

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

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(2) is not binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte NATASHA V. RAIKHEL, WILLEM F. BROEKAERT,
NAM-HAI CHUA and ANIL KUSH

Appeal No. 94-2232
Application 07/888,367¹

HEARING: December 4, 1996

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

GRON, Administrative Patent Judge.

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

1. Introduction

This is an appeal from an examiner's rejections of Claims
7-11, all claims pending in this application. Claims 7-11
stand rejected under 35 U.S.C. § 103 over the combined

¹ Application for patent filed May 26, 1992. According to applicants,
this application is a divisional of Application 07/587,071, filed September
24, 1990, now U.S. Patent 5,187,262, patented February 16, 1993.

Appeal No. 94-2232
Application 07/888,367

teachings of Walujono et al. (Walujono), "Amino Acid Sequence of Hevein," Proceedings of the International Rubber Conference, Vol. 2, Rubber Research Institute Malaysia, Kuala Lumpur, pp. 518-531 (1975), Broekaert, "Chitinases and Chitin-Binding Lectins in Plants: A Biochemical and Physiological Study of Their Role in the Natural Protection of Plants Against Fungi," Dissertationes de Agricultura, Doctoraatsproefschrift Nr. 167 aan de Faculteit der Landbouwwetenschappen van de K. U. Leuven, pp. II-IV (Abs.) and 73-84 (Ch. 7)(September 1988), Weissman et al. (Weissman), U.S. 4,394,443, patented July 19, 1983, and White et al. (White), U.S. 4,677,054, patented June 30, 1987.² Claims 7-11

² As evidence in support of this rejection, the examiner cites the following references (Examiner's Answer (Ans.), pp. 3-4):

Alberts, B., et al., Molecular Biology of the Cell, Garland Publishing, Inc., N.Y., pp. 185-196 (1983);

Safford et al., "Plastid-Localized Seed Acyl-Carrier Protein of *Brassica napus* is Encoded by a Distinct, Nuclear Multigene Family," Eur. J. Biochem., Vol. 174, pp. 287-295 (1988);

Back et al., "Isolation of cDNA Clones Coding for Spinach Nitrite Reductase: Complete Sequence and Nitrate Induction," Mol. Gen. Genet., Vol. 212, pp. 20-26 (1988);

Van der Plas et al., "The Gene for the Precursor of Plastocyanin from the Cyanobacterium *Anabaena* sp. PCC 7937: Isolation, Sequence and Regulation," Mol. Microbiol., Vol. 3, No. 3, pp. 275-284 (1989).

Appeal No. 94-2232
Application 07/888,367

also stand rejected under 35 U.S.C. § 102(f) over and 35 U.S.C. § 103 in view of subject matter appellants claim which is prior art under 35 U.S.C. § 102(f) as evidenced by the co-authorship of later-published Broekaert et al. (Lee I), "Wound-Induced Accumulation of mRNA Containing a Hevein Sequence in Laticifers of Rubber Tree (*Hevea brasiliensis*)," Proc. Natl. Acad. Sci. USA, Vol. 87, pp. 7633-7637 (October 1990), and Lee et al. (Lee II), "Co- and Post-Translational Processing of the Hevein Preproprotein of Latex of the Rubber Tree (*Hevea brasiliensis*), J. Biol. Chem., Vol. 266, No. 24, pp. 15944-15948 (August 25, 1991). Claims 7 and 8 read:

7. A method for detecting the presence of hevein peptide in a plant material which comprises:

(a) providing a selected part of the plant material for detection;

(b) isolating RNA from the plant material; and

While appellants have not objected to the examiner's citation of "other" references in support of the rejection under section 103, we are mindful of the following statement in In re Hoch, 428 F.2d 1341, 1342 n.3, 166 USPQ 406, 407 n.3 (CCPA 1970):

Where a reference is relied on to support a rejection, whether or not in a "minor capacity," there would appear to be no excuse for not positively including the reference in the statement of the rejection.

Appeal No. 94-2232
Application 07/888,367

(c) providing the RNA with a labeled cDNA so that the RNA binds to the cDNA when there is homology and the bound labeled DNA is detected, wherein the cDNA is derived from

E. coli ATCC 68363, and has an open reading frame of 204 amino acids which detects the presence of the hevein peptide sequence encoded by the RNA.

8. A method for detecting the presence of hevein peptide sequences in a plant material which comprises:

(a) providing a selected part of the plant material for detection;

(b) isolating RNA from the plant material; and

(c) probing the RNA with a labeled cDNA so that the RNA binds to the cDNA where there is homology and the bound labeled DNA is then detected, wherein the cDNA is derived from the cDNA shown in Figure 2 which detects the presence of the hevein peptide sequence encoded by the RNA.

2. Claim interpretation

We have considered this appeal with Appeal No. 94-2156 (Application 07/888,366, filed May 26, 1992, as a divisional of Application 07/587,071, now U.S. 5,187,262, also the parent of this application). Appeal No. 94-2156 is an appeal of this same examiner's rejections of claims drawn to a cDNA molecule, HEV1, which (1) corresponds to the DNA sequence of Figure 2 as carried in *E. coli* ATCC 68363 which encodes a protein, or (2)

Appeal No. 94-2232
Application 07/888,367

encodes a protein corresponding to the 204 amino acid sequence in Figure 2, under 35 U.S.C. § 103 in view of the combined teachings of Walujono, Broekaert, and Weissman and 35 U.S.C. § 102(f)/103 in light of Lee I and Lee II.

The examiner appears to have rejected the claims in this case based on a presumption³ that the presently claimed methods of detecting the presence of a hevein peptide and hevein peptide sequences in plant material are peptide detection methods which are distinct from the methods described by White only in the utilization of the cDNA, HEV1, claimed in copending Application 07/888,366, Appeal No. 94-2156. However, as we read the claims on appeal, the herein claimed methods of detecting hevein peptide and hevein peptide sequences in plant material utilize (1) cDNA which "is derived from *E. coli* ATCC 68363, and has a open reading frame of 204 amino acids which detects the presence of the hevein peptide sequence encoded by the RNA" (Claim 7) or (2) cDNA which "is derived from the cDNA shown in Figure 2 which detects the

³ The examiner's Response to argument on pages 8-13 of the Examiner's Answer (Ans.) entered in this appeal is essentially the same as the Response to argument on pages 8-13 of the Examiner's Answer entered in Application 07/888,366, Appeal No. 94-2156.

Appeal No. 94-2232
Application 07/888,367

presence of the hevein peptide sequence encoded by the RNA" (Claim 8). In our view, the cDNA utilized in the methods of the presently appealed claims differs in scope from HEV1. The questions to be answered for both sets of claims are (1) whether the scope of the cDNA employed in the methods of (a) Claims 7 and 9(7) and (b) Claims 8, 10(8) and 11(8) are so indefinite as to prevent this panel from comparing the claimed subject matter to the prior art teaching and from rendering a decision as to their patentability under 35 U.S.C. § 103, and (2) whether the ratio-nale which supports our holding with regard to the patentability of Claims 3 and 4 in Appeal No. 94-2156 is equally applicable to resolve the patentability of the subject matter here claimed.

It is evident to this panel that the cDNA utilized in the method of Claims 7 and 9(7) here on appeal is sufficiently defined to allow this panel to compare cDNA which is "derived from E. coli ATCC 68363, and has an open reading frame of 204 amino acids which detects the presence of the hevein peptide sequence encoded by the RNA" to cDNA which persons having ordinary skill in the art, considering the combined teachings

Appeal No. 94-2232
Application 07/888,367

of Walujono, Broekaert and Weissman, reasonably could have expected to isolate and successfully use to detect hevein peptide sequences. However, based on the record before us, we are unable to determine the scope of cDNA utilized in the methods of Claims 8, 10(8), and 11(8). The phrase which is not definite is the phrase "derived from the cDNA shown in Figure 2" in Claim 8. The specification proffers no help or guidance in interpreting the size and/or sequence of a cDNA segment derived from the cDNA shown in Figure 2 which could detect the presence of the hevein peptide sequence encoded by the RNA. In fact, neither the examiner nor appellants appear to have considered the question in the slightest.

An interpretation of the size and sequence of the "derived" cDNA segment is particularly important in this case because Walujono discloses a 43 amino acid sequence for mature hevein, and the record is not clear whether cDNA which encodes mature hevein reads on a cDNA "derived from the cDNA shown in Figure 2 which detects the presence of the hevein peptide sequence encoded by the RNA," cDNA capable of being utilized in the method of Claim 8.

Appeal No. 94-2232
Application 07/888,367

In re Moore, 439 F.2d 1232, 1235, 169 USPQ 236, 238 (CCPA
1971) teaches:

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

This first inquiry therefore is merely to determine whether the claims do, in fact, set out and circumscribe a particular area with a reasonable degree of precision and particularity. It is here where the definiteness of the language employed must be analyzed--not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art.

Only after ascertaining exactly what subject matter is being claimed can one (1) inquire as to the novelty of the claimed subject matter, (2) determine whether the description of the invention in the specification would have enabled persons skilled in the art to make and use the full scope of the subject matter claimed, and (3) assess the obviousness of the claimed subject matter at the time the invention was made. In re Wilder,

429 F.2d 447, 166 USPQ 545 (CCPA 1970) states at 450, 166 USPQ at 548, "Once having ascertained exactly what subject matter is being claimed, the next inquiry must be into whether such subject matter is novel." In re Geerdes, 491 F.2d 1260, 180

Appeal No. 94-2232
Application 07/888,367

USPQ 789, (CCPA 1974) clarifies at 491 F.2d at 1262, 180 USPQ at 791, "Before considering the rejections under 35 U.S.C. 103 and 112, we must first decide whether the claims include within their scope the presence of recognized . . . agents."

So instructed, we should not and accordingly will not review the appealed rejection of Claims 8, 10(8), and 11(8) under

35 U.S.C. § 103 in view of the teachings of Walujono, Broekaert, Weissman and White until the examiner first ascertains exactly what is being claimed, i.e., the full scope of cDNA "derived from the cDNA shown in Figure 2 which detects the presence of the hevein peptide sequence encoded by the RNA" (Claim 8). Claim interpretation is a matter of law, and the Board certainly has authority to interpret the meaning of the terms in appellants' claims in the first instance.

However, we hesitate to do so in this case. Where, as here, the technology to which the subject matter relates is complex and the level of skill in the art is high, it is most desirable for the Board to review an examiner's rejections of claims in light of a record with preliminary claim interpretation, comprehensive findings, consideration of all

Appeal No. 94-2232
Application 07/888,367

the issues and applicable precedent, and at least minimal prosecution overall. Our review of the merits of the rejections of Claims 8, 10(8) and 11(8) on appeal based on the present record would be premature and resemble an academic rather than a judicial endeavor. Moreover, the scope of cDNA encompassed by the phrase "derived from the cDNA shown in Figure 2" (Claim 8) may render the holding and opinion expressed in In re Bell, 991 F.2d 781, 782, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993) far more relevant to this appeal than they were to co-pending Appeal No. 94-2156. If material to the issues of this appeal, the views expressed in Bell should of necessity be considered in light of newly decided In re Deuel, 51 F.3d 1552, 34 USPQ2d 1210 (Fed. Cir. 1995) and Ex parte Goldgaber, 41 USPQ2d 1172 (Bd. Pat. App. & Int. 1995).

Accordingly, we vacate the examiner's rejection of Claims 8, 10(8), and 11(8) under 35 U.S.C. § 103 in view of the teachings of Walujono, Broekaert, Weissman and White and remand the case to the examiner to ascertain exactly what the phrase "wherein the cDNA is derived from the cDNA shown in Figure 2 which detects the presence of the hevein peptide

Appeal No. 94-2232
Application 07/888,367

sequence encoded by the RNA" in Claim 8 means. Thereafter, the examiner should again determine, consistent with our decisions in Appeal No. 94-2156, this appeal, In re Bell, supra, In re Deuel, supra, and Ex parte Goldgaber, supra, whether the patentability of Claims 8, 10(8), and 11(8) under 35 U.S.C. § 103 is an issue.

3. Discussion

A. Obviousness in view of Walujono, Broekaert & Weissman

The issues on appeal with regard to Claims 7 and 9(7) are whether cDNA which is "derived from E. coli ATCC 68363, and has an open reading frame of 204 amino acids which detects the presence of the hevein peptide sequence encoded by the RNA" would have been obvious to a person having ordinary skill in the art in view of (1) prior art teaching of the 43 amino acid sequence for mature hevein, including an internal Trp-Gly-Trp-Cys sequence (Walujono, p. 519), (2) recognition in the art that hevein has antifungal properties and may be useful for treating human beings infected by fungus (Broekaert), (3) Weissman's description of the information and means required to enable persons skilled in the art to successfully probe a

Appeal No. 94-2232
Application 07/888,367

DNA library for and isolate cDNA which encodes a target protein without undue experimentation, and (4) White's disclosure of a method of detecting the presence of peptides which, but for the use of cDNA which encodes the peptide hevein, is generally the same as the method appellants claim.

White's teaching and its relevance to peptide detection methods of the type appellants claim, does not appear to be disputed. Rather, as in Appeal No. 94-2156, appellants stress the significant differences between cDNA which encodes mature hevein with a 43 amino acid sequence which was known in the art and the claimed cDNA with an open reading frame of 204 amino acids. Appellants here again argue that the combined teachings of Walujono, Broekaert, and Weissman would not have motivated a person having ordinary skill in the art to probe for and isolate cDNA which encodes a peptide with 204 amino acids. Appellants emphasize that they are using cDNA which encodes a peptide having 204 amino acids, not cDNA which encodes the 43 amino acid sequence of mature hevein. We find that the differences between the structures of cDNA which encodes mature hevein and cDNA which encodes a 204 amino acid hevein precursor strongly support the patentability of the

Appeal No. 94-2232
Application 07/888,367

subject matter claimed in this case. Accordingly, we reverse the examiner's rejection of Claims 7 and 9(7) under 35 U.S.C. § 103 in view of the combined teachings of Walujono, Broekaert, Weissman, and White.

In re Dow Chemical Co., 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988) instructs:

The consistent criterion for determination of obviousness is whether the prior art would have suggested to one of ordinary skill in the art that this process should be carried out and would have a reasonable likelihood of success, viewed in light of the prior art. . . . Both the suggestion and the expectation of success must be founded in the prior art, not in the applicant's disclosure.

At 837 F.2d at 473, 5 USPQ2d at 1532, the court explains:

There must be a reason or suggestion in the art for selecting the procedure used, other than the knowledge learned from the applicant's disclosure.

Here, as in Dow Chemical Co., 837 F.2d at 473, 5 USPQ2d at 1532, "[o]f the many scientific publications cited . . . none suggests that any process could be used successfully . . . to produce this product having the desired properties."

The prior art cited in this case reasonably brings the claimed subject matter to no higher than the "obvious-to-try"

Appeal No. 94-2232
Application 07/888,367

level. See In re Eli Lilly & Co., 902 F.2d 943, 945, 14
USPQ2d 1741, 1743 (Fed. Cir. 1990):

An "obvious-to-try" situation exists when a
general disclosure may pique the scientist's curiosity,
such that further investigation might be done as a result
of the disclosure, but the disclosure itself does not
contain a sufficient teaching of how to obtain the
desired

result, or that the claimed result would be obtained if
certain directions were pursued. *See generally In re
O'Farrell*, 853 F.2d 894, 903, 7 USPQ2d 1673, 1681 (Fed.
Cir. 1988)(defining obvious-to-try as when prior art
gives

"only general guidance as to the particular form of the
claimed invention or how to achieve it").

Here, the prior art provides no information whatsoever as to
the "particular form of the claimed invention or how to
achieve it." Id. Moreover, In re O'Farrell confirms at 853
F.2d at 903,

7 USPQ2d at 1681, that the evidence the examiner relies upon
in this case presents a classic "obvious-to-try" situation
which is not the standard for unpatentability under 35 U.S.C.
§ 103:

[W]hat would have been 'obvious to try' would have been
to . . . try each of numerous possible choices until
one possibly arrived at a successful result, where the
prior art gave . . . no direction as to which of many
possible choices is likely to be successful.

Appeal No. 94-2232
Application 07/888,367

Compare the examiner's responses (Examiner's Answer (Ans.)), pp. 8-13) to appellants' argument that the prior art presents persons having ordinary skill in the art with no more than an invitation to experiment, an argument that refers to In re Bell, 991 F.2d 781, 26 USPQ2d 1529 (Fed. Cir. 1993), especially the court's discussion of Weissman's method of probing for and isolating cDNA encoding proteins with known amino acid sequences and the relevance of methods of isolating cDNA using probes based on the amino acid structure of the protein it encodes to the patentability of claims drawn to the cDNA itself.⁴ For example, the examiner emphasizes that the

⁴ Neither the examiner nor appellants have addressed or considered the holdings and opinions in In re Deuel, 51 F.3d 1552, 34 USPQ2d 1210 (Fed. Cir. 1995) and Ex parte Goldgaber, 41 USPQ2d 1172 (Bd. Pat. App. & Int. 1995). Moreover, resolution of the issues in this case with regard to the patentability of Claims 7 and 9(7) does not necessitate our consideration of the holdings and opinions in those cases relative to In re Bell, supra, with in depth comparison of the underlying facts in this case to the facts therein. It should suffice to say that the decision in this case is dictated by the fact unique to this case that the claimed method uses cDNA which encodes a sequence of 204 amino acids, not the 43 amino acid sequence the prior art discloses. See In re Ochiai, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995)(Obviousness deter-

Appeal No. 94-2232
Application 07/888,367

peptide having 204 amino acids encoded by the cDNA utilized in the method of Claim 7 has the same -Trp-Gly-Trp-Cys- internal sequence (Trp has a unique codon) as the known 43 amino acid sequence of mature hevein (Ans., pp. 9-11), yet the fact that appellants' claimed method utilizes cDNA which encodes a 204 amino acid precursor is not considered to be a material distinction. We disagree.

The examiner states (Ans., pp. 11-13, bridging para.

(3)):

While applicants urge that the actual gene expression product and encoding cDNA sequence are larger than the known hevein protein having only 43 amino acids, one of ordinary skill in the art in carrying out the method of Weissman . . . would have inherently or inevitably obtained the full-length cDNA sequence corresponding to the gene encoding the protein which included these 43 amino acids

In our view, the examiner erroneously equates the requisite "likelihood of success" to inevitability. Rather, for obviousness under 35 U.S.C. § 103, persons having ordinary skill in the art would have had to have a reasonable

minations require a fact-specific analysis of the claims and prior art. *Per se* rules of obviousness are legally incorrect.)

Appeal No. 94-2232
Application 07/888,367

expectation of success in view of the cited prior art. See In re O'Farrell,

853 F.2d at 903, 7 USPQ2d at 1681 ("For obviousness under § 103, all that is required is a reasonable expectation of success.")

The examiner predicts (Ans., p. 12, l. 12-17):

Thus, one of ordinary skill in the art would have kept probing until encountering the intact terminator (i.e., including polyadenylation signal) and such a sequence would have inherently encoded the rest of the naturally encoded previously unknown polypeptide portion C-terminal to the N-terminal 43 amino acid sequence which was known.

The position taken by the examiner falls from its own weight. Since the examiner admits that the C-terminal position of the protein in question was "unknown" at the time of the present invention, it is not clear why one of ordinary skill in the art would have had reason to look for it, let alone a reasonable expectation of finding it. This is not obviousness within the meaning of 35 U.S.C. § 103. This is surprise which is more indicative of patentability.

B. Rejections under 35 U.S.C. § 102(f) and § 103

But for the fact that the claimed subject matter in In re Katz, 687 F.2d 450, 215 USPQ 14 (CCPA 1982), was rejected

Appeal No. 94-2232
Application 07/888,367

under 35 U.S.C. § 102(g) over prior publications whose authorship included a student not named as a coinventor of the subject matter claimed in the patent application and the claims in this application stand rejected under 35 U.S.C. § 102(f) over subsequent publications whose authorship includes a student, Lee, not named as a coinventor of the subject matter claimed in this patent application, the evidence in the two cases is virtually identical. This case similarly contains a Declaration Under 37 CFR § 1.132 (attachment to appellants' Supplemental Brief Under 37 CFR § 1.193(b)) by a coinventor, Natasha V. Raikhel, which states in paragraph (1) thereof that "Dr. Lee's contribution was as a student at Michigan State University and he performed routine experimentation under her supervision."

That the holding in Katz applies to rejections under 35 U.S.C. § 102(f) is evident from Ex parte Kroger, 218 USPQ 370 (Bd. App. 1982). In the case then before the Board "various declarations were submitted by Kroger and Rod to the effect that Kroger and Rod are inventors and that Knaster merely carried out assignments and worked under the

Appeal No. 94-2232
Application 07/888,367

supervision and direction of Kroger." Id. at 371. The Board stated at 371-372:

If this were all the evidence in this case, then we would be constrained to agree that Kroger et al are the inventors and that Knaster is not a coinventor.

The difference in Kroger was that the record included additional evidence which showed that (1) Knaster refused to sign a

declaration that he was not a coinventor, and (2) Knaster wrote

a letter to the PTO declaring himself to be a coinventor of the invention claimed.

In this case, we have only an examiner's speculation that Lee must be a coinventor of the subject matter claimed in this application because of the repeated use of the pronoun "we" in the later published papers which Lee co-authored and coinventor Raikhel's reference to "Dr. Lee" in her declaration (Supplemental Examiner's Answer, pp.2-4). However, the examiner may recall that the PTO was expressly cautioned against just this type of speculation in In re Katz, 687 F.2d at 455-56, 215 USPQ at 18 (emphasis added):

[W]e hold that authorship of an article by itself does not raise a *presumption* of inventorship with respect to the subject matter disclosed in the article. Thus, co-authors may not be *presumed* to be coinventors merely from the fact of co-authorship. . . .

. . . [When there was] ambiguity created by the printed publication . . . [i]t was incumbent, therefore, on appellant to provide a satisfactory showing which would lead to a reasonable conclusion that he is the sole inventor.

.

In the declaration, appellant provides the explanation that the co-authors of the publication . . . "were students working under the direction and supervision of the inventor" This statement . . . provides a clear alternative conclusion On the record here, the board should not have engaged in further speculation as to whether appellant's view was shared by . . . [the] co-authors but rather should have accepted that . . . [the co-authors] were acting in the capacity indicated, that is, students working under the direction and supervision of appellant. From such a relationship, joint inventorship cannot be inferred in the face of sworn statements to the contrary.

In light of Raikhel's declaration, the examiner erred as a matter of law in presuming that the co-authorship of the Lee

Appeal No. 94-2232
Application 07/888,367

I and Lee II publications raises the presumption that Lee is a coinventor of the subject matter appellants claimed.

Accordingly, we reverse the examiner's rejections of Claims 7-11 under 35 U.S.C. § 102(f) and under 35 U.S.C. § 103 in view of subject matter the examiner deemed to be prior art under

35 U.S.C. § 102(f).

4. Conclusion

We vacate the examiner's rejection of Claims 8, 10(8), and 11(8) under 35 U.S.C. § 103 in view of the combined teachings of Walujono, Broekaert, Weissman and White.

We reverse the examiner's rejection of Claims 7 and 9(7) under 35 U.S.C. § 103 in view of the combined teachings of Walujono, Broekaert, Weissman and White.

We reverse the examiner's rejection of Claims 7-11 under 35 U.S.C. § 102(f).

We reverse the examiner's rejection of Claims 7-11 under

Appeal No. 94-2232
Application 07/888,367

35 U.S.C. § 103 in view of prior art available under 35 U.S.C.
§ 102(f).

We remand this application to the examiner to ascertain the scope of the phrase "wherein the cDNA is derived from the cDNA shown in Figure 2 which detects the presence of the hevein peptide sequence encoded by the RNA" in Claim 8 and determine whether the patentability of Claims 8, 10(8), and 11(8) under 35 U.S.C. § 103 in view of the combined teachings of Walujono, Broekaert, Weissman and White remains an issue in light of this decision, the decision in Appeal No. 94-2156 (attached), In re Bell, supra, In re Deuel, supra, and Ex parte Goldgaber, supra.

This application, by virtue of its "special" status, requires an immediate action. Manual of Patent Examining Procedure § 708.01(d)(6th ed., Jan. 1995). It is important that the Board be informed promptly of any action affecting the appeal in this case.

Appeal No. 94-2232
Application 07/888,367

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

VACATED-IN-PART; REVERSED-IN-PART; and REMANDED

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

Appeal No. 94-2232
Application 07/888,367

Ian C. McLeod
2190 Commons Parkway
Okemos, MI 48864

Appeal No. 94-2232
Application 07/888,367

TSG/cam