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Via reginfo.gov submission, and via email InformationCollection@uspto.gov

Nicholas A. Fraser, Desk Officer
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
725 17th St. NW
Washington D.C. 20503

Kimberly Hardy
Office of Chief Administrative Officer
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313

Re: 0651-0069 information request, ICR Ref. 202202-0651-001, *Patent Review and Derivation Proceedings*, 30-day notice at 87 Fed. Reg. 10343 (Feb. 24, 2022)

Dear Mr. Fraser and Ms. Hardy:

This ICR appears to have neglected to inventory an information collection of about $10-$15 million per year. This is a new information collection in the last 9 months. Because of imprecision in the Supporting Statement, it's impossible to tell whether this is an imprecision in the PTO's inventory, or whether the information collection is entirely omitted. In either event, Control Number 0651-0069 should be given a month-to-month clearance, so that the PTO can either provide a more-precise Supporting Statement, or can observe the requirements of 5 C.F.R. § 1320.8, .9, .10, .11, and/or .12 for a new information collection. The public should not be left in doubt as to whether certain information collections are or are not cleared, and should not be subject to rules governing an information collection for which the PTO has no clearance.

This ICR covers two trial-type proceedings that occur before the Patent Trial and Appeal Board (PTAB), one of the two trial-type Boards within the Patent and Trademark Office (PTO). In June 2021, the Supreme Court decided *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 594 U.S. ___ (2021). *Arthrex* held that the Constitutional Appointments Clause was violated if the PTAB's decisions were the last word in the executive branch; instead, the PTO would be required to provide one further layer of review by the Director personally (the Director is Presidentially-appointed and Senate confirmed, so the Director *can* constitutionally be the last word in the executive branch.

To implement *Arthrex*, the PTO issued a web page[1] specifying rules and information collections to be embodied in Director review. The PTO has never published *any* notice in the Federal Register relating to Director review. The PTO stands in violation of the rulemaking requirements of 5 U.S.C. §§ 552(a)(1)(B) and (C), 553(b)[2], (c) and (d), 603, 604, 35 U.S.C. §§ 316(a)(4) and 326(a)(4), and 44 U.S.C. § 3507(a)(1)(D). And of course, since there were no Federal Register notices, the PTO has never requested comment as required by § 3506(c)(2)(B), has not offered the certifications of § 3506(c)(3), and has not made the submissions to OIRA required by § 3507(a)(1)(C). The PTO's Director review web page does not inform the public as required by § 3506(c)(1)(B)(iii).

Extrapolating from a public database (http://portal.unifiedpatents.com) it appears that there will be 250-400 of these Director reviews filed in FY2022.

Perhaps Director review is embedded in line item 6 of the Supporting Statement:

6	Request for Rehearing	35 U.S.C. §§ 2(b)(2), 16(a)(13), and 326(a)(12)	37 CFR 42.71

6	Request for Rehearing	No Form Associated	• Used by the parties to request the Board or the Director to reconsider the decision not to institute a trial or another decision. • Used by the Board or the Director to review the original decision to not institute a trial or another decision.

6	Request for Rehearing	350	1	350	80	28,000	$435	$12,180,000
6	Request for Rehearing	1	1	1	80	80	$435	$34,800

If so, that reflects imprecise inventorying, in violation of § 3506(c)(1)(B). Director review does not arise under 35 U.S.C. § 2(b)(2), 316(a)(13), or 326(a)(12). Director review is not covered within the literal terms of 37 C.F.R. § 42.71. The web page provides that Director review is only

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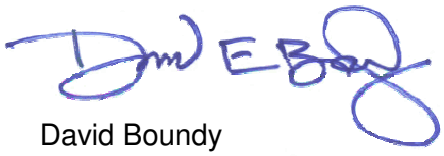
[1] U.S. Patent and Trademark Office, Arthrex Q&As, https://www.uspto.gov/patents/patent-trial-and-appeal-board/procedures/arthrex-qas This page has been updated several times since its initial s

[2] Some of the rules on the web page classify as "substantive" under the Administrative Procedure Act (for example, standards of review and burdens of proof are classified as "substantive"). The PTO's neglect to promulgate them via proper rulemaking Is difficult to explain.

available for reconsideration of a final written decision, and not for "reconsideration of the decision not to institute a trial" or any other interlocutory decision. At the very least, the PTO's inventory is so imprecise that the public cannot ascertain which information collections are cleared, and which are not.

From the spare information the PTO provides, it seems more likely that Director review is simply omitted. The numbers for line 6 in the February 2022 Supporting Statement are only about 9% larger than line item 6 in the November 2018 Supporting Statement; it seems highly unlikely that a new procedure would lead to only a 9% increase in total responses. And 350 seems implausibly low as the number of responses for an entire class, when Director review alone is likely 250-400 responses all by itself.

The PTO should be given a month-to-month clearance, and should be directed to properly observe 5 C.F.R. § 1320.8, .9, .10, .11, and/or .12 as appropriate. The PTO should also be reminded of the delays that have occurred in other recent ICRs when the PTO fails to take its obligations seriously.



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