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Patent Uncertainty: Study Questions Constitutionality of Appointed Patent Judges

Jeff Jeffrey

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The U.S. Patent and Trademark Office and the Department of Justice are scrambling for a solution after a paper published by George Washington University law professor John Duffy raised questions about whether judges on the Board of Patent Appeals and Interferences have been constitutionally appointed.

Duffy's premise, which no one has disputed, is that since 1999, judges have been appointed by a departmental undersecretary, not the secretary of commerce. That leaves those appointments open to legal challenge. The problem affects 46 of the 74 judges on the patent board.

"The writing is on the wall for the patent office," says Bradley Wright, a partner at Banner & Witcoff who has successfully argued cases in front of the board. "There's a big risk that they will lose if someone makes the argument in court that the board's decisions are invalid because the appointments were done illegally."

For his part, Duffy says the problem needs a statutory solution to avoid invalidating thousands of patents that are worth billions of dollars. The question of unconstitutionally appointed judges could also provide grounds for those who had their patents denied to have a "get a new hearing free card," Duffy says.

Jeff Jeffrey can be contacted at jjeffrey@alm.com.
