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HOW TO IMPROVE DESIGN PATENT PROSECUTION TECHNIQUES

Bernard Anshert†

I. INTRODUCTION

The protection of intellectual property has been of national interest for two hundred years. Congress, acting under its constitutional power to protect the writings of authors and the discoveries of inventors, first passed copyright and patent laws for utility inventions in 1790.¹ By 1842, Congress recognized the need to extend governmental protection to new and original designs for manufacture and included provisions in the Design Patent Act of 1842 to protect such property.² Today, the basic statutory scheme for protection of manufacturing designs in the United States is found in sections 171,³ 172,⁴ and 173⁵ of the Patent Act of 1952.⁶

Although the current statutory scheme provides a basis for obtaining design patent protection, long delays in application processing and other problems have been a source of frustration. This Article will examine the factors which give rise to these difficulties and attempt to offer feasible solutions.

II. EXPEDITING THE DESIGN PATENT PROCESS FROM FILING TO ISSUE OR ABANDONMENT

A. *Problems in Obtaining Design Patent Protection*

One of the major criticisms of the design patent system is the length of time it takes to process a patent application. For fiscal year (FY) 1988, the congressional goal for Group 290, the Patent and Trademark Office's group responsible for design patents, was 8000 production units. At the same time, Group 290's administrative goal for the utility area was to reduce average pendency time to eighteen months by 1989. Pendency time increased from 24.2 months in 1987 to 30.7 months in 1988 due to the following five factors: (1) limited human and physical resources; (2) increase in application

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1. Act of Apr. 10, 1790, ch. 7, 1 Stat. 109, *repealed by* Act of July 4, 1836, ch. 357, 5 Stat. 117, 125; *see also* S. REP. NO. 1979, 82d Cong., 2d Sess. 1-4 (recounting history of patent law), *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 2394, 2395-97.

2. Act of Aug. 29, 1842, ch. 263, 5 Stat. 543.

3. 35 U.S.C. § 171 (1988). Section 171 provides: "Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title. The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided." *Id.*

4. *Id.* §172. Section 172 provides: "The right of priority provided for by section 119 of this title and the time specified in section 102(d) shall be six months in the case of designs." *Id.*

5. *Id.* § 173. Section 173 provides: "Patents for designs shall be granted for the term of fourteen years." *Id.*

6. *See* Appendix A, Design Patent Application Flow Chart.

filings; (3) insufficiency of the petition to make special; (4) lack of specificity of titles; and (5) inadequate standards of drawings.

B. Strategic Plans and Recommendations to Facilitate Design Patent Processing

A comprehensive approach to reducing pendency time for design patents will include factors that are the sole responsibility of the Patent and Trademark Office (PTO), and other factors that can only be addressed by patent attorneys and patent practitioners.

1. Increase Resources

The decrease in funds made available to Group 290 at the beginning of FY 1988 resulted in a decrease in examiners from thirty-one in 1986 to twenty-three in 1988. Moreover, no new resources were made available to Group 290 due to limited physical plant space and the possibility of new design copyright registration legislation.⁷

The May 1988 PTO management review of the present and projected long-term resources in Group 290 revealed that pendency to first action was approximately twenty-nine months. The review also indicated that eight of the present staff examiners were expected to retire within the next two to four years. Commissioner of Patents and Trademarks, Donald J. Quigg, announced a design patent application catch-up plan which would provide additional space, expand the examining staff, and include the design patent examiners in the quality reinforcement program.⁸ Based on these projections, the backlog for patent designs should begin to decrease in 1990, and the average pendency time should be reduced to eighteen months by 1992.

2. Response to Increase in Design Filings

A record 11,114 design patent applications were filed in FY 1988 representing an increase of 347 applications from the previous year. The PTO issued and abandoned 8246 of these applications in FY 1988, compared to 8642 applications in FY 1987. New case inventory was approximately 19,600 cases not including undocketed cases; new case filings for FY 1988 were projected at 11,500; and, new case filings for FY 1988, 1989, and 1990 are expected to increase at a rate of thirteen percent per year.

3. Compliance with Requirements for Petition to Make Special

New applications ordinarily are selected for examination in order of their effective filing date. Certain exceptions, however, are made by way of

7. See S. 791, 100th Cong., 1st Sess. (1987).

8. See Appendix B, Design Patent Application Catch-Up Plan.

petition to make special.⁹ Section 708.02 of the *Manual of Patent Examining Procedure* (MPEP)¹⁰ provides for conditions for which exceptions will be made: (I) manufacture, (II) infringement, (III) applicant's health, (IV) applicant's age, (V) environmental quality, (VI) energy, (VII) inventions relating to recombinant DNA, and (VIII) special examining procedures for certain new applications.¹¹

A new application—one which has not received any examination by the examiner—may be granted special status provided the applicant complies with the following: (1) the fee set forth in 37 C.F.R. section 1.17(i) is submitted; (2) all claims are directed to a single invention, or else applicant will make an election without traverse as a prerequisite to the special status grant; (3) a statement is given indicating that a preexamination search was made, specifying who conducted the search and listing the field of search by class and subclass, design patent, utility patents, foreign patents and publications; (4) one copy each of the references deemed most closely related to the subject matter encompassed by the claim is submitted; and (5) a detailed discussion distinguishing the references from petitioner's application is given.¹²

One caveat to note, however, is that petitions to make special under the provisions of 37 C.F.R. section 1.102(d) and M.P.E.P. section 708.02 (VIII) will be denied if petitioner has not conducted a pertinent and thorough field search in both the design and related utility areas. While the claimed subject matter may have an appearance which is different from the related prior art, an examiner may nevertheless question whether the claimed subject matter is new to the art to which it is most closely related.¹³

9. See 37 C.F.R. § 1.102 (1990), which provides:

Advancement of examination.

(a) Applications will not be advanced out of turn for examination or for further action except as provided by this part, or upon order of the Commissioner to expedite the business of the Office, or upon filing of a request under paragraph (b) of this section or upon filing a petition under paragraphs (c) or (d) of this section with a verified showing which, in the opinion of the Commissioner, will justify so advancing it.

(b) Applications wherein the inventions are deemed of peculiar importance to some branch of the public service and the head of some department of the Government requests immediate action for that reason, may be advanced for examination.

(c) A petition to make an application special may be filed without a fee if the basis for the petition is the applicant's age or health or that the invention will materially enhance the quality of the environment or materially contribute to the development or conservation of energy resources.

(d) A petition to make an application special on grounds other than those referred to in paragraph (c) of this section must be accompanied by the petition fee set forth in § 1.17(i)(2).

10. PATENT AND TRADEMARK OFFICE, DEP'T OF COMMERCE, MANUAL OF PATENT EXAMINING PROCEDURE (5th rev. ed. 1989) [hereinafter M.P.E.P.].

11. See M.P.E.P., *supra* note 10, § 708.02.

12. *Id.*

13. *Id.*

4. Designation of a Specific Title

The title of a design invention is critical. It serves to identify the article in which the design is embodied by the name generally known and used by the public. The title should be definite and stated in singular form. In the absence of any detailed specification, an overly broad title may create an assignment, search or classification problem for the examiner.¹⁴ Of course, a preliminary review of an application may indicate that the designation of the design claimed is so broad that it would be difficult for the examiner to make a proper examination of the claim.¹⁵

Counsel should provide sufficient explanation of the claimed design invention regarding its nature and intended use so that the most appropriate docket assignment and pertinent field of search can be made. This information should be submitted in the form of remarks only and should not be inserted in the specification. Since disclosure statement filing is voluntary, applicants are encouraged to file information disclosure statements on form PTO-1449.¹⁶ Additional information regarding analogous fields of search, pertinent prior art, advertising brochures, and the filing of a copending utility application should prove helpful in expediting the examination of the application.¹⁷

5. Executing Proper Drawings

a. *Standards for Drawings*

The design application must contain a drawing(s) which is in conformity with 37 C.F.R. sections 1.84 and 1.152.¹⁸ As the drawing constitutes the whole disclosure of the design, it is important that it be well executed, both as to clarity of showing and completeness, to ensure that nothing is left to conjecture. The full scope of the design claim is encompassed within the four corners of the drawing disclosure. An insufficient drawing may be fatal to validity. Moreover, an insufficient drawing would prevent the applicant from obtaining the benefits of the effective filing date of the parent application in a continuation application.¹⁹

14. See 37 C.F.R. § 1.153 (1990).

15. See *id.* § 1.104.

16. See *id.* §§ 1.97-98.

17. See *id.* § 1.56.

18. *Id.* § 1.152 provides:

The design must be represented by a drawing made in conformity with the rules laid down for drawings of mechanical inventions and must contain a sufficient number of views to constitute a complete disclosure of the appearance of the Article. Appropriate surface shading must be used to show the character or contour of the surfaces represented. Broken lines may be used to show visible environmental structure, but may not be used to show hidden planes and surfaces which cannot be seen through opaque materials.

19. See 35 U.S.C. § 112 (1988).

In *Philco Corp. v. Admiral Corp.*,²⁰ a district court held that failure to disclose a television-receiver-back configuration was significant, since the undisclosed rear portion was left to conjecture. The patent stated that the rear was unornamented; hence the patentee failed to overcome the inadequacy of the disclosure with the use of a vague statement in the specification. Specifically, the court noted:

Design patents, like mechanical patents, are subject to statutory mandates governing disclosure. A design patent must disclose the configuration and complete appearance of the article in which the design is embodied so fully, clearly and with such certainty as to enable those skilled in the art to make the article without being forced to resort to conjecture. Sufficient disclosure has been said to be the *quid pro quo* for the limited monopoly granted by the government. It is necessary so that those skilled in the art may learn the invention and practice it when the period of monopoly is over. The disclosure cannot be so vague as to compel independent experimentation by others to ascertain bounds of the claim. Sufficient disclosure is also required so that the industry concerned will be apprised of the precise scope of the monopoly asserted. Furthermore, inadequate disclosure may well hinder the judicial determination as to whether the purported novelty and invention are genuine.²¹

b. Surface Shading Necessary

The drawing figures should be appropriately surface shaded to clearly show the character and contour of all the surfaces represented. It is of particular importance to delineate plane, concave, convex, raised and depressed surfaces on three-dimensional articles. Also, surface shading should be utilized in distinguishing between open and solid areas.²²

c. Dotted or Broken Lines

At one time the practice in the PTO was to utilize a dual broken line policy—one representing immaterial or unimportant portions of the design and the other indicating environmental features. The ornamental design which is being claimed must be illustrated by full lines in the drawing. In the case of *In re Blum*,²³ the Court of Customs and Patent Appeals (CCPA) emphasized the need for clarity:

Dotted and broken lines may mean different things in different circumstances and all we wish to say here is that in each case it must be made entirely clear what they do mean, else the claim is

20. 199 F. Supp. 797 (D. Del. 1961).

21. *Id.* at 801 (citations omitted).

22. See M.P.E.P., *supra* note 10, § 1503.02.

23. 374 F.2d 904 (C.C.P.A. 1967).

bad for indefiniteness under 35 U.S.C. § 112. It is the examiner's responsibility to obtain such definiteness. A "dominant feature" statement is not calculated to obtain it. . . . A design is a unitary thing and all of its portions are material in that they contribute to the appearance which constitutes the design. There is a distinction to be observed between parts of the total *article illustrated*, in which a new design is embodied, and parts of that article which embody none of the *design*. Such a part is, presumably, what the Manual [of Patent Examining Procedure] means by the reference to "an immaterial part of the design." Actually, it is *no* part of the design but a part of the *article* unrelated thereto. It is environmental only. The distinction should also be maintained between *the design* and its *environment*. It is fatal to clarity to consider the latter as any part of the former, as the Manual appears to do.²⁴

After *Blum*, the PTO terminated the dominant-feature practice and now mandates that broken lines be used to indicate environmental structures which are not part of the design. The specification must make clear that the structure shown in broken lines is not part of the design sought to be patented. No portions of the claimed design are immaterial or unimportant. Subsequently, in the case of *In re Zahn*²⁵ the CCPA reviewed the post-*Blum* changes in design practice, and held that section 171 authorized a patent design of a shank portion of a drill bit to be claimed in full lines.²⁶

Purely mechanically functional features or interior structure not related to the design are disfavored. Subject matter which is within full view by the average observer is the primary concern of the PTO. Most articles, with the exception of flat or thin goods,²⁷ can be disclosed with two-dimensional elevational views. More complicated configurations would best be illustrated with a minimum of two properly executed perspective views. Sectional views which aid the clarity of disclosure in design cases are permissible.²⁸

d. *Special Categories*

The PTO is willing to accept black and white photographs or photomicrographs printed on sensitized paper to illustrate inventions which are incapable of being accurately or adequately depicted by india ink drawings. The use of special categories in section 608.02 of the MPEP is a highly restricted practice. Most frequently, these special categories include complicated fabric designs, detailed ornamentation on silverware, chinaware

24. *Id.* at 907 (emphasis in original).

25. 617 F.2d 261 (C.C.P.A. 1980).

26. *Id.* at 268-69. A drill is unquestionably an article of manufacture under 35 U.S.C. § 171 (1988).

27. Carton blanks and fabrics are examples of flat or thin articles.

28. *See, e.g., Ex parte Lohman*, 1912 Dec. Comm'r Pat. 336.

and the like.²⁹ It is further emphasized that the phrase "ornamental effects," as used in section 608.02, was not intended to be a blanket inclusion of a substitute for properly executed india ink drawings.

Because of the technical problems in printing United States design patents, reproductions of photographic drawings tend to result in a vague and indefinite disclosure. To be acceptable, photographs must be made on photographic paper with a surface described as smooth, tint, white, or mounted on proper size bristolboard.³⁰

e. Use of Indicia

Indicia or legible matter can be illustrated on a design drawing. If it is intended to indicate merely instructional data, however, such as game rules, move sequences, or trade names, the indicia would not be considered as integral parts of the design claimed.

f. Correction of Drawings

When preparing new drawings in compliance with the examiner's requirement, care should be exercised to avoid introducing matter having no antecedent basis in the original drawing disclosure.³¹ For example, the district court in *Whiteway Manufacturing Co. v. Oscar Phillips Co.*,³² held a design patent invalid, because a change in crucial surface from flat in original drawings to convex in the amended drawing constituted a departure from the original disclosure, resulting in the introduction of new matter.³³

In a design patent application, erasure of portions of the original disclosure may constitute new matter. In general terms, if the additional or amended illustration is reasonably supported by the original disclosure under 35 U.S.C. § 112, it will not be refused entry.³⁴ Any entered amendment of the claim involving new matter, however, will result in a new rejection based on the first paragraph of section 112.³⁵

The PTO no longer will allow drawings to be removed for corrections in applications filed after January 1, 1989, or any drawings from any application after January 1, 1991. If corrections are necessary, a new set of drawings must be submitted.³⁶

29. See M.P.E.P., *supra* note 10, § 608.02.

30. See *id.* §§ 608.02, 1503.02.

31. See 35 U.S.C. § 132 (1988); 37 C.F.R. § 1.118 (1990).

32. 261 F. Supp. 841 (S.D. Ohio 1966).

33. *Id.* at 842.

34. See 35 U.S.C. § 112 (1988).

35. *Id.* § 112. Section 112 provides:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Id.; see, e.g., *In re Rasmussen*, 650 F.2d 1212 (C.C.P.A. 1981).

36. The procedure for making drawing corrections was changed with the revision of 37

C. Additional Considerations

Under the provisions of section 171, a design is inseparable from the object to which it is applied, and cannot exist alone merely as a scheme of surface ornamentation or design. The motif of a design which is not incorporated in an article or portion of an article is not considered proper subject matter for a design application filed in the United States. Furthermore, there are no restrictions as to articles or portions of an article except for articles which have offensive depictions or caricatures,³⁷ which are hidden or obscure in normal use,³⁸ or which are purely functional.³⁹

1. Article of Manufacture

An article of manufacture is anything made by hand or from raw materials. In the case of *In re Hruby*,⁴⁰ the CCPA upheld an application for a design patent on a water fountain. Compare *In re Zahn*,⁴¹ in which the court went so far as to hold that section 171 would permit a patent design for the shank of a drill bit.

2. Specification and Claim

The major difference between design and utility applications is in the comparative importance of the written description, the drawings, and the claim language. With utility applications, the description and the claims are of primary importance and the drawings are of secondary importance. With design applications, however, the reverse is true: the description and

C.F.R. § 1.85 on Dec. 13, 1988.

37. See M.P.E.P., *supra* note 10, § 1504, which provides:

Articles which have depictions or caricatures which might reasonably be considered offensive to any race, religion, sex, ethnic group or nationality is rejected as not meeting the requirements of ornamentality under 35 U.S.C. § 171 (1982). Moreover, since 37 C.F.R. § 1.3 (1989) proscribes the presentation of papers which are lacking in decorum and courtesy, and this includes depictions or caricatures in the disclosure, drawing and/or claim which might reasonably be considered offensive, such subject matter as presented herein is deemed to be clearly contrary to 37 C.F.R. § 1.3.

38. Design patents that disclose and claim subject matter which is hidden or obscured in normal use are rejected as not meeting the requirements of ornamentality under 35 U.S.C. § 171 (1988). See, e.g., *In re Stevens*, 173 F.2d 1015 (C.C.P.A. 1949); *Norco Prods., Inc. v. Mecca Dev., Inc.*, 617 F. Supp. 1079 (D. Conn. 1985), *appeal dismissed*, 821 F.2d 644 (Fed. Cir. 1987); *C & M Fiberglass Septic Tanks, Inc. v. T & N Fiberglass Mfg. Co.*, 214 U.S.P.Q. (BNA) 159 (D.S.C. 1981).

39. Design patent applications that disclose subject matter which is obviously the result of purely functional considerations are rejected as not meeting the requirements of ornamentality under 35 U.S.C. § 171 (1988). This includes designs where the differences over the prior art are purely functional in purpose and derivation, as well as those which disclose no surface ornamentation or configuration which can be attributed to ornamental consideration. See, e.g., *In re Carletti*, 328 F.2d 1020 (C.C.P.A. 1964); *In re Garbo*, 287 F.2d 192 (C.C.P.A. 1961); *In re Cornwall*, 230 F.2d 457 (C.C.P.A. 1956).

40. 373 F.2d 997 (C.C.P.A. 1967).

41. 617 F.2d 261 (C.C.P.A. 1980).

claims are formal, while disclosure and definiteness are accomplished by way of the drawings.⁴²

3. Claim

Only one claim is permitted in a design application. It is permissible to illustrate multiple embodiments, but only if they involve a single, inventive concept and are not patentably distinct from one another. In *In re Rubinfeld*,⁴³ the applicant sought a patent on a design of a floor waxer. The designs of the two floor waxers in question had "generally similar but specifically different appearance[s]."⁴⁴ Both embodiments were disclosed and claimed in the same application.

The specification should clearly disclose multiple embodiments and should particularize the differences between the embodiments. For example, in *Ex parte Appeal No. 315-40*,⁴⁵ the Patent Office Board of Appeals noted that, while design practice "permits plural embodiments of a design concept to be illustrated, the design application is only directed to such concept and a single claim is permitted. Such claim is broad in the sense that anticipation of any embodiment presented as representative of the concept would defeat the claim."⁴⁶

4. Segregable-Parts Combination (Subcombination)

Under the segregable-parts doctrine, the disclosure in the drawings of segregable-parts combination subject matter inherently represents distinct inventions. Restrictions in such cases are proper, but the subject matter must be supported by separate claims. Only a single claim is permissible, however, in a design patent application. A requirement for restriction under 35 U.S.C. § 121 in a design patent application is supported by the holdings in *Ex parte Heckman*⁴⁷ and *In re Kelly*.⁴⁸

5. Design-Utility Double Patenting

Double patenting exists where the design invention, as defined by the claim, and the utility invention, as defined by the claim language, are cross read. The United States Court of Appeals for the Federal Circuit in *Carmen Industries, Inc. v. Wahl*,⁴⁹ supported a broader test of double patenting between design and utility claims based on obvious variations as well as the same invention. In a decision of the CCPA, *In re Thorington*,⁵⁰ a design patent

42. See 37 C.F.R. §§ 1.152-.153 (1990).

43. 270 F.2d 391 (1959), cert. denied sub nom. *Rubinfeld v. Watson*, 362 U.S. 903 (1960).

44. *Id.* at 392.

45. 152 U.S.P.Q. (BNA) 71 (Pat. Off. Bd. App. 1965).

46. *Id.* at 72.

47. 135 U.S.P.Q. (BNA) 229 (Pat. Off. Sup. Exam. 1960).

48. 200 U.S.P.Q. (BNA) 560 (Comm'r Pat. & Trademarks 1978).

49. 724 F.2d 932 (Fed. Cir. 1983).

50. 418 F.2d 528 (C.C.P.A. 1969), cert. denied sub nom. *Thorington v. Schuyler*, 397 U.S.

for a fluorescent lamp was interpreted by the court as claiming the same invention as that claimed in patentee's utility application by reason of its external appearance and its title as an article of manufacture. The court took the position that the term "fluorescent lamp" has a well-defined meaning in the art as including the functional elements in the mechanical claim.

6. Design Utility Applications

A design application may be considered a division or continuation of a utility application if the requirements of sections 112 and 120 are satisfied.⁵¹ This issue was discussed in *In re Berkman*,⁵² where the benefit of a design application filing date was denied in the utility application of the same inventor. The CCPA took the position that the design application did not satisfy either section 112 or section 120.

7. Inclusion of Copyright Notice

It is the policy of the PTO to permit the inclusion of a copyright notice in a design patent application. If placed on the drawing in conformance with the provisions set forth in section 1512 of the MPEP, the notice will not be objected to as extraneous matter under 37 C.F.R. section 1.84. The files on design patents D-243,821, D-243,824, and D-243,920 disclose examples of an earlier similar procedure.

8. Design Patent, Trademark and Copyright Protection

The issue of whether a design or a trademark can be based on the same subject matter was decided by the CCPA in *In re Mogen David Wine Corp.*⁵³ The CCPA held that the underlying purpose and essence of patent rights are separate and distinct from those appertaining to trademarks. No right accruing from the one is dependent upon or conditioned by rights concomitant to the other.

III. CONCLUSION

It seems clear that design patent application filings will continue to increase. The PTO wants to encourage and facilitate growth of intellectual property. Therefore, emphasis must be placed on those factors which will increase the level of productivity and efficient performance by the PTO and by applicants for design patents.

The factors cited in this Article have focused on decreasing patent pendency in areas where the PTO has some control. The PTO is aggressively hiring new examiners and providing incentives for high performance.

1038 (1970).

51. See, e.g., *KangaROOS U.S.A., Inc. v. Caldor, Inc.*, 778 F.2d 1571 (Fed. Cir. 1985).

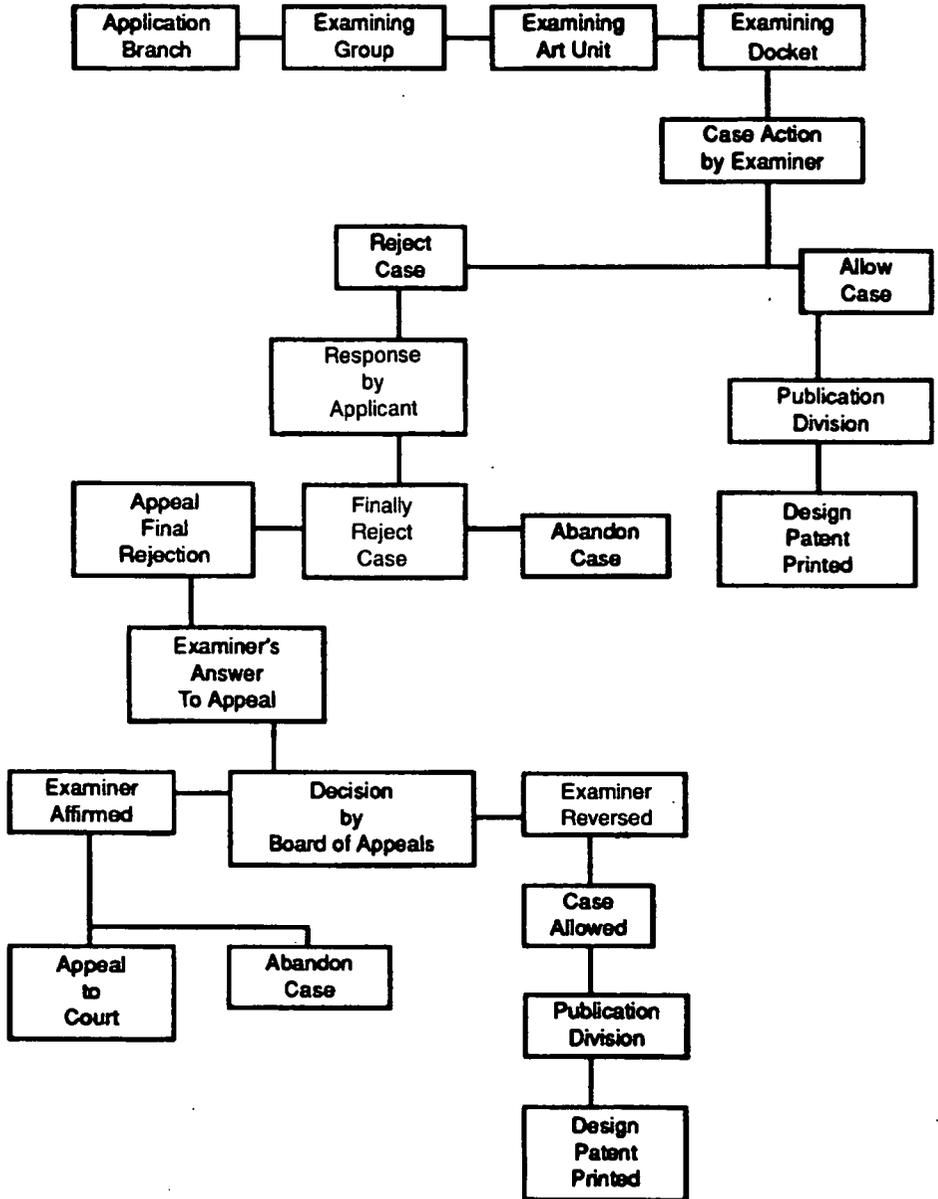
52. 642 F.2d 427 (C.C.P.A. 1981).

53. 372 F.2d 539 (C.C.P.A. 1967).

Practicing patent attorneys, agents, and inventors acting pro se can facilitate case disposition by attending to the details related to the petition to make special, specificity of titles, drawing standards and other areas more fully discussed in subpart II(C) of this Article.

APPENDIX A

Design Patent Application Flow Chart



APPENDIX B

Design Patent Application Catch-Up Plan

Input/Output	<i>FY'86</i>	<i>FY'87</i>	<i>FY'88</i>	
Filings	9792	10,766	11,114	
Production Units	8718	8642	8246	
Pendency	<i>FY'86</i>	<i>FY'87</i>		
to first action	22.5	28.9		
to Issue/Aban.	24.2	30.7		
Staffing Plan	<i>FY'88</i>	<i>FY'89</i>	<i>FY'90</i>	<i>FY'91</i>
Hires	12	18	18	12
E.Y.O. Staff	34	46	57	61

Maximum overtime through FY 1991.
 Third art unit created October 1, 1988.
 Fourth art unit created Fall 1989.