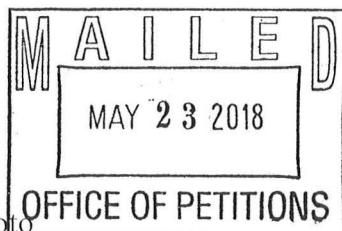




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In re Application of: :  
Alexander I. Soto et al. :  
Application No. 14/588,899 : DECISION ON PETITION  
Filed: January 2, 2015 :  
Attorney Docket No.: UBI-007B :  
For: System and Method for Optical Layer :  
Management in Optical Modules and :  
Remote Control of Optical Modules :

This is a decision on the petition under 37 C.F.R. § 1.181 filed on March 31, 2018, requesting that the Director exercise supervisory authority and overturn the decisions of November 9, 2017 and February 1, 2018 by the Director of Technology Center 2600 (Technology Center Director), which decisions refused to designate the examiner's answer of July 12, 2017 as containing a new ground of rejection and reopen prosecution of the above-identified application.

The petition to direct the Technology Center Director to designate the examiner's answer of July 12, 2017 as containing a new ground of rejection and reopen prosecution of the above-identified application is **DENIED**.

**RELEVANT BACKGROUND**

The above-identified application was filed on January 2, 2015.

Prosecution of the above-identified application resulted in a final Office action being issued on October 19, 2016. The Office action of October 19, 2016 included, *inter alia*: (1) a rejection of claims 1 through 3, 10, and 13 under 35 U.S.C. § 103<sup>1</sup> as being unpatentable over Levinson *et al.*

<sup>1</sup> Section 3 of the AIA revised 35 U.S.C. §§ 102 and 103, effective as to applications ever having a claim with an effective filing date on or after March 16, 2013, or ever having a reference under 35 U.S.C. §§ 120, 121, or 365(c) to any patent or application that ever contained such a claim with an effective filing date on or after March 16, 2013. See Pub. L. No. 112-29, § 3, 125 Stat. at 285-293. The above-identified application was filed after March 16, 2013, but asserts priority to an effective filing date prior to March 16, 2013 for every claim ever contained in the above-identified application, and never contained a reference under 35 U.S.C. §§ 120, 121, or 365(c) to any other patent or application having a claim with an effective filing date on or after March 16, 2013. Therefore, this decision refers to the pre-AIA version of 35 U.S.C. §§ 102 and 103.

(U.S. Patent Application Publication No. US 2003/0053170) in view of Huang *et al.* (U.S. Patent No. 7,031,574) and Tan *et al.* (U.S. Patent Application Publication No. US 2004/0208601); (2) a rejection of claim 4 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* and Tan *et al.* as applied to claims 1 and 3, and further in view of Masucci *et al.* (U. S. Patent No. 6,498,667) and Denton *et al.* (U. S. Patent No. 6,567,413); (3) a rejection of claim 5 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* and Tan *et al.* as applied to claims 1 and 3, and further in view of Medina *et al.* (U. S. Patent No. 6,778,399); (4) a rejection of claims 6 and 8 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* as applied to claims 1 and 3, and further in view of Song *et al.* (U. S. Patent Application Publication No. US 2003/0137975) and Xu *et al.* (U. S. Patent No. 7,181,142); (5) a rejection of claim 7 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* and Tan *et al.* as applied to claims 1 and 3, and further in view of Wang *et al.* (U. S. Patent Application Publication No. US 2004/0052274); (6) a rejection of claim 9 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* as applied to claim 1, and further in view of Johnston *et al.* (U. S. Patent No. 7,991,296); (7) a rejection of claim 11 under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* and Tan *et al.* as applied to claim 1, and further in view of Ethridge *et al.* (U. S. Patent Application Publication No. US 2002/0163921); (8) a rejection of claim 12 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* and Tan *et al.* and Ethridge *et al.* as applied to claims 1 and 11, and further in view of Cox *et al.* (U. S. Patent Application Publication No. US 2004/0028408); (9) a rejection of claims 14 and 20 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* in view of Tan *et al.* (U.S. Patent Application Publication No. US2004/0208601); (10) a rejection of claim 15 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Tan *et al.* as applied to claim 14, and further in view of Masucci *et al.* (U. S. Patent No. 6,498,667) and Denton *et al.* (U.S. Patent Application No. 6,567,413) and Sacrmalis (U.S. Patent No. 6,229,823); (11) a rejection of claim 16 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Tan *et al.* and Masucci *et al.* and Denton *et al.* as applied to claim 14, and further in view of Medina *et al.* (U. S. Patent No. 6,778,399); (12) a rejection of claims 17 and 19 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Tan *et al.* as applied to claim 14, and further in view of Song *et al.* (U. S. Patent Application Publication No. US 2003/0137975) and Xu *et al.* (U.S. Patent No. 7,181,142); (13) a rejection of claim 18 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Tan *et al.* as applied to claim 14, and further in view of Wang *et al.* (U.S. Patent Application Publication No. US 2004/0052274); (14) a rejection of claim 21 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Tan *et al.* as applied to claim 14, and further in view of Ethridge *et al.* (U.S. Patent Application Publication No. US2002/0163921); and (15) a rejection of claim 22 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Tan *et al.* and Ethridge *et al.* as applied to claims 14 and 21, and further in view of Cox *et al.* (U.S. Patent Application Publication No. 2004/0028408).

A notice of appeal and a request for pre-appeal brief review were filed on January 18, 2017.

A decision by the pre-appeal brief conference panel was issued on February 7, 2017, and indicated that the panel decision from the pre-appeal brief review was to proceed to the Patent Trial and Appeal Board (PTAB).

An appeal brief, which appeals the rejections of claims 1 through 22 was filed on March 18, 2017. Notice of a defective appeal brief was issued on April 12, 2017 because the brief did not include a concise explanation of the subject matter defined in each of the independent claims. The deficiency was corrected on May 8, 2017.

An examiner's answer was issued on July 12, 2017.

A first petition under 37 CFR § 1.181 to the Technology Center Director was filed on September 11, 2017. The petition of September 11, 2017 requested that the examiner's answer of July 12, 2017 be designated as containing a new grounds of rejection for including a new suggestion of modification of the Levinson *et al.* reference in regard to Claims 12 and 15 (*i.e.*, new grounds of rejection) in the "Response to Argument" section and prosecution of the application be reopened.

The first petition of September 11, 2017 was denied by the Technology Center Director in a decision issued on November 9, 2017.

A second petition under 37 CFR § 1.181 to the Technology Center Director was filed on January 7, 2018. The petition of January 7, 2018 requested that the examiner's answer of July 12, 2017 be designated as containing a new grounds of rejection for including a new suggestion of modification of the Levinson *et al.* reference in regard to Claim 12 (*i.e.*, new grounds of rejection) in the "Response to Argument" section and prosecution of the application be reopened.

The second petition of January 7, 2018 was denied by the Technology Center Director in a decision issued on February 1, 2018.

The instant renewed petition under 37 CFR § 1.181 was filed on March 31, 2018, and again requests that the examiner's answer of July 12, 2017 be designated as containing a new grounds of rejection and prosecution of the application be reopened.

### **STATUTE AND REGULATION**

35 U.S.C. § 134 provides that:

(a) PATENT APPLICANT.— An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the Board of Patent Appeals and Interferences, having once paid the fee for such appeal.

(b) PATENT OWNER.— A patent owner in any reexamination proceeding may appeal from the final rejection of any claim by the primary examiner to the Board of Patent Appeals and Interferences, having once paid the fee for such appeal.

37 CFR 41.31 provides that:

(a) *Who may appeal and how to file an appeal.* An appeal is taken to the Board by filing a notice of appeal.

(1) Every applicant, any of whose claims has been twice rejected, may appeal from the decision of the examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134 of this title for reply.

(2) Every owner of a patent under *ex parte* reexamination filed under § 1.510 of this title before November 29, 1999, any of whose claims has been twice rejected, may appeal from the decision of the examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134 of this title for reply.

(3) Every owner of a patent under *ex parte* reexamination filed under § 1.510 of this title on or after November 29, 1999, any of whose claims has been finally (§ 1.113 of this title) rejected, may appeal from the decision of the examiner to the Board by filing a notice of appeal accompanied by the fee set forth in § 41.20(b)(1) within the time period provided under § 1.134 of this title for reply.

(b) The signature requirements of §§ 1.33 and 1.18(a) of this title do not apply to a notice of appeal filed under this section.

(c) An appeal, when taken, is presumed to be taken from the rejection of all claims under rejection unless cancelled by an amendment filed by the applicant and entered by the Office. Questions relating to matters not affecting the merits of the invention may be required to be settled before an appeal can be considered.

(d) The time periods set forth in paragraphs (a)(1) through (a)(3) of this section are extendable under the provisions of § 1.136 of this title for patent applications and § 1.550(c) of this title for *ex parte* reexamination proceedings.

37 CFR 41.39 provides that:

(a) *Content of examiner's answer.* The primary examiner may, within such time as may be directed by the Director, furnish a written answer to the appeal brief.

(1) An examiner's answer is deemed to incorporate all of the grounds of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory action and pre-appeal brief conference decision), unless the examiner's answer expressly indicates that a ground of rejection has been withdrawn.

(2) An examiner's answer may include a new ground of rejection. For purposes of the examiner's answer, any rejection that relies upon any Evidence not relied upon in the Office action from which the appeal is taken (as modified by any advisory action) shall be designated by the primary examiner as a new ground of rejection. The examiner must obtain the approval of the Director to furnish an answer that includes a new ground of rejection.

(b) *Appellant's response to new ground of rejection.* If an examiner's answer contains a rejection designated as a new ground of rejection, appellant must within two months from the date of the examiner's answer exercise one of the following two options to avoid *sua sponte* dismissal of the appeal as to the claims subject to the new ground of rejection:

(1) *Reopen prosecution.* Request that prosecution be reopened before the primary examiner by filing a reply under § 1.111 of this title with or without amendment or submission of affidavits (§§ 1.130, 1.131 or 1.132 of this title) or other Evidence. Any amendment or submission of affidavits or other Evidence must be relevant to the new ground of rejection. A request that complies with this paragraph will be entered and the application or the patent under ex parte reexamination will be reconsidered by the examiner under the provisions of § 1.112 of this title. Any request that prosecution be reopened under this paragraph will be treated as a request to withdraw the appeal.

(2) *Maintain appeal.* Request that the appeal be maintained by filing a reply brief as set forth in § 41.41. Such a reply brief must address as set forth in § 41.37(c)(1)(iv) each new ground of rejection and should follow the other requirements of a brief as set forth in § 41.37(c). A reply brief may not be accompanied by any amendment, affidavit (§§ 1.130, 1.131 or 1.132 of this title) or other Evidence. If a reply brief filed pursuant to this section is accompanied by any amendment, affidavit or other Evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under paragraph (b)(1) of this section.

(c) *Extensions of time.* Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for ex parte reexamination proceedings.

37 CFR 41.40 provides that:

(a) *Timing.* Any request to seek review of the primary examiner's failure to designate a rejection as a new ground of rejection in an examiner's answer must be by way of a petition to the Director under § 1.181 of this title filed within two months from the entry of the examiner's answer and before the filing of any reply brief. Failure of appellant to timely file such a petition will constitute a waiver of any arguments that a rejection must be designated as a new ground of rejection.

(b) *Petition granted and prosecution reopened.* A decision granting a petition under § 1.181 to designate a new ground of rejection in an examiner's answer will provide a two-month time period in which appellant must file a reply under § 1.111 of this title to reopen the prosecution before the primary examiner. On failure to timely file a reply under § 1.111, the appeal will stand dismissed.

(c) *Petition not granted and appeal maintained.* A decision refusing to grant a petition under § 1.181 of this title to designate a new ground of rejection



in an examiner's answer will provide a two-month time period in which appellant may file only a single reply brief under § 41.41.

(d) *Withdrawal of petition and appeal maintained.* If a reply brief under § 41.41 is filed within two months from the date of the examiner's answer and on or after the filing of a petition under § 1.181 to designate a new ground of rejection in an examiner's answer, but before a decision on the petition, the reply brief will be treated as a request to withdraw the petition and to maintain the appeal.

(e) *Extensions of time.* Extensions of time under § 1.136(a) of this title for patent applications are not applicable to the time period set forth in this section. See § 1.136(b) of this title for extensions of time to reply for patent applications and § 1.550(c) of this title for extensions of time to reply for *ex parte* reexamination proceedings.

### OPINION

Petitioners assert that the examiner's answer of July 12, 2017 contains new grounds of rejection and therefore, prosecution should be reopened. Petitioners discuss differences in the explanations provided in the examiner's answer of July 12, 2017 and the final Office action of October 19, 2016, and cite *In re Kronig*, 539 F.2d 1300 (CCPA 1976), *In re Leithem*, 661 F.3d 1316 (Fed. Cir. 2011), and *Rambus v. Rea*, 731 F.3d 1248 (Fed. Cir. 2013), in support of the argument that the examiner's answer of July 12, 2017 contains new grounds of rejection.

Whether there is a new ground of rejection depends upon whether the basic thrust of a rejection has remained the same. *Kronig*, 539 F.2d at 1303. "[T]he ultimate criterion of whether a rejection is considered 'new' ... is whether appellants have had fair opportunity to react to the thrust of the rejection." *Kronig*, 539 F.2d at 1302. A new ground of rejection may be present when a rejection relies upon new facts or a new rationale not previously raised to the applicant. See *In re Biedermann*, 733 F.3d 329, 337 (Fed. Cir. 2013) (quoting *Leithem*, 661 F.3d at 1319). The prior rejection, however, need not be repeated *in haec verba* to avoid being considered a new ground of rejection. See *id.* In addition, further explanation and elaboration upon a rejection, and thoroughness in responding to an applicant's arguments, are not considered a new ground of rejection. See *In re Jung*, 637 F.3d 1356, 1364-65 (Fed. Cir. 2011).

Section 1207.03(III) of the Manual of Patent Examining Procedure (MPEP) specifically provides that:

A position or rationale that changes the "basic thrust of the rejection" will also give rise to a new ground of rejection. *In re Kronig*, 539 F.2d 1300, 1303 (CCPA 1976). However, the examiner need not use identical language in both the examiner's answer and the Office action from which the appeal is taken to avoid triggering a new ground of rejection. It is not a new ground of rejection, for example, if the examiner's answer responds to appellant's arguments using different language, or restates the reasoning of the rejection in a different way, so long as the "basic thrust of the rejection" is the same. *In re Kronig*, 539 F.2d at 1303; see also *In re Jung*, 637 F.3d 1356, 1364-65 (Fed. Cir. 2001) (additional explanation responding to arguments offered for the first time "did not

change the rejection” and appellant had fair opportunity to respond); *In re Noznick*, 391 F.2d 946, 949 (CCPA 1968) (no new ground of rejection made when “explaining to appellants why their arguments were ineffective to overcome the rejection made by the examiner”); *In re Krammes*, 314 F.2d 813, 817 (CCPA 1963) (“It is well established that mere difference in form of expression of the reasons for finding claims unpatentable or unobvious over the references does not amount to reliance on a different ground of rejection.” (citations omitted)); *In re Cowles*, 156 F.2d 551, 1241 (CCPA 1946) (holding that the use of “different language” does not necessarily trigger a new ground of rejection).

The final Office action of October 19, 2016 included, *inter alia*, a rejection of claim 12 under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* and Tan *et al.* and Ethridge *et al.* as applied to claims 1 and 11, and further in view of Cox *et al.* <sup>2</sup> The rejection included an explanation that:

“...Levinson et al teaches ‘these programs and instructions contained in memory 222 may be modified by the user(s) such that the optoelectronic device may be reprogramed to communicate in various network protocols and to perform a variety of operations. By altering the program codes contained in memory 222, additional functionality may be added to the optoelectronic device without altering the interface through which it communicates with the host’. Also, Cox et al discloses that forward error correction can be implemented in a transceiver (312 in Figure 3).”<sup>3</sup>

In the appeal brief of March 18, 2017, petitioners argued, *inter alia*, that:

“The Examiner’s position is to conflate Levinson’s laser driver 105 with Appellants’ modulation assembly and then suggest altering Levinson’s memory 222 to account for the additional features of Appellants’ claim. However, the Examiner’s previous position in claim 1 was to conflate memory 222 to Appellants’ protocol processor, not the modulation assembly. Given the Examiner’s position the suggested modification does not read into Appellants’ claim as the Examiner’s is not suggesting further modification of Levinson’s laser driver 105 to perform the additional features of Appellants’ claim. Therefore the rejection has not suggested all of the limitations of the claimed invention and for at least this reason alone the rejection should be withdrawn.”<sup>4</sup>

The “Response to Argument” section of the examiner’s answer of July 12, 2017 responded to the petitioners’ argument by stating that:

“Levinson et al shows SERDES and driver are between the control circuitry and the light source (laser), the control circuitry contains the protocol processing units and other signal processing circuits. Ethridge et al also discloses that a transmit

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<sup>2</sup> See final Office action dated October 19, 2016 at page 16.

<sup>3</sup> *Id.* At page 17

<sup>4</sup> See appeal brief filed March 18, 2017 at page 21.

framer is between the driver and the control circuitry. That is, the combination of Levinson and Ethridge at al teaches a modulation assembly that contains the processing circuit for determining the modulation format and driver etc.

As discussed above, Levinson's control circuitry contains different processing units, which use the programs/instructions to perform different functionalities. The protocol processor in the control circuitry is not a part of 'modulation assembly', but the processing circuit for determining the modulation format and driver etc. is. Therefore, Levinson et al and Huang et al and Tan et al and Ethridge et al 'suggested all of the limitations of the claimed invention.'"<sup>5</sup>

The basic thrust of the examiner's position in rejecting claim 12 has remained the same from the final Office action of October 19, 2016 to the examiner's answer of July 12, 2017. Claim 12 remains rejected under 35 U.S.C. § 103(a) as being unpatentable over Levinson *et al.* and Huang *et al.* and Tan *at al.* and Ethridge *et al.* as applied to claims 1 and 11, and further in view of Cox *et al.* The "Response to Argument" section of the examiner's answer of July 12, 2017 does include additional explanation in response to arguments presented by petitioners in the appeal brief of March 18, 2017. Such additional explanation, however, does not change the basic thrust of the rejection of claim 12 under 35 U.S.C. § 103(a) as set forth in the final Office action of October 19, 2016. The additional discussion in the examiner's answer of July 12, 2017 relative to the final Office action of October 19, 2016 amounts only to an elaboration of the rationale set forth in the final Office action of October 16, 2016, and such an elaboration is not a new ground of rejection. *See Jung*, 637 F.3d at 1364-65. An examiner is not required to anticipate an applicant's arguments concerning the scope of the claims in advance and preemptively respond to those arguments. *See id.* at 1363. Although the examiner did not use identical language in both the "Response to Argument" section of the examiner's answer of July 12, 2017 and the final Office action of October 19, 2016, the use of different language in responding to an applicant's argument is not considered a new grounds of rejection, provided that the "basic thrust of the rejection" is the same. *See Leithem*, 661 F.3d at 1319 (a prior rejection need not be repeated *in haec verba* to avoid being considered a new grounds of rejection).

The cases cited by petitioners are readily distinguishable from the circumstances of the above-identified application. The circumstances of the above-identified application do not involve the examiner changing the interpretation of how a claim element was met by a disclosure in the prior art reference for the first time in the examiner's answer as was the case in *Leithem* and *Imes*. Likewise, the examiner did not change the factual basis for combining the references, as was the case in *Rambus*. The circumstances of the above-identified application are similarly not comparable to the circumstances present in other cases in which a new ground of rejection was found. *See e.g., Biedermann, supra* (changing factual basis for combining references); *In re Stepan Co.*, 660 F.3d 1248 (Fed. Cir. 2011) (changing the treatment of an applicant-submitted affidavit or declaration); *In re Kumar*, 418 F.3d 1361 (Fed. Cir. 2005) (providing new calculations to demonstrate that the prior art references fall within or overlaps with the claimed range); *In re De Blauwe*, 736 F.2d 699 (Fed. Cir. 1984) (changing the treatment of applicant's contentions of unexpected results); *In re Waymouth*, 486 F.2d 1058 (CCPA 1973) (changing aspect of a claim element relied upon for position that application did not provide written

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<sup>5</sup> See examiner's answer dated July 12, 2017 at pages 56 and 57.



description support under 35 U.S.C. § 112, ¶ 1); *In re Eynde*, 480 F.2d 1364 (CCPA 1973) (changing factual basis for the position that application did not provide enablement under 35 U.S.C. § 112, ¶ 1); *In re Echerd*, 471 F.2d 632 (CCPA 1973) (changing portion of a reference relied upon to meet claim limitations); *In re Wiechert*, 370 F.2d 927 (CCPA 1967) (changing portion of a reference relied upon to meet claim limitations); and *In re Hughes*, 345 F.2d 184 (CCPA 1965) (changing the statutory basis of the rejection). The circumstances of the above-identified application are most analogous to the circumstances present in *Jung* (explanation of why the claims are not limited as asserted by the applicant is not a change to the basic thrust of the rejection), and are not analogous to the circumstances which a new grounds of rejection was found.

In conclusion, the examiner's answer of July 12, 2017 did not change the basic thrust of the rejection and petitioners have been given a fair opportunity to respond to the rejection of the claims (specifically, claim 12). Accordingly, the examiner's answer of July 12, 2017 does not contain a new ground of rejection warranting the reopening of prosecution in the above-identified application.

### **DECISION**

For the previously stated reasons, the petition is granted to the extent that the Technology Center Director decisions of September 11, 2017 and February 1, 2018 have been reviewed, but the petition is **DENIED** with respect to designating the examiner's answer of July 12, 2017 as containing a new ground of rejection or generating a new examiner's answer. As such, neither the Technology Center Director decisions of November 9, 2017 and February 1, 2018 nor the examiner's answer of July 12, 2017 will be disturbed.

This constitutes a final decision on this petition. No further requests for reconsideration will be entertained. Judicial review of this petition decision may be available upon entry of a final agency action adverse to the petitioners in the instant application (*e.g.*, a final decision by the Patent Trial and Appeal Board). *See* MPEP §1002.02.

Petitioners are reminded that the appeal forwarding fee (37 CFR § 41.20(b)(4)) must be paid within **two (2) months** from the mailing date of this decision in order to avoid dismissal of the appeal. *See* 37 CFR § 41.45. Extensions of time under 37 CFR § 1.136(a) are not applicable to this time period. *See* 37 CFR § 41.45(c).

Petitioners are also reminded that a reply brief may be filed within **two (2) months** from the mailing date of this decision. *See* 37 CFR § 41.41(a). Extensions of time under 37 CFR § 1.136(a) are not applicable to this time period. *See* 37 CFR § 41.41(c).

Telephone inquiries concerning this decision should be directed to Brian W. Brown at (571) 272-5338.

A handwritten signature in black ink, appearing to read 'RWB', with a long horizontal flourish extending to the right.

Robert W. Bahr  
Deputy Commissioner  
for Patent Examination Policy