

Fixing Continuing Application Practice at the USPTO

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Fixing Continuing Application Practice at the USPTO

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INTRODUCTION

Academia is wrong. Patent practitioners are wrong. The United States Patent & Trademark Office is wrong. Everyone is wrong when it comes to continuing patent application practice before the United States Patent and Trademark Office.

Leading intellectual property law professors Mark Lemley and Kimberly Moore have suggested that an ideal patent world would have very few continuing applications.¹ Patent practitioners represented by the American Intellectual Property Law Association (AIPLA), on the other hand, would prefer no limit to the number of continuing applications they may file.²

1. Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B.U. L. Rev. 63, 93–94, 106–07 (2004). See also *infra* Part I.B.1.

2. See generally Letter from Michael Kirk, Executive Director, AIPLA, to Jon Dudas, Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office (Apr. 24, 2006), available at <http://www.aipla.org/>

The position of the United States Patent & Trademark Office (USPTO) is somewhere between the two extremes. The USPTO contends continuing applications are increasing the backlog of pending applications.³ In response, the USPTO published new rules (Proposed Rules) limiting, but not eliminating, continuing applications.⁴ On the eve of the implementation of the new rules, the District Court for the Eastern District of Virginia issued a preliminary injunction preventing the USPTO from enforcing the rules.⁵ The court made the injunction permanent on April 1, 2008.⁶ The USPTO appealed the ruling and, in April 2009, the Federal Circuit reversed in part, vacated in part, and remanded the case back to the Eastern District of Virginia, which has not yet issued a ruling.⁷

While the ability of applicants to file unlimited continuing applications is not desirable, Lemley and Moore's suggested solutions and the USPTO's Proposed Rules are too restrictive, ignoring realities of patent prosecution. In Part I of this Comment, I will explain what a continuing application is and the differing views of continuing application practice. In Part II, I will apply the USPTO's Proposed Rules to a sample group of patent applications and analyze the effects. Finally, in Part III, I will propose a solution that balances concerns of patent applicants, the USPTO, and the general public.

I. CONTINUING PATENT APPLICATION PRACTICE

A. *Continuing Patent Applications*

A continuing patent application is a type of patent application that claims priority back to an earlier filed patent application (a "parent" application)⁸ and stems from the same general invention disclosure.⁹

Content/ContentGroups/Issues_and_Advocacy/Comments2/Patent_and_Trademark_Office/20066/ContinuationLetter.pdf) (last visited Jan. 18, 2009). *See also infra* Part I.B.2.

3. Changes To Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications, 72 Fed. Reg. 46,716, 46,717 (proposed Aug. 21, 2007) (permanently enjoined from implementation, *see* *Tafas v. Dudas*, 541 F. Supp. 2d 805, 810, 817 (E.D. Va. 2008)) [hereinafter *Changes to Practice*].

4. *Id.*

5. *Tafas v. Dudas*, 511 F. Supp. 2d 652, 671 (E.D. Va. 2007).

6. *Tafas*, 541 F. Supp. 2d at 817.

7. *Tafas v. Doll*, 2009 WL 723353 (Fed. Cir. 2009).

8. 35 U.S.C. §§ 120, 121, 132(b) (2006); U.S. Patent & Trademark Office, U.S. Dep't of Commerce, Manual of Patent Examining Procedure § 201.04 (8th ed., rev. 2008) [hereinafter *MPEP*].

Currently, the USPTO places no limit on the number of continuing applications timely filed by an inventor.¹⁰ Continuing applications come in four forms: (1) a continuation application, (2) a continuation-in-part application, (3) a divisional application, and (4) a Request for Continued Examination (RCE).¹¹

Continuation applications contain different claim scope¹² than their parent applications but may claim only that which was disclosed in the parent application.¹³ Continuation-in-part applications similarly refer back to the parent application but disclose additional material that does not gain the benefit of the parent's priority date.¹⁴ An inventor may file an unlimited number of continuation and continuation-in-part applications as long as a parent application remains pending.¹⁵ For the remainder of this Comment, however, both continuation and continuation-in-part applications will simply be referred to as continuation applications, unless specifically stated otherwise.

Appropriate filing periods for divisional applications and RCEs are more closely tied to the USPTO's substantive examination of the parent

9. See MPEP §§ 201.06 (discussing divisional applications), 201.07 (discussing continuation applications), 201.08 (discussing continuation-in-part applications), 706.07(h) (discussing RCEs).

10. Changes to Practice, 72 Fed. Reg. at 46,719 (referring to "unrestricted continued examination filings"). See also Janice M. Mueller, an Introduction to Patent Law 43–45 (2d ed. 2006); Lemley & Moore, *supra* note 1, at 64, 68.

11. Lemley & Moore, *supra* note 1, at 101 & n.155 (discussing the elimination of "CPA" applications and four remaining types of continuing applications).

12. Every patent application must contain at least one claim that defines the metes and bounds of the patentable invention. MPEP § 2171. The claims of a patent have often been compared to the legal description of a plot of land in a deed, which marks the external boundaries of the plot. See, e.g., Mueller, *supra* note 10, at 54. If the claims filed in a continuation application (or continuation-in-part application) have the *same* claim scope as any commonly-owned application or patent, including a parent application, the claims will be subject to a statutory double patenting rejection under 35 U.S.C. § 101. MPEP §§ 804(I)(B)(2), 804(II)(A), 804.03(I). If the difference in claim scope is merely an obvious variation to one of ordinary skill in the art, the claims will be subject to a nonstatutory obvious-type double patenting rejection. MPEP § 804(II)(B)(1). Unlike the statutory double patenting rejection, the nonstatutory obvious-type double patenting rejection can be overcome with a terminal disclaimer. MPEP § 804.02. Such a terminal disclaimer is designed to eliminate the harm to the public that would result from a patent owner having two patents to similar claims by only allowing enforcement of such a patent during common ownership of the two related patents. 37 C.F.R. § 1.321(c)(3) (2008); MPEP § 804.02(II).

13. MPEP § 201.07.

14. MPEP §§ 201.08, 201.11(I)(B).

15. Changes to Practice, 72 Fed. Reg. at 46,719 (referring to "unrestricted continued examination filings"). See also Mueller, *supra* note 10, at 43–45; Lemley & Moore, *supra* note 1, at 68.

application. Divisional applications are filed to pursue different inventions disclosed within a parent application and are the byproduct of a restriction requirement issued by an examiner.¹⁶ After an application is filed with the USPTO, a patent examiner will determine whether the application meets the patentability requirements of 35 U.S.C. §§ 101, 102, 103, and 112.¹⁷ In addition, the examiner may determine that the application has claims for more than a single invention and issue a restriction requirement.¹⁸ After a restriction requirement, the applicant must elect one claimed invention to pursue in the application; the applicant may use divisional applications to pursue the non-elected claims, which receive the same priority filing date of the parent application.¹⁹

An applicant will file an RCE with the USPTO to gain further consideration of a patent application after prosecution of the application is closed.²⁰ Prosecution of an application is closed after an examiner issues a final rejection, an examiner issues a notice of allowance, or the applicant files an appeal.²¹ Unlike the filing of a divisional or continuation application, an RCE filing does not create a second, co-pending application.

Closed prosecution and the appropriate time for filing an RCE can be better understood after a further explanation of patent prosecution. After the initial application filing, if any claim fails to meet a patentability requirement (for example, novelty or non-obviousness), the examiner will issue a first non-final rejection to the applicant explaining the claim's shortcomings.²² Applicants have up to six months to respond to the non-final rejection before the application will be abandoned.²³ In a response, the applicant can argue against the rejection, make claim amendments, or give supporting evidence to

16. 35 U.S.C. § 121. *See generally* MPEP §§ 802, 803.

17. In particular, the examiner will determine whether the application meets the requirements set forth in 35 U.S.C. §§ 101, 102, 103. *See* 35 U.S.C. § 131 (2006); MPEP § 701. *See generally* MPEP § 2161 for a discussion of the USPTO examination guidelines for 35 U.S.C. § 112.

18. 35 U.S.C. § 121. *See generally* MPEP §§ 802, 803.

19. 35 U.S.C. § 121; *see also* MPEP ch. 800.

20. 37 C.F.R. § 1.114(a) (2008).

21. 37 C.F.R. § 1.114(b).

22. *Tafas v. Dudas*, 511 F. Supp. 2d 652, 657 (E.D. Va. 2007). The examiner is provided with the authority to examine the patent application and reject it under 35 U.S.C. §§ 131, 132, respectively.

23. 35 U.S.C. § 133 (2006).

demonstrate the invention's patentability.²⁴ Thereafter, the patent examiner will generally issue a final rejection, a notice of allowance, or a second non-final rejection, which acts essentially the same as the first non-final rejection.²⁵

A final rejection or notice of allowance will "close" prosecution.²⁶ A timely filed RCE, however, will re-open prosecution for applications under final rejection and under a notice of allowance.²⁷ Thereafter, the prosecution cycle restarts—that is, if the examiner issues another rejection, it will be a non-final rejection in most instances.²⁸

After an examiner issues a final rejection, an application is on course to become abandoned.²⁹ An applicant has four options for proceeding with the application: "(1) appeal to the Board of Patent Appeals and Interferences . . . ; (2) file a 'request for continued examination' . . . of the application; (3) file a 'continuation' or 'continuation-in-part' application; or (4) file an after final 'amendment.'"³⁰ An RCE allows the applicant to amend claims, argue rejections, and present new evidence.³¹ Thus, in theory, an applicant can extend prosecution of a single application indefinitely by continuously filing RCEs each time an examiner issues a final rejection.

After an examiner issues a notice of allowance, the application is on course to become a granted patent upon paying the issue fee.³² However, the applicant may desire to file an RCE to enter in newly discovered evidence that is material to patentability.³³ The examiner

24. *Tafas*, 511 F. Supp. 2d at 657.

25. Mueller, *supra* note 10, at 41–42 (discussing the examiner's ability to issue a final rejection or allow the claims); *see also* 37 C.F.R. § 1.311 (2008) (indicating notice of allowance procedure); MPEP §§ 706.07 (discussing final rejection procedure), 706.07(a) (discussing the appropriate times for second, non-final rejections).

26. 37 C.F.R. § 1.114(b).

27. 37 C.F.R. § 1.114(d). In contrast, if the application has already been abandoned or the patent has granted, an RCE may not be filed. 37 C.F.R. §§ 1.114(a), 1.313(d) (2008).

28. MPEP §§ 706.07(h), 706.07(h)(II), (VIII). An examiner may respond to an RCE with a final rejection in limited circumstances. *See* MPEP § 706.07(b) (discussing first action final rejections).

29. 35 U.S.C. § 133; 37 C.F.R. § 1.135 (2008); MPEP § 711.02.

30. *Tafas v. Dudas*, 511 F. Supp. 2d 652, 657 (E.D. Va. 2007).

31. 37 C.F.R. § 1.114(c).

32. 37 C.F.R. §§ 1.311, 1.314, 1.316 (2008).

33. For instance, an Information Disclosure Statement (IDS) is filed by the applicant under 37 C.F.R. §§ 1.97–98 at various points during prosecution to submit references that are material to patentability, as is required by applicant's duty to disclose under 37 C.F.R. § 1.56. An RCE may be used to file an IDS under 37 C.F.R. § 1.97(d) after a notice of allowance. 37 C.F.R. § 1.114(a)–(c).

can then review the references to ensure a patent is not granted with invalid claims.³⁴

B. Differing Views of Continuing Application Practice

Lemley and Moore, patent practitioners (represented by AIPLA), and the USPTO all have differing views on continuing applications. Each position will be reviewed in turn, and I will use general principles to assist in distinguishing problematic from beneficial continuing applications.

1. Lemley and Moore's View of Continuing Application Practice

Lemley and Moore published a seminal work about continuing applications titled, "*Ending Abuse of Patent Continuations*,"³⁵ which has been widely referenced in the continuing application debate.³⁶ Lemley and Moore discuss continuing application practice before the USPTO, the issues continuing applications can present, and the possible solutions to the presented issues. Lemley and Moore argue that continuation applications have consequences that fall into five categories: (1) "delay and uncertainty," (2) "wearing down the examiner," (3) "changing claims," (4) "submarine patents," and (5) "evergreening."³⁷

a. Five Alleged Problems Caused by Continuing Applications

(1) Delay and Uncertainty

Lemley and Moore found that continuation applications cause delay and uncertainty because patents with a continuation take longer to examine and issue than those without a continuation, which causes uncertainties.³⁸ Continuation delays can cause uncertainty among competitors because competitors are unaware of patents covering their

34. 37 C.F.R. § 1.114(d); MPEP § 1308.01.

35. Lemley & Moore, *supra* note 1.

36. See, e.g., Changes to Practice, 72 Fed. Reg. at 46,718–19; Stephen T. Schreiner & Patrick A. Doody, *Patent Contaminations: How Proposed Rule Changes Will Undermine Our System and Create New Problems*, 24 Intell. Prop. L. Newsl. 38, 39 (2006); Matt Browning, Note, *Now You See Them, Now You Don't: The PTO's Rules on Claims and Continuations*, 23 BERKELEY TECH. L.J. 247, 254–56 (2008); Laxman Sahasrabuddhe, Note, *Is the PTO Authorized to Promulgate the Proposed Rule Change to the Continuation Practice?*, 22 BERKELEY TECH. L.J. 193, 202–03 (2007).

37. Lemley & Moore, *supra* note 1, at 71–83.

38. *Id.* at 71–73. Patents without a continuation were found to "take an average of 1.96 years to issue, while patents with at least one continuation take an average of 4.16 years to issue." *Id.* at 71.

products that may issue.³⁹ Since 2000, most applications are published, which mitigates the problem of uncertainty;⁴⁰ however, the published claims are not necessarily the allowed claims.⁴¹ The potential for claim variation after publication enables uncertainty to remain problematic. Additionally, Lemley and Moore note that “disclosure is a central function of the patent system,”⁴² thus delays are inherently detrimental.⁴³

(2) Wearing Down the Examiner

Lemley and Moore also argue that continuations serve to “wear down” examiners into allowing applications that would not otherwise be allowed.⁴⁴ Lemley argues that “an examiner faced with a determined applicant has every incentive to give in and allow the patent.”⁴⁵ Thus, continuations may be used to push a non-allowable claim to allowance. However, Lemley and Moore exaggerate the incentive for examiners to allow applications and fail to recognize that a newly assigned examiner will not be “worn out” by a continuation application since it is his or her first review of the application.

In their argument that examiners have “every incentive to give in and allow the patent,” Lemley and Moore do not consider the benefit of an RCE or a continuation to an examiner’s performance benchmarks. Lemley and Moore do not give enough weight to the possibility that examiners may prefer continuation applications because they are already familiar with the technology. Examiners receive production credit (called “counts”) for a first action on merits (FAOM) of an application (e.g., a first office action) and for a disposal (e.g., an allowance, abandonment, RCE, examiner’s answer).⁴⁶ Therefore, an

39. *Id.* at 73.

40. *See id.* Applications filed after Nov. 29, 2000, are published after eighteen months unless the application fits an exception. 35 U.S.C. § 122 (2006); 37 C.F.R. § 1.211(a) (2008); MPEP § 1120(I)–(II).

41. The average application will not have an associated first office action within eighteen months of filing. United States Patent and Trademark Office, U.S. Dep’t of Commerce, Performance and Accountability Report: Fiscal Year 2007 16 (2007), available at <http://www.uspto.gov/web/offices/com/annual/2007/2007annualreport.pdf> [hereinafter Performance and Accountability Report 2007]. Therefore, most claim amendments made during prosecution will not be published at the eighteen-month mark.

42. Lemley & Moore, *supra* note 1, at 73.

43. *Id.* at 73–74.

44. *Id.* at 74–75.

45. *Id.* at 75.

46. MPEP § 1705(II)–(III).

examiner receives (1) a disposal count upon the USPTO's receipt of an RCE (or abandonment of a parent application), which restarts examination, and (2) a FAOM count for responding to the RCE (or continuation application).⁴⁷ Thus, an examiner actually has incentive to *not* allow an application, and, instead, drag prosecution on to receive double RCE and continuation counts.⁴⁸

Furthermore, Lemley and Moore imply that an examiner receives little benefit and dislikes continuation applications having a large prior art search history from their respective parent applications. However, this contention is suspect because one of an examiner's primary functions is to locate pertinent prior art.⁴⁹ The earlier cited prior art and familiarity with the parent application can be a head start in the search and examination of the continuation application.

Both a newly assigned examiner provided with a search history and the same examiner with some familiarity with the application and potential for extra counts, weigh against Lemley and Moore's contention that examiners dislike and will be worn out by continuing applications. Therefore, "wearing down the examiner" does not appear to be a substantial problem associated with continuing applications.

(3) Changing Claims

Lemley and Moore also argue that the ability of an applicant to modify claim language in continuations can be problematic.⁵⁰ In particular, Lemley and Moore refer to situations where an applicant modifies a claim to ensure a competitor's product infringes the patent, yet the competitor "was legitimately the first to invent a particular device or process."⁵¹ They conclude that this practice of modifying claims "seems inconsistent with the fundamental economic justification for the patent system . . . to encourage new inventions."⁵²

The fear that applicants will modify patent application claims to cover inventions of others is unfounded. A patent claim must satisfy the written description requirement of 35 U.S.C. § 112, ¶ 1, which, as Lemley and Moore admit, has the purpose of "ensur[ing] that the

47. *See id.*

48. AIPLA also discusses an examiner's "count" incentive to prolong examination. Letter from Michael Kirk to Jon Dudas, *supra* note 2, at 4.

49. *See* MPEP §§ 704.01, 904; *see also* Lemley and Moore, *supra* note 1, at 75.

50. Lemley & Moore, *supra* note 1, at 76–79.

51. *Id.* at 78.

52. *Id.*

applicant claiming priority to an earlier-filed application possessed the invention and made this possession clear in her original specification.”⁵³ Lemley and Moore cite three examples in their discussion of the changing claims issue: (1) *Gentry Gallery v. Berkline*,⁵⁴ (2) *Chiron Corp. v. Genentech*,⁵⁵ and (3) Jerome Lemelson’s submarine patents, which were pending for over thirty-eight years.⁵⁶

Each of these examples, however, actually demonstrates that sufficient safeguards exist to prevent the changing claims problem identified by Lemley and Moore. In *Gentry Gallery*, an applicant claimed an arrangement of his invention not disclosed in the original application.⁵⁷ Although the examiner improperly allowed the claims, the Gentry Gallery Court later invalidated the claims under the written description requirement.⁵⁸ Likewise, in *Chiron*, the written description requirement was a central issue to the infringement suit.⁵⁹ The patent was found invalid by the trial court,⁶⁰ and the invalidity finding was upheld on appeal for failure to satisfy the written description requirement.⁶¹ Finally, the Jerome Lemelson submarine patents, if asserted, would also be open to attack under the written description requirement. Furthermore, the true issues presented by the Lemelson patents are more appropriately addressed in the next section on submarine patents.

(4) Submarine Patents

Submarine patents refer to the practice by which an applicant intentionally delays an application before the USPTO to surprise a developed industry with an allowed patent.⁶² This delayed patent would be more valuable if the market has grown and the granted patent is broad and covers the unsuspecting market.⁶³ The problem of submarine

53. *Id.* at 91.

54. *Id.* at 76 n.46; *see also* *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473 (Fed. Cir. 1998).

55. Lemley & Moore, *supra* note 1, at 76 n.46; *see also* *Chiron Corp. v. Genentech, Inc.*, 268 F. Supp. 2d 1148 (E.D. Cal. 2002).

56. Lemley & Moore, *supra* note 1, at 76–77 & n.48.

57. *Gentry Gallery*, 134 F.3d at 1479–80.

58. *Id.*

59. *See Chiron Corp.*, 268 F. Supp. 2d at 1161–66.

60. *Chiron Corp. v. Genentech, Inc.*, 363 F. 3d 1247, 1249–50 (Fed. Cir. 2004).

61. *Id.* at 1252–58.

62. Lemley & Moore, *supra* note 1, at 79–80.

63. *Id.*

patents has been reduced because patents filed after 1995 have a life of only twenty years, measured from the date of filing (not seventeen years from the patent grant),⁶⁴ and most applications filed after November 29, 2000 are published after eighteen months.⁶⁵ In addition, a “revived” prosecution laches defense can render a patent unenforceable if it “spent an unreasonable amount of time in prosecution without sufficient explanation.”⁶⁶ The threat of submarine patents existing under the current continuing application rules, while curtailed, still exists.⁶⁷

(5) Evergreening

The final concern of Lemley and Moore is “evergreening,” which is the process of acquiring “multiple patents covering the same invention.”⁶⁸ For example, an applicant is granted two patents where one patent has narrowly claimed an invention and another patent broadly claims the same invention. Even Lemley and Moore admit, however, that the problem of evergreening was reduced when Congress closed a Hatch-Waxman loophole. Further, evergreening is mitigated by double patenting rejections and terminal disclaimers.⁶⁹ Therefore, evergreening does not appear to be a substantial problem associated with continuing applications.

b. Summary

After analyzing the five concerns of Lemley and Moore, only two appear valid: (1) delay and uncertainty and (2) submarine patenting (which is related to the problem of delay and uncertainty). Lemley and Moore’s contentions that continuing applications cause additional problems by “wearing down” the examiner, changing claims, and evergreening are not supported.

Furthermore, although Lemley and Moore find that these problems exist for continuations, continuations-in-part, and RCEs, Lemley and Moore do not extend these negative effects to divisional applications.⁷⁰

64. 35 U.S.C. § 154(a)(2) (2006); Lemley and Moore, *supra* note 1, at 80 & n.63.

65. 35 U.S.C. § 122(b)(1)(A); 37 C.F.R. § 1.211; MPEP § 1120(I)–(II); Lemley & Moore, *supra* note 1, at 80 & n. 64.

66. Lemley & Moore, *supra* note 1, at 92–93 (citing *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1364–65 (Fed. Cir. 2002)).

67. Lemley & Moore, *supra* note 1, at 80.

68. *Id.* at 81.

69. *Id.* at 81–83.

70. *Id.* at 101–03.

Lemley and Moore argue that divisional applications are less susceptible to abuse and serve a useful purpose in allowing an examiner to break up a multiple-invention application.⁷¹

2. Patent Practitioners' Views of Continuing Application Practice

Patent practitioners' views of continuing applications were represented by AIPLA during the commenting period for the USPTO's Proposed Rules limiting continuation practice.⁷² AIPLA argued that the limiting of continuing application practice would "prematurely truncat[e] prosecution of their applications."⁷³ AIPLA admitted continuing application abuses existed but believed such abusive filings were in the minority.⁷⁴ AIPLA believed that limiting continuing applications would result in an increase in appeals to the Board of Patent Appeals and Interferences (BPAI) and cause applicants "to reduce the scope of the claims pursued . . . and . . . to accept more narrow claims."⁷⁵ AIPLA admitted the patent application backlog was a "problem" but supported a "stay the course" approach to determine if application fee increases and examiner hiring increases would reduce the backlog.⁷⁶

Although AIPLA provided some strong counter arguments to limiting continuing applications, nearly three years have passed since AIPLA's suggested "stay the course" approach, and each year the backlog has continued to increase,⁷⁷ the time between when an application is first filed and when it is first examined has increased,⁷⁸ and the time between when an application is first filed and when it is finally disposed has increased.⁷⁹ Furthermore, AIPLA's belief that the majority of continuing applications are not abusing the system still allows continuing applications that are harmful to exist.

71. *Id.* at 102–03.

72. *See generally* Letter from Michael Kirk to Jon Dudas, *supra* note 2.

73. *Id.* at 2.

74. *Id.* at 4.

75. *Id.* at 2.

76. *Id.* at 2–3.

77. United States Patent and Trademark Office, U.S. Dep't of Commerce, Performance and Accountability Report: Fiscal Year 2008 117 tbl.3 (2008), *available at* <http://www.uspto.gov/web/offices/com/annual/2008/2008annualreport.pdf> [hereinafter Performance and Accountability Report 2008].

78. *Id.* at 16.

79. *Id.*

3. The USPTO's View of Continuing Application Practice

The backlog of pending patent applications at the USPTO is well known and continues to grow. The backlog has more than doubled since the year 2001.⁸⁰ In 2004, 756,604 applications were pending before the USPTO⁸¹ and an average of 20.2 months passed before an examiner mailed a first office action.⁸² In 2008, 1,208,076 applications were pending⁸³ and 25.6 months passed before a first office action.⁸⁴ Similarly, from 2004 to 2008, the number of months between filing and disposal (issuance or abandonment) increased from 27.6 months to 32.2 months.⁸⁵

The USPTO attributes much of this increase in pendency and delays to “[t]he volume of continued examination filings (including both continuing applications and requests for continued examination) and duplicative applications that contain ‘conflicting’ or patentably indistinct claims. . . .”⁸⁶ The USPTO states that these applications are “having a crippling effect on the Office’s ability to examine ‘new’ (i.e., non-continuing) applications.”⁸⁷ According to the USPTO, continuation applications have increased from 11.4% of filed applications in fiscal year 1980 to 29.4% of filed applications in fiscal year 2006.⁸⁸ This increase allegedly causes “a burden on innovation both by retarding the Office’s ability to examine new applications and by undermining the function of claims to notify the public as to what technology is or is not available for use.”⁸⁹

C. Summarizing Problems with Continuing Applications

After analyzing the views and concerns of Lemley and Moore, AIPLA, and the USPTO, we can assume that continuing applications can potentially cause delays and uncertainty and increase the backlog of patent applications before the USPTO. In turn, the continuing applications that should be prevented can be categorized in two groups: (1) the continuing applications that are pending for too long after an

80. *Id.* at 117 tbl.3.

81. *Id.*

82. Performance and Accountability Report 2007, *supra* note 41, at 16.

83. Performance and Accountability Report 2008, *supra* note 77, at 117.

84. *Id.* at 16.

85. *Id.*; Performance and Accountability Report 2007, *supra* note 41, at 16.

86. Changes to Practice, 72 Fed. Reg. at 46,718.

87. *Id.*

88. *Id.*

89. *Id.*; see also Lemley & Moore, *supra* note 1 (exploring repetitive filing and the burden it imposes on the USPTO and the public).

initial application is filed and (2) the continuing applications that are members of patent application families that are simply too large. According to AIPLA, however, continuing application rules should be careful to avoid causing patent applicants to cede claim scope to which they would otherwise be entitled.

II. AN EMPIRICAL INVESTIGATION OF CONTINUING APPLICATIONS

Lemley and Moore, AIPLA, and the USPTO focus on policy arguments with high-level continuation data or anecdotal references to practitioner comments, but do not examine applications at an individual level. In Part II, I will first explain the USPTO's proposed continuation rules. Thereafter, I will attempt to analyze the USPTO's Proposed Rules with respect to continuing applications at an individual level, shedding new light on the practicalities of implementing the Proposed Rules.

A. USPTO's Proposed Continuing Application Rules

In the proposed continuation rules, applicants, as a matter of right, could file a maximum of two continuation applications, in addition to one RCE, for a patent application family.⁹⁰ "An application family includes the initial application and its continuation or continuation-in-part applications."⁹¹ For any further continuation application or RCE filed, the USPTO would require the applicant to pay the \$400.00 petition fee and file a petition under 37 C.F.R. § 1.78(d)(1)(vi) or § 1.114(g) showing "why the amendment, argument, or evidence sought to be entered could not have been previously submitted."⁹² A divisional application filed in response to a restriction requirement would start its own (divisional) application family, in which the applicant could file an additional two continuation applications and one RCE.⁹³ In addition, an applicant could submit a suggested restriction requirement that, if granted, would enable the filing of a new divisional application family pursuing the non-elected claims.⁹⁴ A filed divisional application that was

90. Changes to Practice, 72 Fed. Reg. at 46,719.

91. United States Patent and Trademark Office, U.S. Dep't of Commerce, Questions and Answers: Claims and Continuations Final Rule 2 (2007), available at <http://www.uspto.gov/web/offices/pac/dapp/opla/presentation/ccfrfaq.pdf> [hereinafter Claims and Continuations Final Rule].

92. Changes to Practice, 72 Fed. Reg. at 46,719, 46,770. See also 37 C.F.R. § 1.17(f) (2008); Changes to Practice, 72 Fed. Reg. at 46,729, 46,733.

93. Changes to Practice, 72 Fed. Reg. at 46,720.

94. See *id.* at 46,740.

not required by restriction (i.e., the examiner did not issue a restriction requirement nor approve a suggested restriction requirement) would count as a continuation in the parent application family.⁹⁵ Finally, no petition would be required for continuation applications filed to cure informalities.⁹⁶

Although the USPTO has stated that each petition under § 1.78(d)(1) or § 1.114(g) would be decided on a “case-by-case basis,”⁹⁷ it discussed situations in which an applicant would likely not be able to satisfy the burden of “could not have been previously submitted.”⁹⁸ For instance, submitting a newly received foreign search report from a foreign patent office on the same or related application would likely not be a sufficient reason.⁹⁹ Moreover, it is likely that an examiner making “new arguments or a new ground of rejection in a final Office action would not be considered a sufficient showing.”¹⁰⁰ The USPTO also listed factors that may be considered when making a decision on a petition, which included:

(1) [w]hether applicant should file an appeal or a petition under § 1.181 (e.g., to withdraw the finality of an Office action) rather than a continuing application or request for continued examination; (2) the number of applications filed in parallel or serially with substantially identical disclosures; and (3) whether the evidence, amendments, or arguments are being submitted with reasonable diligence.¹⁰¹

The last factor includes evaluating the condition of the application when first filed, “the consistency of the [USPTO’s] position during prosecution . . . and the earnestness of the applicant’s efforts to overcome outstanding rejections.”¹⁰²

95. *Id.* at 46,720.

96. *Id.* at 46,769.

97. *Id.* at 46,770.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 46,771.

102. *Id.*

B. Research and Analysis of Patent Application Continuing Application Use

1. Research Techniques

Research for this Comment covered 125 patent applications (application numbers 10/250,000 to 10/250,124) filed between May 27, 2003 and June 5, 2003. Each application was researched on the Public Patent Application Information Retrieval (Public PAIR) system provided by the USPTO.¹⁰³ Public PAIR is an online USPTO database that provides file histories, including nearly all interactions between a patent applicant and the USPTO, on published patents and patent applications.¹⁰⁴ The 2003 time frame was chosen because the applications were filed at a late enough date such that the majority of applications are posted on Public PAIR, yet early enough such that the majority have reached final disposition.¹⁰⁵

The following information was retrieved from Public PAIR for each application in the data set: (1) technology center,¹⁰⁶ (2) application status (granted patent, abandoned application, or still pending application), (3) number of continuations in the application family, and (4) number of RCEs filed in the application family.¹⁰⁷

2. Public PAIR Research Results

a. Data Set in General

Of the 125 applications, 119 were available on Public PAIR for analysis.¹⁰⁸ The 119 applications were not limited to any particular technology area within the USPTO; they spanned six of the seven technology centers for utility patent applications.¹⁰⁹ Eighty-one of the

103. Public PAIR is accessible on the Internet at <http://portal.uspto.gov/external/portal/pair>.

104. Basic Help for Patent Application Information Retrieval (PAIR), <http://www.uspto.gov/ebc/pair/help.html> (follow "What is Pair?" hyperlink under "General") (last visited Mar. 8, 2009).

105. All but six applications were available on PAIR and all but eight of the remaining 118 applications reached final disposition. *See infra* Appendix.

106. The USPTO patent examining corps is broken down into eight different technology centers, each focusing on a different type of technology (e.g., Biotechnology, Organic Chemistry, Communications). USPTO Patent Operations, <http://www.uspto.gov/web/offices/pac/dacp/peg/> (last visited Mar. 8, 2009).

107. *See infra* Appendix.

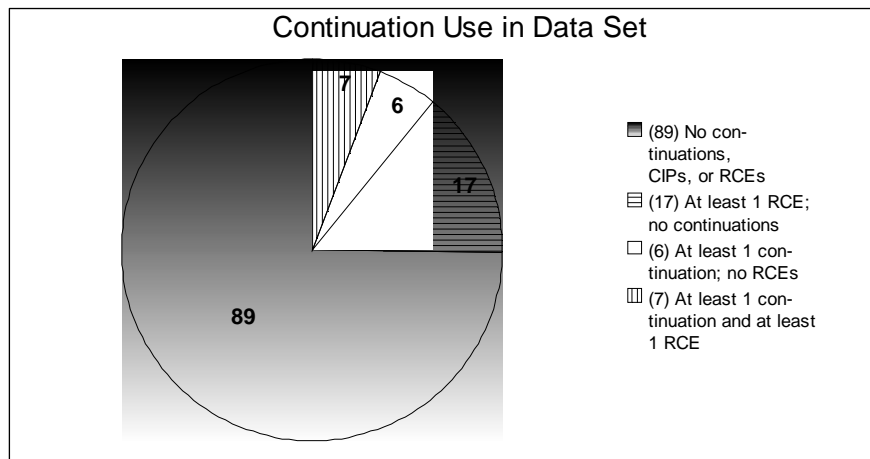
108. *Id.*

109. *Id.* Seven applications were classified in Technology Center (TC) 1600, eighteen

applications were allowed, thirty-one were abandoned, and seven were still pending at the time of the research.¹¹⁰ While the eventual outcomes of the still-pending applications are unknown, these applications provide some additional data for purposes of the continuation research. For instance, three of the seven still-pending applications contain continuing applications in their prosecution history.¹¹¹

b. Continuing Application Use in the Data Set

Of the original 119 applications researched, eighty-eight applications had no RCEs or related continuation applications filed.¹¹² Eighteen of the 119 applications had at least one RCE filed during prosecution, but no related continuation applications; six of the 119 applications had at least one non-divisional continuation or continuation-in-part application filed, but no RCEs filed; and seven applications had both, at least one RCE and at least one continuation application filed.¹¹³



c. Categorization of Data Set in View of Proposed Rules

To analyze the proposed continuation rules in light of the patent

applications were classified in TC 1700, four applications were classified in TC 2100, one application in TC 2400, six applications were classified in TC 2600, forty-four applications were classified in TC 2800, zero applications in TC 2900 (design patents), twenty-three applications were classified in TC 3600, and sixteen applications were classified in TC 3700.
Id.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

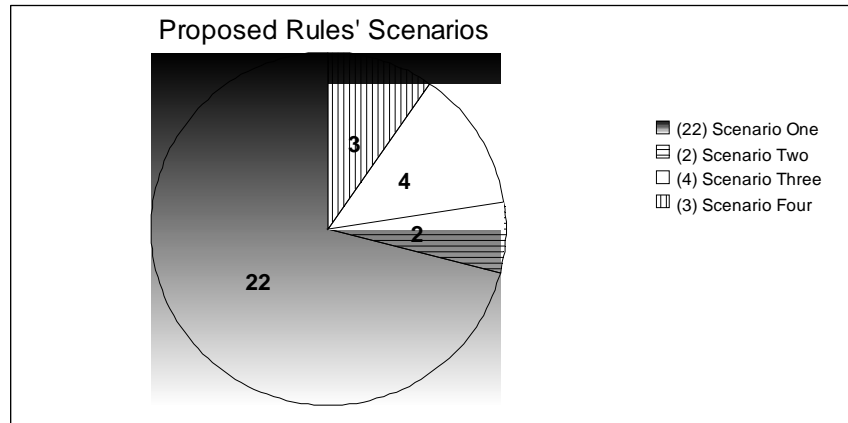
application data, I will categorize the thirty-one patent application families that have at least one non-divisional continuing application into four scenarios. The four scenarios are differentiated by the number of RCEs and continuations filed within an application family.

Scenario one: The application family has two or fewer continuations, one or no RCEs, and does not violate the Proposed Rules.

Scenario two: The application family has more than two continuations, more than one RCE, and violates the Proposed Rules.

Scenario three: The application family has two or fewer continuations, more than one RCE, and violates the Proposed Rules.

Scenario four: The application family has more than two continuations, one or fewer RCEs, and violates the Proposed Rules.



In scenario one, the applicant is not required to change his or her continuation or RCE filings under the Proposed Rules because the application family has two or fewer continuations and one or no RCE. In scenarios two, three, and four, the two continuation limit or one RCE limit in the Proposed Rules has been exceeded and the applicant must (a) file a petition and satisfy the “could not have been previously submitted” burden (CNPS petition) or (b) reduce the number of

continuation or RCE filings.¹¹⁴

An applicant's options to reduce the number of continuation filings are different than the options to reduce the number of RCE filings. To reduce the number of continuation filings for a particular application, an applicant could file a suggested restriction requirement¹¹⁵ or simply not file the respective application. To reduce RCE filings, an applicant could replace an RCE with an appeal, an after-final amendment, a petition to withdraw the finality of the previous Office action,¹¹⁶ or a continuation if less than two continuation applications had been filed in the application family.¹¹⁷ Alternatively, an applicant could simply not file a response, leading to abandonment if the application is under final rejection¹¹⁸ or an allowance if the application has already been found allowable.¹¹⁹

3. Analysis of Data Set

In this section, I will analyze the four scenarios to determine whether the applications targeted by the Proposed Rules resulted in desirable responsive actions by the applicant, whether the Proposed Rules should have targeted the applications requiring action, and whether the Proposed Rules properly overlooked the applications requiring no action.

a. Desirability of Potential Applicant Responses

(1) Scenario One (Two or Fewer Continuations and One or No RCE)

Under the Proposed Rules, only scenarios two, three, and four would require an applicant to take some responsive action.¹²⁰ An applicant, however, could make strategic decisions during prosecution based on the limited number of continuing applications allowed.¹²¹ For instance, an applicant could file and have granted a suggested restriction requirement to spawn a new divisional application family in situations

114. Claims and Continuations Final Rule, *supra* note 91, at 4. *See also* proposed 37 C.F.R. §§ 1.78(d)(1), 1.114(g) discussed in Changes to Practice, 72 Fed. Reg. 46,716.

115. *See supra* notes 92–94 and accompanying text.

116. *See supra* note 30 and accompanying text.

117. Claims and Continuations Final Rule, *supra* note 91, at 5–6.

118. 35 U.S.C. § 133; 37 C.F.R. § 1.135; MPEP § 711.02.

119. 37 C.F.R. §§ 1.311, 1.314, 1.316.

120. *See supra* Part II.A.

121. Letter from Michael Kirk to Jon Dudas, *supra* note 2, at 5.

where an examiner may not have issued a restriction requirement.¹²² If the suggested restriction requirement is granted and the applicant files a divisional application, two application families would be pending instead of one; thus, increasing the number of continuing applications allowed. In addition, the applicant may make more narrowing amendments to claims than necessitated by the prior art to lessen the risk of a final rejection and the need for continuing applications.¹²³ With this course of action, the applicant would be ceding claim scope that would otherwise be eligible for patent protection.

Therefore, in scenario one, the Proposed Rules may both increase the number of continuing applications filed in applications that would otherwise not abuse continuing applications and reduce the claim scope of patents beyond that which is necessitated by the prior art. Specific applications in the data set will not be analyzed, however, as it is more difficult to speculate on an applicant's actions when no action is required by the Proposed Rules.

(2) Scenario Two (More than Two Continuations and More than One RCE)

i. Scenario Two in General

In scenario two, an application family has exceeded the number of RCEs *and* continuations allowed without a granted CNPS petition. As stated above, an applicant has two general options to avoid this situation: (1) file CNPS petitions or (2) reduce the number of continuation and RCE filings.¹²⁴

Given the description of the USPTO's decision making regarding CNPS petitions,¹²⁵ the likelihood of a single CNPS petition being granted does not appear great. Thus, in situations where both two or more continuations and one or more RCE were filed, it seems unlikely that multiple CNPS petitions would be a plausible option.¹²⁶ In turn, an applicant's most likely response would be to file fewer continuation applications and RCEs.

122. *See id.*

123. *Id.* at 2.

124. *See supra* Part II.B.2.c.

125. *See supra* Part II.A.

126. *Id.* In deciding a CNPS petition, the USPTO may consider "the number of applications filed in parallel or serially with substantially identical disclosures. . . ." Changes to Practice, 72 Fed. Reg. at 46,771.

The options available for reducing RCEs where two or more continuations have already been filed include (1) filing no response, (2) filing a petition to withdraw finality of the previous Office action, (3) filing an after-final (rejection) amendment, or (4) filing an appeal.¹²⁷

Filing no response is an option for an applicant in scenario two and would have different outcomes depending on the status of the application. For instance, if the application is under final rejection, filing no response will result in abandonment.¹²⁸ If the application has already been indicated as allowable, however, the application will be granted.¹²⁹

Although petitions to withdraw finality, after-final amendments, and appeals all exist under the current rules, the incentive to use each is not as strong because of the availability of RCEs. The Proposed Rules' strict limit on RCEs would likely result in an increase in petitions to withdraw finality, after-final amendments, and appeals.

A petition seeking to have the finality of a rejection withdrawn must be filed within two months of the determination.¹³⁰ The six-month period to respond to an Office action is not paused while the petition to withdraw finality is decided.¹³¹ Filing such a petition may be an effective approach if the finality of the rejection was improper; but, since the period for reply is not extended, the outcome is not guaranteed, and losing the petition without filing any other response would result in abandonment, the petition to withdraw finality would likely be only a portion of an applicant's strategy.

Similar to the petition to withdraw finality, an after-final amendment does not extend the period to reply to an outstanding final rejection.¹³² An after-final amendment, however, is not entered as a matter of right;¹³³ the examiner can use his or her discretion to not consider new claim amendments because they raise "new issues."¹³⁴ Even if the amendment is entered, the examiner can maintain the final rejection with mere concise statements responding to the arguments presented.¹³⁵

127. *See supra* Part II.B.2.c.

128. *See supra* Part I.A.

129. *Id.*

130. MPEP §§ 706.07, 1002.

131. MPEP § 1002.

132. *See* 37 C.F.R. §§ 1.116(c), 1.135 (2008); *see also* MPEP § 714.13(I).

133. MPEP § 714.13(II).

134. MPEP § 714.13(III).

135. MPEP § 714.13(III) ("The reasons for non-entry should be concisely expressed.").

Therefore, like a petition to withdraw finality, an after-final amendment would likely be only a portion of an applicant's strategy.

Filing an appeal appears to be a likely option for an applicant in scenario two given the limited options to continue prosecution of the application and the amount at stake if the application is under final rejection (i.e., an impending abandoned application after six-months).¹³⁶ An appeal is particularly likely if a petition to withdraw finality and an after-final rejection amendment do not have favorable outcomes.¹³⁷ In an appeal to the BPAI, after an applicant files an appeal brief, the examiner and applicant can exchange arguments over the next several months.¹³⁸ Finally, the application is put on the BPAI's docket,¹³⁹ and the applicant must wait months or years for its decision.¹⁴⁰ Despite the USPTO's desire to pass additional rules to deter appeals,¹⁴¹ as applicants are left with limited options, appeals under the Proposed Rules will increase and its delays and backlogs will too.

Although the number of petitions to withdraw finality, after-final amendments, and appeals may increase, the Proposed Rules would encourage applicants to file RCEs and continuations more efficiently and thoroughly because of the strict limit. Therefore, although the dataset did not provide any examples of egregious overuse of RCE filings, the Proposed Rules would surely prevent RCE abuse.

To reduce the number of continuations, an applicant may file

136. Letter from Michael Kirk to Jon Dudas, *supra* note 2, at 5 n.2 (predicting the likely increase in appeals if continuing applications as a matter of right are limited).

137. *Id.*

138. MPEP §§ 1207, 1207.02. After an applicant files an appeal brief, an examiner has two months to write an examiner's answer, re-open prosecution, or allow the application. *Id.* Once an examiner responds, the applicant has two months to file a response to the examiner's answer. *Id.*

139. MPEP § 1210.

140. *See, e.g.,* Posting of Dennis Crouch to PatentlyO, <http://www.patentlyo.com/patent/2007/09/how-long-does-a.html> (Sept. 17, 2007, 16:09 CST) (finding an average of 18 months for an appeal decision after an applicant filed an appeal brief in a random sampling of 2007 BPAI decisions).

141. *See* Posting of Dennis Crouch to PatentlyO, <http://www.patentlyo.com/patent/2007/11/pto-publishes-c.html> (Nov. 8, 2007, 15:21 CST). The proposed appeal rules were published in the federal register in June 2008 and were to go into effect on Dec. 10, 2008. Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeal, 73 Fed. Reg. 32,938 (June 10, 2008) (to be codified at 37 C.F.R. pt. 41). The effective date of the new appeal rules was postponed six months later. Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals; Delay of Effective and Applicability Dates, 73 Fed. Reg. 74,972 (Dec. 10, 2008).

suggested restriction requirements or simply not file the continuations.¹⁴² These options will likely result in an increase in divisional applications that will take away some of the reduction in continuation applications the Proposed Rules seek to effectuate. Skillful applicants will likely draft claims that are more easily deemed restrictable. The Proposed Rules will also likely create a new form of continuation abuse through divisional applications.¹⁴³

Advantageously, the Proposed Rules' limit on continuation filing will likely reduce the number of continuation applications filed because not all continuation applications could be restructured as a divisional application. A restriction requirement is only proper where at least one claim is found to be independent and distinct from another claim in an application.¹⁴⁴ For example, a suggested restriction requirement for a continuation application filed simply for a narrower or broader scope of claims directed to the same invention will not be found restrictable,¹⁴⁵ therefore, no more than two could be filed without a CNPS petition. Thus, the Proposed Rules should cause a decline in at least some continuation applications.

ii. Specific Examples of Scenario Two

Two applications from the data set fit this description: 10/250,070 (the '070 application) and 10/250,089 (the '089 application). The '070 application family has three continuation applications and two RCEs.¹⁴⁶ Given the burden that applicants must show in a CNPS petition, it seems implausible that the USPTO would grant the two CNPS petitions for the '070 application to comply with the Proposed Rules. Thus, the applicant would likely need to eliminate one continuation and one RCE from the application family. The RCE of the '070 application was filed to broaden a claim and add new claims *after* the examiner issued an

142. *See supra* Part II.A.

143. *See infra* Part II.B.3.c.

144. 35 U.S.C. § 121. *See generally* MPEP §§ 802, 803.

145. *See* MPEP § 806 (explaining situations where restrictions requirements are allowed).

146. *See* Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "10/771,115"; then follow "Continuity Data" hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "10/604,737"; then follow "Continuity Data" hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "10/250,070"; then follow "Image File Wrapper" hyperlink) (showing RCE filing); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "10/248,342"; then follow "Transaction History" hyperlink) (showing RCE filing).

allowance.¹⁴⁷ It seems particularly unlikely that a CNPS petition would be granted in this situation because the applicant waited until after a notice of allowance was issued to broaden the claim and add new claims.¹⁴⁸ As the application was not under final rejection, a petition to withdraw finality, an after-final amendment, or an appeal are not options to eliminate this RCE. The applicant could file a reissue application to pursue broader claims¹⁴⁹ or simply not pursue the claim changes.

If the applicant wanted to pursue the additional continuation (and not just eliminate it), he or she could file a CNPS petition or suggested restriction requirement. However, each of the three child applications was issued a provisional double patenting rejection with a parent application.¹⁵⁰ Thus, because of the closely related claims, the USPTO would likely deny a suggested restriction requirement and a CNPS petition.

In the '070 application example, the Proposed Rules appear to prevent late claim amendments via an RCE filing, reducing delays and uncertainty, and preventing excessive continuation applications drawn to the same invention. The applicant's likely responses, filing earlier claim amendments and one less continuation, are desirable.

The '089 application family is an example of egregious continuing application filings. The '089 application family includes more than twenty-five applications, with the earliest application having been filed

147. See Claims submitted with the RCE for 10/250,070 (Aug. 25, 2004), Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "10/250,070"; then follow "Image File Wrapper" hyperlink; then follow "Claims" hyperlink).

148. In addition to the difficulty the applicant will have in satisfying the "could not have been previously submitted" burden, on its face, when filing a broadening amendment post-allowance, the USPTO stated a factor it may consider when deciding a CNPS petition, "whether the evidence, amendments, or arguments are being submitted with reasonable diligence." See *supra* Part II.A; Changes to Practice, 72 Fed. Reg. at 46,771.

149. 35 U.S.C. § 251 (2006); MPEP §§ 1401-02.

150. See Non-Final Rejection for U.S. Patent Application 10/771,115 (Aug. 17, 2004), Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "10/771,115"; then follow "Image File Wrapper" hyperlink; then follow "Non-Final Rejection" hyperlink); Non-Final Rejection for U.S. Patent Application 10/604,737 (July 27, 2004), Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "10/604,737"; then follow "Image File Wrapper" hyperlink; then follow "Non-Final Rejection" hyperlink); Non-Final Rejection for U.S. Patent Application 10/250,070 (Jan. 14, 2004), Public PAIR, <http://portal.uspto.gov/external/portal/pair>, (search "Application Number" for "10/250,070"; then follow "Image File Wrapper" hyperlink; then follow "Non-Final Rejection" hyperlink).

in 1999 and with applications still pending as of January 2009.¹⁵¹ The Proposed Rules would likely have a drastic effect on the '089 application family, as the possibility of the USPTO granting over twenty CNPS petitions is very unlikely. More likely, the applicant would file suggested restriction requirements for some applications and, overall, file fewer continuation applications. Thus, the applicant's likely response strategy if the Proposed Rules had been in effect would also be desirable.

(3) Scenario Three (Two or Fewer Continuations and More than One RCE)

i. Scenario Three in General

In scenario three, an application family has exceeded the number of RCEs allowed without a granted CNPS petition.¹⁵² To comply with the Proposed Rules, an applicant could (1) file a CNPS petition or (2) reduce the number of RCE filings.¹⁵³ To reduce the number of RCE filings where two continuations have been filed in the application family, an applicant would have the same options as in scenario two: filing no response or replacing an RCE with a petition of the finality of the previous Office action, an after-final amendment, and/or an appeal.¹⁵⁴ However, if the application family has less than two continuations, an applicant is able to file a continuation in place of each additional RCE until the two continuation application limit is reached.¹⁵⁵

The continuation filing would have essentially the same outcome as the RCE filing if the applicant chooses to pursue the Proposed Rules' optional streamlined continuation procedure.¹⁵⁶ Under the optional streamlined continuation application procedure, the continuation application would be placed directly on the examiner's regular amended docket as would an RCE.¹⁵⁷ This procedure, however, is merely *optional*.¹⁵⁸ An applicant may avoid this option and cause the continuation application to go through the normal, longer procedure for

151. See Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "09/431,982"; then follow "Continuity Data" hyperlink).

152. See *supra* Part II.A.

153. *Id.*

154. See *supra* Part.II.B.3.a.2.

155. See *supra* Part II.A.

156. See Claims and Continuations Final Rule, *supra* note 91, at 5-6.

157. *Id.*

158. *Id.*

a new continuation application.¹⁵⁹ Such a continuation application may not receive a first Office action for an average of 25.6 months after the initial filing,¹⁶⁰ whereas the streamlined continuation applications will receive a first action within a few months.¹⁶¹

ii. Specific Examples of Scenario Three

The research dataset includes four applications that had two or fewer continuation applications and more than one RCE filed in an application family.¹⁶² In three of the four applications, two RCEs were filed in an application and no related continuations were filed.¹⁶³ As such, although the second RCE in each application could not be filed without a granted CNPS petition, a continuation application could be submitted in place of the RCE. The streamlined continuation application would have been a likely option for applicants given the similarity in results between an RCE and a streamlined continuation application. The USPTO would likely see no benefit from preventing the second RCE filing and, in fact, would continue to provide the applicant the option to delay prosecution available under the current continuation rules by making the streamlined continuation application merely optional. Thus, no reduction in delays and uncertainties or the backlog would be achieved.

The fourth application, 10/250,020 (the '020 application), has two confirmed continuation applications¹⁶⁴ and three RCEs filed within the application's family.¹⁶⁵ The parent application to the '020 application, application 09/457,173, had two RCEs filed therein.¹⁶⁶ The first RCE presented new arguments to the examiner,¹⁶⁷ which eventually led to the

159. *Id.*

160. See Performance and Accountability Report 2008, *supra* note 77, at 16.

161. Claims and Continuations Final Rule, *supra* note 91, at 5–6.

162. See *infra* Appendix. U.S. Patent Applications 10/250,020, 10/250,021, 10/250,079, and 10/250,123 fit within scenario three.

163. See *infra* Appendix.

164. See *infra* Appendix. Application 10/815,110 claimed priority to the '020 application family, but it is not available on PAIR. Therefore, 10/815,110's status as a continuation application (and not a divisional application) cannot be confirmed. If the 10/815,110 application is a continuation, '020 would be properly categorized in scenario two and would include additional issues related to excessive continuations filings as discussed in Part II.B.3.a.2.

165. See *infra* Appendix.

166. See Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "09/457,173"; then follow "Image File Wrapper" hyperlink) (showing RCE filing).

167. See generally Amendment Submitted/Entered with Filing of CPA/RCE for

examiner finding the application allowable.¹⁶⁸ After the examiner issued an allowance, however, the applicant submitted an RCE with an Information Disclosure Statement (IDS) including newly discovered references that the examiner had not yet considered.¹⁶⁹ The IDS resulted in a new rejection and the eventual abandonment of the patent application.¹⁷⁰ The third RCE filing in the '020 application family was also for a post-allowance IDS submission by the application.¹⁷¹ In this case, the examiner considered the new references, but issued another allowance because the references did not render the application unpatentable.¹⁷²

09/457,173 (July 26, 2002), Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "09/457,173"; then follow "Image File Wrapper" hyperlink; then follow "Amendment Submitted/Entered with Filing of CPA/RCE" hyperlink).

168. See Notice of Allowance for Application 09/457,173 (Oct. 31, 2003), Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "09/457,173"; then follow "Image File Wrapper" hyperlink; then follow "Notice of Allowance and Fees Due (PTOL-85)" hyperlink).

169. See generally Request for Continued Examination (RCE) for 09/457,173 (Mar. 30, 2004), Public PAIR, <http://portal.uspto.gov/external/portal/pair>, (search "Application Number" for "09/457,173"; then follow "Image File Wrapper" hyperlink; then follow "Request for Continued Examination (RCE)" hyperlink). See also Information Disclosure Statement for 09/457,173 (SB-08) (Mar. 30, 2004), Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "09/457,173"; then follow "Image File Wrapper" hyperlink; then follow "Information Disclosure Statement (IDS) Filed (SB-08)" hyperlink). An IDS is a means for an applicant to submit references for the examiner to review when determining patentability. MPEP § 609 ("The provisions of 37 C.F.R. 1.97 [filing of information disclosure statement] and 37 C.F.R. 1.98 [content of information disclosure statement] provide a mechanism by which patent applicants may comply with the duty of disclosure provided in 37 C.F.R. 1.56.").

170. See Non-Final Rejection for Application 09/457,173 (Apr. 14, 2004), Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "09/457,173"; then follow "Image File Wrapper" hyperlink; then follow "Non-Final Rejection" hyperlink). See generally Abandonment for 09/457,173, (Jan. 5, 2006), Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search "Application Number" for "09/457,173"; then follow "Image File Wrapper" hyperlink; then follow "Abandonment" hyperlink).

171. See generally Request for Continued Examination (RCE) for 10/167,890 (Apr. 8, 2005), Public PAIR, <http://portal.uspto.gov/external/portal/pair>, (search "Application Number" for "10/167,890"; then follow "Image File Wrapper" hyperlink; then follow "Request for Continued Examination (RCE)" hyperlink). See also Information Disclosure Statement for 10/167,890 (Apr. 8, 2005), Public PAIR, <http://portal.uspto.gov/external/portal/pair>, (search "Application Number" for "10/167,890"; then follow "Image File Wrapper" hyperlink; then follow "Information Disclosure Statement (IDS) Filed (SB-08)" hyperlink).

172. See Notice of Allowance for 10/167,890 (Aug. 3, 2005), Public PAIR, <http://portal.uspto.gov/external/portal/pair>, (search "Application Number" for "10/167,890"; then follow "Image File Wrapper" hyperlink; then follow "Notice of Allowance and Fees Due (PTOL-85)" hyperlink).

The Proposed Rules, if applied to the '020 application family, would have created obstacles preventing the examiner from receiving prior art material applicable to the application's patentability. The applicant could file a CNPS petition to have the references considered by the examiner, but the outcome of the petition would not be guaranteed. In one application, U.S. Patent Application 09/457,173, a CNPS petition denial would have caused the USPTO to grant an invalid patent application. Thus, the potential for such a pertinent reference to go unconsidered by an examiner, allowing an invalid patent, is undesirable.

(4) Scenario Four (More Than Two Continuations and One or No RCE)

i. Scenario Four in General

In scenario four, the applicant has filed too many continuation applications under the Proposed Rules.¹⁷³ An applicant with excessive continuations, if not filed as substitute RCEs, has three options: (1) file a CNPS petition, (2) file a suggested restriction response, or (3) not file the continuation application.¹⁷⁴ If the continuation was filed as a substitute RCE (i.e., the parent was abandoned and similar claims were pursued in the continuation), then the analysis of the methods for reducing RCEs discussed above would apply.¹⁷⁵

Note that while a continuation can be a suitable RCE substitute under the Proposed Rules, an RCE is generally not a continuation substitute. A continuation filing spawns a new patent application, whereas an RCE merely continues an already existing application.¹⁷⁶ Moreover, an RCE's claim scope cannot be independent or distinct from the already existing application or it will be subject to restriction.¹⁷⁷ Thus, an RCE would not be an adequate substitute if a continuation was filed seeking a different claim scope.

173. *See supra* Part II.A.

174. *Id.*

175. *See supra* Part II.B.3.a.3.

176. MPEP § 706.07(h) ("An RCE is not the filing of a new application. Thus, the Office will not convert an RCE to a new application such as an application filed under 37 C.F.R. 1.53(b) or a continued prosecution application (CPA) under 37 C.F.R. 1.53(d)."). *See also supra* notes 20–31 and accompanying text (providing a more detailed explanation of RCEs).

177. 37 C.F.R. § 1.145 (2008); MPEP § 706.07(h).

ii. Specific Examples of Scenario Four

Three applications fit within scenario four: 10/250,058 (the ‘058 application), 10/250,078 (the ‘078 application), and 10/250,110 (the ‘110 application). The ‘058 and ‘110 applications each had three continuations in their respective patent application families, while the ‘078 application included four continuations.¹⁷⁸

The ‘058 application family included four applications:¹⁷⁹ a parent application that was patented¹⁸⁰ and three serially-filed continuation applications that were abandoned during prosecution without an appeal filed.¹⁸¹ Given the earlier abandoned applications, it seems unlikely that the USPTO would grant a CNPS petition and allow the third continuation. The applicant may attempt a suggested restriction requirement or simply not file the additional continuation. The situation, and likely results, are similar in the ‘110 and ‘078 application families, where applications were abandoned during prosecution without any appeals filed¹⁸² and, in each family, one application was abandoned after a mere restriction requirement.¹⁸³

If the Proposed Rules’ continuation limitation was in effect during the prosecution of the ‘058, ‘078, and ‘110 application families, the

178. See *infra* Appendix.

179. See Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “09/252,334”; then follow “Continuity Data” hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “09/682,257”; then follow “Continuity Data” hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “10/250,058”; then follow “Continuity Data” hyperlink).

180. See Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “09/252,334”; then follow “Application Data” hyperlink).

181. See Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “11/161,587”; then follow “Transaction History” hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair>, (search “Application Number” for “09/682,257”; then follow “Transaction History” hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “10/250,058”; then follow “Transaction History” hyperlink).

182. See Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “11/363,671”; then follow “Transaction History” hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “10/250,110”; then follow “Transaction History” hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “10/250,078”; then follow “Transaction History” hyperlink).

183. See Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “11/363,671”; then follow “Transaction History” hyperlink); Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “10/250,078”; then follow “Transaction History” hyperlink).

applicants would be less likely to abandon continuation applications midway through prosecution in favor of filing new continuation applications. This change would result in a more efficient use of continuations and examination resources at the USPTO. If applicants were not more efficient, CNPS petitions would likely be denied. Therefore, unless the applicants filed a suggested restriction requirement that was granted, the Proposed Rules would likely eliminate continuation applications or encourage more efficient use of the continuation applications, which are desirable results.

b. Applications Correctly Targeted?

The nine applications of scenarios two, three, and four are considered “targeted” by the Proposed Rules because their applicants would need to alter prosecution strategies to comply with the Proposed Rules. Of the nine applications, scenario three’s four applications are examples of incorrect targeting. Three of the applications (10/250,021, 10/250,079, and 10/250,123) had a second RCE filed but had no continuations filed.¹⁸⁴ For these three applications, the applicant would likely file a streamlined continuation application and the USPTO would see little positive or negative effects.

The fourth and final application of scenario three was also improperly targeted. As stated above, the ‘020 application family included three RCEs, two of which were filed to present newly found references to the examiner.¹⁸⁵ If one of the references was not considered by the examiner, the application would have been improperly allowed.¹⁸⁶

The remaining five applications were successfully targeted by the Proposed Rules. The ‘089 application stands out as an example of overly aggressive continuation filing as it has at least twenty-five continuation applications all stemming from a 1999 parent application.¹⁸⁷ Another application family had four continuations,¹⁸⁸ and three application families had three continuations filed.¹⁸⁹ These application

184. *See supra* note 162 and accompanying text.

185. *See supra* notes 163–71 and accompanying text.

186. *See supra* Part II.B.3.a.3.b.

187. *See* Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “09/431,982”; then follow “Continuity Data” hyperlink). *See* Public PAIR, <http://portal.uspto.gov/external/portal/pair> (search “Application Number” for “10/250,089”; then follow “Continuity Data” hyperlink).

188. *See infra* Appendix for continuation data for application 10/250,078.

189. *See infra* Appendix for continuation data for applications 10/250,058, 10/250,070,

families were correctly targeted for excessive continuations^b because of the backlog of applications at the USPTO and continuation applications' potential for delays and uncertainties.

c. Applications Correctly Not Targeted?

The USPTO intended to prevent excessive continuation applications from being filed with the Proposed Rules because these continuation applications impede examination of new applications and “undermin[e] the function of claims to notify the public as to what technology is or is not available for use.”¹⁹⁰ The Proposed Rules, however, do not directly address the length of time applications may pend or the potential for divisional application abuse.

A hypothetical example may assist in understanding the potential for divisional application abuse. For instance, an application discloses a new car design that has many patentable features, including a patentable aerodynamic shape and new advanced airbag. In the first application, the applicant pursues claims that are directed to the advanced airbag generally. After two years, the applicant files a continuation directed towards a particular feature of the airbag. After two more years, the applicant files a second continuation claiming the aerodynamic design of the car and submitting a suggested restriction requirement (which would likely be granted given the differing technologies and claims). This application, and its claims directed to the aerodynamic design, would not be published for eighteen months¹⁹¹ (five and half years after the initial application was filed) and would not begin to be examined for two years (six years after the initial application was filed).¹⁹² Thus, even under the Proposed Rules, applicants could pursue a “submarine patent” and change its claims to meet competitors' products. Additionally, the application could still file two continuations serially off the divisional application, in which case, the last continuation application would not be *filed* until eight years after the initial parent application.

Moreover, even without divisional applications being used, an applicant can serially file a first application, a first continuation application, and a second continuation application. With applications

and 10/250,110.

190. Changes to Practice, 72 Fed. Reg. at 46,718.

191. See *supra* note 65 and accompanying text.

192. See Performance and Accountability Report 2008, *supra* note 77, at 16.

averaging 32.2 months to final disposition in 2008,¹⁹³ the last application's final disposition could be eight years from the initial filing date.

Thus, although the Proposed Rules would likely reduce the volume of continuation applications, the Proposed Rules still tolerate long-pending continuation applications and divisional application abuse.

III. IMPROVED CONTINUING APPLICATION RULES

In Part III, I first summarize the guiding principles gleaned from the preceding analysis. I then provide a new set of continuing application rules that balances the concerns of applicants, the USPTO, and the public.

A. Categories of Continuing Applications to Prevent

The above analysis of the different views of continuing applications, as well as the analysis of the Proposed Rules, has provided guiding principles in crafting new continuing application rules. First, the continuations sought to be prevented can be categorized in two groups: (1) the continuation applications that are pending too long after an initial application is filed and (2) the continuation applications that are members of patent application families that are simply too large and increase the backlog of applications. Second, continuing application rules should be careful to avoid causing patent applicants to cede claim scope to which they would otherwise be entitled. Finally, continuation rules should not prohibit or overly burden applicants from providing the USPTO with references material to patentability.

B. Improved Continuing Application Rules

I propose new continuing application rules (Improved Rules) that address the two categories of continuation applications sought to be prevented, but allow applicants to protect the full scope of their invention and submit pertinent references. The Improved Rules consist of four general rules, three of which seek to prevent continuations that pend too long and one seeking to prevent too many continuation applications being filed for a single invention.

1. Preventing Long-Pending Continuing Applications

Three rules will work together to prevent application families from

193. *Id.*

using continuing applications to pend ad infinitum. First, limiting the time for filing continuation and divisional applications. Second, requiring RCEs to “further prosecution.” Finally, presuming prosecution laches if an application pends too long.

a. Limit Time for Filing Continuation and Divisional Applications

The first of the Improved Rules would limit the time when a continuation or divisional application can be filed. Under current continuation rules and the USPTO’s Proposed Rules, a continuation application can be filed at any time while a parent application remains pending.¹⁹⁴ This time allotment allows serial filing of continuation applications and, as shown above, the ability for continuation applications to remain pending long after the initial parent application is filed.

In an example implementing the rule, continuation applications would be required to be filed within one year of the initial parent application. No priority would be granted to a continuation application that claims priority to an application filed more than a year earlier.

For divisional applications, two categories can be created: divisional applications stemming from an examiner’s restriction requirement and divisional applications stemming from an applicant’s suggested restriction requirement. The distinction is based on an applicant’s inability to control the examiner’s determination. Currently, an examiner can issue a restriction requirement at most stages of prosecution.¹⁹⁵ Under the Improved Rules, the examiner would be required to make all restrictions before a first Office action unless Director approval was given. In addition, an applicant would be required to file any divisional applications desired within six months of any restriction requirement issued. A later-filed divisional application directed to the non-elected claims would not be granted the parent’s priority date.

b. Require RCEs to Further Prosecution

Currently, few restrictions or limits are placed on filing RCEs in an application. A determined applicant can keep an application pending by continually filing an RCE after each final rejection.¹⁹⁶ The current

194. See *supra* Parts I.A. (describing the current continuing application rules); II.A (describing the USPTO’s Proposed Rules).

195. See MPEP § 811.

196. See *supra* Part I.A.

patent system offers some incentives to filing RCEs that further prosecution. For instance, an RCE that provides no new arguments can be finally rejected in a first Office action. Additionally, the patent will continue to lose years off its potential enforceable life because an issued patent is only enforceable for twenty years from the filing date of the original or parent application.¹⁹⁷ Also, an RCE cannot be used to file claims that are independent and distinct, as the newly presented claims will be subject to a restriction.¹⁹⁸

To definitively prevent RCEs that merely prolong prosecution of an application, a new rule could be implemented that allows only RCEs that “further prosecution” to be submitted. RCEs that “further prosecution” can be defined as RCEs including a narrowing amendment to at least one rejected independent claim and no broadening amendments. An amendment that fails to further prosecution as determined by an examiner, and subject to review on petition, could be denied entrance. The application would then be treated as if no amendment had been filed (if six months had passed, the application would be abandoned). This rule is akin to an already existing rule conditioning entrance of an applicant’s response to an examiner’s rejection on the response being “bona fide.”¹⁹⁹

Additionally, the Improved Rules provide two exceptions to the RCE furthering prosecution rule for post-allowance RCEs. First, an RCE to submit new discovered prior art in an IDS for the examiner to consider, filed after allowance, would be permitted. If prior art is newly discovered, it would be beneficial to have an examiner review the art to ensure an invalid patent is not issued. This aspect of the Improved Rules would prevent the situation presented by the ‘020 application in light of the Proposed Rules discussed above.²⁰⁰ Second, the Improved Rules should allow RCEs to correct minor informalities, for instance, typographical errors or errors in the figures. Although this exception is not critical, as certificates of correction are available,²⁰¹ it seems prudent to correct minor errors the applicant is aware of as soon as possible.

c. Presumption of Prosecution Laches if Application Pends Too Long

A final rule to prevent purposefully delayed applications was

197. 35 U.S.C. § 154(a)(2).

198. *See supra* notes 175–76 and accompanying text.

199. 37 C.F.R. § 1.111(b) (2008); *see also* MPEP §§ 714.02–03.

200. *See supra* Part II.B.3.b.

201. MPEP §§ 1480, 1481.

proposed by Lemley and Moore: a presumption of prosecution laches would apply to any application that is pending eight years after the earliest claimed priority date.²⁰² The presumption would be rebuttable if the applicant can show that the delays in prosecution were “not unreasonable, but instead there was a legitimate reason why prosecution took so long. . . .”²⁰³ Possible reasons to rebut the presumption include delays caused by an appeal, USPTO error, interference proceedings, and secrecy orders prohibiting a patent from issuing.²⁰⁴

2. Limiting Non-Divisional Continuation Applications

The Improved Rules should place a limit on the number of non-divisional continuation applications allowed. The USPTO proposed limiting application families to two continuation applications, while Lemley and Moore argue for only a single continuation application. Eliminating all continuations, even Lemley admits, “may be overkill.”²⁰⁵ However, limiting application families to either a single continuation or two continuations would prevent the extreme continuation filings, yet allow applicants the latitude to correct for imperfect claims in a first application. This limitation will allow applicants two or three attempts to accurately file claims from which to base the remainder of that application’s prosecution.

The continuation limitation should not apply to divisional applications. By definition, a divisional application is for an independent and distinct invention.²⁰⁶ As such, the arguments for limiting the number of continuation applications do not extend to divisionals. For example, divisional applications are not redundant applications adding to the backlog of applications to be examined because they are for independent and distinct inventions. With the limitations on when divisionals may be filed set forth above, the threat of delay and uncertainty and submarine patents do not apply.

Finally, to counter an applicant’s desire to simply file a number of applications in parallel that do not claim priority to each other, similar to the USPTO’s Proposed Rules,²⁰⁷ the Improved Rules will presume applications filed by the same inventive entity, with a substantially

202. Lemley & Moore, *supra* note 1, at 116.

203. *Id.*

204. *Id.*

205. *Id.* at 94.

206. 35 U.S.C. § 121. *See generally* MPEP §§ 802, 803.

207. Changes to Practice, 72 Fed. Reg. at 46,719.

similar disclosure, and filed within a certain time frame (e.g., one year), are related applications for purposes of this rule. Applicants that file such applications can submit suggested restriction requirements and argue that the applications should be treated as a separate divisional application family.

CONCLUSION

While the ability for applicants to file unlimited continuing applications is not desirable, Lemley and Moore's suggested solutions and the USPTO's Proposed Rules go too far, ignoring realities of patent prosecution. AIPLA's "wait and see" approach is not a sufficient answer to continuing application abuse or the backlog of applications at the USPTO. The Improved Rules offer a better approach that balances the concerns of patent applicants, the USPTO, and the general public. Applicants will not cede claim scope or be prevented from filing newly discovered references for the examiner to consider. Moreover, applicants are not permitted to file unlimited continuing applications that cause delays and uncertainties in society, as well as add to the backlog of patent applications pending before the USPTO.

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208. Kevin Rizzuto received a J.D. in 2009 from Marquette University Law School, received a B.S. in Computer Engineering from the University of Wisconsin-Madison in 2004, and is a former patent examiner with the United States Patent and Trademark Office (2004-2006). He would like to thank his family and friends, particularly his wife, Brooke, for all their patience and support, and Professor Kali Murray, for her guidance and encouragement during the writing of this Comment.

APPENDIX

Patent Application Number	Technology Center	Application Status	Continuations in Application Family	RCEs in Application Family
10/250000	2817	Granted	0	0
10/250001	3711	Granted	0	0
10/250002	3629	Pending	0	0
10/250003	3635	Granted	0	0
10/250004	2431	Pending	0	0
10/250005	2629	Granted	0	0
10/250006	2815	Granted	0	0
10/250007	2822	Granted	0	0
10/250008	2879	Granted	0	0
10/250009	2839	Granted	0	0
10/250010	2882	Granted	0	0
10/250011	3612	Granted	0	0
10/250012	3746	Granted	0	0
10/250013	3623	Pending	0	0
10/250014	2859	Granted	0	0
10/250015	2859	Granted	0	0
10/250016	2884	Granted	2	0
10/250017	2822	Granted	0	0
10/250018	2871	Abandoned	0	0
10/250019	2625	Granted	0	0
10/250020	1723	Abandoned	2	3
10/250021	1794	Pending	0	2
10/250022	3749	Granted	0	0
10/250023	1751	Granted	0	0
10/250024	3632	Granted	0	0
10/250025	1745	Abandoned	0	1
10/250026	1725	Granted	0	0
10/250027	3612	Granted	0	0
10/250028	no data	no data	no data	no data
10/250029	1633	Granted	0	0
10/250030	2862	Granted	0	0
10/250031	2834	Granted	0	1
10/250032	2629	Granted	0	0
10/250033	2871	Abandoned	0	0
10/250034	2871	Granted	1	0
10/250035	1756	Abandoned	0	0
10/250036	2811	Abandoned	0	0
10/250037	no data	no data	no data	no data
10/250038	2829	Granted	0	0
10/250039	2818	Granted	0	0
10/250040	2818	Granted	0	0
10/250041	3747	Granted	0	0

Patent Application Number	Technology Center	Application Status	Continuations in Application Family	RCEs in Application Family
10/250042	3672	Granted	0	0
10/250043	2819	Granted	0	1
10/250044	1765	Granted	0	0
10/250045	1615	Abandoned	0	0
10/250046	2813	Granted	0	0
10/250047	2822	Granted	0	0
10/250048	1712	Abandoned	1	0
10/250049	2857	Granted	0	0
10/250050	2818	Granted	0	0
10/250051	2873	Granted	0	1
10/250052	2873	Granted	0	0
10/250053	2818	Granted	0	1
10/250054	2161	Abandoned	0	0
10/250055	3728	Abandoned	0	0
10/250056	3727	Abandoned	0	0
10/250057	1734	Abandoned	0	0
10/250058	1731	Abandoned	3	1
10/250059	3654	Granted	0	0
10/250060	3618	Pending	0	1
10/250061	no data	no data	no data	no data
10/250062	no data	no data	no data	no data
10/250063	3618	Abandoned	0	0
10/250064	3751	Granted	0	0
10/250065	2878	Granted	0	1
10/250066	2875	Granted	0	1
10/250067	1626	Granted	0	0
10/250068	3753	Abandoned	0	0
10/250069	2818	Granted	0	1
10/250070	3711	Granted	3	2
10/250071	2872	Granted	0	0
10/250072	3673	Granted	0	0
10/250073	no data	no data	no data	no data
10/250074	1611	Abandoned	0	0
10/250075	2832	Granted	0	1
10/250076	2877	Granted	0	0
10/250077	3751	Granted	0	0
10/250078	2614	Abandoned	6	1
10/250079	3641	Granted	0	2
10/250080	3637	Abandoned	0	0
10/250081	3682	Granted	0	1
10/250082	2816	Abandoned	1	0
10/250083	2834	Granted	0	0

Patent Application Number	Technology Center	Application Status	Continuations in Application Family	RCEs in Application Family
10/250084	2856	Granted	0	0
10/250085	3641	Granted	0	0
10/250086	2161	Abandoned	0	0
10/250087	3744	Granted	0	0
10/250088	3745	Granted	0	0
10/250089	3711	Granted	25	2
10/250090	2825	Granted	0	0
10/250091	2113	Abandoned	0	0
10/250092	2812	Granted	0	0
10/250093	2826	Granted	0	0
10/250094	3636	Granted	0	0
10/250095	no data	no data	no data	no data
10/250096	1711	Granted	2	0
10/250097	1754	Granted	0	0
10/250098	3626	Pending	0	0
10/250099	2144	Abandoned	0	0
10/250100	2825	Granted	0	0
10/250101	3671	Abandoned	0	0
10/250102	2874	Granted	0	0
10/250103	1655	Abandoned	0	0
10/250104	3671	Abandoned	0	0
10/250105	3671	Abandoned	0	0
10/250106	3711	Granted	1	0
10/250107	1621	Granted	0	0
10/250108	1725	Abandoned	0	0
10/250109	1744	Abandoned	0	0
10/250110	1762	Abandoned	3	1
10/250111	1713	Granted	0	0
10/250112	1713	Granted	1	1
10/250113	3724	Granted	0	0
10/250114	1621	Pending	0	1
10/250115	2872	Abandoned	0	1
10/250116	3727	Granted	0	0
10/250117	3676	Granted	0	0
10/250118	1725	Granted	0	0
10/250119	2622	Granted	0	1
10/250120	2873	Granted	0	0
10/250121	3671	Abandoned	0	0
10/250122	2871	Granted	0	0
10/250123	2629	Pending	0	2
10/250124	3612	Granted	0	0