008/April/Boalt_Reexamination2.pdf).

not yet received a first action on the merits. Since all of the requests are in the same procedural posture, the PTO may merge them into a single inter partes proceeding. For purposes of docketing at the PTO, however, the single proceeding gains the benefit of the filing date of the first-filed request. Thus, the reexamination should proceed more quickly than if the requester had waited until it had all the information used in filing for its last inter partes request.

This serial-request strategy can encounter a problem with the PTO's stringent requirements for a *new* question of patentability in each reexamination request. If the follow-up inter partes request simply restates the same questions previously presented in the individual ex parte requests, the inter partes request risks being denied.<sup>15</sup> The requirement of a *new* question with each request also means that a patent owner that knows of an adversary's best art—perhaps because of licensing negotiations—may be able to “block” the use of inter partes reexamination. The patent owner can file for ex parte reexamination using that art. Once the ex parte reexamination begins, the adversary will have to locate additional prior art or present the art in a “new light” in order to initiate an inter partes reexamination.

Forecast Consoles used this preemptive ex parte reexamination technique in a dispute with TBC Consoles over Forecast's U.S. Patent No. 6,857,712. In April 2005, Forecast requested reexamination of its own patent in view of a variety of references, with the principal references being a patent to Catta and a brochure by Evan. The PTO found that Catta and Evan raised a substantial new question of patentability and ordered the ex parte reexamination.

In August 2005, TBC requested inter partes reexamination of the patent.<sup>16</sup> TBC's request presented some references that were different from Forecast's ex parte request, but only for the dependent claims. TBC's request relied on the same Catta and Evan references to raise questions of patentability about the independent claims of the patent.

The PTO denied TBC's inter partes request, saying that it failed to present a substantial new question of patentability.<sup>17</sup> Because the issues raised by Catta and

Evan were already the subject of an ex parte reexamination, they could no longer raise a *new* question of patentability. The PTO also stated that TBC's failure to present a new question for the *independent* claims precluded TBC from presenting a new question for the *dependent* claims. Thus, the fact that TBC presented new and different art against the dependent claims was irrelevant.

TBC petitioned for review of the denial, but the petition was similarly denied, effectively affirming the examiner's decision.<sup>18</sup> The petition decision stated that TBC's remedy was to file a new request for inter partes reexamination based either on new art or on the same art presented in a new light. TBC later filed a second request for inter partes reexamination, based again on the Catta reference, but that request was denied as failing to present Catta in a new light, and thus, failing to raise a substantial new question. Meanwhile, the ex parte reexamination went forward and ultimately confirmed the patentability of all the claims.

Parties who intend to file one or more ex parte requests before filing a follow-up inter partes request can reserve at least one prior art reference—and the associated substantial new question of patentability—for the inter partes request. But there is essentially nothing that can be done to prevent a patent owner from preemptively filing for ex parte reexamination. A party that finds itself in TBC's situation can only react quickly—perhaps filing an inter partes request before the Patent Office decides whether to order the ex parte reexamination—and if at all possible, file a request that relies on different art.

## 8. Consider Using Expert Declarations

Another technique being used more frequently by the patent reexamination requesters is filing expert declarations to explain prior art references. Such declarations are especially effective when presenting an invalidity argument that rests in part on features that are inherent in the prior art reference's disclosure. The expert's declaration can explain in detail how a claimed limitation is inherently disclosed in the prior art or explain why a difference in terminology is insignificant.

One example of the use of expert declarations is the reexamination of U.S. 6,924,264, a patent covering compounds derived from the saliva of the Gila monster that may be useful in treating diabetes. Conjuchem requested inter partes reexamination of the patent in view of numerous references, including references that Conjuchem asserted disclose methods that would

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<sup>15</sup> See Reexamination Control No. 95/000,286 (denying inter partes request because it presented the same substantial new question as already-pending ex parte Reexamination Control No. 90/007,706).

<sup>16</sup> Request for Inter Partes Reexamination, Reexamination Control No. 95/000,106 (Aug. 22, 2005).

<sup>17</sup> Order Denying Request for Inter Partes Reexamination, Reexamination Control No. 95/000,106 (Nov. 16, 2005).

<sup>18</sup> Decision on Petition, Reexamination Control No. 95/000,106 (Jun. 27, 2007).

inherently produce the claimed compounds.<sup>19</sup> To support those claims of inherent disclosure, Conjuchem submitted with its request a declaration by a scientist who performed the prior art process and analyzed the results. When the patent owner pointed to certain discrepancies between the methods in the prior art and those used by the scientist, the requester submitted a second declaration from the scientist containing new evidence from newly performed experiments. The patent owner petitioned to have the second declaration stricken, asserting that the declaration was not directed to the patent owner's response and was therefore improper. But the PTO dismissed the petition, stating that the new experiments were properly directed to refuting the arguments in the patent owner's response:

Requester having initially presented certain evidence to demonstrate claim unpatentability cannot reasonably have been expected to have anticipated all arguments that might be advanced by patent owner to thereby rebut such evidence *ab initio*. There is nothing in the regulations that would preclude requester from conducting new tests that produce evidence addressing a patent owner's argument against evidence initially relied on by requester that was produced by tests that had been conducted earlier.<sup>20</sup>

The PTO allowed the new evidence from newly performed experiments to be entered into the reexamination record and to be considered by the examiner. As of this writing, the reexamination is still pending.

As the Conjuchem case shows, declarations can provide important evidence that would be difficult or impossible to present to the PTO otherwise. And in some cases, the declarations themselves do not count toward the page limits imposed on parties in inter partes reexamination. In general, declarations do not count toward the page limits when they simply state facts, but they do count when they contain analysis or argument:

Affidavits or declarations that are excluded from the page limit requirements include, for example, declarations attempting to swear behind (antedate) the filing date of a reference, or to establish the date of a printed publication, or declarations that provide comparative test

data and an analysis of same.

However, if the patent owner's affidavit or declaration includes any argument as to how an outstanding/proposed rejection is overcome, then the page(s) of the affidavit or declaration upon which the argument appears would be included against of the page limit counts.

Likewise, if a requester affidavit or declaration includes any argument as to how a rejection is supported, then the page(s) of the affidavit or declaration upon which the argument appears would be included against of the page limit count.<sup>21</sup>

Thus, in the Conjuchem case, the scientist's declarations did not count toward the requester's page limits because they merely recited the experimental steps and results. A second declaration did count toward the page limits because it included analysis of experimental results and explained how they showed the prior art references as inherently anticipating the patent claims.

## 9. Handle Page and Time Extension Petitions Correctly (and Separately)

The rules provide page and time limits for participants in a reexamination,<sup>22</sup> but the PTO will often grant a waiver in appropriate circumstances. Several facts bear consideration, however. First, a patent owner is not entitled to an extension of time. Extensions are given only for sufficient cause, and the filing of a extension request will not in itself affect any deadlines.<sup>23</sup> Thus, it is preferable to petition for an extension of time early, so that the PTO's decision can be made ahead of the deadline. Third party requesters in inter partes reexamination are not permitted any time extensions.<sup>24</sup>

The rules do not provide any mechanism to request an extension of the page limits. As such, a reexamination participant can request an extension by

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<sup>21</sup> Decision Dismissing Petition Under 37 CFR 1.183, Reexamination Control No. 95/000,276, at 3 (Mar. 12, 2008).

<sup>22</sup> See 37 C.F.R. 1.945(a) (patent owner to be given at least 30 days to file a response); 37 C.F.R. § 1.943(b) (prohibiting a patent owner in an inter partes reexamination proceeding from filing a response that exceeds 50 pages).

<sup>23</sup> See 37 C.F.R. 1.956.

<sup>24</sup> See 37 C.F.R. 1.947.

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<sup>19</sup> See generally Reexamination Control No. 95/000,276.

<sup>20</sup> Decision Dismissing Petition, Reexamination Control No. 95/000,276, at 4–5 (Sep. 24, 2008).



petitioning for a suspension of the rules under 37 C.F.R. 1.183.

Often a patent owner may wish to request both a page limit extension and an extension of time. But it is important to not combine these two requests in one petition, since a petition must be directed to a single issue. Combining the requests will result in the petition being refused consideration.<sup>25</sup>

#### **10. Consider Whether to File a Cross-Appeal in Inter Partes Reexamination**

Arguments that are not raised on appeal are deemed to be waived and will not be considered by the Board.<sup>26</sup> For this reason, the party who ultimately “won” before the examiner may want to file a cross-appeal for any issues where it lost. An example of why a cross-appeal may be necessary is in Reexamination Control No. 95/000,006 of U.S. Patent No. 6,357,595. The patent claims a tray for holding integrated circuits, especially circuits packaged in a ball grid array. The tray includes angled walls that support the integrated circuit without making any contact with the electrical contacts of the ball grid array.

The reexamination requester proposed three separate rejections of independent claim 1. The examiner adopted one of the proposed rejections, but not the other two. The patent owner appealed to the BPAI, and the requester filed a Respondent brief. Although the requester argued that the other two rejections should have been made, it did not file a cross-appeal of the examiner’s decision not to adopt the other two proposed rejections. So the Board treated the appeal as being limited to the rejection actually entered by the examiner – a rejection that the board reversed. But the requester’s failure to cross-appeal the other rejections was ultimately harmless because the Board used its authority to enter a new ground of rejection to impose one of the two non-appealed rejections.

Procedurally, the Board’s decision to enter a new ground of rejection is treated the same as a decision that reverses an examiner who declined to enter a rejection.<sup>27</sup> The parties’ positions would have been the same if the requester had filed a cross-appeal and prevailed in getting the same rejection adopted by the Board. But if the Board had not used its authority to enter the new ground of rejection, however, the

outcome of the case could have been quite different.

#### **IV. CONCLUSION**

Patent reexamination continues to provide an important check on the overall quality of the patent system. If recent history is any guide, patent owners and defendants will continue to expand their use of ex parte and inter partes reexamination as a practical and effective tool for investigating patent validity.

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<sup>25</sup> See Decision Dismissing Petition, Reexamination Control No. 95/000,351 (Jul. 2, 2008).

<sup>26</sup> 37 C.F.R. §§ 41.67(c)(1)(vii) & 41.68(a)(3).

<sup>27</sup> See 37 C.F.R. § 41.77(b).



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Ex Parte Reexamination Filing Data - March 31, 2009

1.	Total requests filed since start of <i>ex parte</i> reexam on 07/01/81.....	9893 <sup>1</sup>	
	a. By patent owner	3603	36%
	b. By other member of public	6125	62%
	c. By order of Commissioner	165	2%
2.	Number of filings by discipline		
	a. Chemical Operation	2873	29%
	b. Electrical Operation	3404	34%
	c. Mechanical Operation	3456	35%
	d. Design Patents	160	2%
3.	Annual Ex Parte Reexam Filings		
	Fiscal Yr. No.	Fiscal Yr. No.	Fiscal Yr. No.
	1981 78 (3 mos.)	1989 243	1997 376
	1982 187	1990 297	1998 350
	1983 186	1991 307	1999 385
	1984 189	1992 392	2000 318
	1985 230	1993 359	2001 296
	1986 232	1994 379	2002 272
	1987 240	1995 392	2003 392
	1988 268	1996 418	2004 441
4.	Number known to be in litigation.....	2992	30%
5.	Decisions on requests .....	9525	
	a. No. granted.....	8754	92%
	(1) By examiner	8641	
	(2) By Director (on petition)	113	
	b. No. denied .....	771	8%
	(1) By examiner	736	
	(2) Reexam vacated	35	

<sup>1</sup>Of the requests received in FY 2009, 26 requests have not yet been accorded a filing date, and preprocessing of 12 requests was terminated for failure to comply with the requirements of 37 CFR 1.510. See Clarification of Filing Date Requirements for *Ex Parte* and *Inter Partes* Reexamination Proceedings, Final Rule, 71 Fed. Reg. 44219 (August 4, 2006).

6.	Total examiner denials (includes denials reserved by Director).....	849		
a.	Patent owner requester	444	52%	
b.	Third party requester	405	48%	
7.	Overall reexamination pendency (Filing date to certificate issue date)			
a.	Average pendency	24.8 (mos.)		
b.	Median pendency	19.3 (mos.)		
8.	Reexam certificate claim analysis:	Owner Requester	3 <sup>rd</sup> Party Requester	Comm'r Initiated
				Overall
a.	All claims confirmed	22%	27%	12%
b.	All claims cancelled	8%	13%	21%
c.	Claims changes	70%	60%	67%
9.	Total ex parte reexamination certificates issued (1981 – present) .....	6743		
a.	Certificates with all claims confirmed	1681	25%	
b.	Certificates with all claims canceled	756	11%	
c.	Certificates with claims changes	4306	64%	
10.	Reexam claim analysis – requester is patent owner or 3 <sup>rd</sup> party; or Comm'r initiated.			
a.	Certificates – PATENT OWNER REQUESTER .....	2790		
	(1) All claims confirmed	619	22%	
	(2) All claims canceled	228	8%	
	(3) Claim changes	1943	70%	
b.	Certificates – 3 <sup>rd</sup> PARTY REQUESTER .....	3806		
	(1) All claims confirmed	1044	27%	
	(2) All claims canceled	497	13%	
	(3) Claim changes	2265	60%	
c.	Certificates – COMM'R INITIATED REEXAM .....	147		
	(1) All claims confirmed	18	12%	
	(2) All claims canceled	31	21%	
	(3) Claim changes	98	67%	



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*Inter Partes* Reexamination Filing Data - March 31, 2009

1.	Total requests filed since start of <i>inter partes</i> reexam on 11/29/99.....	609 <sup>1</sup>																																	
2.	Number of filings by discipline																																		
	a. Chemical Operation	139	23%																																
	b. Electrical Operation	242	39%																																
	c. Mechanical Operation	217	36%																																
	d. Design Patents	11	2%																																
3.	Annual Reexam Filings																																		
	<table><tr><td><u>Fiscal Yr.</u></td><td><u>No.</u></td><td><u>Fiscal Yr.</u></td><td><u>No.</u></td><td><u>Fiscal Yr.</u></td><td><u>No.</u></td><td><u>Fiscal Yr.</u></td><td><u>No.</u></td></tr><tr><td>2000</td><td>0</td><td>2003</td><td>21</td><td>2006</td><td>70</td><td>2009</td><td>133 YTD</td></tr><tr><td>2001</td><td>1</td><td>2004</td><td>27</td><td>2007</td><td>126</td><td></td><td></td></tr><tr><td>2002</td><td>4</td><td>2005</td><td>59</td><td>2008</td><td>168</td><td></td><td></td></tr></table>	<u>Fiscal Yr.</u>	<u>No.</u>	<u>Fiscal Yr.</u>	<u>No.</u>	<u>Fiscal Yr.</u>	<u>No.</u>	<u>Fiscal Yr.</u>	<u>No.</u>	2000	0	2003	21	2006	70	2009	133 YTD	2001	1	2004	27	2007	126			2002	4	2005	59	2008	168				
<u>Fiscal Yr.</u>	<u>No.</u>	<u>Fiscal Yr.</u>	<u>No.</u>	<u>Fiscal Yr.</u>	<u>No.</u>	<u>Fiscal Yr.</u>	<u>No.</u>																												
2000	0	2003	21	2006	70	2009	133 YTD																												
2001	1	2004	27	2007	126																														
2002	4	2005	59	2008	168																														
4.	Number known to be in litigation.....	382.....	63%																																
5.	Decisions on requests .....	532																																	
	a. No. granted .....	503 .....	95%																																
	(1) By examiner	502																																	
	(2) By Director (on petition)	1																																	
	b. No. not granted.....	29.....	5%																																
	(1) By examiner	25																																	
	(2) Reexam vacated	4																																	
6.	Overall reexamination pendency (Filing date to certificate issue date)																																		
	a. Average pendency	33.7 (mos.)																																	
	b. Median pendency	30.8 (mos.)																																	
7.	Total <i>inter partes</i> reexamination certificates issued (1999 - present) .....	55																																	
	a. Certificates with all claims confirmed	4	7%																																
	b. Certificates with all claims canceled (or disclaimed)	40	73%																																
	c. Certificates with claims changes	11	20%																																

<sup>1</sup>Of the requests received in FY 2009, 20 requests have not yet been accorded a filing date, and 7 requests have had preprocessing terminated, for failure to comply with the requirements of 37 CFR 1.915. See Clarification of Filing Date Requirements for *Ex Parte* and *Inter Partes* Reexamination Proceedings, Final Rule, 71 Fed. Reg. 44219 (August 4, 2006).