

The covered activities include the operation of the two power plants on the Hudson River as described in the "Conservation Plan for the Incidental Take of Shortnose Sturgeon at the Roseton and Danskammer Point Generating Stations" and in the Environmental Assessment.

The publication on August 9, 2000 (65 FR 48677), notified that an application had been filed by CHGE for a permit to incidentally take endangered shortnose sturgeon from the Hudson River distinct population segment of shortnose sturgeon at the Roseton and Danskammer Point power plants on the Hudson River. CHGE submitted an application including a Conservation Plan (CP) on April 20, 2000. The CP describes measures designed to avoid, minimize, mitigate, and monitor the incidental take of shortnose sturgeon associated with operation of the Roseton and Danskammer Point power plants. The decision to issue a permit for the activities as described in the CP is based on a thorough review of the alternatives and of their environmental consequences. The terms and conditions of this permit ensure that the incidental take of shortnose sturgeon through the operation of Roseton and Danskammer Point power plants will not appreciably reduce the likelihood of the survival and recovery of shortnose sturgeon in the Hudson River.

NMFS staff worked with CHGE during the development of the application. During these discussions, CHGE said that the plants would likely be sold to a new owner. Following submission of the application materials, CHGE notified NMFS that it had entered into an agreement to sell Danskammer and Roseton Power Plants to Dynegy. The only commenter on the draft Conservation Plan (CP), Implementing Agreement (IA) and Environmental Assessment (EA) also was aware of the sale and attached a copy of a press release from CHGE announcing the pending sale to Dynegy. The parties plan to complete the sale by the end of the year. NMFS has now been officially informed by CHGE that the buyer will be Dynegy Danskammer, L.L.C. and Dynegy Roseton, L.L.C. Both CHGE and Dynegy have requested that Dynegy be added as a co-applicant and co-permittee in this permit issuance process, as provided for in NMFS' regulations. As explained in correspondence from CHGE and Dynegy; Dynegy Danskammer, L.L.C. and Dynegy Roseton, L.L.C. are willing to agree to all of the terms and conditions included in the Conservation Plan submitted by CHGE, the IA, and the permit.

Issuance of the permit was based on a finding that CHGE and Dynegy Danskammer, L.L.C. and Dynegy Roseton, L.L.C. had met the permit issuance criteria of 50 CFR 222.307(c). Permit 1269, issued on November 29, 2000, expires on December 31, 2015.

Dated: December 14, 2000.

**Wanda L. Cain,**

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

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**BILLING CODE: 3510-22-S**

## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

**RIN 0651-AB29**

#### Standard for Declaring a Patent Interference

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Director of the United States Patent and Trademark Office has discretion to declare an interference involving a patent application. The current standard requires a two-way patentability analysis for the Director to be of the opinion that an interference-in-fact exists. In view of public commentary suggesting that, at least in some cases, a one-way patentability analysis should be sufficient, USPTO provides reasons for the current standard and solicits comments on the propriety of that standard.

**DATE:** Submit comments on or before January 31, 2001.

**ADDRESSES:** Send all comments:

1. Electronically to "[Interference.Rules@uspto.gov](mailto:Interference.Rules@uspto.gov)", Subject: "Interference-in-fact";
2. By mail to Director of the United States Patent and Trademark Office, BOX INTERFERENCE, Washington, D.C. 20231, ATTN: "Interference-in-Fact"; or
3. By facsimile to 703-305-0942, ATTN: "Interference-in-fact".

**FOR FURTHER INFORMATION CONTACT:** Fred E. McKelvey or Richard Torczon at 703-308-9797.

**SUPPLEMENTARY INFORMATION:** The patent statute provides that "[w]hen an application is made for a patent which, in the opinion of the Director, would interfere with any pending application, or with any unexpired patent, an interference may be declared \* \* \*" 35 U.S.C. 135(a). "It is \* \* \* [the Director] who is to judge (be of opinion) whether

an application will interfere with a pending one \* \* \*" *Ewing v. United States ex rel. Fowler Car Co.*, 244 U.S. 1, 11 (1917). The duty imposed upon the Director to declare an interference involves the exercise of judgment upon the facts presented and cannot be controlled by mandamus. *United States ex rel. International Money Machine Co. v. Newton*, 47 App. D.C. 449, 450 (1918). A party does not have a right to have the Director declare an interference. *United States ex rel. Troy Laundry Machinery Co. v. Robertson*, 6 F.2d 714, 715 (D.C. Cir. 1925). Likewise, a third-party has no right to intervene in the prosecution of a particular patent application to prevent issuance of a patent. *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 930, 18 USPQ2d 1677, 1685 (Fed. Cir. 1991).

An interference is declared when two parties are claiming the "same patentable invention." 37 CFR 1.601(i). An "interference-in-fact," a term of art in patent law, exists when at least one claim of a first party and at least one claim of a second party define the same patentable invention. 37 CFR 1.601(j). The phrase "same patentable invention" is defined as follows at 37 CFR 1.601(n) (emphasis in original):

Invention "A" is *the same patentable invention* as an invention "B" when invention "A" is the same as (35 U.S.C. 102) or is obvious (35 U.S.C. 103) in view of invention "B" assuming invention "B" is prior art with respect to invention "A". Invention "A" is a *separate patentable invention* with respect to invention "B" when invention "A" is new (35 U.S.C. 102) and non-obvious (35 U.S.C. 103) in view of invention "B" assuming invention "B" is prior art with respect to invention "A".

Recent precedent of the Trial Section of the Interference Division of the Board of Patent Appeals and Interferences confirms that resolution of whether an interference-in-fact exists involves a two-way patentability analysis. *Winter v. Fujita*, 53 USPQ2d 1234, 1243 (BPAI 1999), *reh'g denied*, 53 USPQ2d 1478 (BPAI 2000):

The claimed invention of Party A is presumed to be prior art vis-a-vis Party B and vice versa. The claimed invention of Party A must anticipate or render obvious the claimed invention of Party B *and* the claimed invention of Party B must anticipate or render obvious the claimed invention of Party A. When the two-way analysis is applied, then regardless of who ultimately prevails on the issue of priority, \* \* \* [USPTO] assures itself that it will not issue two patents to the same patentable invention.

The *Winter v. Fujita* rationale is consistent with examples set out in the supplemental information accompanying the final rule, Patent

Interference Proceedings, published at 49 FR 48416 on December 12, 1984. In this respect, attention is directed to Examples 3, 4 and 5 of that notice, 49 FR at 48420:

*Example 3:* Application E contains patentable claims 1 (engine), 2 (6-cylinder engine), and 3 (engine with a platinum piston). Application F contains patentable claims 11 (engine) and 12 (8-cylinder engine). Claims 1 and 2 of application E and claims 11 and 12 of application F define the same patentable invention. Claim 3 of application E defines a separate patentable invention from claims 1 and 2 of application E and claims 11 and 12 of application F. If an interference is declared, there would be one count (engine). Claims 1 and 2 of application E and claims 11 and 12 of application F would be designated to correspond to the count. Claim 3 of application E would not be designated to correspond to the count.

*Example 4:* Application G contains patentable claims 1 (engine), 2 (6-cylinder engine), and 3 (engine with a platinum piston). Application H contains patentable claims 11 (engine) and 15 (engine with a platinum piston). Claims 1 and 2 of application G and claim 11 of application H define the same patentable invention. Claim 3 of application G and claim 15 of application H define a separate patentable invention from claims 1 and 2 of application G and claim 11 of application H. If an interference is declared, there would be two counts: Count 1 (engine) and Count 2 (engine with a platinum piston). Claims 1 and 2 of application G and claim 11 of application H would be designated to correspond to Count 1. Claim 3 of application G and claim 15 of application H would be designated to correspond to Count 2.

*Example 5:* Application J contains patentable claims 1 (engine), 2 (combination of an engine and a carburetor) and 3 (combination of an engine, a carburetor, and a catalytic converter). Application K contains patentable claims 31 (engine), 32 (combination of an engine and a carburetor), and 33 (combination of an engine, a carburetor, and an air filter). The engine, combination of an engine and carburetor, and combination of an engine, carburetor, and air filter define the same patentable invention. The combination of an engine, carburetor, and catalytic converter define a separate patentable invention from engine. If an interference is declared, there would be one count (engine). Claims 1 and 2 of application J and claims 31, 32, and 33 of application K would be designated to correspond to the count. Claim 3 of application J would not be designated as corresponding to the count.

If the facts of Example 3 are changed so that Application E contained only claim 3 (engine with a platinum piston), no interference would be declared because there is no interference-in-fact between claim 3 of Application E and claims 1–2 of Application F. The engine or 8-cylinder engine of Application F would not anticipate or render obvious an engine with a platinum piston of

Application E. Likewise, and based on similar rationale, if the facts of Example 5 are changed so that Application J contained only claim 3 (combination of an engine, a carburetor, and a catalytic converter), no interference would be declared because there is no interference-in-fact between claim 3 of Application J and claims 31–33 of Application K.

At recent public events, it has been suggested that there may be a need to expand the situations where an interference should be declared or maintained. Any decision to expand the nature of interference proceedings will have a resource consequence for USPTO and for applicants and patentees involved in interferences. Approximately one-quarter of the resources of the Board of Patent Appeals and Interferences are used to resolve interferences, notwithstanding the fact that there are many more appeals than interferences. USPTO has received many reports that interferences involve considerable costs for applicants and patentees. Additionally, there is no desire on the part of USPTO, and no authority under the law, to turn interference proceedings under 35 U.S.C. 135(a) into pre-grant oppositions or post-grant cancellations. Accordingly, USPTO is reluctant, at this time, to expand the circumstances under which an interference might be declared or maintained absent a compelling reason.

This notice provides interested parties with an opportunity to comment and make out a case that the nature of interferences should be expanded beyond the current practice. If a one-way patentability analysis is sufficient to establish an interference-in-fact, would it be possible to have an interference with two counts as set out in Example 4, reproduced above? How would having an interference between claim 1 of application G and claim 15 of application H of Example 4 square with the holding of *Nitz v. Ehrenreich*, 537 F.2d 539, 543, 190 USPQ 413, 416–17 (CCPA 1976)? If a one-way patentability analysis is sufficient, what would it take to establish that there is no interference-in-fact in a given case?

#### Comment Format

Comments should be submitted in electronic form if possible, either via the Internet or on a 3¼-inch diskette. Comments submitted in electronic form should be submitted as ASCII text. Special characters, proprietary formats, and encryption should not be used.

**Authority:** 35 U.S.C. 2(b)(2)(A), 3(a)(2), 135(a).

Dated: December 14, 2000.

**Q. Todd Dickinson,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 00–32374 Filed 12–19–00; 8:45 am]

**BILLING CODE 3510–16–P**

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Adjustment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Taiwan

December 15, 2000.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs adjusting limits.

**EFFECTIVE DATE:** December 20, 2000.

**FOR FURTHER INFORMATION CONTACT:** Roy Unger, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at <http://www.customs.gov>. For information on embargoes and quota reopenings, call (202) 482–3715.

#### SUPPLEMENTARY INFORMATION:

**Authority:** Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limits for certain categories are being increased for carryforward.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 64 FR 71982, published on December 22, 1999). Also see 64 FR 60796, published on November 8, 1999.

**Richard B. Steinkamp,**

*Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

December 15, 2000.

Commissioner of Customs,  
*Department of the Treasury, Washington, DC 20229.*