

How long will a Patent Application Appeal Take?

By Rick Neifeld

Anyone considering an appeal in a patent application needs to factor in the impact of the average total time for the appeal on potential patent term (due to adjustment for a "successful" appeal) and timing of issuance.

The USPTO "dashboard" indicates that the pendency from application filing to Board decision is about 81 months.

See: <http://www.uspto.gov/dashboards/patents/main.dashxml>.

But that is not appeal duration. The dashboard does not identify the rapid rise in pendency of decision in appealed cases.

The Board statistics page, does.

See: <http://www.uspto.gov/ip/boards/bpai/stats/perform/index.jsp>.

The Board statistics page contains annual appeal decision performance measures for 2009-2011. They show that the average time from Board docket notice (that is what you get when the Board finally accepts jurisdiction over an appealed application after the briefing on the appeal is complete) to decision, has risen from 7.7 months in 2009, to 12 months in 2010, to 17 months in 2011, Q3. But that is for cases decided in 2011, Q3. Which means that those statistics are for cases that, on average, were docketed at the Board circa 17 months ago, or 2/2010. What we need to know is the delay for an appeal noted today. The most recent Board statistics show cases in which an appeal was noted that were docketed at the Board, took about 12 months from Notice of appeal to docketing. Assume that number does not change with time, which is a reasonable assumption given the time required for the Brief, Examiner's answer, Reply Brief, and examiner noting the reply brief.

If you extrapolate out to a date of notice of appeal being filed today, assuming the appeal results in a docketed at the Board in 12 months (2012, Q3) , that results in about a 2.5 year period to extrapolate the estimated increase in the delay from Board docketing to decision (17 months plus 12 months). The average rate of increase in the delay from Board docketing to decision from 2009 to today, is about 6 months per year. Therefore, for a case in which an appeal is noted today, assuming it is docketed at the Board in 2012 Q3 (unless the case is disposed of in a manner other than Board decision on appeal or the USPTO takes action to accelerate Board decision on appeal), I extrapolate a delay from docketing to decision of about $17 \text{ months} + 2.5 \text{ years} * 6 \text{ months/year} = 32 \text{ months}$.

This is a rough estimate, but it means that any filing an appeal today (that is, in September 2011), should expect a decision circa 44 months (>3.5 years) from today. And add to that 44 months about one half month additional delay, for every month from September 2011 until the date that the appeal is filed.

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