

EXHIBIT 6

2602 Citation of Prior Art [R-7]

35 U.S.C. 301. Citation of prior art.

Any person at any time may cite to the Office in writing prior art consisting of patents or printed publications which that person believes to have a bearing on the patentability of any claim of a particular patent. If the person explains in writing the pertinency and manner of applying such prior art to at least one claim of the patent, the citation of such prior art and the explanation thereof will become a part of the official file of the patent. At the written request of the person citing the prior art, his or her identity will be excluded from the patent file and kept confidential.

37 CFR 1.501. Citation of prior art in patent files.

(a) At any time during the period of enforceability of a patent, any person may cite, to the Office in writing, prior art consisting of patents or printed publications which that person states to be pertinent and applicable to the patent and believes to have a bearing on the patentability of any claim of the patent. If the citation is made by the patent owner, the explanation of pertinency and applicability may include an explanation of how the claims differ from the prior art. Such citations shall be entered in the patent file except as set forth in §§ 1.502 and 1.902.

(b) If the person making the citation wishes his or her identity to be excluded from the patent file and kept confidential, the citation papers must be submitted without any identification of the person making the submission.

(c) Citation of patents or printed publications by the public in patent files should either: (1) Reflect that a copy of the same has been mailed to the patent owner at the address as provided for in § 1.33(c); or in the event service is not possible (2) Be filed with the Office in duplicate.

37 CFR 1.902. Processing of prior art citations during an *inter partes* reexamination proceeding.

**>Citations by the patent owner in accordance with § 1.933 and by an *inter partes* reexamination third party requester under § 1.915 or § 1.948 will be entered in the *inter partes* reexamination file. The entry in the patent file of other citations submitted after the date of an order for reexamination pursuant to § 1.931 by persons other than the patent owner, or the third party requester under either § 1.913 or § 1.948, will be delayed until the *inter partes* reexamination proceeding has been concluded by the issuance and publication of a reexamination certificate. See § 1.502 for processing of prior art citations in patent and reexamination files during an *ex parte* reexamination proceeding filed under § 1.510.<

Public Law 106-113 did not affect the manner of the public's citation of prior art under 37 CFR 1.501 in a patent. Likewise, it did not affect the Office's handling of a 37 CFR 1.501 prior art citation in a patent where no reexamination proceeding is pending for that patent when the citation is filed.

Where an *inter partes* reexamination proceeding is pending when a prior art citation is filed, the following applies:

If the prior art citation satisfies 37 CFR 1.501 and is submitted prior to an order to reexamine, the cited documents (citations) will be considered in an *inter partes* reexamination proceeding as a prior art citation would be considered in an *ex parte* reexamination proceeding. See MPEP § 2206.

If the prior art citation satisfies 37 CFR 1.501 and is submitted **after an order to reexamine**, the citation will be treated as follows:

(A) A patent owner citation will normally be considered if it is submitted in time to do so before the reexamination certificate issues.

(B) A third party requester citation will be considered if it is submitted as part of a third party requester comments submission under 37 CFR 1.947 or 1.951(b) (made as required by 37 CFR 1.948), or in a properly filed request for reexamination under 37 CFR 1.915 or 1.510.

(C) Any other prior art citation satisfying 37 CFR 1.501 which is submitted after an order to reexamine will be retained (stored) in the Central Reexamination Unit or Technology Center (in which the reexamination proceeding is being examined) until the reexamination is concluded >by the issuance and publication of a reexamination certificate<, after which it will be placed in the file of the patent. 37 CFR 1.902.

See MPEP §§ 2202 through 2206 and 2208 for the manner of making such citations and Office handling of same.

2609 *Inter Partes* Reexamination [R-7]

The *inter partes* reexamination statute and rules permit any third party requester to request *inter partes* reexamination of a patent which issued from an original application was filed on or after November 29, 1999, where the request contains certain elements (see 37 CFR 1.915(b)) and is accompanied by the fee required under 37 CFR 1.20(c)(2). The Office initially determines if “a substantial new question of patentability” (35 U.S.C. 312(a)) is presented. If such a new question has been presented, reexamination will be ordered. The reexamination proceedings which follow the order for reexamination are somewhat similar to regular examination procedures in patent applications; however, there are notable differences. For example, there are certain limitations as to the kind of rejections which may be made, a third party requester

may participate throughout the proceeding, there is an “action closing prosecution” and a “right of appeal notice” rather than a final rejection, special reexamination forms are to be used, and time periods are set to provide “special dispatch.” When the prosecution of an *inter partes* reexamination proceeding is terminated, an *inter partes* reexamination certificate is issued to indicate the status of all claims following the reexamination and concludes the reexamination proceeding.

The basic characteristics of *inter partes* reexamination are as follows:

(A) Any third party requester can request *inter partes* reexamination at any time during the period of enforceability of the patent (for a patent issued from an original application filed on or after November 29, 1999);

(B) Prior art considered during reexamination is limited to prior patents or printed publications applied under the appropriate parts of 35 U.S.C. 102 and 103;

(C) A substantial new question of patentability must be present for reexamination to be ordered;

(D) If ordered, the actual reexamination proceeding is essentially *inter partes* in nature;

(E) Decision on the request must be made not later than *three months* from its filing date, and the remainder of proceedings must proceed with “special dispatch” within the Office;

(F) If ordered, a reexamination proceeding will normally be conducted to its conclusion and the issuance of an *inter partes* reexamination certificate;

(G) The scope of the patent claims cannot be enlarged by amendment;

(H) Reexamination and patent files are open to the public, but see paragraph (I) below;

(I) The reexamination file is scanned to provide an electronic copy of the file. All public access to and copying of reexamination proceedings may be had from the electronic copy. The paper file is not available to the public.

>Patent owners and third party requesters are cautioned that the reexamination statute, regulations, and published examining procedures do not countenance so-called “litigation tactics” in reexamination proceedings. The parties are expected to conduct themselves accordingly. For example, it is expected that submissions of papers that are not provided for in the

reexamination regulations and/or appear to be excluded by the regulation will either be filed with an appropriate petition to accept the paper and/or waive the regulation(s), or not filed at all. Parties are advised that multiple submissions, such as a reply to a paper opposing a petition and a sur-reply directed to such a reply are not provided for in the regulations or examining procedures governing *inter partes* reexamination. It is expected that the parties will adhere to the provisions of 37 CFR 10.18(b) throughout the course of a reexamination proceeding.<

2610 Request for *Inter Partes* Reexamination [R-7]

35 U.S.C. 311. Request for *inter partes* reexamination

(a) IN GENERAL.— Any third-party requester at any time may file a request for *inter partes* reexamination by the Office of a patent on the basis of any prior art cited under the provisions of section 301.

(b) REQUIREMENTS.— The request shall—

(1) be in writing, include the identity of the real party in interest, and be accompanied by payment of an *inter partes* reexamination fee established by the Director under section 41; and

(2) set forth the pertinency and manner of applying cited prior art to every claim for which reexamination is requested.

(c) COPY.— The Director promptly shall send a copy of the request to the owner of record of the patent.

37 CFR 1.913. Persons eligible to file request for *inter partes* reexamination.

Except as provided for in § 1.907, any person other than the patent owner or its privies may, at any time during the period of enforceability of a patent which issued from an original application filed in the United States on or after November 29, 1999, file a request for *inter partes* reexamination by the Office of any claim of the patent on the basis of prior art patents or printed publications cited under § 1.501.

37 CFR 1.915. Content of request for *inter partes* reexamination.

(a) The request must be accompanied by the fee for requesting *inter partes* reexamination set forth in § 1.20(c)(2).

(b) A request for *inter partes* reexamination must include the following parts:

(1) An identification of the patent by patent number and every claim for which reexamination is requested.

(2) A citation of the patents and printed publications which are presented to provide a substantial new question of patentability.

(3) A statement pointing out each substantial new question of patentability based on the cited patents and printed publications, and a detailed explanation of the pertinency and manner of applying the patents and printed publications to every claim for which reexamination is requested.

(D) *Reporting Events to PALM* - The PALM system is used to monitor major events that take place in processing reexamination proceedings. All major examination events are reported. The mailing of examiner's actions are reported, as well as owner's responses and third party requester comments. The CRU support staff is responsible for reporting these events using the reexamination icon and window initiated in the PALM EXPO program. Events that will be reported include the following:

- (1) Determination Mailed-Denial of request for reexamination;
- (2) Determination Mailed-Grant of request for reexamination;
- (3) Petition for reconsideration of determination received;
- (4) Decision on petition mailed-Denied;
- (5) Decision on petition mailed-Granted;
- (6) Mailing of all examiner actions;
- (7) Patent owner responses to Office Actions
- (8) Third party requester comments after a patent owner response.

All events will be permanently recorded and displayed in the "Contents" portion of PALM. In addition, status representative of these events will also be displayed.

(E) *Status Reports* - Various weekly "tickler" reports can be generated for each TC, given the event reporting discussed above. The primary purpose of these computer outputs is to assure that reexaminations are, in fact, processed with "special dispatch".

2636 Assignment of Reexamination [R-7]

I. EXAMINER ASSIGNMENT OF THE REEXAMINATION PROCEEDING

Reexamination requests will normally be assigned to the Central Reexamination Unit (CRU) art unit which examines the technology (Chemical, Electrical, Mechanical, etc.) in which the patent to be reexamined is currently classified as an original. In that art unit, the ****>Supervisory Patent Examiner (SPE)<** assigns the reexamination request to a primary examiner, other than the examiner that originally examined the patent (see "Examiner Assignment Policy" below), who is most familiar with the claimed subject matter of the patent. ****>In an extremely rare situa-**

tion, where a proceeding is still in a Technology Center (TC) rather than the CRU, the reexamination may be assigned to an assistant examiner if no knowledgeable primary examiner is available.< In such an instance a primary examiner must sign all actions and take responsibility for all actions taken.

(A) *Examiner Assignment Policy*

It is the policy of the Office that the CRU ***>SPE<** will assign the reexamination request to an examiner different from the examiner(s) who examined the patent application. Thus, under normal circumstances, the reexamination request will not be assigned to a primary examiner or assistant examiner who was involved in any part of the examination of the patent for which reexamination is requested (e.g., by preparing/signing an action), or was so involved in the examination of the parent of the patent. This would preclude assignment of the request to an examiner who was a conferee in an appeal conference or panel review conference in an earlier concluded examination of the patent (e.g., the application for patent, a reissue, or a prior concluded reexamination proceeding). The conferee is considered to have participated in preparing the Office action which is preceded by the conference.

Exceptions to this general policy include cases where the original examiner is the only examiner with adequate knowledge of the relevant technology to examine the case. In the unusual case where there is a need to assign the request to the original examiner, the assignment must be approved by the CRU Director, and the fact that such approval was given by the CRU Director must be stated (by the examiner) in the decision on the request for reexamination.

It should be noted that while an examiner who examined an earlier **concluded** reexamination proceeding is generally excluded from assignment of a newly filed reexamination, *if the earlier reexamination is still ongoing, the same examiner will be assigned the new reexamination.*

Copending reissue and reexamination proceeding:

- (1) When a reissue application is pending for a patent, and a reexamination request is filed for the same patent, the reexamination request is generally assigned to an examiner who did not examine the original patent application even though the examiner

who examined the patent application is handling the reissue application. If the reexamination request is granted and the reissue and reexamination proceedings are merged (see MPEP § 2686.03), the merged proceeding will be handled by a TC examiner other than the examiner who examined the original patent application. In that instance, the reissue application would be transferred (reassigned) from the originally assigned examiner.

(2) When a reexamination proceeding is pending for a patent, and a reissue application is filed for the same patent:

(a) Where reexamination has already been ordered (granted) in the reexamination proceeding, the Office of Patent Legal Administration (OPLA) should be notified, as promptly as possible after the reissue application reaches the TC, that the proceedings are ready for consideration of merger. If any of the reexamination file, the reissue application, and the patent file are paper files, they should be hand delivered to OPLA at the time of the notification to OPLA (see MPEP § 2686.03). If the reissue and reexamination proceedings are merged by OPLA, the reissue will generally be assigned in the TC having the reissue (upon return of the files from OPLA) to the TC examiner who would ordinarily handle the reissue application. However, if that examiner was involved in any part of the examination of the patent for which reexamination is requested (e.g., by preparing/signing an action), or was so involved in the examination of the parent application of the patent, a different TC examiner will be assigned. If the reissue and reexamination proceedings are not merged by OPLA, the decision will provide guidance as to assignment of the reissue proceeding depending on the individual fact situation.

(b) If reexamination has not yet been ordered (granted) in the reexamination proceeding, a TC Quality Assurance Specialist (QAS) will ensure that the reissue application is not assigned nor acted on, and the decision on the reexamination request will be made. If reexamination is denied, the reexamination proceeding will be concluded pursuant to MPEP § 2694, and the reissue application assigned in accordance with MPEP § 1440. If reexamination is granted, a first Office action will not accompany the order granting reexamination. The signed order should be (after review by the CRU SPE) promptly for-

warded to the OPLA for mailing. At the same time, the OPLA should be notified that the proceedings are ready for consideration of merger. If any of the reexamination file, the reissue application, and the patent file are paper files, they should be hand delivered to OPLA at the time of the e-mail notification to OPLA (see MPEP § 2686.03). If the reissue and reexamination proceedings are merged by OPLA, the reissue application will generally be assigned in the TC having the reissue (upon return of the files from OPLA) to the TC examiner who ordinarily handle the reissue application. However, if that examiner was involved in any part of the examination of the patent for which reexamination is requested (e.g., by preparing/signing the action), or was so involved in examination of the parent application of the patent, a different TC examiner will be assigned. If the reissue and reexamination proceedings are not merged by OPLA, the decision will provide guidance as to assignment of the reissue proceeding depending on the individual fact situation.

(B) Consequences of Inadvertent Assignment to an “Original Examiner”

Should a reexamination be inadvertently assigned to an “original examiner” (in a situation where the TC or CRU Director’s approval is not stated in the decision on the request), the patent owner or the third party requester who objects must promptly file a paper alerting the Office of this fact. Any request challenging the assignment of an examiner to the case must be made within two months of the first Office action or other Office communication indicating the examiner assignment, or reassignment will not be considered. Reassignment of the reexamination to a different examiner will be addressed on a case-by-case basis. In no event will the assignment to the original examiner, by itself, be grounds for vacating any Office decision(s) or action(s) and “restarting” the reexamination.

A situation may arise where a party timely (i.e., within the two months noted above) files a paper alerting the Office to the assignment of a reexamination to the “original examiner,” but that paper does not have a right of entry under the rules (e.g., where an order granting reexamination was issued by the “original examiner” but a first action on the merits did not accompany the order, the patent owner timely files a paper alerting the Office of the fact that the “original

examiner” has been assigned the reexamination proceeding. Pursuant to 37 CFR 1.939(b), that paper does not have a right of entry since a first Office action on the merits has not yet been issued.) In such situations, the Office may waive the rules to the extent that the paper directed to the examiner assignment will be entered and considered.

II. MECHANICS OF ASSIGNMENT

When a request for reexamination is received in the Office, it will be processed by the CRU support staff. After the case file has been reviewed in the CRU to ensure it is ready for examination, the CRU support staff will docket the case to the examiner assigned to the reexamination proceeding by the *>CRU SPE<.

In the event the *>CRU SPE< believes that another Art Unit should examine the case, see MPEP § 2637 for procedures for transferring the case.

2637 Transfer Procedure [R-7]

Although the number of reexamination requests which must be transferred should be very small, the following procedures have been established for an expeditious resolution of any such problems.

An *inter partes* reexamination request is normally assigned to the Central Reexamination (CRU) art unit which examines the technology (Chemical, Electrical, Mechanical, etc.) in which the patent to be reexamined is currently classified as an original. If the CRU *>Supervisory Patent Examiner (SPE)< (to whose art unit the reexamination has been assigned) believes that the reexamination should be assigned to another art unit, he or she must obtain the consent of the CRU *>SPE< of the art unit to which a transfer is desired. Pursuant to 35 U.S.C. 314(c), all *inter partes* reexamination proceedings must be conducted with special dispatch within the Office. This applies to the transfer of reexamination proceedings. Accordingly, the CRU *>SPE< to whose art unit the reexamination has been assigned should expeditiously make any request for transfer of a reexamination proceeding to the CRU *>SPE< of the art unit to which a transfer is desired (the “new” art unit). Further, the CRU *>SPE< to whose art unit the reexamination has been assigned should hand-carry any paper patent file for the reexamination proceeding to the SPE of the art unit to

which a transfer is desired. Any conflict which cannot be resolved by the *>SPEs< will be resolved by the CRU Director.

If the “new” art unit accepts assignment of the reexamination request, the “new” CRU *>SPE< assigns the request to an examiner in that unit.

2638 Time Reporting [R-7]

*>Reexamination fees are based on full cost recovery, and it is essential that all time expended on reexamination activities be reported accurately. Thus, all USPTO personnel should report all time spent on reexamination on their individual Time and Attendance Reports. Even activities such as supervision, copying, typing, and docketing should be included.<

2640 Decision on Request [R-7]

35 U.S.C. 312. *Determination of issue by Director*

(a) REEXAMINATION.— Not later than 3 months after the filing of a request for inter partes reexamination under section 311, the Director shall determine whether a substantial new question of patentability affecting any claim of the patent concerned is raised by the request, with or without consideration of other patents or printed publications. The existence of a substantial new question of patentability is not precluded by the fact that a patent or printed publication was previously cited by or to the Office or considered by the Office.

(b) RECORD.— A record of the Director’s determination under subsection (a) shall be placed in the official file of the patent, and a copy shall be promptly given or mailed to the owner of record of the patent and to the third-party requester.

(c) FINAL DECISION.— A determination by the Director under subsection (a) shall be final and non-appealable. Upon a determination that no substantial new question of patentability has been raised, the Director may refund a portion of the inter partes reexamination fee required under section 311.

37 CFR 1.923. *Examiner’s determination on the request for inter partes reexamination.*

*>Within three months following the filing date of a request for *inter partes* reexamination under § 1.915, the examiner will consider the request and determine whether or not a substantial new question of patentability affecting any claim of the patent is raised by the request and the prior art citation. The examiner’s determination will be based on the claims in effect at the time of the determination, will become a part of the official file of the patent, and will be mailed to the patent owner at the address as provided for in § 1.33(c) and to the third party requester. If the examiner determines that no substantial new question of patentability is present, the examiner shall refuse the request and shall not order *inter partes* reexamination.<

reexamination would be suspended until conclusion of proceedings in the first reexamination. In such an instance, merger of the second (or subsequent) reexamination with the first would unduly prolong the conclusion of the pending reexamination and be inconsistent with the requirement that the reexamination proceeding be conducted with special dispatch.

Where an ordered *inter partes* reexamination is pending, and an *inter partes* reexamination request is subsequently filed, the prohibition provision of 37 CFR 1.907(a) must be borne in mind. Once an order for *inter partes* reexamination has been issued, neither the third party requester of the *inter partes* reexamination, nor its privies, may file a subsequent request for *inter partes* reexamination of the same patent until an *inter partes* reexamination certificate has been issued, unless expressly authorized by the Director of the Office. Note that 37 CFR 1.907(a) tracks the statutory provision of 35 U.S.C. 317(a). A petition for such express authorization is a request for extraordinary relief and will not be granted where there is a more conventional avenue to accomplish the same purpose and provide relief analogous to that requested. See also *Cantello v. Rasmussen*, 220 USPQ 664 (Comm'r Pat. 1982) for the principle that extraordinary relief will not normally be considered if the rules provide an avenue for obtaining the relief sought.

>For additional treatment of cases in which either the first or subsequent request for examination, or both, is/are an *inter partes* reexamination proceeding, see MPEP § 2640 and § 2686.01.

For additional treatment of cases in which a first *ex parte* reexamination is pending at the time a second or subsequent request for *ex parte* reexamination is to be decided, see MPEP § 2283.<

2641 Time for Deciding Request [R-7]

The determination of whether or not to reexamine must be made (completed and mailed) not later than three (3) months after the filing date of a request. See 35 U.S.C. 312(a) and 37 CFR 1.923. *If the 3-month period ends on a Saturday, Sunday or Federal holiday within the District of Columbia*, then the determination must be mailed by the **preceding** business day.

Generally, the Central Reexamination Unit (CRU) forwards the *inter partes* reexamination case to the examiner within two (2) weeks of the filing date of the request.

(A) The examiner has one (1) week from his/her receipt of the reexamination to prepare for an initial consultation conference with a Reexamination Legal Advisor (RLA).

After the consultation with the RLA, the examiner has two (2) weeks from the date of the consultation conference to prepare the decision on the request and an Office action (if reexamination is granted), and forwards the reexamination to the **>CRU** Supervisory Patent Examiner (SPE)<.

The decision and the action will be reviewed by the **>CRU SPE<** and the reexamination file along with the decision and action will be forwarded (hand carried) to the RLA.

(B) **At the very latest**, the decision and action prepared by the examiner must be hand carried by the SPRE to the RLA within nine (9) weeks from the filing date of the request (unless otherwise authorized by the CRU Director or a RLA).

(C) It should be noted that the first Office action ordinarily accompanies an order for reexamination; however, if the issuance of the first Office action would delay the order to the extent that a critical deadline will not be met, the order will be mailed and the first action will follow in due course, as per the guidance set forth in MPEP § 2660.

2642 Criteria for Deciding Request [R-7]

I. SUBSTANTIAL NEW QUESTION OF PATENTABILITY

The presence or absence of “a substantial new question of patentability” determines whether or not reexamination is ordered. The meaning and scope of the term “a substantial new question of patentability” is not defined in the statute and must be developed to some extent on a case-by-case basis, using the case law to provide guidance as will be discussed in this section.

If the prior art patents and printed publications raise a substantial question of patentability of at least one claim of the patent, then a substantial new question of patentability is present, unless the same question of patentability has already been decided by (A) a final holding of invalidity, after all appeals, or (B) by the Office in a previous examination or pending reexamination of the patent. A “previous examination” of the patent is: (A) the original examination of the