

Michelle K. Lee, Lisa K. Jorgenson: Their Big Challenge

Michelle K. Lee stands on the cusp of formal nomination and Senate approval as the next Under Secretary of Commerce to lead the Patent Office. Lisa K. Jorgenson is the new Executive Director of the AIPLA, the first person in decades to lead the organization coming directly from a major corporate leadership position.

Each has a leadership role to play in the major crisis at the Patent Office: How to fix an out of control refiling problem that has resulted in a *continued* million plus backlog of pending applications during the Obama Administration *despite* an annual budget that has swollen during that period by a *billion dollars per year* and a bloated examiner corps now in excess of *eight thousand* examiners (up from just over six thousand – a jump of *two thousand* examiners).

The root problem is that nearly fifty percent of all applications are *retreaded* applications, RCE's or applications under 35 USC § 120. The solution if implemented will instantly solve the problem: Examiners should no longer be given "count" (production) credit for application refiles.

Under Secretary Lee and Executive Director Jorgenson each has the opportunity to play unique roles in solving the problem. Indeed, their success in their new positions may well be measured by how they tackle and solve their challenge.

The Problem: The biggest ongoing scandal at the U.S. Patent and Trademark Office is the failure of the examiners' union – POPA – to reduce the number of refiled applications following its historic agreement with Management in 2009 when there was a slight adjustment in production "counts". At the time, it was projected that RCE refilings (30 % in 2009) would drop to roughly two-thirds that level by 2015.[*]

[*] The "Patent Pendency Model" that was issued contemporaneously with the agreement projected that RCE's would account for 21.0 % of all applications by the year 2015. See "Patent Pendency Model", *available at* "http://www.uspto.gov/patents/stats/patent_pend_model.jsp

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Instead, the overall rate of refilings has ballooned to nearly half of all filings (or 46 % including refilings under 35 USC § 120). As a result of refilings, despite an increase in the annual Patent Office budget by roughly *one billion dollars* and a bloated examiner corps of eight thousand (8000) (up from just over six thousand at the start of the Obama Administration), the one million plus application backlog at the start of the Obama Administration *remains at a total of one million plus applications*.

The Solution: The answer is quite clear and simple, once a single reform is implemented.

Examiner production should be measured by the total number of *final dispositions* of applications through allowances plus abandonments *without counting RCE's or refiles*. Without this reform some examiners will continue to issue arbitrary, premature final rejections, refuse to cooperate in interviews (or sometimes even refuse to schedule interviews) and, above all, promise to deny a patent until an application is refiled. Such behavior is *rewarded* by the current policy which gives a substantial "count" credit for refiles.

Whither Applicant Bad Actors? There certainly is basis to criticize some applicant actions that have contributed to the rise in refiles. This is a separate matter which the new AIPLA Executive Director, Lisa K. Jorgenson – given her great *in house* experience and skills within the AIPLA – should face as her first major leadership challenge.

This note has focused upon the challenges that Ms. Lee faces which must be the first area for reform.

Stay tuned for ways that Ms. Jorgenson can play a vital role in this reform.

Regards,

Hal

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