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Subject: Comments of the Antitrust Division, U.S. Dep't of Justice

Attached

Please find attached Comments of the Antitrust Division, United States Department of Justice on Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims, 71 Fed. Reg. 48 (Jan. 3, 2006); and Changes to Practice for the Examination of Claims in Patent Applications, 71 Fed. Reg. 61 (Jan. 3, 2006). A hard copy will follow via Federal Express.

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Before the  
United States Department of Commerce  
Patent and Trademark Office

In the Matter of  
Changes to Practice for Continuing Applications, Requests for Continued Examination Practice,  
and Applications Containing Patentably Indistinct Claims; and Changes to Practice for the  
Examination of Claims in Patent Applications

Docket Nos. 2005-P-066, 2005-P-067

Comments of the Antitrust Division  
United States Department of Justice

May 3, 2006

The U.S. Patent and Trademark Office (“the PTO” or “the Office”) issued Federal Register Notices on January 3, 2006 proposing certain changes to the rules patent applicants must follow to have a patent issued by the PTO.<sup>1</sup> These proposed changes affect claims examination, continued examination practice,<sup>2</sup> and the patentability of indistinct claims. The Antitrust Division of the U.S. Department of Justice, whose mission it is to protect and promote competition, offers these comments in support of the PTO’s proposed changes.

A dramatic increase in patent application filings in recent years has created a significant backlog in resolving patent applications.<sup>3</sup> Under Secretary Dudas recently testified that “[i]n fiscal year 2005, [the PTO] received over 400,000 patent applications – an eight percent increase over the previous year.”<sup>4</sup> He also noted, “the complexity of patent applications is growing. A greater percentage is now filed in more complex areas such as biotech and telecommunications. These require many more hours to examine than traditional areas . . . [s]o [the] number of hours

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<sup>1</sup> Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims, 71 Fed. Reg. 48 (Jan. 3, 2006) (to be codified at 37 C.F.R. pt. 1); Changes to Practice for the Examination of Claims in Patent Applications, 71 Fed. Reg. 61 (Jan. 3, 2006) (to be codified at 37 C.F.R. pt. 1).

<sup>2</sup> Continued examination practice may involve the use of a continuation application, a request for continued examination, or a continuation-in-part application. See 71 Fed. Reg. 48; MANUAL OF PATENT EXAMINING PROCEDURES §§ 201.07, 201.08, 706.07(h) (8th ed. rev. 2005). A continuation application is a second application for the same invention claimed in an earlier-filed parent application, which claims the benefit of that earlier application’s filing date pursuant to 35 U.S.C. § 120. See 37 C.F.R. § 1.78 (2005); MANUAL OF PATENT EXAMINING PROCEDURES § 201.07. Alternatively, an applicant may file a “request for continued examination” in lieu of a continuation application, see 35 U.S.C. § 132(b) (2000), after the prosecution of the application is closed. 37 C.F.R. § 1.114 (2005); MANUAL OF PATENT EXAMINING PROCEDURES § 706.07(h). A continuation-in-part application includes additional subject matter not in the parent application, and may still claim the benefit of the parent’s earlier filing date, however, any new matter will be evaluated as of the date the continuation-in-part application is filed. MANUAL OF PATENT EXAMINING PROCEDURES § 201.08. We refer to these alternatives collectively as “continuations” or more generally as “continued examination practice.”

<sup>3</sup> *Patent Quality Enhancement in the Information Based Economy: Hearing Before the H. Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 2 (2006) (statement of Hon. Jon W. Dudas, Under Secretary of Commerce for Intellectual Property & Director of the U. S. Patent and Trademark Office) [hereinafter Dudas Testimony], available at <http://judiciary.house.gov/media/pdfs/dudas040506.pdf>.

<sup>4</sup> *Id.*

needed to examine the average application filed is increasing as well.”<sup>5</sup> The Office’s backlog also is in part due to the frequent filing of continuations and duplicative applications that divert PTO examining resources from new applications.<sup>6</sup> Consequently, the PTO has concluded that policy and operational changes are crucial to lessening the Office’s backlog.<sup>7</sup>

During hearings on *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*,<sup>8</sup> which the Division held jointly with the U.S. Federal Trade Commission in 2002, commentators made clear that problems associated with patent prosecution create uncertainty in the marketplace and increase the risks associated with innovation.<sup>9</sup> The proposed rule changes are directed toward improving patent quality, reducing the Office’s backlog, and preventing abuses common to the current system. The Antitrust Division expects that the changes will improve confidence in U.S. patents, potentially having a net positive effect on competition and innovation.

## I. Background

Current PTO continued examination practice and claims examination practice is making patent prosecution less efficient than it could be, and problems associated with current practice

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<sup>5</sup> *Id.*

<sup>6</sup> 71 Fed. Reg. at 49.

<sup>7</sup> Dudas Testimony at 2.

<sup>8</sup> *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy* (2002), <http://www.usdoj.gov/atr/hearing.htm>.

<sup>9</sup> *See, e.g.*, Feb. 28 Hr’g Tr., *Business Perspectives on Patents: Hardware and Semiconductors* at 696 (Fox) [hereinafter Feb. 28 Tr.], <http://www.ftc.gov/opp/intellect/0228ftc.pdf>; Mar. 20, 2002 Hr’g Tr., *Business Perspectives on Patents: Hardware and Semiconductors* at 37 (McCurdy), <http://www.ftc.gov/opp/intellect/020320trans.pdf>; *see also* Apr. 10 Hr’g Tr., *Patenting Procedures, Presumptions and Uncertainties* at 138-39 (Thomas) (describing “strategic” use of continuation applications and double patenting) [hereinafter Apr. 10 Tr.], <http://www.ftc.gov/opp/intellect/020410trans.pdf>; FEDERAL TRADE COMM’N, *TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY* (2003) ch. 4, at 26-31 (discussing problems associated with continuation practice) [hereinafter *FTC INNOVATION REPORT*], <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; NAT’L RESEARCH COUNCIL, *A PATENT SYSTEM FOR THE 21ST CENTURY* 65-66 (Stephen A. Merrill et al., eds., 2004) (indicating delays in patent prosecution or litigation can negatively affect innovation incentives) [hereinafter *A PATENT SYSTEM FOR THE 21ST CENTURY*].

are creating opportunities for applicants to unduly benefit from the patent prosecution system.

A. *Continued Examination Practice*

Under present Office practice, applicants have two formal communications, known as “Office Actions,” through which a patent applicant may urge the patent examiner to allow the application’s claims.<sup>10</sup> If the applicant is unsuccessful on second examination, the examiner’s rejection will become final. At this point, the applicant may choose to abandon his application altogether, file a continuation, or appeal the examiner’s rejection to the Board of Patent Appeals and Interferences.<sup>11</sup> In many cases, the applicant will file a continuation.

Using continuations, the applicant can further prosecute previously-rejected claims, which provides two additional chances to persuade the examiner to allow the claims; alternatively, the applicant may modify the claims so that they meet the requirements of the patent statute.<sup>12</sup> The applicant may also file a continuation even if the examiner allows the claims, enabling the applicant to file additional or broader claims.<sup>13</sup> The continuation receives the benefit of the earliest filing date in a series of applications, provided that the invention it recites was adequately disclosed in the earlier applications.<sup>14</sup> Retaining the earliest filing date allows the applicant to avoid having public disclosures, or other prior art from the intervening time period, defeat the patentability of the claims.

Currently, there is no limit on the number of continuations an applicant may file and still claim the benefit of the parent application’s initial filing date. The rule changes still permit multiple opportunities to argue for allowance or to pursue additional claims. After one continuation, however, second and subsequent filings for continued examinations require “a showing to the satisfaction of the Director that the amendment, argument, or evidence could not

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<sup>10</sup> See 37 C.F.R. §§ 1.104, 1.111, 1.113 (2005); see also Feb. 8 Hr’g Tr., Patent Law for Antitrust Lawyers at 101 (Chambers) [hereinafter Feb. 8 Tr.], <http://www.ftc.gov/opp/intellect/020208intelpropertytrans.pdf>. See generally MANUAL OF PATENT EXAMINING PROCEDURES § 700.

<sup>11</sup> 37 C.F.R. §§ 1.113, 1.114, 41.31 (2005).

<sup>12</sup> See, e.g., Feb. 8 Tr. at 101-02 (Chambers).

<sup>13</sup> *Id.* at 103-04 (Chambers); see also Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B. U. L. REV. 63, 68 (2004) (describing reasons to file a continuation after allowance).

<sup>14</sup> See, e.g., MANUAL OF PATENT EXAMINING PROCEDURES § 201.11.

have been submitted prior to the close of prosecution in the application,”<sup>15</sup> or with respect to continuation applications, “during the prosecution of the prior-filed application.”<sup>16</sup>

The proposed rule changes also place limitations on the strategic use of continuation-in-part applications<sup>17</sup> and divisional applications,<sup>18</sup> and seek to avoid double patenting by: (1) requiring the applicant to disclose all related applications and (2) applying a rebuttable presumption that claims in different patent applications filed by a common inventor, a common assignee, on the same date, and with overlapping disclosures are patentably indistinct claims.<sup>19</sup>

#### B. *Claims Examination Practice*

Under current procedures for patent prosecution, a patent examiner will consider all the claims of the patent application.<sup>20</sup> The proposed rule limits the initial examination to ten representative claims chosen by the applicant. The changes also allow the applicant to request examination of more than ten claims if he submits an examination support document,<sup>21</sup> and thus, bear some of the burden of gathering the information necessary to evaluate the patentability of the claims.<sup>22</sup> If the examiner determines that the representative claims of an application are

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<sup>15</sup> 71 Fed. Reg. at 56, 61, 37 C.F.R. § 1.114(f) (proposed).

<sup>16</sup> 71 Fed. Reg. at 53-54, 59, 37 C.F.R. § 1.78(d)(1)(iv) (proposed). The changes will be applicable to any application in which a continuation is filed on or after the effective date of the final rule. 71 Fed. Reg. at 56.

<sup>17</sup> *E.g.*, 37 C.F.R. § 1.78(d)(3) (proposed) (requiring the applicant to identify which claims in the continuation-in-part application are disclosed in the previously-filed application).

<sup>18</sup> *E.g.*, 37 C.F.R. § 1.78(d)(1)(ii) (proposed) (limiting divisional applications to involuntary applications filed after a restriction or lack of unity requirement).

<sup>19</sup> 37 C.F.R. § 1.78(f)(1) & (2) (proposed). *See generally* 71 Fed. Reg. at 58-61.

<sup>20</sup> 71 Fed. Reg. at 62.

<sup>21</sup> An “examination support document” is similar to a statement required for accelerated examination, requiring *inter alia*, a statement that a preexamination search was conducted, an information disclosure statement concerning related references, identification of limitations disclosed by the cited references, a patentability statement, a utility statement, and a showing of how the claim limitations are supported by the written description of the invention. 71 Fed. Reg. at 68-69, 37 C.F.R. § 1.261 (new section proposed).

<sup>22</sup> 71 Fed. Reg. at 67, 37 C.F.R. § 1.75(b) (proposed).

patentable, all the other claims of the application will be examined.<sup>23</sup>

The rule changes also permit the Office to require elimination of patentably indistinct claims from all but one of an applicant's patent applications.<sup>24</sup>

C. *Problems with Current Office Practice*

The PTO identifies several problems with current Office practice in its notices of proposed rulemaking, including: (1) patent examination is being impeded by applications with many claims and by applicants that over rely on continued examination practice, diverting scarce PTO resources from new applications and contributing to the Office's significant backlog of unexamined applications; (2) current practice is less efficient than it could be because it requires an initial patentability examination of every claim in the application, even though the patentability of dependent claims stands or falls together with independent claims; (3) the delays inherent in continued examination practice interfere with the public notice function of patent claims in the initial application; (4) the quality of exchange between applicant and examiner diminishes in applications with large strings of continuations; and (5) current continued examination practice allows applicants to capture developments in similar or parallel technologies already in the marketplace.<sup>25</sup>

## II. Discussion

Delays in patent prosecution or issuance create uncertainty in the marketplace that can be harmful to innovation. A recent report by the National Academies, *A Patent System for the 21st Century*, concluded, "if decisions about whether a patent will be allowed or upheld in a dispute, are delayed, or if the costs associated with those decisions are very high, that alone may tip the balance against investing in innovation."<sup>26</sup> Delays in patent issuance are particularly problematic

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<sup>23</sup> 71 Fed. Reg. at 62.

<sup>24</sup> 71 Fed. Reg. at 68, 37 C.F.R. § 1.75(b)(4) (proposed). The new requirements would apply to applications filed on or after the effective date of the new rule, as well as to any applications on which a First Office Action has not been mailed. 71 Fed. Reg. at 66.

<sup>25</sup> 71 Fed. Reg. at 48-49; 71 Fed. Reg. at 61-62.

<sup>26</sup> A PATENT SYSTEM FOR THE 21ST CENTURY at 65. The Office has an average of 21.1 months to take the First Office Action on an application, and 29.1 months to issue a final decision. Dudas Testimony at 2. The NAS Report indicates that pendency is higher for more complex areas, such as biotechnology. A PATENT SYSTEM FOR THE 21ST CENTURY at 66; *see also* James Toupin, Gen. Counsel,

in some industries where product life cycles are short and new advances can soon make a technology obsolete.<sup>27</sup> The proposed changes to claims examination are designed to promote more focused examination and to reduce delay.<sup>28</sup> Although the proposed changes will not eliminate the Office's backlog,<sup>29</sup> the changes will likely help to alleviate some of the problem. The changes can also help conserve scarce PTO resources by requiring the few patent applicants that file an unusually high number of claims to shoulder part of the examination burden, which presently is entirely on the examiner.<sup>30</sup> These changes could also curtail strategic behavior by discouraging the filing of an unreasonably large number of claims to prompt a restriction.<sup>31</sup> Moreover, no patent claim will issue without a complete examination; remaining claims are

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U. S. Patent & Trademark Office, *The State of the Patent System: Background for Rule Proposals*, PTO Presentation, Los Angeles Intellectual Property Law Association "Washington and West" Conference 4-6 (Jan. 25, 2006) (describing patent pendency by technology area) [hereinafter *Toupin Presentation*], <http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/laiplabackground.ppt>.

<sup>27</sup> See FTC INNOVATION REPORT, ch. 3, at 45; Robert Barr, *Statement* (Feb. 28 2002 Hr'g R.) at 2 ("In an industry where healthy competition makes time to market critical, and the pace of innovation is so rapid, [three to four years is] a long time to wait for a patent. Too long.") [hereinafter *Barr Statement*], <http://www.ftc.gov/opp/intellect/barrobert.doc>.

<sup>28</sup> See 71 Fed. Reg. at 61; see also Robert Spar, Director, Office of Patent Admin., U.S. Patent and Trademark Office, *Changes to Practice for the Examination of Claims in Patent Applications*, PTO Presentation, Los Angeles Intellectual Property Law Association "Washington and West" Conference 2 (Jan. 25, 2006), [http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/laiplaclaims\\_npr\\_1\\_19\\_06.ppt](http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/laiplaclaims_npr_1_19_06.ppt).

<sup>29</sup> For example, very few patent applications have more than ten independent claims. 71 Fed. Reg. at 62 ("[T]his proposal will allow for the examination of every independent claim in 98.8 percent of applications filed since January 1, 2005 . . ."). Moreover, few applications seek second and subsequent continuations. 71 Fed. Reg. at 50 (indicating 10,000 out of 52,000 requests for continued examination filed in fiscal year 2005 were second or subsequent continuation/CIP applications).

<sup>30</sup> 71 Fed. Reg. at 67, 37 C.F.R. § 1.75(b)(1) (proposed) (requiring an examination support document); see also Dudas Testimony at 5 ("Every year, a small number of applications are filed with an extraordinary number of claims.").

<sup>31</sup> See Oct. 30, 2002 Hr'g Tr., *Competition, Economic, and Business Perspectives on Substantive Patent Law Issues: Non-Obviousness and Other Patentability Criteria* at 178 (Myrick) ("[P]eople will rapidly learn to game the system by filing [applications] that are quite omnibus and knowing full well that the [the PTO will impose a restriction], and then allowing those cases to proceed over years and years . . . so they can be adjusted along the way and so forth.") [hereinafter *Oct. 30 Tr.*], <http://www.ftc.gov/opp/intellect/021030trans.pdf>.

merely held in abeyance until representative claims are ready for allowance, ensuring that all claims are adequately reviewed.<sup>32</sup>

The proposed rule changes should help prevent potential abuses during patent prosecution. The Office has indicated that a significant portion of an examiner's time is spent reviewing previously-filed applications.<sup>33</sup> There are legitimate reasons for filing continuations, e.g., to amend a claim in light of an examiner's evidence and arguments in order to more accurately describe the bounds of an invention,<sup>34</sup> but some may be using continuations to engage in strategic behavior.<sup>35</sup> The most notorious example of strategic behavior is the case of Jerome Lemelson, whose continuation applications concerning machine vision and automatic identification bar code technology were maintained before the PTO for more than 38 years.<sup>36</sup> After his patents issued, Lemelson, and subsequently the Lemelson Foundation, enforced the patents against companies that used this now ubiquitous technology.<sup>37</sup> Many years later, the U.S. Court of Appeals for the Federal Circuit found that Lemelson's strategic behavior during patent prosecution resulted in prosecution laches, which prevents a patent's enforcement when the patentee unreasonably delays prosecution.<sup>38</sup>

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<sup>32</sup> 71 Fed. Reg. at 62.

<sup>33</sup> Dudas Testimony at 5 ("In fiscal year 2005, more than 85,000 of the USPTO's 400,000 new patent applications were a continued prosecution of an application that has previously been before an examiner in the examination process.").

<sup>34</sup> An applicant might also discover additional evidence in subsequent testing that supports patentability, which he can introduce using a continuation. *See also* FTC INNOVATION REPORT, ch. 4, at 27-28 (describing legitimate reasons for continued examination practice).

<sup>35</sup> Some argue that continuation practice also wears down the examiner, encouraging the issuance of questionable claims. Lemley & Moore, 84 B. U. L. REV. at 74-76.

<sup>36</sup> *See Symbol Techs. Inc. v. Lemelson Med., Educ. & Research Found.*, 422 F.3d 1378 (Fed. Cir. 2005); Lemley & Moore, 84 B.U. L. REV. at 76-77 & n.48.

<sup>37</sup> *See* Brenda Sandburg, *Lemelson Patents Ruled Unenforceable*, THE RECORDER (Sept. 13, 2005), available at <http://www.law.com/jsp/printerfriendly.jsp?c=LawArticle&t=PrinterFriendlyArticle&cid=112652852421> 1.

<sup>38</sup> *See Symbol Techs.*, 422 F.3d at 1385 ("[P]rosecution laches may render a patent unenforceable when it has issued only after an unreasonable and unexplained delay in prosecution.") (citing *Symbol Techs. Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1363, 1368 (Fed. Cir. 2002)).

*Ex ante* deterrents are needed as well. One such deterrent is the publication of most pending applications after 18 months, *see* 35 U.S.C. § 122(b), which gives firms notice of the invention that the applicant is attempting to claim. But publication does not entirely solve the problems associated with the uncertainty of patent coverage.<sup>39</sup> Delays at the PTO perpetuate uncertainty “by keeping eventual coverage of the patents indefinite” while firms continue to produce goods that could potentially infringe the claims that issue.<sup>40</sup> The proposed changes to continued examination practice should help to deter applicants from strategically using that practice to disadvantage competitors, or their licensees, that are providing desirable goods or services to consumers.<sup>41</sup> Discouraging strategic behavior during patent prosecution has the potential to alleviate some of the uncertainty that can negatively affect innovation and competition.<sup>42</sup> We recognize that continuations of patent applications serve an important role, and the proposed changes preserve opportunities to file continuations. Applicants may file second and subsequent continuations, upon showing that “the amendment, argument, or evidence could not have been submitted prior to the close of prosecution in the application” or “during the

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<sup>39</sup> Barr Statement at 1 (“[E]ven early publication does not solve the problem, because of the uncertainty about the claims that will issue.”); Feb. 28 Tr. at 692-93 (Poppen) (“[T]here are current exceptions [to publication] that are problematic because not everyone ha[s] to publish. . . . [P]ublication [does not] necessarily indicate the scope of the ultimate claims.”); Apr. 10 Tr. at 193 (Katsh) (“As long as there’s the potential for continuations, [or] divisionals that are not going to be published until their months are up, you’re still dealing with an unknown period of uncertainty as to what additional claims are going to be sought.”); *see also* Apr. 10 Tr. at 192 (Thomas) (indicating that 18 month publication does not add to certainty because “it simply discloses what was already available from foreign patent offices”).

<sup>40</sup> Feb. 28 Tr. at 680 (Barr); *see also* Barr Statement at 2 (noting delay is 3 to 4 years in some technologies).

<sup>41</sup> Intentionally seeking patent protection for inventions currently in the marketplace, however, does not render the patent unenforceable. *Kingsdown Med. Consultants v. Hollister Inc.*, 863 F.2d 867, 874 (Fed. Cir. 1988).

<sup>42</sup> Panelists representing industry perspectives at the IP Hearings were generally in favor of changes to PTO practice that would curtail such abuses. *See, e.g.*, Feb. 28 Tr. at 715-16 (Mar-Spinola) (“[T]here is room in the Patent Office to create [regulations] that would prohibit [abuses of continuation practice].”); Feb. 28 Tr. at 687-88 (Poppen) (questioning whether as a matter of policy manipulation of the process should be allowed); Apr. 10 Tr. at 139 (Katsh) (“[T]he extent to which the system encourages tricks and techniques is something that should be dealt with.”); *see also* Oct. 30 Tr. at 177-81 (Myrick) (describing the problems associated with continued examination practice and indicating “there is no easy solution”).

prosecution of the prior-filed application.”<sup>43</sup>

In addition, the changes could provide increased certainty as to the scope of patent rights if, as the Office expects, adoption of the changes results in greater attention to new applications, less delay in the amount of time to First Office Action, and the quicker resolution of existing applications. Greater certainty regarding patent rights could raise incentives to engage in procompetitive licensing arrangements and facilitate the flow of information to the licensee.<sup>44</sup> Moreover, greater certainty may lead to a reduction in litigation over the scope of patents rights, thereby focusing resources on more procompetitive activity, such as research and development, which may increase both incremental and leap-frog innovation.

### **III. Conclusion**

The Antitrust Division believes that the PTO’s proposed changes are likely to improve the efficiency of the patent examination process and should discourage potential abuses of that process. Thus, they have the potential to stimulate innovation, enhance competition, and increase consumer welfare.

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<sup>43</sup> 71 Fed. Reg. at 53-54, 56, 59, 61, 37 C.F.R. §§ 1.114(f) (proposed), 1.78(d)(1)(iv) (proposed). Although the changes to continued examination practice may increase the number of appeals to the PTO’s Board of Patent Appeals and Interferences, the Office has taken measures to ensure that the appeals process moves swiftly. *See, e.g.*, Toupin Presentation at 11 (indicating reductions in inventory and time to decision, and discussing appeal conference initiatives).

<sup>44</sup> *See* Joshua S. Gans, David H. Hsu & Scott Stern, *The Impact of Uncertain Intellectual Property Rights on the Market for Ideas: Evidence from Patent Grant Delays* (Working Paper, Apr. 2006) 23-24 (“Reducing delays in the patent system would allow for earlier resolution of uncertainty, which should provide efficiency gains in the market for ideas.”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=895601](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895601).