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In re Patent of	:	OFFICE OF PETITIONS
Sharpless et al.	:	
Patent No. 5,023,342	:	
Application No. 07/199,157	:	DECISION
Filed: May 26, 1988	:	ON PETITION
Issued: June 11, 1991	:	
Title of Invention:	:	
CYCLIC SULFATE COMPOUNDS	:	

This Decision is in response to the "Petition for Reconsideration Under 37 CFR § 1.378(b)", to reinstate the above-identified patent, filed August 4, 2007.

The petition is denied.

Background

The patent issued June 11, 1991. The eleven and one-half (11½) year maintenance fee could have been paid from June 11, 2002, through December 14, 2002, or with a surcharge during the period from December 15, 2002, to June 11, 2003. Petitioner did not do so. Accordingly, the patent expired June 12, 2003.

The September 5, 2005 petition

Patentee filed a petition on September 5, 2005, wherein Patentee asserted that due to an error during conversion of the docketing system, to Computer Packages Inc.'s Patent Managing System ("CPI), which included maintenance fee payment data for approximately 1,700 patents¹, the monthly run "US Maintenance

¹The petition stated that approximately 11,000 records were converted; however, the petition did not provide any information as to any errors that may have been discovered among the 11,000 records. The petition limits its discussion of errors to the 1,700 U.S. patent records, wherein 63 records

Report" failed to include the above-identified patent as having a maintenance fee due.

The petition provided that "a number of tests were run to verify the completeness and reliability of the data that was converted." Applicant did not explain the tests, but provided that "[t]he tests showed that the data transferred properly." *O'Brien Declaration* at p.3.

The September 30, 2005 Decision granting the September 5, 2005 petition

The September 5, 2005 petition was granted in a decision mailed September 30, 2005. The Decision stated that Patentee had demonstrated that a docketing error was the cause of the delay.

The February 10, 2006 Letter and Request for Information Vacating the September 30, 2005 Decision

The September 30, 2005 Decision was vacated in a Letter and Request for Information mailed February 10, 2006. The Letter acknowledged that the September 5, 2005 petition was lacking in several respects, and the Letter requested additional information regarding the reliability of Cpi; the process used to convert to Cpi; any reliability tests conducted on the data; statements from employees with first-hand knowledge of the conversion process and any reliability tests conducted; explanation of the data entry process and of how the error occurred; a statement from Ms. Rita Filipowitz as to how the docketing error occurred, and an explanation as to why the Cpi database failed to generate the maintenance fee action, even though the information was in the database.

The April 10, 2006 Response to Request for Information

Petitioner filed a Response to the Request for Information on April 10, 2006. In the Response, Petitioner for the first time asserted that the conversion/transfer of the maintenance fee data for the above-identified patent into CPI, was successful. Patentee provided that the failure to pay the maintenance fee was the result of a failure of the Docketing Manager to follow

were/are being addressed. The issue here is Petitioner's reliance upon CPI, and whether that reliance was reasonable. It is noted that while 63 errors in 11,000 records may be found to be reasonable, 63 errors in 1,700 may be found to be less reasonable.

the Technology Licensing Office's (TLO) procedures for clearing and updating maintenance fee action screens. Response at p.2.

The Patentee acknowledged that the conversion to the CPi system was a result of the seriousness with which the Patentee took docketing issues. Petition at pp.3, 5. The docketing data included maintenance fee due dates. Declaration of (Docket Managers) Supervisor² at p.4. As part of the reasonable care the Patentee used to ensure the maintenance fee due dates were entered, the Patentee converted to the CPi system. Petition at p.6. Patentee appointed the Docket Manager in 2000, one year before Patentee converted to the CPi docketing system. Declaration of Director of the Massachusetts Institute of Technology ("MIT") Technology Licensing Office ("TLO"), at p.2.

Regarding Patentee's business routine, Patentee asserted that the business routing was reasonable. The routine consisted of the Docket Manager running monthly reports and then requesting instructions from Patentee's Technology Licensing Officers. If no instructions were obtained, second requests were made, and if instructions were still not obtained, personal visits by the Docketing Manager were made to the Technology Licensing Officers. Past due reports were run by both the Docketing Manager and her supervisor, who met weekly to resolve the past due reports. Petition at p.7, Declaration of the Docketing Manager's Supervisor ("Supervisor") at p.8.

The Supervisor provided that "at no time during the conversion or training, nor during the weekly docket meetings, [did she] recall a problem with maintenance fees." Declaration of Supervisor at p.6. However, the Supervisor also provided that "[s]oon after the conversion to the CPi system, [she] became concerned about [the Docket Managers] knowledge of the CPi system." Id. at p.8. The Supervisor met with the Docketing Manager "on February 15, 2002, to discuss these issues and required the Docket Manager to become more familiar with the CPi program." Id. At pp.8-9. The Supervisor provided that an on-site training session on February 26, 2002, was among additional training steps taken; however, no other "additional training steps" were been provided in the petition. Id. At p.9. The Supervisor stated that, "despite our weekly meetings and repeated inquiries regarding ongoing projects, [the Docket Manager's] job performance remained inconsistent, as reflected in her performance evaluation." Id. The Supervisor stated

² The Docketing Supervisor was/is also, at the time the petition was filed, Assistant Director and Counsel of the MIT TLO.

that, for tasks that had not changed over time, the Docket Manager was performing adequately; however, it appeared that the Docket Manager was relying on paper products and not utilizing the capabilities of CPi. Id. "Accordingly, in April 2003, [the Supervisor] informed [the Docket Manager] that she had 6 months to show significant improvement by consistently meeting expectations." Id. The Supervisor averred that the "above-identified patent lapsed during the time [she] was subjecting [the Docket Manager] to closer supervision beyond our weekly docket meetings." Id., at p.10. The Supervisor alleges that she was not aware of maintenance fee problems, and while she did develop a concern after the conversion to CPi over [the Docket Manager's] performance, that concern was unrelated to maintenance fees." Id.

Supplement to Petition filed October 23, 2006

Petitioner filed a Supplement to the Petition for Reconsideration on October 23, 2006, wherein Petitioner asserted that reliance upon the Docket Manager was reasonable in view of the Docket Manager's experience and ability. The Supplement provided evidence of the Docket Manager's performance in 1996 - 1997 and through to her promotion to Assistant Patent Administrator and Office Manager and eventual promotion to Docket Manager in 2001. Supplement at pp. 2-3. Petitioner provided evidence of the Docket Manager's superior performance leading up to her appointment as Docket Manager. Petitioner asserted that the Docket Manager performed well in her responsibility to pay maintenance fees, despite evidence in April, 2003, that the Docket Manager appeared to be failing in most of her [other] job responsibilities. Id. At pp 3-4. Petitioner alleged that the final warning of non-performance contains the first mention of a concern with maintenance fees.

Petitioner admitted that the Docketing Manager "began to have problems with docketing issues that had changed after MIT's conversion to the CPi docketing software..." Supplement at p.4. However, Petitioner averred that the Docket Manager appeared to be handling maintenance fees - a task that had not been changed by the conversion - well." Id. At p.5.

Petitioner cited to *In re Katrapat*, AG, 6 USPQ2d 1863 (Comm'r Pat. 1988), and *Medical Products v. Tecnol Medical Products, Inc.*, 921 F. Supp. 1219, 1254-60 (D.Del. 1995), where the relevant inquiry was whether the attorneys reliance upon an employee in the performance of a clerical function - in the two

cases cited the employees were both secretaries - was reasonable.

The June 4, 2007 Decision dismissing the September 5, 2005 petition, Response to Requirement for Information filed September 5, 2005 and Supplemental Petition for Reconsideration filed October 23, 2006

In a Decision mailed June 4, 2007, the petition was dismissed. The decision stated the following:

Patentee became concerned about the docketing managers knowledge of the CPI system in February, 2002; however, that concern did not carryover to the payment of maintenance fees, despite the fact that 1) the timely payment of maintenance fees was one of the reasons for converting to the CPI system; 2) updating action screens was part of the CPI system, and 3) the maintenance fee was missed due to a failure to update and resolve the maintenance fee action screen. The Docket Managers job performance remained inconsistent, through 2002 and 2003, as reflected in her performance evaluation, and in April 2003, the Supervisor informed the Docket Manager that she had 6 months to show significant improvement by consistently meeting expectations. The maintenance fee for the above-identified patent was due on June 11, 2003, which was during the period that the Supervisor knew or should have known that reliance upon the Docket Manager to ensure that payment of the maintenance fee - Patentee's most important business³, was unreasonable.

Patentee was aware that that the Docketing Manager was experiencing difficulties with the docketing system, and was aware that it appeared that the Docket Manager was relying on paper products and not utilizing the capabilities of CPI. Despite this awareness, Patentee continued to rely upon the Docketing Manager for timely payment of maintenance fees, which at this time were incorporated into capabilities of CPI. Patentee now asserts that payment of the maintenance fee was missed because the Docketing Manager failed to update the "action screens" in the CPI program.

³ The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. (Emphasis supplied). See, *In re Mattullath*, 38 App. D.C. 497, 514-15 (1912) (quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), *aff'd*, 143 USPQ 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913).

The relevant inquiry is whether the patentee's reliance upon the docket clerk was reasonable during and after the conversion to the CPi system. The question is whether "the employee was sufficiently trained and experienced *with regard to the function and routine for its performance* that reliance upon such employee represented the exercise of due care." Here, the function and routine for [payment of maintenance fees] changed with the conversion to the CPi system.

Patentee asserted, on the one hand, that the docket clerk "appeared to be failing in most of her job responsibilities with the notable exception of responsibilities that had not changed over time. First and foremost among the tasks that appeared to have been performed well was payment of maintenance fees. Thus, the increased supervision the docketing manager was subjected to appeared to reveal to her supervisor that maintenance fees - one of the Docketing Manager's primary responsibilities - continued to be handled well." Supplement at pp. 3-4. Patentee thus infers that the payment of maintenance fees was a task that had not changed with the conversion to the CPi system. However, Patentee has acknowledged that the timely payment of maintenance fees was one of the reasons for converting to the CPi system; that action screens were part of the CPi system, and updating the action screens was required to ensure timely payment of maintenance fees.

Here, the maintenance fee for the above-identified patent was due on June 11, 2003. Approximately 16 months prior to the maintenance fee due date, in February, 2002, Patentee became concerned about the docketing managers knowledge of the CPi system; however, that concern did not carryover to the payment of maintenance fees, despite the fact that the timely payment of maintenance fees was dependent upon accurately updating the CPi action screens.

The Docket Managers job performance remained inconsistent, through 2002 and 2003, as reflected in her performance evaluation, and in April 2003, the Supervisor informed the Docket Manager that she had 6 months to show significant improvement by consistently meeting expectations. The maintenance fee for the above-identified patent was due on June 11, 2003, which was during the period that the Supervisor knew or should have known that reliance upon the Docket Manager to ensure that the action screens in the CPi system were updated in order to effect timely payment of the maintenance fee - Patentee's most important business - was unreasonable.

Patentee now asserts that payment of the maintenance fee was missed because the Docketing Manager failed to update the "action screens" in the CPI program. Patentee was aware that that the Docketing Manager was experiencing difficulties with the CPI docketing system, and was aware that it appeared that the Docket Manager was relying on paper products and not utilizing the capabilities of CPI. Despite this awareness, Patentee continued to rely upon CPI and the Docketing Manager for timely payment of maintenance fees.

Unlike the situations in *In re Katrapat* and *Medical Products v. Tecnol Medical Products, Inc.*, Patentee was aware that the Docket Manager was experiencing difficulty with the CPI docketing system, and should have expected that errors in docketing may have occurred. And while Patentee subjected the Docket Manager to closer monitoring, Patentee's concern did not carryover to maintenance fees. Patentee continued to rely upon the Docket Manager to update the CPI system to ensure timely payment of the maintenance fee. As such, Patentee has not demonstrated that it acted as a reasonable prudent person in the exercise of due care and diligence, in continuing to rely upon an employee whom the Patentee knew or should have known was unreliable. Where the record fails to disclose that the patentee took reasonable steps to ensure timely payment of the maintenance fee, 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3), acceptance of the delayed payment of the maintenance fee is precluded.

The present request for reconsideration

Petitioner/Patentee files the present request for reconsideration and cites two premises; the first is that the Decision dismissing the petition incorrectly states that MIT's process for paying maintenance fees changed, when in fact the process did not change. The second is that the Decision incorrectly states that "the timely payment of maintenance fees was dependant upon accurately updating the CPI action screens." This too, Petitioner asserts, is incorrect. Petition for Reconsideration at p.2.

Petitioner states that the patent expired because the action screen "was not properly acted upon". Id., at. P.3. Petitioner avers that the task - updating the action screens, had not changed with the CPI conversion. The action screens still needed to be acted upon and updated. Id. Petitioner argues that, despite the Docket Manager's diminished performance, the Patentee's reliance upon the Docket Manager was reasonable.

Applicable Law, Rules and MPEP

37 CFR 1.378(b) provides that a patent may be reinstated at any time following expiration of the patent for failure to timely pay a maintenance fee. A petition to accept late payment of a maintenance fee, where the delay was unavoidable, must include:

- (A) the required maintenance fee set forth in 37 CFR 1.20(e)-(g);
- (B) the surcharge set forth in 37 CFR 1.20(i)(1); and
- (C) a showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent.

The required showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly. Furthermore, an adequate showing requires a *statement by all persons with direct knowledge of the cause of the delay*, setting forth the facts as they know them. Copies of all documentary evidence referred to in a statement should be furnished as exhibits to the statement. (Emphasis supplied).

As language in 35 U.S.C. § 41(c)(1) is identical to that in 35 U.S.C. § 133 (i.e., "unavoidable" delay), a late maintenance fee for the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. § 133. See *Ray v. Lehman*, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995) (quoting *In re Patent No. 4,409,763*, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988), aff 'd sub nom. Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff 'd, 937 F.2d 623 (Fed. Cir. 1991) (table), cert. denied, 502 U.S. 1075 (1992)). See MPEP § 711.03(c) for a general discussion of the "unavoidable" delay standard.

As 35 U.S.C. § 41(c) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees. *Ray*, 55 F.3d at 609, 34 USPQ2d at 1788. That is, an adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken to ensure the timely payment of the maintenance

fees for this patent. Id. Thus, where the record fails to disclose that the patentee took reasonable steps, or discloses that the patentee took no steps, to ensure timely payment of the maintenance fee, 35 U.S.C. 41(c) and 37 CFR 1.378(b)(3) preclude acceptance of the delayed payment of the maintenance fee under 37 CFR 1.378(b).

In view of the requirement to enumerate the steps taken to ensure timely payment of the maintenance fee, the patentee's lack of knowledge of the need to pay the maintenance fee and the failure to receive the Maintenance Fee Reminder do not constitute unavoidable delay. See Patent No. 4,409,763, supra. See also Final Rule entitled "Final Rules for Patent Maintenance Fees," published in the Federal Register at 49 Fed. Reg. 34716, 34722-23 (August 31, 1984), and republished in the Official Gazette at 1046 Off. Gaz. Pat. Office 28, 34 (September 25, 1984). Under the statutes and rules, the Office has no duty to notify patentees of the requirement to pay maintenance fees or to notify patentees when the maintenance fees are due. It is solely the responsibility of the patentee to assure that the maintenance fee is timely paid to prevent expiration of the patent. The lack of knowledge of the requirement to pay a maintenance fee and the failure to receive the Maintenance Fee Reminder will not shift the burden of monitoring the time for paying a maintenance fee from the patentee to the Office. Thus, evidence that despite reasonable care on behalf of the patentee and/or the patentee's agents, and reasonable steps to ensure timely payment, the maintenance fee was unavoidably not paid, could be submitted in support of an argument that the delay in payment was unavoidable.

An error in a docketing system could possibly result in a finding that a delay in payment was unavoidable if it were shown that reasonable care was exercised in designing and operating the system and that the patentee took reasonable steps to ensure that the patent was entered into the system to ensure timely payment of the maintenance fees.

A showing of unavoidable delay will (in addition to the above) require: (1) evidence concerning the procedures in place that should have avoided the error resulting in the delay; (2) evidence concerning the training and experience of the persons responsible for the error; and (3) copies of any applicable docketing records to show that the error was in fact the cause of the delay. See MPEP § 711.03(c)(III)(C)(2).

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that:

(A) the error was the cause of the delay at issue;

(B) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and

(C) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. See In re Egbers, 6 USPQ2d 1869, 1872 (Comm'r Pat. 1988), rev'd on other grounds sub nom., Theodor Groz & Sohne & Ernst Bechert Nadelfabrik KG v. Quigg, 10 USPQ2d 1787 (D.D.C. 1988); In re Katrapat, 6 USPQ2d 1863, 1867-68 (Comm'r Pat. 1988).

Opinion

The record supports the following findings of fact:

- (1) Patentee converted to the CPi system as a result of the seriousness with which the Patentee took docketing issues;
- (2) The docketing data included maintenance fee due dates;
- (3) As part of the reasonable care the Patentee used to ensure the maintenance fee due dates were entered, the Patentee converted to the CPi system;
- (4) Patentee appointed the Docket Manager in 2000, the year prior to converting to the CPi docketing system;
- (5) Soon after the conversion to the CPi system, the Supervisor became concerned about the Docket Managers knowledge of the CPi system. The Supervisor met with the Docketing Manager on February 15, 2002, to discuss these issues and required the Docket Manager to become more familiar with the CPi program;
- (6) Additional training, in the form of an on-site training session on February 26, 2002, was provided the Docket Manager;
- (7) Despite weekly meetings and repeated inquiries regarding ongoing projects, the Docket Managers job performance remained

inconsistent, as reflected in her performance evaluation, covering the period of April 1, 2002 through April 1, 2003;

(8) The Supervisor was aware that it appeared that the Docket Manager was relying on paper products and not utilizing the capabilities of CPi;

(9) In April 2003, the Supervisor informed the Docket Manager that she had 6 months to show significant improvement by consistently meeting expectations;

(10) The maintenance fee for the above-identified patent was due on June 11, 2003;

(11) The Supervisor acknowledges that the above-identified patent lapsed during the time she was subjecting the Docket Manager to closer supervision beyond their weekly docket meetings.

(12) The Docketing Manager failed to update the "action screens", which are part of the CPi program.

(13) The maintenance fee was missed due to a failure to update and resolve the maintenance fee action screen.

Analysis

As to Petitioner's assertion that the Decision dismissing the petition incorrectly states that MIT's process for paying maintenance fees changed, when in fact the process did not change, a review of the Response to the Request for Information filed on April 10, 2006, reveals the following:

As part of the reasonable care the Patentee used to ensure the maintenance fee due dates were entered, the Patentee converted to the CPi system. Petition at p.6.

As stated in the Declaration of Karin K Rivard, the Assistant Director and Counsel of the MIT Technology Licensing Office (TLO), who was also the supervisor of the patent docket functions and of the Docket Manager:for tasks that had not changed over time, the Docket Manager was performing adequately; however, it appeared that the Docket Manager was relying on paper products and not utilizing the capabilities of CPi. Rivard Declaration at p.9. Para. 26.

The record thus supports a finding that the process for paying the maintenance fees changed (converted) from the old TLO system to the use of the CPi system. It is this change that the Docket Manager was apparently unable to master. "Accordingly, in April 2003, [the Supervisor] informed [the Docket Manager] that she had 6 months to show significant improvement by consistently meeting expectations." Rivard Declaration at p.9. Para. 26.

Further to this, and as to Petitioner's assertion that the Decision dismissing the Decision incorrectly states that "the timely payment of maintenance fees was dependant upon accurately updating the CPi action screens," the record further discloses, as stated by Ms. Rivard:

I believe that the lapse of the above-identified patent for failure to pay the third maintenance fee was unavoidable. The TLO converted to a modern docket system to try to avoid any such unavoidable abandonments. With over a decade of docketing experience, our Docket Manager appeared to be a trustworthy and reliable employee. Weekly docket meetings with her did not reveal problems with maintenance fees, and none appeared on the CPi reports I requested she run. Nonetheless, the maintenance fee action screen was not properly acted upon and updated, and the patent lapsed. (Emphasis supplied).

Rivard Declaration at p.10. Para. 31.

Moreover, the Response to Request for Information states: "Thus, the error did not result from a failure of the docket system. Rather, it resulted from a failure to follow the TLO's procedures for clearing and updating maintenance fee action screens." Response at p.2. (Emphasis supplied).

As such the record supports a finding that the patent lapsed because the maintenance fee action screen was not properly acted upon and updated.

As to Petitioner's assertion that reliance upon the Docket Manager was reasonable because "the task - updating the action screens, had not changed with the CPi conversion. The action screens still needed to be acted upon and updated," Petitioner seeks to conflate the old system and the new system into the same task. This attempt is supported by the statement that "the action screens still needed to be acted upon and updated," apparently regardless of whether the acting upon and updating occurred in the old system or the new system. However, it is

the CPi system that Petitioner converted to, from the old system, as part of the reasonable care the Patentee used to ensure the maintenance fee due dates were entered. It is the action screens that are part of the CPi system that were not acted upon and updated. The Supervisor met with the Docketing Manager on February 15, 2002, to... require the Docket Manager to become more familiar with the CPi program, and it is the inability of the Docket Manager to act upon and update the action screens that caused the patent to lapse.

The person responsible for acting upon and updating the actions screens, the Docket Manager, failed to act upon or update the action screens, and at a time when the Docket Manager's Supervisor knew or should have known that reliance upon the Docket Manager to act upon and update the action screens in the CPi system in order to ensure timely payment of the maintenance fee - Patentee's most important business⁴, was unreasonable.

Decision

The instant petition under 37 CFR 1.378(e) is granted to the extent that the decision of August 4, 2007, has been reconsidered; however, the renewed petition to accept under 37 CFR 1.378(e) the delayed payment of a maintenance fee and reinstate the above-identified patent is **DENIED**.

As stated in 37 CFR 1.378(e), no further reconsideration or review of this matter will be undertaken.

This patent file is being forwarded to the Files Repository.

Telephone inquiries concerning this matter should be directed to Attorney Derek L. Woods at (571) 272-3232.



Charles Pearson
Director
Office of Petitions

⁴ The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. (Emphasis supplied). See, *In re Mattullath*, 38 App. D.C. 497, 514-15 (1912) (quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), *aff'd*, 143 USPQ 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913).