

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VICTOR KOUZNETSOV, DAVIDE LIBENZI,
MARTIN FALLENSTEDT, DAVID W. PALMER, and MICHAEL C. PAK

Appeal 2007-3470
Application 10/122,100
Technology Center 2100

Decided: June 30, 2008

Before HOWARD B. BLANKENSHIP, ALLEN R. MACDONALD, and
ST. JOHN COURTENAY III, *Administrative Patent Judges*.

BLANKENSHIP, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1-7, 10-21, and 24-41, which are all the claims remaining in the application.¹ We have jurisdiction under 35 U.S.C. § 6(b).

¹ The Examiner withdrew the rejection of claim 39 after the final rejection.

We affirm, and enter a new ground of rejection as permitted by 37 C.F.R. § 41.50(b).

I. Appellants' Invention

Appellants claim a method, system, and “computer program product” for scanning a mobile wireless device for malware. Claims 1 and 30 are illustrative.

1. A method for scanning a handheld mobile wireless device for malware, comprising:

receiving a scan command from a user utilizing a handheld mobile wireless device;

instantiating a component manager of the handheld mobile wireless device in response to the scan command;

executing an anti-malware scanner utilizing the component manager;
and

scanning the handheld mobile wireless device utilizing the anti-malware scanner;

wherein the scanning includes on-access scanning and on-demand scanning;

wherein the on-access scanning is disabled during on-demand scanning to preserve resources on the handheld mobile wireless device.

30. A system for scanning a handheld mobile wireless device for malware, comprising:

logic for receiving a scan command from a user utilizing a handheld mobile wireless device;

logic for instantiating a component manager of the handheld mobile wireless device in response to the scan command;

logic for executing an anti-malware scanner utilizing the component manager; and

logic for scanning the handheld mobile wireless device utilizing the anti-malware scanner;

wherein the scanning includes on-access scanning and on-demand scanning;

wherein the on-access scanning is disabled during on-demand scanning to preserve resources on the handheld mobile wireless device.

II. The Examiner's Rejections

The Examiner relies on the following references as evidence of unpatentability.

Chen	US 5,960,170	Sep. 28, 1999
Samman	US 2003/0177397 A1	Sep. 18, 2003 (filed Aug. 20, 2001)

Norton AntiVirus Corporate Edition User's Guide, (Norton), 1-38, (2000).

R. Alexander et al. ("Alexander"), *C++ Footprint and Performance Optimization*, (2000), available at <http://proquest.safaribooksonline.com/0672319047>.

Claims 15-28 and 30 stand rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter. The rejection of claims 15-28 is a new ground of rejection entered by the Examiner in the Answer.

Claims 1-7, 11, 14-21, 25, 28-32, 40, and 41 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Norton and Samman.

Claims 12, 13, 26, 27, and 33-35 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Norton, Samman, and Chen.

Claims 10 and 24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Norton, Samman, and Alexander.

Claims 36-38 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Norton, Samman, Chen, and Alexander.

An earlier rejection of claim 39 under 35 U.S.C. § 112, first paragraph has been withdrawn by the Examiner. (Ans. 3.)

III. 35 U.S.C. § 101

In the Answer's new ground of rejection applied against claims 15-28, the Examiner submits that independent "computer program product" claim 15 does not recite language that limits the product to executing the code on a computer readable medium that can perform the procedural steps. The Examiner concludes that claims 15 through 28 are directed to mere computer programs per se. (Answer 22.)

Claim 15 recites, "[a] computer program product embodied on a computer readable medium for scanning a handheld mobile wireless device for malware, comprising" separate elements of "computer code" for performing respective functions.

In our understanding of current USPTO policy, the Office does not require language that limits a "product" to executing the code on a computer readable medium that can perform the procedural steps. "When functional

descriptive material is recorded on some computer-readable medium, it becomes structurally and functionally interrelated to the medium and will be statutory in most cases since use of technology permits the function of the descriptive material to be realized.” *Manual of Patent Examining Procedure* (MPEP) § 2106.01 (8th ed., Rev. 6, Sept. 2007).

Since the Examiner’s rejection of claims 15 through 28 appears to rest on the absence of language that does not seem necessary, under current Office policy, in requiring claimed subject matter to reside within a statutory class, we do not sustain the rejection as to those claims.

We do, however, sustain the rejection of claim 30 as being directed to non-statutory subject matter, which the Examiner considers to be a computer program (or software) per se. The claim recites a “system” comprising “logic” elements for performing respective functions. Appellants argue that “the claimed system and associated instantiated component manager of the handheld mobile wireless device makes this claim statutory.” (App. Br. 12.)

We disagree. Claim 30 does not set forth a “component manager,” instantiated or otherwise, but “logic for” instantiating a component manager. Further, a “system” is not necessarily within any category of patent-eligible subject matter. A “system” for beating the house odds in a casino, for example, may be no more than an abstract idea that one might describe verbally. The “logic” as claimed is not limited to hardware implementation, nor limited to functional descriptive material recorded on some computer-readable medium. Appellants have not demonstrated that the “system” comprising “logic” requires more than software per se, or “logic” in the abstract.

“The four categories [of § 101] together describe the exclusive reach of patentable subject matter. If a claim covers material not found in any of the four statutory categories, that claim falls outside the plainly expressed scope of § 101 even if the subject matter is otherwise new and useful.” *In re Nuijten*, 500 F.3d 1346, 1354 (Fed. Cir. 2007).

IV. 35 U.S.C. § 103(a)

Samman

Samman describes computer virus protection in an Internet environment, especially protection relating to delivery of Internet-based content to mobile platforms using Wireless Application Protocol (WAP). Samman ¶¶ [0001] - [0002]. According to Samman, the next generation of mobile telephones are “likely to resemble mini-computers rather than telephones per se.” ¶ [0003]. The reference further notes that mobile wireless platforms are increasingly susceptible to computer viruses. ¶ [0004]. A number of desktop (i.e., server or workstation-based) anti-virus applications are available. “It is expected that similar anti-virus solutions will be employed in wireless platforms, assuming that the problems caused by lack of memory space and processing power can be overcome.” Samman ¶ [0005].

Norton

Norton describes a commercially available suite of anti-virus software applications.

Claims subject to § 103(a) rejection

In the Appeal Brief, Appellants provide more headings than separate arguments for patentability. We will select representative claims, *infra*, to the extent that claims or groups of claims are separately argued. See 37 C.F.R. § 41.37(c)(1)(vii).

Claim 1

In *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1739 (2007), the Supreme Court emphasized “the need for caution in granting a patent based on the combination of elements found in the prior art,” and discussed circumstances in which a patent might be determined to be obvious without an explicit application of the teaching, suggestion, motivation test.

In particular, the Supreme Court emphasized that “the principles laid down in *Graham* reaffirmed the ‘functional approach’ of *Hotchkiss*, 11 How. 248.” *KSR*, 127 S. Ct. at 1739 (citing *Graham v. John Deere Co.*, 383 U.S. 1, 12 (1966) (emphasis added)), and reaffirmed principles based on its precedent that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* The Court explained:

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, §103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in

the same way, using the technique is obvious unless its actual application is beyond his or her skill.

Id. at 1740. The operative question in this “functional approach” is thus “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *Id.*

Applying desktop-based anti-virus software, as described by Norton, to a mobile wireless platform, as described by Samman, appears to represent no more than the predictable use of prior art elements according to their established functions. Appellants have not demonstrated that applying software as described by Norton to a platform as described by Samman was beyond the skill of the ordinary artisan at the time of invention.

Samman further teaches the expectation that conventional anti-virus software solutions will be applied to mobile wireless devices (¶ [0005]), and that the devices will possess the requisite memory space and processing power (¶ [0003]).

Despite the express suggestion in Samman to apply conventional (desktop-based) anti-virus applications to mobile wireless platforms, Appellants allege that Samman “teaches away” from the use of desktop antivirus solutions, as disclosed by Norton. (Appeal Br. 12-14.) “A reference may be said to teach away when a person of ordinary skill, upon [examining] the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *Para-Ordnance Mfg. v. SGS Importers Int’l, Inc.*, 73 F.3d 1085, 1090 (Fed. Cir. 1995) (quoting *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)).

We agree with the Examiner's finding that Samman does not "teach away" from the claimed invention.² Appellants' support for the "teaching away" allegation is based on the premise that Sammans' teachings are limited to those directed to anti-virus solutions for executable binary Wireless Markup Language (WML) files that may be downloaded into a WAP browser. *See* Samman ¶¶ [0006] - [0007]. Appellants focus on the invention described by the reference, while discounting or disregarding the more general teachings directed to the artisan. "The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain." *In re Heck*, 699 F.2d 1331, 1333 (Fed. Cir. 1983) (quoting *In re Lemelson*, 397 F.2d 1006, 1009 (CCPA 1968)). Samman teaches (¶ [0006]) that the "conventional" anti-virus applications should be sufficient for standard file types downloaded or stored on a wireless platform -- file types that are dissimilar to executable binary WML files downloaded into a WAP browser.

Moreover, Appellants do not identify, in Samman, any warning to the artisan to avoid applying conventional anti-virus applications to mobile wireless platforms. On the contrary, as we have noted, the reference expressly teaches the opposite of what Appellants allege.

Appellants also argue that the final "wherein" clause of instant claim 1 is not taught or suggested by the applied prior art. The claim recites, "wherein the on-access scanning is disabled during on-demand scanning to

² Whether the prior art teaches toward or away from the claimed invention is a determination of fact. *Para-Ordnance*, 73 F.3d at 1088 (citations omitted).

preserve resources on the handheld mobile wireless device.” The final “wherein” clause thus recites that the on-access scanning is disabled during on-demand scanning, followed by an intended-use phrase that does not further limit the actual requirement of disabling on-access scanning during on-demand scanning.

Norton teaches both on-demand and on-access (startup) scans (*see, e.g.*, pages 25-28). Predictable variations include: (1) running both types of scans simultaneously; and (2) disabling one scan while running another. The artisan would have appreciated that disabling on-access scanning during on-demand scanning would ensure that the higher-priority scan -- that determined by the user to be of greater priority at the moment on-demand scanning is “demanded” -- runs unimpeded by a similar but automatic scanning process that is not currently selected by the user. Further, disabling on-access scanning during on-demand scanning appears to be within the level of ordinary skill in the art. In any event, Appellants have provided no evidence tending to show that disabling on-access scanning during on-demand scanning was “uniquely challenging or difficult for one of ordinary skill in the art.” *See Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (citing *KSR*, 127 S. Ct. at 1740-41).

We have considered all of Appellants’ arguments in the briefs, but are not persuaded of error in the rejection of claim 1.³

³ We have not considered the new evidence mentioned by the Examiner at page 24 of the Answer, as the alleged prior art has not been applied in a properly constituted rejection in this appeal.

Claim 2

Appellants' arguments in defense of claim 2 (App. Br. 14-16; Reply Br. 9-12) are based on two premises. One, the references are deemed not to disclose or suggest a "component manager." Two, the references do not disclose or suggest that the instantiation of the component manager includes allocating memory of the handheld mobile wireless device to the component manager.

Appellants' briefs do not offer a definition of "component manager" to distinguish over the applied prior art. Appellants do not point to a definition of the term in the Specification. Appellants have not provided any extrinsic evidence in support of some special meaning recognized in the art. Appellants do not even allege any specific, prior-art-distinguishing definition understood by the artisan.

The Specification describes component manager 204 (a rectangle in Figure 2) as responsible for controlling and managing software modules. (*See* Spec. 12: 10 - 13: 3.) Component manager 204 is also described as a "logic layer." (*Id.*, 15: 21-22.)

We interpret the claimed "component manager" as software capable of controlling or managing related software. However, we do not interpret the "manager" as requiring any functions that are not specified in the claims. Instant claim 1, and depending claim 2, provide a functional definition for the "component manager" that does not extend beyond what the claims actually require of the "manager." The *claims* measure the invention. *See SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc). Our reviewing court has repeatedly warned against confining the

claims to specific embodiments described in the specification. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc). During prosecution before the USPTO, claims are to be given their broadest reasonable interpretation, and the scope of a claim cannot be narrowed by reading disclosed limitations into the claim. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989); *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969). “An essential purpose of patent examination is to fashion claims that are precise, clear, correct, and unambiguous. Only in this way can uncertainties of claim scope be removed, as much as possible, during the administrative process.” *In re Zletz*, 893 F.2d at 322.

Because Appellants have not shown that the “component manager” as set forth in base claim 1 distinguishes over the prior art, Appellants’ argument with respect to claim 2 reduces to the allegation that one skilled in the art would have considered it non-obvious to allocate memory to the software responsible for scanning a handheld mobile wireless device.

The Examiner finds that it was a requirement in the prior art that a system allocate memory for an application to execute. Appellants appear not to disagree with the finding, but seem to complain that the Examiner provided a supporting reference when Appellants decided that the “inherency argument” had been rebutted. (Appeal Br. 15-16.)

The Examiner also points out that the Samman Abstract teaches an instance of a browser plugin that provides a virus scanning function, which instantiation inherently requires allocating memory for the application. (Answer 26.) *See also* Samman ¶¶ [0018] - [0019].

Appellants respond in the Reply Brief⁴ that Samman does not “specifically teach” language of claim 2, and that Samman fails to support the Examiner’s position that instantiation inherently includes allocating memory for the virus scanning plugin. (Reply Br. 11.)

Appellants’ first-noted point is not responsive to the rejection over the applied prior art, as the rejection is not for anticipation over Samman. With respect to Appellants’ second point, Appellants have not offered any counter-theory as to how a digital electronic software application can effect its application without the provision of digital electronic memory.

We have considered all of Appellants’ arguments in the briefs, but are not persuaded of error in the rejection of claim 2.

Claim 6

Instant claim 6 recites that the anti-malware scanner cleans the handheld mobile wireless device based on the configuration settings. Appellants provide remarks to advance the view that the “virus definitions” in Norton are not part of “configuration settings.”

Norton shows that the artisan used configuration settings to provide a certain extent of user control over anti-virus scans. For on-demand scans,

⁴ A reply brief is in reply “to an examiner’s answer.” 37 C.F.R. § 41.41(a)(1). The *purpose* of a reply brief under § 41.41 is to provide the Board with the appellant’s views with respect to any new arguments or clarifications set out in an examiner’s answer. The paper filed March 29, 2007 is styled a “Reply Brief,” but the paper in “reply” to the Examiner’s Answer is replete with arguments reproduced from the Appeal Brief. For reasons unknown, the “Reply Brief” addresses an Advisory Action that the Examiner provided to Appellants more than two months prior to submission of the Appeal Brief.

one could check “anything from the entire computer to a single file.” Norton 26, § 3. One could optionally “change to default settings for what is scanned and how to respond if a virus is detected.” *Id.*, § 4. Similar configuration settings were associated with other types of scans: scheduled; startup; and custom. Norton 27-29.

A person having ordinary skill in the art uses known elements for their intended purpose. *Anderson’s-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969) (radiant-heat burner used for its intended purpose in combination with a spreader and a tamper and screed). “[W]hen a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.” *KSR*, 127 S. Ct. at 1740 (quoting *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976)).

We have considered all of Appellants’ arguments in the briefs, but are not persuaded of error in the rejection of claim 6.

Claim 31

Most of Appellants’ arguments purported to be in support of separate patentability of claim 31 have been considered in our review of the rejection of claim 1. Appellants’ arguments in the Appeal Brief specific to claim 31 begin on page 19, second full paragraph: “In addition”

Claim 31 recites, “wherein the component manager controls a plurality of functional modules of the handheld mobile wireless device” According to Appellants, Norton at page 26 fails to teach all of the noted “wherein” clause.

Appellants' remarks are not responsive to the applied rejection, based on the combined teachings of Norton and Samman. Norton at page 26 describes "functional modules" (e.g., startup scan and custom scan) within the meaning of the claim, the "modules" being controlled by a management program.

Claim 31 further recites that the component manager is "capable of interfacing with any one of a plurality of handheld mobile wireless device platforms," which Appellants contend distinguishes over the applied prior art.

Unfortunately, Appellants neglect to tell us where the claimed feature might be described in the Specification (*see, e.g.*, "Summary of Claimed Subject Matter," App. Br. 9). However, the Specification at page 13, lines 5 through 9 refers to a "platform abstraction layer" 218 (Fig. 2) that provides an interface between an operating system 220 and the component manager 204.

In light of the Specification, the "capability" of the component manager is not a function of the component manager, but of an unclaimed "platform abstraction layer." Appellants' remarks do not persuade us that the management software suggested by the references would not be "capable of" interfacing with any one of a plurality of handheld mobile device platforms, or that effecting such "capability" would be beyond the skill of the ordinary artisan.

We have considered all of Appellants' arguments in the briefs, but are not persuaded of error in the rejection of claim 31.

Claim 32

We agree with the Examiner's finding that Norton teaches (e.g., page 28) scanning data stored in persistent memory. Appellants' remarks (App. Br. 21) are, again, not responsive to the applied combination of references. We have considered all of Appellants' arguments in the briefs, but are not persuaded of error in the rejection of claim 32.

Claim 12

The Examiner relies on Chen for its teaching of platform independent software. There is no requirement that the reference teach a "component manager," since Norton teaches a program that controls scan modules. We have considered all of Appellants' arguments in the briefs, but are not persuaded of error in the rejection of claim 12.

Claim 13

The reason for platform independent software is to facilitate interfacing software applications to different platforms. We have considered all of Appellants' arguments in the briefs, but are not persuaded of error in the rejection of claim 13.

Claim 34

The Examiner relies on Chen for its teaching of an abstract file system interface. Appellants contest (App. Br. 24-25) the Examiner's finding that the interface is implemented for "each class of data" that is stored in memory.

We are not persuaded of error in the Examiner's finding. Moreover, in our view, it would have been obvious to one skilled in the art to use the same (i.e., a single) file system interface regardless of the "class" of data stored in persistent memory.

We have considered all of Appellants' arguments in the briefs, but are not persuaded of error in the rejection of claim 34.

Claim 10

The Examiner relies on Alexander for its teachings of call back functions. A person having ordinary skill in the art uses known elements for their intended purpose. *Anderson's-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969).

Appellants' arguments (App. Br. 25-26) are based on individual deficiencies of the references that are applied against claim 10. Nonobviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (citing *In re Keller*, 642 F.2d 413, 425 (CCPA 1981)).

We have considered all of Appellants' arguments in the briefs, but are not persuaded of error in the rejection of claim 10.

Claims 37, 38

Alexander establishes that the artisan used call back functions. Appellants fail to explain why the artisan would have considered it non-

obvious to use the known functions to “enumerate” or “manipulate” data as broadly claimed.

We have considered all of Appellants’ arguments in the briefs, but are not persuaded of error in the rejection of claims 37 and 38.

Conclusion -- § 103(a)

For the foregoing reasons we sustain the Examiner’s § 103(a) rejection of claims 1-7, 10-21, 24-38, 40, and 41.

V. New Ground of Rejection (37 C.F.R. § 41.50(b))

We reject claim 39 under 35 U.S.C. § 103(a) as being unpatentable over Norton and Samman.

Appellants have not shown the rejection of base claim 1, or the rejection of intervening claim 32, to be in error. We rely on the Examiner’s position in the Answer and on the foregoing opinion as they apply to claim 1 and claim 32.

Claim 39 recites that the data (which is scanned) includes a media access control (MAC) address. In the context of claim 39, the MAC address is a mere arrangement of data in memory, as the “address” does not change the underlying structure or function of the memory. Further, the “address” is not applied to some actual machine function (such as addressing a MAC device). The *content* of the data that may be scanned in persistent memory does not modify the “scanning” step that is implied in the “wherein” clause of claim 32.

We thus hold claim 39 to be unpatentable over the applied prior art. The *content* of the nonfunctional descriptive material carries no weight in the analysis of patentability over the prior art. *Cf. In re Lowry*, 32 F.3d 1579, 1583 (Fed. Cir. 1994) (“Lowry does not claim merely the information content of a memory. . . . [N]or does he seek to patent the content of information resident in a database.”). *See also Ex parte Nehls* (BPAI Jan. 28, 2008), *available at* <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071823.pdf>; *Ex parte Curry*, 84 USPQ2d 1272 (BPAI 2005) (nonprecedential) (Fed. Cir. Appeal No. 2006-1003, *aff’d* Rule 36 Jun. 12, 2006); MPEP § 2106.01.

CONCLUSION

The rejection of claims 15-28 and 30 under 35 U.S.C. § 101 as being directed to non-statutory subject matter is affirmed with respect to claim 30 but reversed with respect to claims 15-28.

The rejection of claims 1-7, 10-21, 24-38, 40, and 41 under 35 U.S.C. § 103(a) is affirmed.

Since we have sustained at least one ground of rejection applied against each claim on appeal, the Examiner’s decision to reject claims 1-7, 10-21, 24-38, 40, and 41 is affirmed.

In a new ground of rejection as permitted under 37 C.F.R. § 41.50(b), we have rejected claim 39 under 35 U.S.C. § 103(a).

With respect to the affirmed rejection(s), 37 C.F.R. § 41.52(a)(1) provides that “Appellant may file a single request for rehearing within two months from the date of the original decision of the Board.”

In addition to affirming the Examiner's rejection(s) of one or more claims, this decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides that "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 C.F.R. § 41.50(b) also provides that Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Should Appellants elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the Examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If Appellants elect prosecution before the Examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for

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final action on the affirmed rejection, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED -- 37 C.F.R. § 41.50(b)

rwk

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