

Patents: Responding to an Office Action

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- 212-316-0381
<http://PatentLawNY.com>
- Locations: New York City; Passaic, New Jersey; and Philadelphia, PA.
- Primary area of practice – Patent and Trademark Prosecution



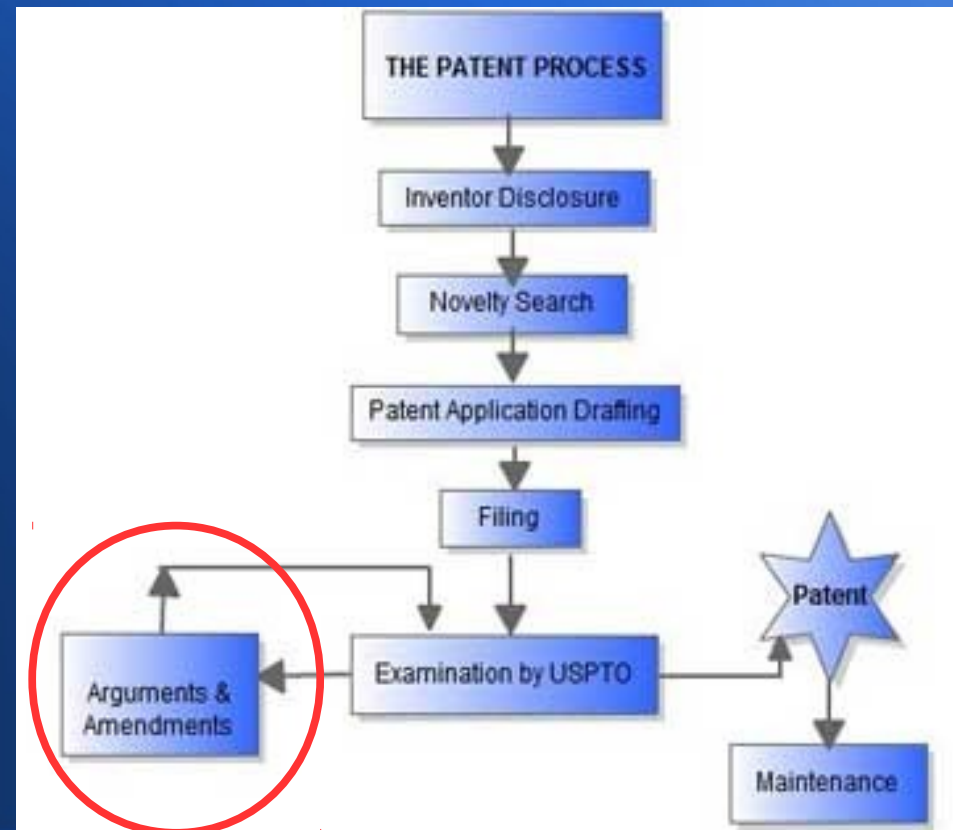
Outline of Today's Presentation

- 1) Introduction
- 2) Draft Patent with the Office Action in Mind
- 3) Non-Prior Art Rejections (e.g. § 101)
- 4) Prior Art Rejections (e.g. § 102, 103)
- 5) Examiner Interview
- 6) Writing a Response to an Office Action

Introduction

Quick Background on the Process...

- - Receive disclosure from inventor; generally conduct a Novelty Search
- Draft and File Patent Application
- First Office Action on the Merits 1 to 3 yrs later
- **^ Response = topic of today's presentation**

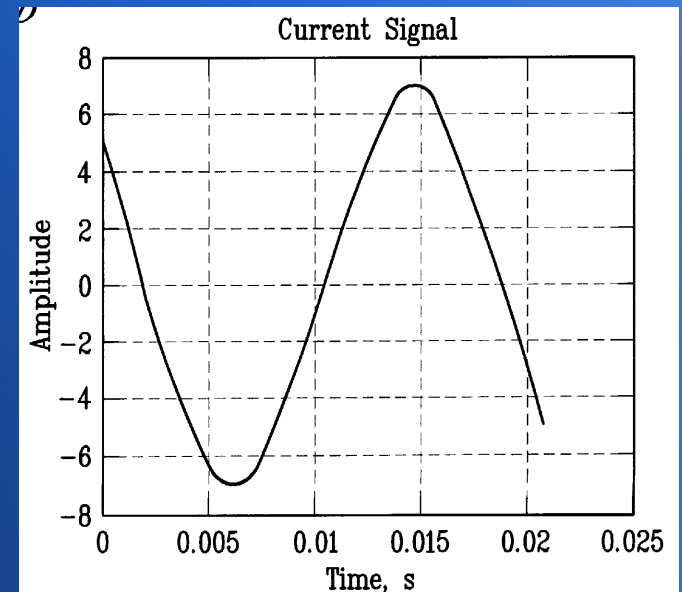


Response to Crazy Office Action

- Claim in the application:
“7. The device of claim 1, wherein said ... device is coupled to a neutral wire.”
- Office Action: “see Hart 5B”, no further explanation. (Presumably, the Examiner means “Figure 5B”)
- So we look at Figure 5B in Hart...

Response to Crazy Office Action

- Anyone see anything coupled to a neutral wire in that figure?
- Telephone interview – Examiner refuses to discuss claim; I forced the issue, as it was so egregious.
- After 20 minutes of back and forth, Examiner finally says, “we're so pressed for time.”
- Common refrain – not enough time to examine applications.



**Draft your Patent
with the
Office Action in Mind**

Draft your patent with the Office Action in mind

- Some Examiners will only read the claims, little more.
- Define all key terms used in your claim language.
- Avoid 112 rejections – e.g. if you say “substantially”, define “substantially” in the Specification.
- Have backup terminology and variations in specification, in case you need to amend.
- Use signals so you can find the variations years later when you receive the Office Action, e.g. “alternate embodiment”, “defined as X or Y”.

Background (optional section)

- You can use the 'background' section to discuss the prior art – what is the problem with the prior art?
- “sell” your invention to the Examiner
- Tell the Examiner what you’re talking about, where to search
- Be Careful - Anything you write here is admitted prior art

Summary (optional)

- Tracks the claim language in plain English
 - Avoid words like “comprising” in the summary.
 - Write it, as close as possible, in “regular” English
- Might be what a Judge will read in determining infringement

Drawings

- Makes your life easier when responding to an Office Action
- Good practice: copy a relevant portion of drawing in a Response so the Examiner needs only look at one document.
 - Can also show next to a picture of the prior art cited.
 - Visuals make your arguments easier to understand
- With method claims, use corresponding flow charts; try to use wording from the claim.

Be Expansive in Your Application

- Patent Applications used to fit on 1 to 3 pages – today, more like 10 pages (single spaced, small font)
- Don't limit yourself - be expansive
 - e.g. disclose “comprising” and “consisting of” in case you need to narrow the claim language (where applicable)
 - e.g. use “may” or “in another embodiment”
- No new matter after filing (unless CPA), so get it all in
- Don't talk negatively about the technology (or the prior art)

Claim Drafting with Office Action in Mind

- If you have support for variations, you'll be better prepared if the Patent Office finds art that reads on some of your claims; can amend claims.
- Make your claims count – include novel variations in dependent claims.
- Draft claims limited to what is new and unobvious over prior art, but as broad as possible.
- Two schools of thought on claims in Office Action – fight for claims, or amend to let Examiner feel a “win”.

Non-Prior Art Rejections

When You First Receive an Office Action . . .

- Send it to the client without comment or review it first?
 - What is sophistication level of the client?
 - Most clients will want at least some comment on it
- How well do you understand the technology vs. your client?
 - You may need to send the cited art to the client for comment on what's different about his tech.
 - Keep the goal in mind: Respond in the best manner to get broadest claims allowed.

Parts of an Office Action - Cover Page

- Mailing Date on the Cover – used for calculations
- Docket dates: (typical dates are as follows)
 - 1 month – 'ping' client (personally, I send an invoice right away, due in 30 days with automatic reminders)
 - 2 month – begin work, if haven't already
 - 3 month – regular DEADLINE
 - 5 month – incessantly 'ping' client – one month left!
 - 6 month - ABANDONED



Office Action Summary

- Not always accurate, but gives you something of a 'roadmap'
- May want to take allowed claims to protect them; file a Divisional Application for the rest of the claims
- If Office Action is 'final' tread with more caution
 - Consider 'Notice of Pre-Appeal'
 - Be on top of your client to respond quicker
 - If filing Request for Cont. Exam (RCE), treat like non-final, but more \$\$\$ to government

ICE

UNITED STATES DEPARTMENT OF COMMERCE
 United States Patent and Trademark Office
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 www.uspto.gov

| | | |
|----|---------------------|------------------|
| OR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|----|---------------------|------------------|

1 ERK002 1514

EXAMINER

LAYNO, BENJAMIN

| | |
|----------|--------------|
| ART UNIT | PAPER NUMBER |
|----------|--------------|

3711

| | |
|-----------|---------------|
| MAIL DATE | DELIVERY MODE |
|-----------|---------------|

03/23/2011 PAPER

concerning this application or proceeding.

ication.

APPROPRIATE STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 16 February 2011.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-20 is/are pending in the application.
 4a) Of the above claim(s) 1-10 and 15-20 is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 11-14 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date <u>10/08/10</u> . | 6) <input type="checkbox"/> Other: _____ |

Restriction Requirement

MPEP § 803: “There are two criteria for a proper requirement for restriction between patentably distinct inventions:

- (A) The inventions must be independent or distinct as claimed; **and**
- (B) There would be a serious burden on the examiner if restriction is not required.”
- Rarely applied properly, but overcoming it is rare.

Restrictions Increasing, Overcoming Restrictions Also Increasing

- Example: Biotech Art Unit:
 - 1993: ~1000 restrictions; ~32,000 Office Actions
 - 2008: ~22,000 restrictions; ~42,000 Office Actions
 - (source: Jon Dudas, Former USPTO Director, 2009)
- But Overcoming Restrictions Also Rising:
 - Biotech: 54% overcome; Chemical: 21% overcome
 - Computer: 6% overcome; Mechanical: 18% overcome
 - (source: Patently-O blog, 2010, based on sampling of 20,000 applications)

Example of Restriction likely to “stick”

- Likely to stick:
 - Claims 1-10, drawn to a method of making [complex article of manufacture], classified in class 265, subclass xxx.xx
 - Claims 11-20, drawn to a device for making [same thing], in class 425, subclass xxx.
 - Prior Art Search had revealed that for the past 20 years, all the close prior art was restricted like this.
 - Examiner properly applied MPEP § 803 as follows . . .

3. Restriction for examination purposes as indicated is proper because all these inventions listed in this action are independent or distinct for the reasons given above and there would be a serious search and examination burden if restriction were not required because one or more of the following reasons apply:

- (a) the inventions have acquired a separate status in the art in view of their different classification;
- (b) the inventions have acquired a separate status in the art due to their recognized divergent subject matter;
- (c) the inventions require a different field of search (for example, searching different classes/subclasses or electronic resources, or employing different search queries);
- (d) the prior art applicable to one invention would not likely be applicable to another invention;
- (e) the inventions are likely to raise different non-prior art issues under 35 U.S.C. 101 and/or 35 U.S.C. 112, first paragraph.

Example of a Restriction you May Overcome

- Restriction was as follows:
 - Claims 15-20 – method of playing game of chance, class 273, subclass 269
 - Claims 11-14 – balls for **ball selector**, class 273, subclass 144A
 - Claims 1-10 – **ball selector**, class 463, subclass 17
- Office Action:

There would be a burden of search on the part of the Examiner.

 - WHAT?! That's your job! Sorry to burden you, but that is not the legal standard! (Don't say it that way)

More Clues to Overcome Restriction

- Look at Examiner's Search Report
 - It's right after the Office Action
 - What classes/subclasses did they search?
 - Was the class/subclass even relevant? (on the right, nope!)
- Argue language of MPEP § 803 (for some reason, Off.Action's seem to use a different text) with quotations.

| Hits | Search Query | DBs |
|------|--|---|
| 3394 | (rdif or RDIF or (radio adj1 frequency adj1 idenfication) or antenna or tag or circuit or chip) near7 (inside or within or contain or contained or containing or interior or imbed?) near7 (ball or dice or ((game or playing) adj1 (piece or token))) | US-PGPUB; USPAT; EPO; JPO; DERWENT; IBM_TDB |
| 3402 | (rdif or RDIF or (radio adj1 frequency adj1 identification) or antenna or tag or circuit or chip) near7 (inside or within or contain or contained or containing or interior or imbed?) near7 (ball or dice or ((game or playing) adj1 (piece or token))) | US-PGPUB; USPAT; EPO; JPO; DERWENT; IBM_TDB |
| 391 | (rdif or RDIF or (radio adj1 frequency adj1 identification) or antenna or tag or circuit or chip) near7 (inside or within or contain or contained or containing or interior or imbed?) near7 (ball or dice or ((game or playing) adj1 (piece or token))) and (game or lotto or lotter? or keno or bingo) | US-PGPUB; USPAT; EPO; JPO; DERWENT; IBM_TDB |
| 2 | ("20060046837").PN. | US-PGPUB; USPAT; EPO; JPO; DERWENT; IBM_TDB |

A Winning Argument - Example

- Must provisionally elect one grouping, no choice.
- Must say you are electing one group with traverse.
- Must provide arguments with your traversal.
- Best argument: “intertwinement” between groupings
 - means search burden of one grouping makes exam of additional groupings something less than a “substantial burden”
 - Overlap in limitations between one group and another

A Winning Argument - Continued

- “patent for any one of these groups likely placed in each subclass” ... or the subclass is the same
- Examiner will argue: “but independent claim 1 has A, B, C, and D and claim 11 has A, B, C, and E”
 - Preempt/argue that, e.g. claim 2 depends on claim 1 and has element E; claim 12 depends on claim 1 and has element D
 - Argue that “E” doesn't add a substantial search burden
 - e.g. “a battery holder” (this really happened . . .)
 - Argue if we followed your logic, we'd need an 8-way restriction and that can't be what § 803 means

Rejection under 35 U.S.C. § 101

- § 101 limits patentability to: "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."
- In practice, most § 101 rejections (for "properly" written applications) are in business method patents (software); come to wording
- *Bilski*: Supreme Court said one test is "transformation of matter" or "tied to a specific machine"

How to Overcome Many § 101 Rejections

- Acceptable wording changes every few years
 - Real life example: In 2007 we'd say “computer readable storage medium” even with no direct support in specification – don't try this today
 - In 2012, we'd say, “processor” - in a current case, no support in specification is needed
- May follow the Office Action's suggested wording...
- Avoiding 101: Can't patent law of nature, but can potentially patent “method of creating conditions for ball lightning”

Prior Art Rejections

First Review of Office Action

- Goal is to break down the Office Action into manageable pieces
- Avoid getting caught up in the Office Action – focus on Prior Art Cited
- Review in a systematic order:
 - Review your patent application, claims first
 - Review major prior art cited
 - Look for differences
- Do high level analysis, then LCTA method . . .

Before We get Started . . .

- Check earliest filing date of each cited reference
 - Make sure it's a valid prior art citation
 - (until 2013, can 'swear behind' a reference)
- Look at Search Report – see where Examiner Searched, did they find a lot, did they spend a lot of time, . . . gives you some clues.
- Reality: Most first Office Actions are poor
- Reality: Most Applications can at least one rejection, whether warranted or not.

1) High Level Analysis

- What's the “point” (e.g. problem solved) of your technology?
 - Review / refresh recollection before getting side-tracked by prior art
 - Put this in your head; or even better . . .
 - Write out a paragraph in your own words, with citations
 - Review cited prior art – what's its point?
 - Put this in your head / write out a paragraph, with citations
 - Why is it different?

High Level Analysis Example: My Application

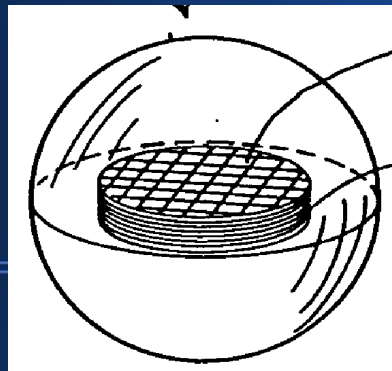
- a spherical ball with internal transponder freely movable about in interior space such that the transponder falls to the gravitational bottom (paragraph [039]).
- This prevents the ball from getting lost by rolling away as the transponder is constantly working against the centrifugal motion of the ball.

Further, as recited in paragraph [039], “this has important implications for efficient reading of data on the transponder” as the reader is placed immediately below or next to the known position of the transponder when the ball is in a resting position.

High Level Analysis Example: Cited Prior Art

US 2006/0046837 to Ito *et. al.*, is directed towards balls that are made of translucent resin with an RFID tag (paragraph [0054])

Figure 3 of the Ito reference shows the RFID tag 3 fixed to a plane passing through the center of a ball 2. No reference has been located stating whether the ball is hollow or solid (?), or that the RFID tag is anywhere other than in it's fixed position shown in Figure 3.



High Level Analysis Recap

- We have reviewed our claims
- We have looked at the prior art ourselves
- We have picked out differences in claimed features
- Now we are ready to look at the arguments in the Office Action

2) LCTA Method – Delving into the Rejection

- Remember: An Office Action is improper unless each and every limitation is cited in the prior art
 - § 102 – In one piece of art
 - § 103 – in multiple pieces of prior art
- If § 103 used, must give reason for combination.
 - That being said, the most successful arguments are that a feature is not shown, alone or in combination.

LCTA Method Explained

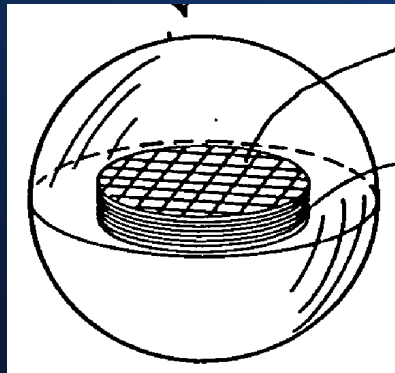
- **LCTA** is a systematic method of responding.
- Limitation – Look at each limitation in your claim
- Citation – Is there a citation?
- Text – Copy cited text.
- Analysis – Is the citation correct?

Carrying out the LCA Method

- Limitation: "generally spherical encasement with a hollow interior"

- Citation: Each ball comprises a spherical encasement with a hollow interior, see Fig. 3 The

- Text:



- Analysis: Figure 3 not enough to show "hollow"

Carrying out LCTA on Another Claim Limitation

- Limitation: “a near field communication reader below an exit tube”
- Citation:

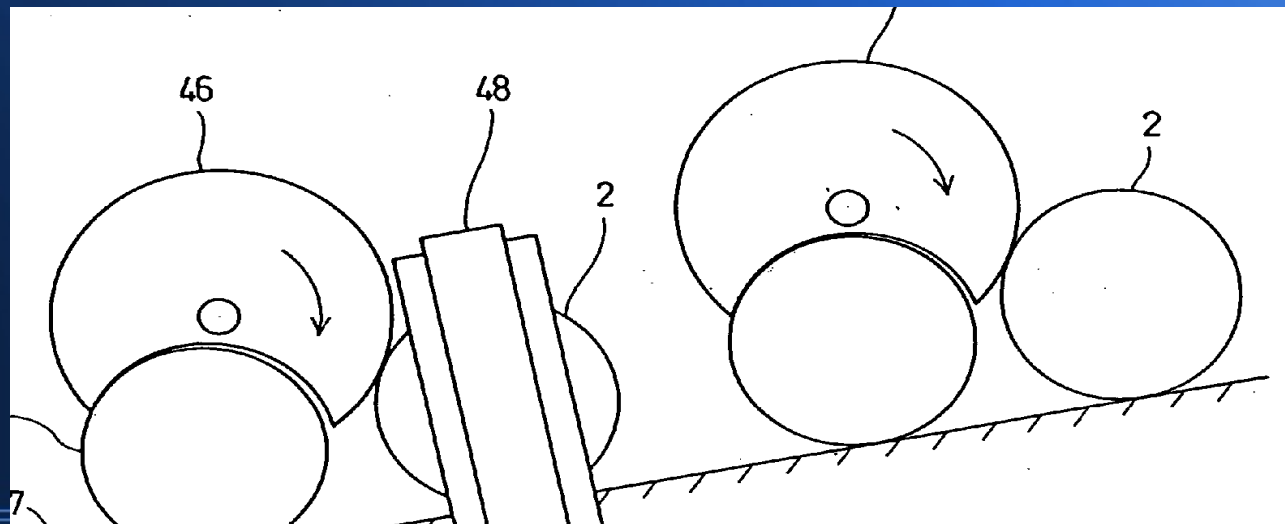
ball selector also comprises a near field communication reader, antenna 48, which is below an exit tube, ball recovery box 32, paragraph [0067]. The exit tube 32 (ball
- Text: No recitation of “Antenna 48” in paragraph [067]! Find it myself...
 - Why? Not being in the Office Action properly isn't enough - need to make sure it's not in the prior art!

Found it . . .

- Paragraph [0068]:

direction in which the balls **2** move. The antenna **48** is disposed between the rotating disks **45** and **46**. The antenna **48** has rectangular coils surrounding the guide duct **47**.

- ... which
- Describes
- Figure 8:



Conclusion of Second LCTA Example

- Limitation – reader (or antenna...) below exit tube
- Citation – bogus; but we looked further and found a “proper” citation of the antenna
- Text – shows antenna is a coil around ball, not under the exit tube
- Analysis: This prior art citation does not show “reader below exit tube” because the reader is actually around the ball path, and above the exit tube.

Repeat LCTA for Each and Every Limitation

- Rejection under 35 U.S.C. § 102 and § 103 treated exactly the same in this regard
- If you can find a proper citation for each and every limitation (it happens), then don't argue it
- If, and only if, there is a proper citation for each and every limitation – add more limitations (amend claims)
 - Can take limitation of dependent claim
 - Can add limitation from specification
- Keep your High Level + LCTA notes in order

Examiner Interview

Examiner Interview

- Etiquette and good manners are critical!
- Statistics show shorter prosecution, greater allowances when an Interview is conducted
 - In person, best
 - Telephonic, second best
- Often, easier to explain with a “give and take” of direct communication than on paper
- Can also understand Examiner's position better

When To Have an Examiner Interview

- Early and often.
 - Before final rejection, an Examiner will have the most leeway to act.
- Patent Office allocates 1 hr, per application for Examiner's to talk to you.
- Do your homework (High Level and LCTA analysis) and:
 - Be prepared with claim amendment; and/or
 - Be prepared to explain difference over prior art

Writing a Response to an Office Action

Your Response

- Part I: Cover Sheet
- Part II: Amendments
- Part III: Arguments
- Part IV: Declarations
 - (e.g. test results, swearing behind, . . .)

Cover Sheet

- Heading Block
- State what it is
- State what page each item starts on.

File No. GEO001

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

| | | | |
|-----------------|----------------------|-----------|-------------------|
| Application of: | Jeffrey Feigin et al | | |
| Serial No.: | 12/620,012 | Art Unit: | 3662 |
| Filed: | 11/17/09 | Examiner: | Sotomayor, John B |
| Title: | [REDACTED] | | |

To: Commissioner of Patents
Via Electronic Filing

RESPONSE TO OFFICE ACTION OF NOVEMBER 16, 2011

Interview Summary begins on page 2 of this paper.

Amendment to the Claims begins on page 3 of this paper.

Remarks begin on page 9 of this paper.

Interview Summary

- Examiner will also provide one.
- Good idea to state (politely) what was discussed.
- Creates a paper record.

INTERVIEW SUMMARY

The undersigned thanks Examiner Sotomayor for the telephonic interview of December 6, 2011, and appreciates the Examiner's extra efforts in contacting the undersigned despite technical problems at the USPTO.

The claims amendments submitted herewith were submitted for consideration during the interview and, during the interview, it was agreed by both parties that the amended claims overcome the objections made in the Office Action.

Amended Claims

- Use status identifiers on amended claims:
 - Original
 - Currently amended
 - Withdrawn
 - Canceled
 - ...
- Underline new text, strike-through deleted.

18. **(currently amended)** The ground penetrating radar measurement device of claim 15, wherein said means for measuring a composition of a heterogeneous material further comprise means for measuring said composition ~~is measured~~ to a resolution of at least one inch.

Remarks (Arguments)

- State what the Office Action said succinctly.
 - Rejection under ?
 - Allowance of certain claims?
 - Restriction?
- State what you are doing.
 - Arguing?
 - Amending?

REMARKS

Claims 11-14 have been rejected under 35 U.S.C. § 102 (b) as being anticipated in view of Ito *et. al.* (US 2006/0046837). Arguments are provided below to overcome these rejections. The Office Action has further restricted examination to claims 11-14. Applicant traverses this restriction.

Writing Up Response to 102/103 . . .

- Paragraph on your patent app (with citations).
- Paragraph on each prior art reference (with citations).

I. Rejections Under 35 U.S.C. § 102 (b) in View of Ito et al.

Claims 11-14 of the present application are directed towards a spherical ball with internal transponder which is freely movable about in interior space such that the transponder falls to the gravitational bottom (paragraph [039]). This prevents the ball from getting lost by rolling away as the transponder is constantly working against the centrifugal motion of the ball. Further, as recited in paragraph [039], “this has important implications for efficient reading of data on the transponder” as the reader is placed immediately below or next to the known position of the transponder when the ball is in a resting position.

US 2006/0046837 to Ito *et. al.*, is directed towards balls that are made of translucent resin of different colors (paragraph [0054]) such as red, green and yellow with an RFID tag. Figure 3 of the Ito reference shows the RFID tag 3 fixed to a plane passing through the center of a ball 2. No reference has been located stating whether the ball is hollow or solid, or that the RFID

State the Law

- 102 court case >
 - With legal test.
- 103 court case >
 - With legal test.

Referring now to the claims, in order to demonstrate anticipation under 35 U.S.C. § 102, the Office Action must show “that the four corners of a single, prior art document describe every element of the claimed invention.” *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1282 (Fed. Cir. 2000). Moreover, the reference must also disclose those elements “arranged as in the claim.” *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983).

The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR* noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Court quoting *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006), stated that “[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR*, 550 U.S. at ___, 82 USPQ2d at 1396.

Then, Use Your LCTA for each Limitation . . .

- Limitation →
- Citation →
- Text →
- Analysis -->

Claim 11 of the present disclosure is directed towards a plurality of balls with each ball having a "generally spherical encasement with a hollow interior". The Office Action states, that this limitation is shown in Ito as follows:

Each ball comprises a spherical encasement with a hollow interior, see Fig. 3. The encasement comprises a human-readable indicia (color), paragraph [0054]. A radio frequency identification tag 3 is located within the hollow interior, paragraphs [0054], [0055], [0070]. The radio frequency identification tag is adapted to transmit data

As recited above, Figure 3 fails to show that the spherical encasement is hollow. Rather, the RFID tag appears to be held at a central plane, implying that the ball is solid. No text has been located within the written specification of Ito one way or the other, and as such, the Office Action has not met the burden of showing that the prior art discloses each and every limitation of claim 11. Further, as recited above, the balls are produced from translucent resin, so it is highly unlikely that these balls are produced hollow. Therefore, claim 11 is allowable.

Conclusion

- Please allow the claims . . .

III. Conclusion

Withdrawal of the rejections and early acceptance of all claims is requested.

Sincerely,
MICHAEL J. FEIGIN
/Michael J. Feigin/
Michael J. Feigin, Esq.
Attorney at Law
Reg. No. 59,013

Thank You . . .

- Questions? Reach Michael J. Feigin, Esq. at:
 - michael@PatentLawNY.com
 - PatentLawNY.com
 - (212)316-0381
- Disclaimer: This presentation is meant to be a broad overview and is a teaching aid – no legal advice is contained in the presentation.