

# IP Musings

with **Learned Paw** and **Percy the Lizard**

February 2017, Issue No. 6

by Jiyong David Chung



## Insider's View of After Final Consideration Pilot Program 2.0.

For the past several years, the USPTO has been conducting an After Final Consideration Pilot program (AFCP 2.0). Under the AFCP 2.0, applicants may request consideration of

amendments made after a Final Office Action. If an examiner grants the request, the examiner can claim up to three hours of "other" time to review the amendments and perform any related search. The goal of the AFCP 2.0 is to reduce the number of Requests for Continued Examination (RCEs) and to more expeditiously advance cases toward allowance.

Asked to comment on the AFCP 2.0, one Supervisory Patent Examiner (SPE) indicated that the program is largely ineffective. On one hand, substantive amendments submitted under the AFCP 2.0 generally require more time to fully consider than the time that an examiner is allotted under the program. On the other hand, amendments that are more minor in nature or are in line with previously indicated allowable subject matter may be considered expeditiously without the AFCP 2.0, resulting in either an Advisory Action or a Notice of Allowance.

Since examiners must meet production requirements (i.e., examine or dispose of a specific number of cases every two weeks), for the examiners to review applications under the AFCP 2.0, the examiners must feel that the extra work is worth

their effort. Apparently, this is usually not the case. Examiners have little incentive to "re-open prosecution" of a case for a minimal return under the AFCP 2.0, unless the examiners already feel that the case should be allowed but for minor changes, in which case the examiners would likely have indicated so in the Advisory Action or through a telephone interview followed by an Examiner's Amendment. On the contrary, the examiners have more incentive to guide a case toward a filing of an RCE, as the RCE results in significantly more credit or "counts" to the examiner.

Apparently, the AFCP 2.0 rubs some USPTO Examiners and SPEs the wrong way because participating in the AFCP 2.0 implies that the examiners should "mini-examine" a case after the prosecution is closed at a discount relative to the time allocated upon a new filing or upon filing of an RCE. To some at the USPTO, the AFCP 2.0 symbolizes the USPTO's upper management caving into a small group of applicants that unreasonably and unfairly request additional examination on closed cases.

Although the AFCP 2.0 is largely ineffective (notwithstanding the fact that there are cases that benefit from the AFCP 2.0), the program remains relatively "popular." A law firm is likely to participate in the AFCP 2.0 because: (1) the cost for participating in the AFCP 2.0 is minimal (administrative cost) since the USPTO does not charge fees for the AFCP 2.0; and (2) not participating in the program gives the impression, to their clients, of not doing their best to obtain speedy allowances.

