

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 30

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ARIE BEN-BASSAT, ROBERT BRUNER, SHARON SHOEMAKER,
YEHOASHUA ALONI, HARRY WONG, DONALD C. JOHNSON, and AMAR N.
NEOGI

Appeal No. 95-1484
Application 08/070,650¹

HEARING: November 4, 1998

Before WILLIAM F. SMITH, GRON, and ELLIS, Administrative
Patent Judges.

Per Curiam.

¹ Application for patent filed June 1, 1993. According to applicants, this application is a continuation of Application 07/657,178, filed February 19, 1991, abandoned; which is a divisional of Application 07/196,496, filed May 19, 1988, U.S. Patent 5,079,162, issued January 7, 1992; which is a continuation-in-part of Application 06/900,086, filed August 28, 1986, abandoned; which is a continuation-in-part of Application 06/788,994, filed October 18, 1985, abandoned.

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DECISION ON APPEAL UNDER 35 U.S.C. § 134

This is an appeal under 35 U.S.C. § 134 from an examiner's rejections of Claims 49-68, all claims pending in this application.

Introduction

Claims 49-68 stand rejected under 35 U.S.C. § 112, first paragraph, purportedly because appellants' specification would not have enabled persons skilled in the art to make and use the full scope of the subject matter claimed.

Claims 67-68 stand rejected for obviousness-type double patenting of Claims 1-10 of Johnson et al. (Johnson), U.S. 4,863,565, patented September 5, 1989.

Claims 49-68 stand rejected under 35 U.S.C. § 102(b) as being anticipated by (1) Ring et al. (Ring), U.S. 4,588,400, patented May 13, 1986 (prior art under section 102(e) based on an application filing date of December 16, 1982); (2) Valla et al. (Valla), "Cellulose-negative Mutants of Acetobacter xylinum," J. Gen. Microbiol., Vol. 128, pp. 1401-08 (1982); (3) Kusakabe et al. (Kusakabe), UK Patent Specification 1,570,487, published July 2, 1980); or Ramamurti et al. (Ramamurti), "Cellulose Formation by Acetobacter acetigenum in

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a 50% (w/v) Glycerol Synthetic Medium," Biotech. & Bioeng.,
Vol. XXIV, pp. 2267-68 (1982).

Claims 49-68 stand rejected under 35 U.S.C. § 103 as
being unpatentable in view of the teaching of Ring, Valla,
Kusakabe, or Ramamurti.

Claims 49, 57, 64, 67, and 68 are representative of the
claimed inventions. For reasons explained hereafter, we
consider Claims 57, 64-66, and 68 separately from Claims 49-
56, 58-63,
and 67. Claims 49, 57, 67, and 68 read:

49. A method for producing substantially reticulated
cellulose comprising:

- a) culturing a microorganism of the genus
Acetobacter and mutants thereof, wherein said
microorganism is capable of producing substantially
pure cellulose, under substantially continuous
agitation in a liquid medium suitable for growth of
said microorganism for a sufficient time to produce
reticulated cellulose, said microorganism being
characterized as being stable against conversion
from cellulose producing forms to non-cellulose
producing forms under said culturing conditions; and
- b) recovering said reticulated cellulose.

57. The method of claim 49 wherein the recovered
reticulated cellulose is characterized when viewed with a
scanning electron microscope by a reticulated structure
having strands of cellulose that interconnect forming a
grid-like pattern extending in three dimensions to give
a fenestrated appearance.

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67. Reticulated cellulose produced by the method of claim 49.

68. Reticulated cellulose produced by the method of claim 64.^[2]

Discussion

A

Even though all rejections under 35 U.S.C. § 112, second paragraph, have been withdrawn (Examiner's Answer (Ans.), p. 1), the examiner remains troubled by the meaning of the terms "substantially pure cellulose" and "substantially continuous agitation" in Claim 49 (Ans., pp. 2-3, Part I). The examiner objects to the use of the aforementioned terms in appellants' claims because, in his view, the claims on appeal are directed to a method of producing "substantially reticulated cellulose" which is defined solely as the product of microorganisms of the genus Acetobacter when cultured under "substantially continuous agitation" conditions. However, instead of rejecting appellants' claims for unpatentability under the second paragraph of section 112 because they do not particularly point out and distinctly claim the subject matter

² In method Claim 64, the recovered reticulated cellulose is characterized in the same manner as in method Claim 57.

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which the applicants regard as their invention, the examiner concluded that appellants' specification would not have enabled persons skilled in the art to make and use "substantially reticulated cellulose" because neither the microorganism which produces the indicated product under the conditions specified nor the product which is produced by suitable microorganisms cultured under the specified conditions is adequately defined. In our view, the examiner erroneously considered the patentability of the subject matter of Claims 49-56, 58-63, and 67 under 35 U.S.C. § 112, first paragraph, 35 U.S.C. § 102, 35 U.S.C. § 103, and for obviousness-type double patenting without first determining the full scope of the subject matter claimed.

Generally, before issues related to the patentability of the claimed subject matter under 35 U.S.C. § 112, first paragraph, 102, 103, or the court-created doctrine of obviousness-type double patenting can begin to be considered, the examiner must determine what is being claimed. See In re Moore, 439 F.2d 1232, 1235, 169 USPQ 236, 238 (CCPA 1971);

[T]he claims must be analyzed first in order to determine exactly what subject matter they encompass. . . .

The first inquiry therefore is merely to determine whether the claims do, in fact, set out and circumscribe

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a particular area with a reasonable degree of precision and particularity. It is here where the definiteness of the language employed must be analyzed--not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art.

"Once having ascertained exactly what subject matter is being claimed, the next inquiry must be into whether such subject matter is novel." In re Wilder, 429 F.2d 447, 450, 166 USPQ 545, 548 (CCPA 1970). "Before considering the rejections under

35 U.S.C. §§ 103 and 112, we must first decide . . . [what] the claims include within their scope." In re Geerdes, 491 F.2d 1260, 1262, 180 USPQ 789, 791 (CCPA 1974). With regard to the scope of the claimed process, the examiner focused on the product-producing microorganism rather than the product being produced (Ans., p. 3, first para.):

The only method left to determine if a microorganisms [sic] fits within the claim is to run the process itself. However, even this is not sufficient since there is no guidance provided as to what constitutes "substantially" pure product or "substantially" continuous agitation.

Thus

even if one skilled in the art ran the process, the artisan would be left to guess as to whether the microorganism would fit within the scope of the claims. Thus the isolation or even identification of bacterial strains of Acetobacter

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which produce reticulated cellulose product as herein
claimed is unpredictable in the art

The examiner added (Ans., p. 11), "[O]ne of skill would be hard pressed to identify the intended microorganisms for use in the claimed method" The complexity of the examiner's dilemma is best seen in his attempts to compare appellants' process steps to the process steps the prior art describes. For example, the examiner could not distinguish the intermittent agitation purportedly taught by Ring from the "substantially continuous agitation" (Claim 49) required for appellants' claimed process (Ans., p. 17, first para.). Note the examiner's aside that the cellulose product Ring produces "appear[s] to correspond to the claimed reticulated cellulose" (Ans., p. 17, second para.). It is not and apparently never has been clear to the examiner what the term "reticulated cellulose" means (Ans., p. 18, first para.):

No data has actually been submitted to distinguish "reticulated cellulose" from the pellicle formation of Ring, and the other references, wherein the Acetobacter microorganisms are cultured under conditions of agitation.

Irrespective of his belief that persons skilled in the art would have been left to guess whether subject matter falls within the scope of appellants' claims, the examiner failed to directly address the uncertainty of the scope of the claims

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under section 112, second paragraph, and proceeded to reject appellants' claimed invention under sections 112, first paragraph, 102, and 103 and court-created obviousness-type double patenting. We hold that the examiner erred in considering the patentability of Claims 49-56, 58-63, and 67 under sections 112, first paragraph, 102, and 103 without first "having ascertained exactly what subject matter is being claimed." In re Wilder, 429 F.2d at 450, 166 USPQ at 548.

It is improper for this Board to review a finding of anticipation under section 102, In re Wilder, 429 F.2d at 450, 166 USPQ at 548, or a holding of unpatentability under sections 103 and 112, first paragraph, In re Geerdes, 491 F.2d at 1262, 180 USPQ at 791, based on speculation as to the meaning of the terms in the claims. In re Steele, 305 F.2d 859, 862, 134 USPQ 292, 295 (CCPA 1962). Accordingly, we do not at this point review the propriety of the pending rejections of Claims 49-56, 58-63, and 67 under sections 112, first paragraph, 102, and 103. Rather, we remand the application to the examiner for the examiner to determine in the first instance the meaning of the terms in the claims, the scope of the subject matter claimed, and whether the claims

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are in compliance with the requirements of 35 U.S.C. § 112,
second paragraph³.

B

However, Claims 57, 64-66, and 68 stand on a different
footing since they read in relevant part:

. . . reticulated cellulose is characterized when viewed
with a scanning electron microscope by a reticulated
structure having strands of cellulose that interconnect
forming a grid-like pattern extending in three dimensions
to give a fenestrated appearance.

In considering the patentability of these claims, we
refer both the examiner and appellants to Ben-Bassat et al.
(Ben-Bassat), U.S. Patent 5,144,021, patented September 1,
1992. U.S. 5,144,021, issued from Application 07/633,761,
filed January 30, 1991. Application 08/070,650 of this appeal
was filed June 1, 1993, as a continuation of Application
07/657,178, filed February 19, 1991. Both Applications
07/633,761 and 07/657,178 are divisionals of Application
07/196,496, filed May 19, 1988, now U.S. Patent 5,079,162.

³ To the extent the examiner is troubled by appellants' use
of the qualifying word "substantially" in these claims, the
examiner should review the decision in In re Mattison, 509 F.2d
563, 184 USPQ 484 (CCPA 1975).

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Thus, the claims here on appeal and the claims in U.S.
5,144,021 are supported by the same disclosure.

Claim 1 of U.S. 5,144,021 reads:

1. A reticulated cellulose product characterized as having a reticulated structure and having strands of cellulose that interconnect forming a grid-like pattern extending in three dimensions to give a fenestrated appearance when viewed with a scanning electron microscope.

We note that the product of Claim 1 of U.S. 5,144,021 is defined in the same manner as the product made by the processes of Claims 57 and 64 of this appeal, and, thus, appears to be indistinguishable from the reticulated cellulose product of Claim 68 of this appeal which is "produced by the by method of claim 64" (Claim 68)⁴.

Claims 1 and 3-6 of Johnson et al. (Johnson), U.S. 4,863,565, issued September 5, 1989, over which Claims 67 and 68 here stand rejected for obviousness-type double patenting, read:

1. A wet laid cellulosic sheet comprising a

⁴ The examiner should consider whether the patenting of product Claims 67 and 68 of this appeal would be obviousness-type double patenting of Claim 1 of U.S. 5,144,021. Moreover, the examiner and appellants should consider the propriety of a rejection of product-by-process Claim 68 under 35 U.S.C. § 101 over Claim 1 of U.S. 5,144,021.

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microbially produced cellulose under conditions of agitation, said cellulose being characterized by a high frequency of thickened branched substantially continuous cellulose strands that interconnect to form reticulated grid-like structure extending in three dimensions, said sheet showing a high degree of resistance to densification by wet compression.

3. The cellulosic sheet of claim 1 wherein the microbial cellulose is produced by a cellulose producing organism of the genus *Acetobacter*.

4. The cellulosic sheet of claim 3 in which the *Acetobacter* organism is resistant to mutation in agitated culture to non-cellulose producing strains.

5. The cellulosic sheet of claim 4 wherein the microbial cellulose is produced by a cellulose producing organism of the species *Acetobacter xylinum*.

6. The cellulosic sheet of claim 5 wherein said microorganism is selected from the group consisting of *Acetobacter xylinum* ATTC 53264, 53263, and 53254, corresponding to strains 1306-3, 1306-11, and 1306-21.

Johnson's specification is practically, if not completely, identical to the specifications supporting the claims of this appeal and the claims of Ben-Bassat, U.S. 5,144,021.

On consideration of the claimed subject matter allowed in Ben-Bassat, U.S. 5,144,021, and Johnson, U.S. 4,863,565, it appears that the present examiner's rejection of Claims 57, 64-66 and 68 in this application is inconsistent with the allowance of similar subject matter by other examiners.

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C

We hold that the examiner's rejections of Claims 57 and 64-66 under 35 U.S.C. § 112, first paragraph, 35 U.S.C. § 102, and 35 U.S.C. § 103 are reviewable on the merits and the examiner's rejections of Claims 68 under 35 U.S.C. § 112, first paragraph, 35 U.S.C. § 102, and 35 U.S.C. § 103 and for obviousness-type double patenting are reviewable on the merits. However, the merits of the examiner's rejections of Claims 49-56, 58-63, and 67 under 35 U.S.C. § 112, first paragraph, 35 U.S.C. § 102, and 35 U.S.C. § 103 are not properly reviewable at this time. The scope and meaning of the term "reticulated cellulose" in those claims is unclear; the term in Claim 49 must be broader in scope than the limiting characterization in dependent Claim 57, because Claim 57 must, as a matter of law, further limit Claim 49 upon which it depends (35 U.S.C. § 112, fourth paragraph).

1. 35 U.S.C. § 112, first paragraph

During prosecution in the PTO, claim language is to be given its broadest reasonable interpretation which is consistent with the description of the invention in the specification. In re Zletz, 893 F.2d 319, 321, 13 USPQ2d

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1320, 1322 (Fed. Cir. 1989). It is difficult to interpret the subject matter of Claims 57, 64-66 and 68 in light of the specification in this case, since the examiner and appellants declined to consider the language of any claim separately from the language appearing in Claim 49. The examiner stated (Ans., p. 2, first para.):

The rejection of claims 49-68 stand or fall together because appellant's brief does not include a statement that

this grouping of claims does not stand or fall together.

We shall consider Claims 57, 64-66, and 68 separately. Rather than remand this case in its entirety to the examiner, we proceed to the extent the claim language permits.

A specification fails to satisfy the requirements of 35 U.S.C. § 112, first paragraph, when it would not have enabled persons skilled in the art to make and use the full scope of the subject matter claimed, without undue experimentation. In re Vaeck, 947 F.2d 488, 495-96, 20 USPQ2d 1438, 1444 (Fed. Cir. 1991). The examiner has the initial burden to explain why the specification which supports Claims 57, 64-66, and 68 in this case would not have enabled persons skilled in the art to make and use the full scope of the subject matter claimed. See In re Marzocchi, 439 F.2d 220,

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223, 169 USPQ 367, 369 (CCPA 1971)("[A] specification disclosure which contains a teaching of the manner and process of making and using the invention in terms which correspond in scope to those used in describing and defining the subject matter sought to be patented must be taken as in compliance with the enabling requirement of the first paragraph of § 112 unless there is reason to doubt the objective truth of the statements contained therein which must be relied on for enabling support.") The PTO has issued two patents with claimed subject matter defined by claim language substantially the same as that in Claims 57, 64, and 68 on appeal, which are supported by substantially the same specification as supports the claims presently on appeal. Presumably, then, this specification would also have enabled persons skilled in the art to make and use the full scope of the subject matter defined by Claims 57, 64-66, and 68.

Under the circumstances, the examiner has not met his initial burden to show unpatentability under the first paragraph of § 112. Absent other, more clear and convincing evidence in support of a holding contrary to that previously made by the PTO that a substantially identical specification would have enabled persons skilled in the art to make and use

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the full scope of "reticulated cellulose product" characterized in substantially the same manner in appealed Claims 57, 64-66, and 68 as in the patented claims, we reverse the examiner's rejections of Claims 57, 64-66, and 68 on appeal under 35 U.S.C. § 112, first paragraph.

However, as indicated above, we remand the case with respect to Claims 49-56, 58-63, and 67 for the examiner to determine, in the first instance, what the scope and content of the subject matter claimed is. This is not to say that the examiner's rejection of Claims 49-56, 58-63, and 67 under 35 U.S.C. § 112, first paragraph, is without merit. The subject matter of

Claims 49-56, 58-63, and 67 appears to be far broader in scope than the scope of the claims allowed in U.S. 5,144,021 to Ben-Bassat. We cannot review the examiner's holding that the subject matter of those claims is broader in scope than the enabling disclosure until the examiner first determines the scope of the subject matter claimed.

After determining the scope of the subject matter claimed, the examiner should then consider the following instruction

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in PPG Indus., Inc. v. Guardian Indus. Corp., 75 F.3d 1558, 1564, 37 USPQ2d 1618, 1623 (Fed. Cir. 1996), with regard to the propriety of rejections of broadly claimed subject matter under 35 U.S.C. § 112, first paragraph:

In unpredictable art areas, this court has refused to find broad generic claims enabled by specifications that demonstrate the enablement of only one or a few embodiments and do not demonstrate with reasonable specificity how to make and use other potential embodiments across the full scope of the claim. See, e.g., In re Goodman, 11 F.3d 1046, 1050-52, 29 USPQ2d 2010, 2013-15 (Fed. Cir. 1993); Amgen, Inc. v. Chugai Pharmaceutical Co., 927 F.2d 1200, 1212-14, 18 USPQ2d 1016, 1026-28 (Fed. Cir.), cert. denied, 502 U.S. 1445. 856 (1991); In re Vaeck, 947 F.2d at 496, 20 USPQ at 1445. Enablement is lacking in those cases, the court has explained, because the undescribed embodiments cannot be made, based on the disclosure in the specification, without undue experimentation. But the question of undue experimentation is a matter of degree. The fact that some experimentation is necessary does not preclude enablement; what is required is that the amount of experimentation "must not be unduly extensive." Atlas Powder Co. v. E.I. DuPont de Nemours & Co., 750 F.2d 1569, 1576, 224 USPQ 409, 413 (Fed. Cir. 1984). The Patent and Trademark Office Board of Appeals summarized the point well when it stated:

The test is not merely quantitative, since a considerable amount of experimentation is permissible,

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if it is merely routine, or if the specification in question provides a reasonable amount of guidance with respect to the direction in which the experimentation should proceed to enable the determination of how to practice a desired embodiment of the invention claimed.

Ex parte Jackson, 217 USPQ 804, 807 ([Bd. Pat. App. & Int.] 1982).

2. Obviousness-type double patenting

Claims 67 and 68 stand rejected for obviousness-type double patenting of Claims 1-10 of Johnson, U.S. 4,863,565.

We affirm this rejection.

As stated in In re Goodman, 11 F.3d 1046, 1052, 29 USPQ2d 2010, 2015 (Fed. Cir. 1993):

To prevent extension of the patent right beyond statutory limits, the doctrine of obviousness-type double patenting rejects application claims to subject matter different but not patentably distinct from the subject matter claimed in a prior patent. *In re Braat*, 937 F.2d 589, 592, 19 USPQ2d 1289, 1291-92 (Fed. Cir. 1991).

In this case, as in Goodman, 11 F.3d at 1053, 29 USPQ2d at 2016, the patented claims are drawn to species of the patentably indistinct generic invention of the claims here on appeal. While the patented claims are directed to a wet laid sheet of cellulose and Claims 67 and 68 are directed to reticulated cellulose, the cellulosic composition, reticulated

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structure, and three dimensional configuration of both products appear to be the same or substantially the same. The reticulated cellulose of Claims 67 and 68 appears to be generic to the patented wet laid cellulosic sheet produced under conditions of agitation by fermentation of the same Acetobacter species and characterized by "thickened branched substantially continuous cellulose strands that interconnect to form a reticulated grid-like structure extending in three dimensions" (Claim 1 of U.S. 4,863,565). The examiner concluded that three dimensional reticulated cellulose and a wet laid cellulosic sheet made having a three dimensional reticulated structure reasonably appear to be patentably indistinct (Ans., p. 4). We see no error.

As said in Goodman, 11 F.3d at 1053, 29 USPQ2d at 2016, this case does not require the "two-way" type of analysis that was required in Braat, 937 F.2d at 593, 19 USPQ2d at 1292-93. Here, as in Goodman, supra, the PTO's actions did not dictate the rate of prosecution of the claimed subject matter, and any patent issued with claims drawn to the subject matter of Claims 67 and 68 of this appeal would further exclude others from making and using the invention claimed in U.S. 4,863,565.

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Furthermore, the examiner should not only consider whether the subject matter of Claims 67 and 68 is unpatentable for obviousness-type double patenting of the subject matter claimed in Ben-Bassat, U.S. 5,144,021, patented September 1, 1992, but also whether Claim 68 should be rejected under 35 U.S.C. § 101 as drawn to the same invention as the claims of the patent. As for the existing appeal, we affirm the obviousness-type double patenting rejection of Claims 67 and 68 in view of the subject matter claimed in U.S. 4,863,565.

3. § 102 or 103 over Ring, Valla, Kusakabe or Ramamurti

First, we note that Ring, Valla and Kusakabe are all included as References Cited on the face of Ben-Bassat, U.S. 5,144,021. Ramamurti's teaching stands on no better footing. Therefore, the subject matter claimed in the patent, namely:

1. A reticulated cellulose product characterized as having a reticulated structure and having strands of cellulose that interconnect forming a grid-like pattern extending in three dimensions to give a fenestrated appearance when viewed with a scanning electron microscope

. . . [;]

is presumably patentable over the disclosure of Ring, Valla, or Kusakabe, or in view of the teaching of Ring, Valla, or Kusakabe. Consequently, the examiner's action in this case appears to be inconsistent with the previous determination.

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Since the examiner needs to consider the conflict in the first instance, we reverse all the examiner's rejections of Claims 57, 64-66, and 68 under 35 U.S.C. § 102 or § 103.

Conclusion

1. We reverse the examiner's rejection of Claims 57, 64-66, and 68 under 35 U.S.C. § 112, first paragraph.

2. We affirm the examiner's rejection of Claims 67 and 68 for obviousness-type double patenting of Claims 1-10 of U.S. 4,863,565.

3. We reverse the examiner's rejection of Claims 57, 64-66, and 68 under 35 U.S.C. § 102 over Ring, Valla, Kusakabe, or Ramamurti.

4. We reverse the examiner's rejection of Claims 57, 64-66, and 68 under 35 U.S.C. § 103 in view of the separate teaching of Ring, Valla, Kusakabe, or Ramamurti.

5. We do not consider the merits of the examiner's rejections of Claims 49-56, 58-63, and 67 under 35 U.S.C. § 112, first paragraph, 35 U.S.C. § 102, or 35 U.S.C. § 103. Rather we remand the case for initial interpretation of the claim language, determination of the scope of the subject matter claimed, and compliance with the requirements of 35

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U.S.C. § 112, second paragraph; and thereafter for consideration of patentability issues arising under 35 U.S.C. § 112, first paragraph, 35 U.S.C. § 102, or 35 U.S.C. § 103.

The application, by virtue of its "special" status, requires immediate action. See Manual of Patent Examining Procedure, § 708.01(d). It is important that the Board of Patent Appeals and Interferences be informed promptly of any action affecting the appeal.

AFFIRMED-IN-PART; REVERSED-IN-PART; REMANDED

WILLIAM F. SMITH)	
Administrative Patent Judge))	
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TEDDY S. GRON)	BOARD OF PATENT
Administrative Patent Judge))	APPEALS AND
)	INTERFERENCES
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