

## U.S. Agency Seeks Reexamination Of Biotech Patent

*IP Law Bulletin* (Wednesday, February 16, 2005)--In a sign of the government's increasing vigilance in protecting its patent rights, the U.S. Department of Health & Human Services has taken the highly unusual step of requesting an inter-partes reexamination of a patent for an anti-cancer antibody held by biotech company Immunomedics, Inc.

In its filing, the Department of HHS argues that the patent, filed in November 2001, was anticipated by another patent filed in September 1993 by the Department of HHS.

The patent, U.S. patent no. 6,653,104, is for "immunotoxins, comprising an internalizing antibody, directed against malignant and normal cells," according to the filing.

The move marks the first time in recent history that a government agency has filed for an *inter partes* reexamination of a patent, according to patent attorney Dennis Crouch with the law firm of McDonnell Boehnen Hulbert & Berghoff LLP in Chicago.

In this case, it appears the Department is acting like a corporation trying to protect the value of its own patent, Crouch said.

The U.S. government has become a major player in the patent market. In 2004 the U.S. government obtained over 800 patents.

In the past, if the federal government felt that a patent should be reexamined, the U.S. Patent and Trademark Office director was informally asked to review the case and file a "director ordered reexamination."

A director-ordered reexamination is a rare event: More than 6,000 reexaminations have taken place since the early 1980s, when the procedure began, and fewer than 200 of those were director-ordered.

"This more aggressive move taken by the Department of HHS indicates that the department is getting serious about the business of patenting and that the Department does not want to cede control of the reexamination process to its sister agency, the Patent Office," said Crouch, who runs the widely read blog "Patently-O" (<http://patentlaw.typepad.com>).

The case was filed on behalf of the HHS technology transfer office by Kenneth Webber at Townsend Townsend Crew in San Francisco.

Congress introduced *ex parte* reexamination in 1980 to provide a vehicle for a third party or patent owner to obtain reexamination of a patent. The process was to serve as an expedited, low-cost alternative to patent litigation for reviewing only certain aspects of patent validity, based on patents and printed publications.

In 2002, in order to make the optional *inter partes* reexamination procedures a more attractive alternative to litigation, the reexamination practice was expanded to provide third parties the right to appeal to the U.S. Court of Appeals for the Federal Circuit and to participate in the patent owner's appeal to the court.