

MANUAL OF  
PATENT  
EXAMINING  
PROCEDURE

3<sup>RD</sup> EDITION

Rev. 39



U.S. DEPARTMENT OF COMMERCE  
Patent and Trademark Office

REEL NUMBER 3

BOOK NUMBERS 615

MANUAL OF PATENT EXAMINING PROCEDURE, 3rd. Ed.  
Change NoticeSeries No. 41-1  
(Follows Change 29-1)

Reference: MPEP 803

May 1, 1974

## PRACTICE RE MARKUSH-TYPE CLAIMS

This notice deals with Markush-type claims which include a plurality of alternatively usable substances or members. In most cases this recitation by enumeration is used because there is no appropriate or true generic language.

Where an application claims two or more independent and distinct inventions, the Commissioner, under the provisions of 35 U.S.C. 121, may require the application to be restricted to one of the inventions.

A Markush-type claim is directed to "independent and distinct inventions," if two or more of its members are so unrelated and diverse that a prior art reference anticipating the claim with respect to one of the members would not render the claim obvious under 35 U.S.C. 103 with respect to the other member(s).

If the claim is of that nature, the examiner is authorized to reject it as an improper Markush claim and for misjoinder under 35 U.S.C. 121 and to require the applicant to restrict the application to a single invention. In making such a requirement, the examiner will (1) clearly delineate the members or groups of members believed to constitute improperly joined inventions, and (2) state reasons fully explaining why they are independent and distinct. Applicant's response to such a requirement should be an election of a single adequately disclosed and supported invention, with or without restriction of the claim(s) to that invention. Of course, the response must not introduce new matter into the application. See 35 U.S.C. 132 and *In re Welstead*, 59 CCPA 1105, 463 F. 2d 1110, 174 USPQ 449 (1972). A refusal to elect a single invention will be treated as a non-responsive reply.

If the members of the Markush group are sufficiently few in number or so closely related that a search and examination of the entire claim can be made without serious burden, the examiner is encouraged to examine it on the merits, even though it is directed to independent and distinct inventions. In such a case, the examiner will not follow the procedure outlined in the preceding paragraph and will not require restriction.

Where the examiner has rejected the claim and required restriction and the applicant has responded without restricting the claim(s) to a single invention, the examiner shall, if the position is adhered to, again reject the claim and any other Markush claims not restricted to the elected invention. No further examination of these claims is required unless and until such rejection has been overcome. However, if the search of the single elected invention develops prior art which would render both the elected invention and the improper Markush claim(s) unpatentable, such prior art may be applied in rejections of both without a complete search of the subject matter of the improper Markush claim(s). Otherwise, only true generic claims and those restricted to the elected invention will be examined in the usual manner.

Review of the rejection will be by appeal to the Board of Appeals under 35 U.S.C. 134.

C. Marshall Dann  
Commissioner of Patents

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All pages issued in other revisions have been revised.

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U. S. DEPARTMENT OF COMMERCE  
Patent Office  
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MANUAL OF PATENT EXAMINING PROCEDURE  
Third Edition

Instructions regarding Revision No. 39

The attached revised pages are replacements for those in the Manual having corresponding numbers, or additional pages to be placed in appropriate numerical sequence.

The notation "[R-39]" in the attached pages appears either at the title or at the end of a section that has been revised.

Louis O. Maassel, Editor  
Manual of Patent Examining Procedure

Particular attention is called to the following sections:

- |             |   |
|-------------|---|
| 102         | Amended to clarify what information may be given as to status of an application.  |
| 201.06(a)   | New section relating to the rule 60, division-continuation procedure.   |
| 201.11      | Citation of Continental Can Company Inc. et al. v. Schuyler, 168 USPQ 625 on termination date of CCPA proceedings added.                                |
| 201.13(a)   | New section relating to right of priority based upon an application for an Inventor's Certificate.  |
| 201.14(a)   | Last paragraph added on filing priority papers after payment of base issue fee.   |
| 201.14(b)   | Subsection under "Later Filed Applications, Reissues" rewritten to clearly indicate that priority papers may be filed in later or reissue applications. |
| 502, 714.13 | Portion on "Hand Delivery of Papers" has been revised.  |

- 506 Use of forms PO-152, PO-1094 and PO-1123 included.
- 510 New section on Patent Office business hours added.
- 608.01(p) Revised to indicate procedure for handling incorporation by reference of foreign application. (In re Hawkins, 179 USPQ 157 situation)
- 708.02 Subsection on according special status to "Energy" applications added.
- 711.01, 1210, 1215.01 Material added on ability of an attorney acting in a representative capacity under rule 34(a) to withdraw an appeal.
- 714.01(a) Paragraph on acceptability of "Telecopier" documents added.
- 803.01, 1005 Revised to allow partial signatory authority examiner to make initial restriction requirement.
- 804.03 Paragraph added to indicate that abandonment of other application is a proper response to a rule 78(c) requirement.
- 901.07 Paragraph added on arrangement of foreign patent documents in files involved in recent reclassification projects.
- 905.02 Paragraph added to indicate that examiners may not order soft copies of patents with color drawings.

All other changes are corrections which are largely matters of clarification, terminology, form or capitalization.

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MANUAL OF  
**PATENT  
EXAMINING  
PROCEDURE**

Original Third Edition, dated November 1961

Latest Revision January 1974



U.S. DEPARTMENT OF COMMERCE • PATENT OFFICE

Rev. 39, Jan. 1974



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# Foreword

This Manual is published to provide Patent Office examiners, applicants, attorneys, agents, and representatives of applicants with a reference work on the practices and procedures relative to the prosecution of applications before the Patent Office. It contains instructions to examiners, as well as other material in the nature of information and interpretation, and outlines the current procedures which the examiners are required or authorized to follow in appropriate cases in the normal examination of application.

Examiners will be governed by the applicable statutes, the Rules of Practice, decisions, and orders and instructions issued by the Commissioner and the Assistant Commissioners. Orders and Notices still in force which relate to the subject matter included in this Manual are incorporated in the text. Orders and Notices, or portions thereof, relating to the examiners' duties and functions which have been omitted or not incorporated in the text may be considered obsolete. Interference procedure not directly involving the Primary Examiner is not included in this Manual and, therefore, Orders and Notices relating thereto remain in force.

Subsequent changes in practice and other revisions will be incorporated in the form of substitute or additional pages for the Manual.

Suggestions for improving the form and content of the Manual are always welcome. They should be addressed to:

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# Introduction

## Constitutional Basis

The Constitution of the United States provides:

"ART. 1, SEC. 8. The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

## Statutes

Pursuant to the provision of the Constitution, Congress has over the years passed a number of statutes under which the Patent Office is organized and our patent system is established. The provisions of the statutes can in no way be changed or waived by the Patent Office.

Prior to January 1, 1953, the law relating to patents consisted of various sections of the Revised Statutes of 1874, derived from the Patent Act of 1870 and numerous amendatory and additional acts.

By an Act of Congress approved July 19, 1952, which came into effect on January 1, 1953, the patent laws were revised and codified into their present form. With certain exceptions applying to applications filed and patents issued before January 1, 1953, this law governs all cases in the Patent Office. The patent law is Title 35 of the United States Code, which contains 96 sections numbered from 1 to 293, with gaps in the numbering between various chapters of the title. In referring to a particular section of the patent code the citation is given, for example, as, 35 U.S.C. 31. The pamphlet "Patent Laws" (available from the Superintendent of Documents for 75 cents) reprints the patent code and some additional statutes.

*35 U.S.C. 1 Establishment.* The Patent Office shall continue as an office in the Department of Commerce, where records, books, drawings, specifications, and other papers and things pertaining to patents and to trademark registrations shall be kept and preserved, except as otherwise provided by law.

## Rules of Practice

One of the sections of the patent statute, namely, 35 U.S.C. 6, authorizes the Commissioner of Patents, subject to the approval of the Secretary of Commerce, to establish regula-

tions, not inconsistent with law, for the conduct of proceedings in the Patent Office.

*Rule 351. Amendments to rules will be published.* All amendments to these rules will be published in the Official Gazette and in the Federal Register.

*Rule 352. Publication of notice of proposed amendments.* (a) Whenever required by law, and in other cases whenever practicable, notice of proposed amendments to these rules will be published in the Official Gazette and in the Federal Register. If not published with the notice, copies of the text will be furnished to any person requesting the same. All comments, suggestions, and briefs received within a time specified in the notice will be considered before adoption of the proposed amendments which may be modified in the light thereof.

(b) Oral hearings may be held at the discretion of the Commissioner.

These rules are set forth in a Patent Office booklet entitled "Rules of Practice of the United States Patent Office in Patent Cases" (available from the Superintendent of Documents for \$3.50). These rules and the various amendments were published in the Federal Register. In the Federal Register and in the Code of Federal Regulations these rules are Part 1 of Title 37, Patents, Trademarks and Copyrights, and the individual rules, there called sections, are numbered with the Part number and a decimal point prefixed to the numbers to the rule number; thus section 1.33 in the Federal Register and the Code of Federal Regulations is the same as rule 33. Primarily the function of the Rules of Practice is to advise the public of the regulations which have been established in accordance with the statutes and which must be followed before the Office. The Rules of Practice govern the examiners, as well as applicants and their attorneys.

## Commissioner's Orders and Notices

From time to time, the Commissioner of Patents has issued Orders and Notices relating to various specific situations that have arisen in operating the Patent Office. Notices and circulars of information or instructions have also been issued by other Office Officials under authority of the Commissioner. Orders and Notices have served various purposes including directions to the examiners giving them instruction, information, interpretations and the like. Some may be for the information of the public,

advising what the Office will do under specified circumstances.

### Decisions

In addition to the statutory regulations, the actions taken by the examiner in the examination of applications for patents are to a great extent governed by decisions on prior cases. Applicants dissatisfied with an examiner's action may have it reviewed. In general, that por-

tion of the examiner's action pertaining to objections on formal matters may be reviewed by petition to the Commissioner of Patents (see § 1002) and that portion of the examiner's action pertaining to the rejection of claims on the merits, may be reviewed by appeal to the Board of Appeals (see § 1201). The distinction is set forth in rules 181 and 191. In citing decisions as authority for his actions, the examiner should cite the decision in the manner set forth in § 707.06.