Fixing Continuing Application Practice at the USPTO

Kevin Rizzuto
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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

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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. In response, the USPTO published new rules (Proposed Rules) limiting, but not eliminating, continuing applications. 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. The court made the injunction permanent on April 1, 2008. 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.

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) and stems from the same general invention disclosure.
Currently, the USPTO places no limit on the number of continuing applications timely filed by an inventor. Continuation 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).

Continuation applications contain different claim scope than their parent applications but may claim only that which was disclosed in the parent application. 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. An inventor may file an unlimited number of continuation and continuation-in-part applications as long as a parent application remains pending. 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 application.

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.\textsuperscript{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.\textsuperscript{17} In addition, the examiner may determine that the application has claims for more than a single invention and issue a restriction requirement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{22} Applicants have up to six months to respond to the non-final rejection before the application will be abandoned.\textsuperscript{23} In a response, the applicant can argue against the rejection, make claim amendments, or give supporting evidence to

\begin{footnotesize}
\begin{enumerate}
\item[19.] 35 U.S.C. § 121; \textit{see also} MPEP ch. 800.
\item[20.] 37 C.F.R. § 1.114(a) (2008).
\item[21.] 37 C.F.R. § 1.114(b).
\item[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.
\end{enumerate}
\end{footnotesize}
demonstrate the invention’s patentability. 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.

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

After an examiner issues a final rejection, an application is on course to become abandoned. 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.’” An RCE allows the applicant to amend claims, argue rejections, and present new evidence. 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. However, the applicant may desire to file an RCE to enter in newly discovered evidence that is material to patentability. The examiner

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).
31. 37 C.F.R. § 1.114(c).
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.  

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,” which has been widely referenced in the continuing application debate. 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.”

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. Continuation delays can cause uncertainty among competitors because competitors are unaware of patents covering their own inventions.  

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

35. Lemley & Moore, supra note 1.


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. Since 2000, most applications are published, which mitigates the problem of uncertainty; however, the published claims are not necessarily the allowed claims. 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,” thus delays are inherently detrimental.

(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. Lemley argues that “an examiner faced with a determined applicant has every incentive to give in and allow the patent.” 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). 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).
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). Thus, an examiner actually has incentive to not allow an application, and, instead, drag prosecution on to receive double RCE and continuation counts.

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. 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. 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.” They conclude that this practice of modifying claims “seems inconsistent with the fundamental economic justification for the patent system . . . to encourage new inventions.”

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.\textsuperscript{53} Lemley and Moore cite three examples in their discussion of the changing claims issue: (1) \textit{Gentry Gallery v. Berkline},\textsuperscript{54} (2) \textit{Chiron Corp. v. Genentech},\textsuperscript{55} and (3) Jerome Lemelson’s submarine patents, which were pending for over thirty-eight years.\textsuperscript{56}

Each of these examples, however, actually demonstrates that sufficient safeguards exist to prevent the changing claims problem identified by Lemley and Moore. In \textit{Gentry Gallery}, an applicant claimed an arrangement of his invention not disclosed in the original application.\textsuperscript{57} Although the examiner improperly allowed the claims, the Gentry Gallery Court later invalidated the claims under the written description requirement.\textsuperscript{58} Likewise, in \textit{Chiron}, the written description requirement was a central issue to the infringement suit.\textsuperscript{59} The patent was found invalid by the trial court,\textsuperscript{60} and the invalidity finding was upheld on appeal for failure to satisfy the written description requirement.\textsuperscript{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.\textsuperscript{62} This delayed patent would be more valuable if the market has grown and the granted patent is broad and covers the unsuspecting market.\textsuperscript{63} The problem of submarine

\textsuperscript{53} Id. at 91.
\textsuperscript{54} Id. at 76 n.46; see also Gentry Gallery, Inc. v. Berkline Corp., 134 F.3d 1473 (Fed. Cir. 1998).
\textsuperscript{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).
\textsuperscript{56} Lemley & Moore, supra note 1, at 76–77 & n.48.
\textsuperscript{57} Gentry Gallery, 134 F.3d at 1479–80.
\textsuperscript{58} Id.
\textsuperscript{59} See Chiron Corp., 268 F. Supp. 2d at 1161–66.
\textsuperscript{60} Chiron Corp. v. Genentech, Inc., 363 F. 3d 1247, 1249–50 (Fed. Cir. 2004).
\textsuperscript{61} Id. at 1252–58.
\textsuperscript{62} Lemley & Moore, supra note 1, at 79–80.
\textsuperscript{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), and most applications filed after November 29, 2000 are published after eighteen months. 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.” The threat of submarine patents existing under the current continuing application rules, while curtailed, still exists.

(5) Evergreening

The final concern of Lemley and Moore is “evergreening,” which is the process of acquiring “multiple patents covering the same invention.” 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.

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.

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.  

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.  

AIPLA argued that the limiting of continuing application practice would “prematurely truncat[e] prosecution of their applications.”  

AIPLA admitted continuing application abuses existed but believed such abusive filings were in the minority.  

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.”  

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.

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, the time between when an application is first filed and when it is first examined has increased, and the time between when an application is first filed and when it is finally disposed has increased. 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.
78. Id. at 16.
79. Id.
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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.\textsuperscript{80} In 2004, 756,604 applications were pending before the USPTO\textsuperscript{81} and an average of 20.2 months passed before an examiner mailed a first office action.\textsuperscript{82} In 2008, 1,208,076 applications were pending\textsuperscript{83} and 25.6 months passed before a first office action.\textsuperscript{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.\textsuperscript{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. . . .”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{89}

\textbf{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

\begin{itemize}
  \item 80. Id. at 117 tbl.3.
  \item 81. Id.
  \item 82. Performance and Accountability Report 2007, supra note 41, at 16.
  \item 83. Performance and Accountability Report 2008, supra note 77, at 117.
  \item 84. Id. at 16.  
  \item 85. Id.; Performance and Accountability Report 2007, supra note 41, at 16.
  \item 86. Changes to Practice, 72 Fed. Reg. at 46,718.
  \item 87. Id.
  \item 88. Id.
  \item 89. Id; see also Lemley & Moore, supra note 1 (exploring repetitive filing and the burden it imposes on the USPTO and the public).
\end{itemize}
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. An application family includes the initial application and its continuation or continuation-in-part applications. 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.” 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. 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. A filed divisional application that was

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. Finally, no petition would be required for continuation applications filed to cure informalities.

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,” it discussed situations in which an applicant would likely not be able to satisfy the burden of “could not have been previously submitted.” 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. 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.” The USPTO also listed factors that may be considered when making a decision on a petition, which included:

1. Whether 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.

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.”

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. 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. 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.

The following information was retrieved from Public PAIR for each application in the data set: (1) technology center, (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.

2. Public PAIR Research Results

a. Data Set in General

Of the 125 applications, 119 were available on Public PAIR for analysis. 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. Eighty-one of the

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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.\textsuperscript{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.\textsuperscript{111}

\textbf{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.\textsuperscript{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.\textsuperscript{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 applications 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.

\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{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.

![Proposed Rules' Scenarios](image)

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. 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 requirement 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, or a continuation if less than two continuation applications had been filed in the application family. Alternatively, an applicant could simply not file a response, leading to abandonment if the application is under final rejection or an allowance if the application has already been found allowable.

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. An applicant, however, could make strategic decisions during prosecution based on the limited number of continuing applications allowed. For instance, an applicant could file and have granted a suggested restriction requirement to spawn a new divisional application family in situations

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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.
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. 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. 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.

Given the description of the USPTO’s decision making regarding CNPS petitions, 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. 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.\textsuperscript{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.\textsuperscript{128} If the application has already been indicated as allowable, however, the application will be granted.\textsuperscript{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.\textsuperscript{130} The six-month period to respond to an Office action is not paused while the petition to withdraw finality is decided.\textsuperscript{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.\textsuperscript{132} An after-final amendment, however, is not entered as a matter of right;\textsuperscript{133} the examiner can use his or her discretion to not consider new claim amendments because they raise “new issues.”\textsuperscript{134} Even if the amendment is entered, the examiner can maintain the final rejection with mere concise statements responding to the arguments presented.\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{127} See supra Part II.B.2.c.
\item \textsuperscript{128} See supra Part I.A.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} MPEP §§ 706.07, 1002.
\item \textsuperscript{131} MPEP § 1002.
\item \textsuperscript{132} See 37 C.F.R. §§ 1.116(c), 1.135 (2008); see also MPEP § 714.13(I).
\item \textsuperscript{133} MPEP § 714.13(II).
\item \textsuperscript{134} MPEP § 714.13(III).
\item \textsuperscript{135} MPEP § 714.13(III) (“The reasons for non-entry should be concisely expressed.”).
\end{itemize}
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). An appeal is particularly likely if a petition to withdraw finality and an after-final rejection amendment do not have favorable outcomes. 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. Finally, the application is put on the BPAI’s docket, and the applicant must wait months or years for its decision. Despite the USPTO’s desire to pass additional rules to deter appeals, 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.


suggested restriction requirements or simply not file the continuations. 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.

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. 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; 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.

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.
145. See MPEP § 806 (explaining situations where restrictions requirements are allowed).
allowance.\footnote{See Claims submitted with the RCE for 10/250,070 (Aug. 25, 2004), Public PAIR, \url{http://portal.uspto.gov/external/portal/pair} (search “Application Number” for “10/250,070”; then follow “Image File Wrapper” hyperlink; then follow “Claims” hyperlink ).} 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.\footnote{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.” \textit{See supra} Part II.A; Changes to Practice, 72 Fed. Reg. at 46,771.} 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 claims\footnote{35 U.S.C. § 251 (2006); MPEP §§ 1401–02.} 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.\footnote{See Non-Final Rejection for U.S. Patent Application 10/771,115 (Aug. 17, 2004), Public PAIR, \url{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, \url{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, \url{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).} 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
in 1999 and with applications still pending as of January 2009.\textsuperscript{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)

\emph{i. Scenario Three in General}

In scenario three, an application family has exceeded the number of RCEs allowed without a granted CNPS petition.\textsuperscript{152} To comply with the Proposed Rules, an applicant could (1) file a CNPS petition or (2) reduce the number of RCE filings.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{157} This procedure, however, is merely \textit{optional}.\textsuperscript{158} An applicant may avoid this option and cause the continuation application to go through the normal, longer procedure for

\begin{footnotes}
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\item[152] See \textit{supra} Part II.A.
\item[153] \textit{Id.}
\item[154] See \textit{supra} Part II.B.3.a.2.
\item[155] See \textit{supra} Part II.A.
\item[156] See Claims and Continuations Final Rule, \textit{supra} note 91, at 5–6.
\item[157] \textit{Id.}
\item[158] \textit{Id.}
\end{footnotes}
a new continuation application. Such a continuation application may not receive a first Office action for an average of 25.6 months after the initial filing, whereas the streamlined continuation applications will receive a first action within a few months.

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. In three of the four applications, two RCEs were filed in an application and no related continuations were filed. 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 applications and three RCEs filed within the application’s family. The parent application to the ‘020 application, application 09/457,173, had two RCEs filed therein. The first RCE presented new arguments to the examiner, which eventually led to the
examiner finding the application allowable.\textsuperscript{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.\textsuperscript{169} The IDS resulted in a new rejection and the eventual abandonment of the patent application.\textsuperscript{170} The third RCE filing in the ‘020 application family was also for a post-allowance IDS submission by the application.\textsuperscript{171} In this case, the examiner considered the new references, but issued another allowance because the references did not render the application unpatentable.\textsuperscript{172}


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. 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. 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.

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. Moreover, an RCE’s claim scope cannot be independent or distinct from the already existing application or it will be subject to restriction. 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

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178. See infra Appendix.


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.\(^\text{184}\) 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.\(^\text{185}\) If one of the references was not considered by the examiner, the application would have been improperly allowed.\(^\text{186}\)

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.\(^\text{187}\) Another application family had four continuations, and three application families had three continuations filed.\(^\text{188}\) These application

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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.
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 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.” 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 months (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). 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

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191. See supra note 65 and accompanying text.
averaging 32.2 months to final disposition in 2008, 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
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.\footnote{See supra Parts I.A. (describing the current continuing application rules); II.A
(describing the USPTO’s Proposed Rules).} 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.\footnote{See MPEP § 811.} 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.\footnote{See supra Part I.A.} The current
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,\textsuperscript{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

\textsuperscript{197} 35 U.S.C. § 154(a)(2).
\textsuperscript{198} See supra notes 175–76 and accompanying text.
\textsuperscript{199} 37 C.F.R. § 1.111(b) (2008); see also MPEP §§ 714.02-03.
\textsuperscript{200} See supra Part II.B.3.b.
\textsuperscript{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. 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. . . .” Possible reasons to rebut the presumption include delays caused by an appeal, USPTO error, interference proceedings, and secrecy orders prohibiting a patent from issuing.

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.” 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. 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, the Improved Rules will presume applications filed by the same inventive entity, with a substantially

203. Id.
204. Id.
205. Id. at 94.
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.

Kevin Rizzuto

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

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