

BRIEF FOR *AMICUS CURIAE*
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE
SUPPORTING REVERSAL-IN-PART

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 2008-1016

ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LIMITED
and ARISTOCRAT TECHNOLOGIES,
Plaintiffs-Appellants,

v.

INTERNATIONAL GAME TECHNOLOGY and IGT,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of
California in case no. 06-CV-3717, Judge Martin J. Jenkins.

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Statute

35 U.S.C. § 41(a)(7) (1982):

On filing each petition for the revival of an unintentionally abandoned application for a patent or for the unintentionally delayed payment of the fee for issuing each patent, \$500
unless the petition is filed under section 133 or 151 of this title, in which case the fee shall be \$50.

35 U.S.C. § 41(a)(7) (2007):

On filing each petition for the revival of an unintentionally abandoned application for a patent, for the unintentionally delayed payment of the fee for issuing each patent, or for an unintentionally delayed response by the patent owner in any reexamination proceeding, \$1,210
unless the petition is filed under section 133 or 151 of this title, in which case the fee shall be \$110.

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I. STATEMENT OF THE DIRECTOR'S INTEREST

The Director of the United States Patent and Trademark Office (“USPTO”) is an officer of the United States and is filing as *amicus curiae* under the authority of Fed. R. App. P. 29(a). The Director does not support either party, but supports reversal of the statutory construction by the United States District Court for the Northern District of California (“District Court”) in the decision below.

The USPTO has a substantial interest in this case. This is an appeal from a decision holding that the USPTO does not have authority under 35 U.S.C. § 41(a)(7) to grant a petition to revive an abandoned patent application under the “unintentional” delay standard of that section. Over the past 25 years, the USPTO has revived approximately 73,000 unintentionally abandoned patent applications. Of these, about 56% have issued as patents. Importantly, the number of patents potentially affected by the District Court’s decision includes not only those patents that issued directly from applications revived under the unintentional delay standard, but also patents that claim priority to an application revived under this standard. Thus, if upheld, the number of potentially affected patents is quite large.

The USPTO has a strong interest in defending its interpretation of its governing statute, and its longstanding practice, upon which a generation of patent applicants have relied. The USPTO also believes that its brief will offer insights and perspectives unlikely to be provided by the parties.

II. STATEMENT OF THE ISSUE

Whether the USPTO has had statutory authority pursuant to 35 U.S.C. § 41(a)(7) since 1982 to revive unintentionally abandoned patent applications regardless of the reasons for abandonment.

III. STATEMENT OF THE CASE

This is an appeal from a decision in a patent infringement suit brought by the Appellant, Aristocrat Technologies (“Aristocrat”), in the United States District Court for the Northern District of California under 28 U.S.C. § 1338, against International Game Technology (“IGT”). *See* JA1-28¹. As one of its affirmative defenses, IGT argued that one of Aristocrat’s patents-in-suit, U.S. Patent No. 7,056,215 B1 (“the ’215 patent”) was invalid because the application that issued as the ’215 patent had been improperly revived by the USPTO. Specifically, IGT argued that the USPTO lacked statutory authority to revive the application under the “unintentional” delay standard. JA8-9. The District Court agreed with IGT, and held that the USPTO’s revival was an abuse of discretion because it was not in accordance with the law. JA21. Accordingly, the District Court held the ’215 patent invalid because it was not lawfully revived. JA26.

IV. STATEMENT OF THE FACTS

A. Brief History Of Section 41(a)(7)

To aid the Court in understanding the USPTO’s position, a brief history of § 41(a)(7) is provided.

¹ Citations to the Joint Appendix as “JA__.”

1. Congress Amended The Patent Act In 1982 To Permit The Revival Of Abandoned Patent Applications Under The Unintentional Delay Standard

Prior to 1982, the only way that an abandoned patent application could be revived was under the “unavoidable” delay standard. Specifically, pre-1982, only two types of abandoned patent applications could be revived: (1) an application abandoned pursuant to 35 U.S.C. § 133, for failure to prosecute; and (2) an application abandoned pursuant to 35 U.S.C. § 151, for failure to timely pay the issue fee. Section 133 provided that, in the event of failure to respond to an outstanding agency action, a patent application would be deemed abandoned “unless it be shown to the satisfaction of the [Director] that such delay was unavoidable.” 35 U.S.C. § 133. Section 151 provided that, in the event of untimely issue fee payment, a late payment could be accepted if “the delay in payment is shown to have been unavoidable.” 35 U.S.C. § 151. Sections 133 and 151 have remained virtually unchanged since 1975.²

In 1982, the Patent Act was amended to provide fees for the revival of patent applications under the unintentional delay standard. 35 U.S.C. § 41. Specifically, § 41(a)(7) was amended in 1982 to provide a \$500 fee for the revival of an

² With the exception of an amendment in 1999 to strike out the word “Commissioner” and replace it with the word “Director,” § 133 has not been amended since first enacted in 1952, and § 151 has not been amended since 1975.

“unintentionally abandoned application for a patent” and an “unintentionally delayed payment of the fee for issuing each patent”:

The [Director] shall charge the following fees:

* * *

Revival fees.— On filing each petition for the revival of an unintentionally abandoned application for a patent or for the unintentionally delayed payment of the fee for issuing each patent, \$500, unless the petition is filed under section 133 or 151 of this title, in which case the fee shall be \$50.

35 U.S.C. § 41(a)(7) (1982) (emphasis added). Section 41(a)(7) also stated that the \$500 fee for reviving an unintentionally abandoned application would apply “unless the petition is filed under section 133 or 151 of this title [each of which refer to unavoidable delay], in which case the fee shall be \$50.” *Id.* Thus, newly-amended § 41(a)(7) had two alternatives: (1) the first alternative provides for the revival of patent applications under the unintentional delay standard; and (2) the second alternative provides for the revival of patent applications under the unavoidable delay standard.

2. The USPTO Concurrently Interpreted Section 41(a)(7) And Promulgated Rules To Administer The Statute

The USPTO interpreted the language of § 41(a)(7) regarding unintentional delay and Congress’s stated intent when it amended § 41(a)(7) to authorize the revival of patent applications that had been unintentionally abandoned. Consistent

with this interpretation, the USPTO promulgated rules to administer the revival of abandoned patent applications under the unintentional delay standard. In particular, the USPTO amended 37 C.F.R. § 1.137 to permit the revival of unintentionally abandoned patent applications, and established separate fee provisions for petitions filed under the unintentional and unavoidable delay standards, *i.e.*, 37 C.F.R. §§ 1.17(l) and (m), respectively. *See* 47 Fed. Reg. 33,086 (July 30, 1982); 47 Fed. Reg. 41,272 (Sept. 17, 1982).

B. The Revival Of Aristocrat's Patent-In-Suit

This case concerns, *inter alia*, the prosecution history of one of Aristocrat's patents related to slot machines: U.S. Patent No. 7,056,215 B1 ("the '215 patent"). The facts are recited in the District Court's decision. *See* JA1-28. The application from which the '215 patent issued claims priority back to an Australian provisional patent application filed on July 8, 1997. As permitted under the Paris Cooperative Treaty ("PCT"), Aristocrat filed an international application ("the PCT Application") based on its Australian provisional application one year later on July 8, 1998. Under the applicable rules, Aristocrat was required to file a U.S. national stage application based on its PCT Application by January 10, 2000. However, the USPTO did not receive Aristocrat's national stage filing fee until one

day after the deadline expired. Accordingly, USPTO deemed Aristocrat's application abandoned as of January 11, 2000.

Aristocrat petitioned the USPTO to revive Aristocrat's application pursuant to the "unintentional" delay standard of 37 C.F.R. § 1.137(b). On September 3, 2002, the USPTO granted Aristocrat's petition to revive Aristocrat's application under the unintentional delay standard, and the application eventually issued as the '215 patent on June 6, 2006.

C. The District Court's Decision

The District Court held that patent applications that are abandoned pursuant to § 133 and § 371(d) may be revived only under the unavoidable delay standard. JA12. In the District Court's view, the plain language of § 133 and § 371(d) alone supports this construction because neither statute refers to "unintentional" delay, but instead states that an application "shall be regarded" as abandoned unless a delay is shown to be "unavoidable." JA11-12. To further support this construction, the District Court noted that § 111 was amended in 1994 to refer to both unintentional and unavoidable delays, but §§ 133 and 371(d) were not. JA12.

The District Court rejected Aristocrat's argument that § 41(a)(7) authorizes the revival of abandoned applications, finding that § 41(a)(7) is merely a fee

provision that does not alter §§ 133 and 371(d). JA14. According to the District Court, if Congress had intended to permit the revival of patent applications that became abandoned for failing to meet the requirements of §§ 133 and 371(d) under the unintentional delay standard, then Congress could have amended those sections to specifically refer to unintentional delay, as it had done with § 111 in 1994. JA15, n.14. Having determined that the unintentional delay standard could not apply, the District Court held that the USPTO abused its discretion in reviving the '215 patent because Aristocrat had not alleged or provided any facts to show unavoidable delay in its petition to revive. JA24. The District Court similarly held Aristocrat's other patent-in-suit, which issued from a continuation of the '215 patent, invalid because it could no longer claim priority to the '215's priority date and was, thus, anticipated under 35 U.S.C. § 102(b) by Aristocrat's PCT application. JA26.

V. SUMMARY OF THE ARGUMENT

35 U.S.C. § 41(a)(7) clearly authorizes the USPTO to permit the revival of unintentionally abandoned patent applications, whether abandoned for failing to meet the requirements of § 133 or § 371(d). The plain language of § 41(a)(7) shows that it has a two alternative structure: (1) a first alternative, which provides for the revival of patent applications under the unintentional delay standard; and

(2) a second alternative which provides for the revival of patent applications under the unavoidable delay standard. This interpretation is supported by the fact that, when it enacted § 41(a)(7), Congress expressly stated that it was establishing “two different fees” for administering two “different standards,” and that a petitioner could “choose” between these standards. There were no other provisions in Title 35 that permitted the revival of unintentionally abandoned patent applications when § 41(a)(7) was enacted in 1982. Accordingly, if § 41(a)(7) were as limited as the District Court held, then Congress was establishing a fee for a petition on which the USPTO had no authority to act. Instead, § 41(a)(7) itself authorized the alternative of revival for unintentional delay.

To the extent that any ambiguities or gaps exist between § 41(a)(7) and the other provisions of Title 35, the USPTO’s reasonable and contemporaneous interpretation of its governing statute is entitled to *Chevron* deference.

In contrast, the District Court’s analysis ignores the clear instructions Congress gave when enacting § 41(a)(7), and the framework of the Patent Act, both in 1982 and now. The District Court also erred by failing to give deference to the USPTO’s statutory interpretation and longstanding regulations, regulations used to revive approximately 73,000 patent applications over the past 25 years.

VI. ARGUMENT

A. Section 41(a)(7) Has Plain Language Providing Revival Of Abandoned Patent Applications Under Two Different Standards: Unintentional And Unavoidable

The Supreme Court has instructed that, when construing a statute, a court must first determine “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (emphasis added). “If the intent of Congress is clear, that is the end of the matter,” and the courts and the agency charged with administering the statute “must give effect to the unambiguously expressed intent of Congress.” *Id.*, see also *Garcia v. United States*, 469 U.S. 70, 75 (1984) (“[O]nly the most extraordinary showing of contrary intentions from [legislative history] would justify a limitation on the ‘plain meaning’ of the statutory language.” (emphasis added)); *BP Am. Prod. Co. v. Burton*, ___ U.S. ___, ___, 127 S. Ct. 638, 643 (2006) (“Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.”).

1. Section 41(a)(7) Allows Patent Applicants To Revive Abandoned Applications Under The Unintentional Delay Standard Or The Unavoidable Delay Standard

Since 1982, § 41(a)(7), the principal statute at issue in this case, has had two alternatives. Then and now, the first alternative generally addresses petitions to revive unintentionally abandoned patent applications:

On filing each petition for the revival of an unintentionally abandoned application for a patent or for the unintentionally delayed payment of the fee for issuing each patent, \$500

35 U.S.C. § 41(a)(7) (1982) (emphasis added).

On filing each petition for the revival of an unintentionally abandoned application for a patent, for the unintentionally delayed payment of the fee for issuing each patent, or for an unintentionally delayed response by the patent owner in any reexamination proceeding, \$1,210

35 U.S.C. § 41(a)(7) (2007) (emphasis added). Because, in 1982, the only sections of Title 35 that provided for the revival of an “unintentionally abandoned application for a patent” or an “unintentionally delayed payment of the fee for issuing each patent” were § 133 and § 151, respectively, Congress plainly and clearly indicated its intent to authorize the revival of these types of abandoned patent applications under the unintentional delay standard. Although Congress never amended either § 133 or § 151 to expressly refer to unintentional delay, the plain language of the first alternative of § 41(a)(7) clearly governs unintentional

delays as to (i) patent applications, and (ii) patent issue fees. An alternative construction would ignore the plain language of the statute.

Similarly, when Congress subsequently amended § 371 in 1984 to permit the revival of abandoned U.S. patent applications that claim priority to related PCT applications, the plain language of § 41(a)(7) also indicated that applications abandoned under § 371 could be revived under the unintentional delay standard set forth in the first alternative of § 41(a)(7).³ Specifically, § 41(a)(7) governs the revival of “unintentionally abandoned application[s] for a patent,” and patent applications filed under 35 U.S.C. § 371 are unambiguously “application[s] for a patent.” Again, to otherwise construe the statute would be to ignore the plain language in Title 35. *See, e.g., Garcia*, 469 U.S. at 75 (plain meaning would only be limited by extraordinary legislative history to the contrary).

The first alternative of § 41(a)(7) is separated from the second alternative by the critical, pivot-word “unless,” which indicates that the statute provides two distinct types of petitions that can be employed by patent applicants to revive abandoned applications.

³ More specifically, § 371(d) governs the abandonment of patent applications based on foreign filings where the U.S. national stage application fails to satisfy the requirements of § 371 generally. In 1984, Congress amended § 371(d) to permit the revival of patent applications abandoned under this section. Like all sections of

The second alternative of § 41(a)(7) addresses petitions to revive abandoned patent applications under the very stringent unavoidable delay standard.

Specifically, the second alternative of § 41(a)(7), both in 1982 and now, expressly refers to petitions filed under § 133 or § 151:

unless the petition is filed under section 133 or 151 of this title, in which case the fee shall be \$50.

35 U.S.C. § 41(a)(7) (1982) (emphasis added).

unless the petition is filed under section 133 or 151 of this title, in which case the fee shall be \$110.

35 U.S.C. § 41(a)(7) (2007) (emphasis added). The common element in both of the referenced statutes (*i.e.*, §§ 133 and 151) is that each refers to revival under the unavoidable delay standard:

Upon failure of the applicant to prosecute the application within six months after any action therein . . . the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

35 U.S.C. § 133 (1982) (emphasis added).

If any payment required by this section is not timely made, but . . . the delay in payment is shown to have been unavoidable, it may be accepted by the Commissioner as though no abandonment or lapse had ever occurred.

the Patent Act in 1984 other than § 41(a)(7), § 371(d) referred only to the revival of abandoned patent applications under the unavoidable delay standard.

35 U.S.C. § 151 (1982) (emphasis added). Thus, by referencing §§ 133 and 151, the plain language of the second alternative of § 41(a)(7) governs unavoidable delays as to (i) patent applications, and (ii) patent issue fees, respectively.

In summary, § 41(a)(7) provides two distinct standards for determining whether a delay can serve as the basis for revival:

- (1) Unintentional delays – (i) as to applications, (ii) as to patent issue fee.
- (2) Unavoidable delays – (i) as to applications, (ii) as to patent issue fee.

Section 41(a)(7) also provides two different fees for petitions made under each standard: (1) a high fee for petitions to revive under the unintentional delay standard (*i.e.*, \$500 in 1982, and \$1,210 now); and (2) a significantly lower fee for petitions under the unavoidable delay standard (*i.e.*, \$50 in 1982, and \$110 now).

The most pertinent legislative history confirms the correctness of the USPTO's interpretation of the statute and subsequent rulemaking:

Section 41(a)7 establishes two different fees for filing petitions with different standards to revive abandoned patent applications. The same two fees are applicable to petitions to accept the delayed payment of the fee for issuing a patent. The fees set forth in this section are due on filing the petition. Since the section provides for two alternative fees with different standards, the section would permit the applicant seeking revival or acceptance of a delayed payment of the fee for issuing a patent to choose one or the other of the fees and standards under such regulations as the Commissioner may establish.

H.R. Rep. No. 97-542, at 6-7 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 765, 770 (emphasis added). Thus, Congress's express purpose was that applicants have a choice of the standard for seeking revival. Congress directed the Commissioner (now Director) to establish a regulatory structure to accommodate these choices. Accordingly, the different fees and standards drive the proper interpretation of the plain language of the statute. Because Congress's clear intent was to establish two alternative fees/standards, each applicable to revivals and late issue fee payments, "that is the end of the matter" and the agency must apply Congress's mandate. *Chevron*, 467 U.S. at 842-43 (emphasis added).

2. The USPTO's Contemporaneous Rulemaking Mirrors The Two Alternatives Of § 41(a)(7)

The USPTO contemporaneously construed the plain language of the statute, and shortly after § 41(a)(7) was enacted, precisely mirrored the four choices expressly recited therein:

37 C.F.R. § 1.137 Revival of abandoned application . . .

- (a) An application abandoned for failure to prosecute may be revived as a pending application if it is shown to the satisfaction of the Commissioner that the delay was unavoidable. . . .
- (b) An application unintentionally abandoned for failure to prosecute may be revived as a pending application if the delay was unintentional.
...

37 C.F.R. § 1.317 Lapsed patents; delayed payment of balance of issue fee.

...
(b) The Commissioner may accept the payment of the remaining balance of the issue fee later than three months after the mailing of the notice thereof as though no lapse had ever occurred if upon petition the delay in payment is shown to have been unavoidable. . . .

(c) The Commissioner may, upon petition, accept the payment of the remaining balance of the issue fee later than three months after the mailing of the notice thereof as though no lapse had ever occurred if the delay in payment was unintentional. . . .

47 Fed. Reg. 41,272, 41,277-81 (Sept. 17, 1982) (emphasis added). Thus, the above four-part rule scheme precisely mirrors the four choices expressly recited in the statute:

- (1) Unintentional delays – (i) as to applications, (ii) as to patent issue fee.
- (2) Unavoidable delays – (i) as to applications, (ii) as to patent issue fee.

Again, the USPTO’s interpretation wholly matches the two alternatives provided by the statute. *See Chevron*, 467 U.S. at 843 n.9 (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”); *Garcia*, 469 U.S. at 75 (“plain meaning” ordinarily controls the proper interpretation of a statute). Accordingly, the USPTO’s interpretation is in complete concert with the statute handed down by Congress.

3. The District Court Committed Reversible Error By Ignoring The Plain Language Of § 41(a)(7) And Congress's Clear Intent When Enacting The Statute

The District Court's construction is grounded on several erroneous assumptions. In the District Court's view, the authority to revive abandoned patent applications under the unintentional delay standard cannot be based in § 41(a)(7) because § 41(a)(7) merely governs the fee associated with revival under the unintentional delay standard. JA12-14. Instead, the District Court posits that the authority to revive abandoned applications under the unintentional delay standard must be expressly found in the other, non-fee provisions of Title 35 governing the various reasons for which patent applications may become abandoned (*i.e.*, §§ 111, 133, 151, 305, and 371(d)). *Id.* To support this construction, the District Court relies on the fact that § 111, unlike any other section of Title 35 governing abandoned patent applications, was amended in 1994 to refer to both the unintentional and unavoidable delay standards. JA15, n.14.

The most obvious problem with the District Court's analysis is that it gives no consideration to Title 35 as it existed in 1982 and dismisses the legislative history surrounding the 1982 amendments. First, because there were no other provisions in Title 35 that permitted the revival of unintentionally abandoned patent

applications when § 41(a)(7) was enacted in 1982, if § 41(a)(7) itself does not authorize such revivals, *i.e.*, is not self-executing, then § 41(a)(7) established a fee for a type of petition that the USPTO had no authority to accept. Such an interpretation would have rendered § 41(a)(7) a nullity. *See American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981); *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 560 (1963); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1940) (each holding that, if the intent of Congress would be defeated and the statute therefore rendered nugatory, such a construction must be rejected). That interpretation also ignores Congress's stated intent when enacting § 41(a)(7), *i.e.*, to "establish[] two different fees for filing petitions with different standards to revive abandoned patent applications." H.R. Rep. No. 97-542, at 6-7 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 765, 770 (emphasis added). Moreover, no published decision agrees with the District Court's interpretation on this matter. In contrast, the leading treatise agrees that § 41(a)(7) grants the USPTO authority to revive unintentionally abandoned patent applications. *See, e.g.*, CHISUM ON PATENTS §§ 11.02[1][d][ii], 11.03[2][b][vi][A]. Moreover, shortly after § 41(a)(7) was enacted, this Court held that "[t]he only provision specifically dealing with revival of unintentionally abandoned patent applications is section 41(a)(7)." *Morganroth*

v. Quigg, 885 F.2d 843, 847 (Fed. Cir. 1989). This Court has held that, as the party primarily responsible for the application and enforcement of this statute, the USPTO's interpretation of § 41(a)(7) "is entitled to considerable deference." *Morganroth*, 885 F.2d at 848.

Additionally, the District Court's failure to look at the history of § 41(a)(7) and the other sections of Title 35 governing revival led the District Court to erroneously conclude that § 41(a)(7) is merely a fee provision. As far back as 1999, Congress used § 41(a)(7) to grant further authority to the USPTO to revive a patent that has been abandoned during reexamination. Abandonment of a patent during reexamination for failure to prosecute is governed by 35 U.S.C. § 305. Section 305 states that "reexamination will be conducted according to the procedures established for initial examination under the provisions of sections 132 and 133," *i.e.*, like an originally filed patent application. Again, § 133 itself refers only to unavoidable delay. *See* 35 U.S.C. § 133. Nonetheless, rather than amend § 133 or § 305 to recite both the unavoidable and unintentional delay standard, Congress amended § 41(a)(7) to provide a fee for revival in the case of "an unintentionally delayed response by [a] patent owner in [a] reexamination proceeding." Pub. L. 106-113. (November 29, 1999) (emphasis added). This 1999 amendment to

§ 41(a)(7) evidences another instance in which Congress used this fee statute to authorize revival under the unintentional delay standard, rather than amending a corresponding section of Title 35 governing abandonment.

Finally, Congress's choice to uniquely amend § 111 to recite both delay standards is not dispositive. Section 111 was amended in 1982 to provide for abandonment for failure to timely file an inventor's oath or submit a patent application filing fee at the same time that § 41(a)(7) was amended to permit revival under the unintentional delay standard. When amended in 1982, § 111 referred only to revival under the "unavoidable" delay standard, just as §§ 133 and 151 did and do. However, when the USPTO first interpreted the 1982 amendment to § 41(a)(7), the USPTO interpreted § 41(a)(7) to not authorize the revival of applications that were unintentionally abandoned for failure to meet a filing requirement of § 111. *See* 48 Fed. Reg. 2696 (Jan. 20, 1983). Seven years later, in 1990, the USPTO properly adjusted its interpretation with respect to § 111 delays, and found that § 41(a)(7) authorized such revivals. *See* 1121 Off. Gaz. Pat. & Trademark Office 6 (Nov. 5, 1990).

Thereafter, Congress amended § 111 to permit revival where the delay is shown to be "unavoidable or unintentional." Pub. L. 103-465, 108 Stat. 4809, 4986

(1994) (emphasis added). This is the first instance that any portion of the Patent Act was amended to refer to revival for “unintentional” delay outside of § 41(a)(7).

Because Congress has found it unnecessary to similarly or subsequently amend §§ 133, 151 or 371(d), it may be that Congress’s 1994 amendment to § 111 was made to codify the USPTO’s 1990 interpretation that § 41(a)(7) permitted revival where the filing requirements of § 111 were not met. There is no relevant legislative history that might help elucidate Congress’s reason for uniquely amending § 111. In any event, it would be impermissible to construe the 1994 amendment to § 111 as a repeal of the authority to revive unintentionally abandoned applications that Congress gave to the USPTO in 1982. *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (holding that repeal by implication requires that the earlier and later statutes be irreconcilable); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (holding that overwhelming evidence is needed to establish repeal by implication).

For all of these reasons, the District Court’s statutory construction analysis reads the applicable statute completely out of context and, thereby, ignores its plain meaning and Congress’s clear intent.

B. If The Plain Language Of § 41(a)(7) Is Deemed Ambiguous, The District Court Erred By Not Giving *Chevron* Deference To The USPTO's Reasonable Interpretation Of Its Governing Statute

If the first prong in *Chevron* is not met, the second prong in *Chevron* is triggered for the administering agency, namely:

if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 843-44. The Supreme Court has instructed that, where Congress has delegated the administration of a statute to an agency, courts are not to substitute their own construction of a statute for a reasonable interpretation of the agency charged with administering the statute:

Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 843-44 (emphasis added) (footnote omitted). The question then is whether the agency's interpretation "is reasonable in light of the legislature's revealed design." *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (emphasis added). Importantly, when multiple statutory constructions may be permissible, an agency need only show that its construction was chosen from the multiple permissible options. *See Chevron*, 467

U.S. at 843 n.11 (“The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction.”).

Although the USPTO believes that Congress directly and fully spoke to the issue in this case when it enacted § 41(a)(7) in 1982, to the extent that any ambiguity or gaps appear to have been created between § 41(a)(7) and the other statutes in Title 35 concerning revival (*e.g.*, §§ 111, 133, 151, 371(d), and 305), Congress expressly delegated authority to the USPTO to resolve that ambiguity. Specifically, §§ 133, 151, and 371(d) provide that the specified delay or failure to comply does not constitute abandonment if it is shown to the satisfaction of the Director to have been “unavoidable.” None of these provisions, however, expressly addresses the question whether abandoned applications can be revived on other grounds, and § 41(a)(7) provides powerful confirmation that abandoned applications can be revived either for unavoidable or unintentional delays or failures to comply. That is, Congress expressly directed the Commissioner of Patents and Trademarks (now Director), as the head of the USPTO, to administer § 41(a)(7):

§ 41. Patent fees

(a) The Commissioner [now Director] shall charge the following fees:

7. On filing each petition for the revival of an unintentionally abandoned application for a patent or for the unintentionally delayed payment of the fee for issuing each patent, \$500, unless the petition is filed under section 133 or 151 of this title [both of which expressly referred only to unavoidable delay], in which case the fee shall be \$50.

35 U.S.C. § 41(a)(7) (1982) (emphasis added). As the agency charged with both administering the statute and removing any gaps or ambiguities therein, the USPTO is afforded *Chevron* deference, making its interpretation stand unless shown to be unreasonable (impermissible). *See Chevron*, 467 U.S. at 843-44; *SurAmerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 663 (Fed. Cir. 1992) (holding that when “an interpretational gap exists regarding a statutory provision, [the courts] are to examiner whether, in its own interpretation of its responsibilities under the Act, the agency charged with the everyday administration of the provision applies a permissible construction” (internal citations omitted)).

As shown *supra*, when enacting § 41(a)(7), Congress directed the USPTO to promulgate regulations establishing two different standards and two different fees by which applicants could choose to revive their abandoned patent applications.

H.R. Rep. No. 97-542, at 6-7 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 765, 770-

71. The USPTO did exactly as Congress directed, and established two different fees and two different standards for reviving abandoned patent applications,

whether for failure to prosecute or to pay the issue fee, when it promulgated 37 C.F.R. § 1.137, which administers the revival of abandoned patent applications under the unintentional and unavoidable delay standards, and 37 C.F.R. § 1.317, which administers revivals for failure to pay issue fees under the unintentional and unavoidable delay standards. *See* 47 Fed. Reg. 41,272, 41,277-81 (Sept. 17, 1982).

In view of the statute's legislative history, any gap-filling by the USPTO is reasonable, in complete accord with Congress's intent and, thus, legally binding. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, ___ U.S. ___, ___, 127 S.Ct. 2339, 2345-46 (2007) ("When an agency fills such a 'gap' reasonably, and in accordance with other applicable (*e.g.*, procedural) requirements, the courts accept the result as legally binding."); *NationsBank of North Carolina*, 513 U.S. at 257 (the administering agency's interpretation will be upheld when it "is reasonable in light of the legislature's revealed design"). Accordingly, the District Court erred by not giving deference to the USPTO's reasonable interpretation of the statute, read as a whole.

C. The USPTO's Longstanding Regulations Concerning Unavoidable And Unintentional Abandonments Wholly Track Congress's Statutory Scheme, And Are Thus Entitled To "Great Deference"

Congress clearly intended that the USPTO should promulgate regulations to establish two different fees and two different standards for reviving abandoned

patent applications. Significantly, the House Report accompanying the enactment of § 41(a)(7) expressly provided that this two fee-two standard system would be implemented “under such regulations as the Commissioner may establish . . . [to] permit the Commissioner to have more discretion than present law to revive abandoned applications . . . in appropriate circumstances.” H.R. Rep. No. 97-542, at 6-7 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 765, 770-71. Thus, the legislative history clearly shows that Congress fully intended the USPTO to promulgate rules within this statutory scheme. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”) (quoted in *Chevron*, 467 U.S. at 843). “When an agency fills such a ‘gap’ reasonably, and in accordance with other applicable (e.g., procedural) requirements, the courts accept the result as legally binding.” *Long Island Care at Home*, ___ U.S. at ___, 127 S.Ct. at 2345-46 (emphasis added).

Accordingly, in 1982, the USPTO contemporaneously interpreted its governing statute and promulgated rules to administer and enforce it. The USPTO issued final rules concerning revival under the unintentional delay standard just

three weeks after Congress enacted § 41(a)(7). The USPTO's then-new rules wholly tracked the two alternatives of the statute, with its two directly corresponding subsections (a) and (b) reading in pertinent part:

Revival of abandoned application.

(a) An application abandoned for failure to prosecute may be revived as a pending application if it is shown to the satisfaction of the Commissioner that the delay was unavoidable. . . .

(b) An application unintentionally abandoned for failure to prosecute may be revived as a pending application if the delay was unintentional.
...

47 Fed. Reg. 41,272, 41,277 (Sept. 17, 1982) (codified in 37 C.F.R. § 1.137)

(emphasis added). Because the USPTO's two-alternative rule precisely follows Congress's directive, the rule is wholly supported by the 1982 statutory scheme.

Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326, 1342 (Fed. Cir. 2005); *Ambassador Div. of Florsheim Shoe v. U.S.*, 748 F.2d 1560, 1562-65 (Fed. Cir. 1984) (showing that contemporaneous agency interpretation entitled deference).

With respect to supporting well-founded promulgated rules, the Supreme Court has stated that “the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.” *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). *Accord*

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-741 (1996) (giving *Chevron* deference to “a full-dress regulation, issued by the [agency head] and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation, *see* 5 U.S.C. § 553”); *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1362-63 (Fed. Cir. 2005) (“regulation following formal notice and comment procedures . . . is therefore entitled to full *Chevron* deference from this court”); *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379 (Fed. Cir. 2001) (“Where [the Department of] Commerce has adopted a regulation by notice-and-comment rulemaking pursuant to the Administrative Procedure Act (5 U.S.C. § 553), the *Chevron* standard, of course, applies.”). Accordingly, a longstanding construction (e.g., a rule) by the agency charged with administering a statutory scheme is entitled to “great deference.” *United States v. Clark*, 454 U.S. 555, 565 (1982) (emphasis added).

Additionally, when that agency has applied the rule numerous times over a long time period, “considerable deference” must be afforded. *United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694, 718-19 (1975); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915). Further, a longstanding agency rule “is entitled

to great weight [when] congress has revisited the [pertinent] Act and left the practice untouched.” *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (emphasis added). Thus, (i) a longstanding agency rule, (ii) applied numerous times, and (iii) left untouched by Congress in the face of surrounding amendments triggers “great deference” by the courts for that particular rule. Here, all three requirements to establish “great deference” are strikingly met.

Since Congress first authorized revival under the unintentional delay standard in 1982, the USPTO has had a rule in place to administer unintentional abandonment revivals. 47 Fed. Reg. 41,272, 41,277 (Sept. 17, 1982) (codified in 37 C.F.R. § 1.137). The unintentional abandonment rule is approximately 25 years old, which is fairly characterized by caselaw as “longstanding.” *See Clark*, 454 U.S. at 564-65 (agency construction “followed for nearly 25 years” was held to be “a long period of time”).

USPTO records show that it has revived approximately 73,000 abandoned patent applications under this rule. This number far exceeds any case law discussions found concerning what qualifies as a significant number of occurrences. *Cf. Nat’l Ass’n of Sec. Dealers*, 422 U.S. at 718-19 (five opinions identified);

Midwest Oil Co., 236 U.S. at 473 (discussing agency action as “often repeated as to crystallize into a regular practice”).

Moreover, since 1982, Congress has visited the relevant statutory scheme (without upsetting the rule) many times. Specifically, during eight subsequent public laws, Congress addressed 35 U.S.C. § 41, but in no way nullified the USPTO’s reading of it, as expressed in 37 C.F.R. § 1.137:

Nov. 8, 1984, Pub. L. 98-622;
Nov. 6, 1986, Pub. L. 99-607;
Dec. 10, 1991, Pub. L. 102-204;
Oct. 23, 1992, Pub. L. 102-444;
Dec. 8, 1994, Pub. L. 103-465;
Nov. 10, 1998, Pub. L. 105-358;
Nov. 29, 1999, Pub. L. 106-113; and
Nov. 2, 2002, Pub. L. 107-273.

The multitude of times that Congress amended the overarching statutory scheme is a legally significant number, weighing strongly in favor of the USPTO’s practice. See *Clark*, 454 U.S. at 564 (discussing the relevance of “Congress’ failure to correct [the agency’s] practice . . . at the very time Congress was revamping the laws applicable to [the practice]”); *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (“In [] 15 years . . . Congress has never expressed its disapproval, and its silence in this regard suggests its consent to the [agency]’s practice”); *Chemehuevi Tribe of Indians v. Fed. Power Comm’n*, 420 U.S. 395, 410 (1975)

(referring to two subsequent congressional amendments); *Red Lion Broad. Co. v. Fed. Comm'n Comm'n*, 395 U.S. 367, 381 (1969) (noting the importance of “when Congress has refused to alter the administrative construction”); *United States v. Fed. Ins. Co.*, 805 F.2d 1012,1017 (Fed. Cir. 1986) (“[C]ongressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.” (internal citations omitted).)

As shown, the USPTO rules governing revival under the unintentional delay standard meet all of the requirements necessary to be granted “great deference,” *i.e.*, the USPTO’s rule (i) is longstanding; (ii) has been applied numerous times; and (iii) has not been disturbed by Congress during multiple related legislative amendments. *See Clark*, 454 U.S. at 565; *Nat’l Ass’n of Sec. Dealers*, 422 U.S. at 718-19; *Saxbe*, 419 U.S. at 74. Accordingly, the USPTO’s construction of § 41(a)(7) and its rules promulgated under the 1982 statutory scheme are entitled to “great deference” by the courts, and should in no way be invalidated by this or any court.

VII. CONCLUSION

The District Court's decision should be reversed because it ignores the plain language of 35 U.S.C. § 41(a)(7) and Congress's clear intent when enacting the statute. Further, the District Court committed reversible error by not giving deference to the USPTO's reasonable interpretation of its governing statute and/or the USPTO's properly promulgated rules for administering the statute.

Respectfully submitted,

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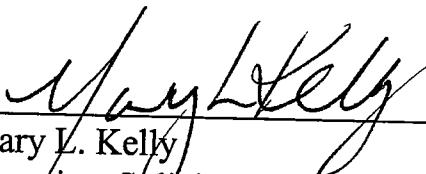
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RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. Proc. 32(a)(7) that the foregoing BRIEF FOR *AMICUS CURIAE* DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE SUPPORTING REVERSAL-IN-PART complies with the type-volume limitation required by the Court's rule. The total number of words in the foregoing brief, excluding table of contents and table of authorities, is 6,484 words as calculated using the Word[®] software program.



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CERTIFICATE OF SERVICE

I certify that on December 13, 2007, I caused two copies of the foregoing
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