

**INTERFERENCE TRIAL SECTION PRECEDENTIAL OPINION**

The opinion in support of the decision being entered today is binding precedent of the Interference Trial Section of the Board of Patent Appeals and Interferences.

Paper No. 147

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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JOSEPH E. LOUIS

Junior Party  
(Sauer Inc.)  
(Patent No. 5,513,717)

v.

HIDEAKI OKADA and SHUSUKE NEMOTO

Senior Party  
(Kanzaki Kokyukoki Mfg. Co., Ltd.)  
(Application 08/818,964)

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Patent Interference No. 104,311

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BEFORE STONER, Chief Administrative Patent Judge, McKELVEY, Senior Administrative Patent Judge, and SCHAFFER, LEE, TORCZON, GARDNER-LANE, and MEDLEY, Administrative Patent Judges.

LEE, Administrative Patent Judge.

**DECISION ON SAUER'S MOTIONS 6 AND 7**

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A. Background

This interference was declared on February 16, 2000, and involves (1) Sauer Inc.'s patent 5,513,717 naming Joseph E. Louis as inventor (hereinafter Sauer) versus (2) Kanzaki Kokyukoki Mfg. Co., Ltd.'s application 08/818,964 naming Hideaki Okada and Shusuke Nemoto as inventors (hereinafter Kanzaki).

Sauer filed Motion 6, under 37 CFR § 1.635/1.642, seeking to add Patent No. 5,473,964, also owned by Kanzaki, to this interference.

Sauer further filed Motion 7, under 37 CFR § 1.635/1.642, to add patent No. 5,950,500, also owned by Kanzaki, to this interference.

In JD v. SH, a trial section precedential decision ([www.uspto.gov/web/offices/dcom/bpai/its/104044.pdf](http://www.uspto.gov/web/offices/dcom/bpai/its/104044.pdf)), it was held that the Board would not add a patent to an ongoing interference where the opposing party is involved in the interference only on the basis of patents and not applications. The decision cited to 35 U.S.C. § 135(a), and stated: "Section 135(a) does not authorize the Commissioner to declare an interference between interfering patents. Compare 35 U.S.C. § 291, which authorizes a civil action to resolve priority between interfering patents."

Upon receipt of Sauer Motions 6 and 7, an order was entered

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stating that Kanzaki need not respond to the merits of Sauer's Motions 6 and 7 until the question of whether the Board has jurisdiction to add Patent Nos. 5,473,964 and 5,950,500 to this interference has been resolved. Sauer filed a paper explaining why the Board has jurisdiction and should overrule JD v. SH. (Paper No. 28). Kanzaki opposed. (Paper No. 62). Sauer replied. (Paper No. 70).

On July 26, 2000, the parties appeared before the Board for oral argument with regard to Sauer's Motions 6 and 7.

#### B. Discussion

##### 1.

The Board's jurisdiction for declaring and conducting interferences is bottomed on 35 U.S.C. § 135(a), which states:

Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, an interference may be declared and the Commissioner shall give notice of such declaration to the applicants, or applicant and patentee, as the case may be. The Board of Patent Appeals and Interferences shall determine questions of priority of the inventions and may determine questions of patentability.

Section 135(a) of Title 35, United States Code, does not authorize declaration of a patent versus patent interference. Even Sauer appears to be in agreement with that view. The

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"opinion" of the Director in 35 U.S.C. § 135(a) is directed to "an application." What Sauer contends is that where one of the two patents is owned by a party which also has a pending application drawn to the same patentable invention, then the Board has jurisdiction to declare an interference involving the two patents and the application -- i.e., one patent and an application of one party, on one side, versus one patent of another party, on the other side. Sauer contends that if an application from either party is in the picture, the situation is not a patent versus patent interference and thus the Board has jurisdiction under 35 U.S.C. § 135(a) to declare and conduct an interference.

Sauer's position is based on an erroneous view of § 135(a) interferences as a means to solve all conflicts between parties with respect to an invention **rather** than an administrative tool for the Patent and Trademark Office to decide whether to issue an application as a patent. The conflict between parties, insofar as any interference proceeding in the Patent and Trademark Office is concerned, arises solely because one or more applications or patents stand in the way of the issuance of an application under examination. As we have mentioned above, the "opinion" of the Director, as is referred to in 35 U.S.C. § 135(a), is directed to

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"an application."

Moreover, whether it is between two applications, an application and a patent, or two patents, it is the "claims" which give rise to a conflict in priority of invention. The parties have a dispute only because the "claims" in their respective cases interfere with each other. If no "claim" of one party interferes with at least one "claim" of another party, then there can be no interference-in-fact. See, 37 CFR § 1.601(j). As the Federal Circuit has observed, "the name of the game is the claim," In re Hiniker Co., 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998), citing Giles Sutherland Rich, Extent of Protection and Interpretation of Claims--American Perspectives, 21 Int' Rev. Indus. Prop. & Copyright L, 497, 499 (1990)("The U.S. is strictly an examination country and the main purpose of the examination, to which every application is subjected, is to try to make sure that what each claim defines is patentable. To coin a phrase, the name of the game is the claims. (Emphasis in original)"). It is claims which define what an applicant regards as his or her invention. 35 U.S.C. § 112, second paragraph.

Thus, an interference between two parties, a first party with an involved patent and also an involved application, and a second party with a single involved patent, would necessarily be

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two separate interferences administratively merged into one proceeding for convenience or efficiency. The first interference would be directed to a conflict or interference between the first party's involved application and the second party's involved patent. The second interference would be directed to a conflict between the first party's involved patent and the second party's involved patent. Viewed properly in this light, the Board does not have jurisdiction under 35 U.S.C. § 135(a) to declare or conduct an interference involving parties A and B, where (1) party A is involved on the basis of patents and no application and (2) party B is involved on the basis of an application and one or more patents. Party B's patent does not stand in the way of examining or issuing Party B's application. What stands in the way of issuing Party B's application is the existence of Party A's patent or patents. If there is an interference between Party A's patent or patents and Party B's patent, 35 U.S.C. § 291 gives an adequate avenue of relief. Section 291 states, in part:

**Interfering Patents**

The owner of an interfering patent may have relief against the owner of another by civil action, and the court may adjudge the question of the validity of any of the interfering patents, in whole or in part.

Sauer is only partially correct in stating that "[t]he

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purpose of the patent operation in the PTO is to assist the public in obtaining valid patents and in resolving certain classes of disputes involving patents and applications." Sauer cites no precedential decision, and we are aware of none, which indicates that the mission or purpose of the Patent and Trademark Office includes resolving disputes between issued patents. While it is true that 35 U.S.C. § 6(b) provides that the Board of Patent Appeals and Interferences shall determine priority and patentability of invention in interferences declared under 35 U.S.C. § 135(a), it is not apparent to us how we can declare a patent versus patent interference under 35 U.S.C. § 135(a). It may well be that Sauer feels that the Patent and Trademark Office should have authority to cancel patents. However, until Congress authorizes inter partes "cancellation" proceedings similar to those authorized in trademark cases (15 U.S.C. § 1064), Sauer will have to be satisfied with the provisions of law relating to reexamination. There is no persuasive evidence that Congress intended for 35 U.S.C. § 135(a) to be a patent cancellation proceedings based on something other than a pending application under examination. As § 135(a) notes, a predicate to an interference is the pendency of an "application" which in the opinion of the Director interferes with another application or an

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unexpired patent.

Technically, Sauer's Motions 6 and 7 seek the addition of Kanzaki patents to this interference and not the declaration of any additional interference between the patents sought to be added to this interference and Sauer's involved patent. But, where we lack the jurisdiction to declare a patent versus patent interference, we also lack jurisdiction to add a patent to an existing interference such that the addition results in a patent versus patent interference. Sauer may not circumvent the prohibition by giving the prohibited act another name. Adding a Kanzaki patent to the interference is the same as declaring another interference, one between two issued patents, and merging it into this one.

Sauer points out that Winner Int. Royalty Corp. v. Wang, 202 F.3d 1340, 53 USPQ2d 1580 (Fed. Cir. 2000), is a recent example of a patent-patent-application interference handled by the Board, and stated: "While the propriety of the patent-patent aspect of the interference was not an issue on appeal, the party Wu (assignee of Winner Int. Royalty Corp.) made the argument advanced by Kanzaki at the administrative level, and that argument was soundly rejected by a panel of this board."

The Board's opinion in Wu v. Wang noted by Sauer is not binding



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precedent. Sauer has identified no binding precedent of this Board which need be overruled to clear the way for our decision here.

Also, nothing expressed herein is contrary to any pre-existing practice, as argued by party Sauer in its reply, of treating a motion to substitute a reissue application for the patent sought to be reissued as a motion to add the reissue application to the interference already involving that patent. It is the addition of an issued patent, not a pending reissue application, to an on-going interference, which causes a problem under 35 U.S.C. § 135(a).

We are cognizant of the Federal Circuit's decisions in Perkins v. Kwon, 886 F.2d 325, 12 USPQ2d 1308 (Fed. Cir. 1989) and Schulze v. Green, 136 F.3d 786, 45 USPQ2d 1769 (Fed. Cir. 1998), which generally set forth that when issues have been fairly placed at issue and fully developed by parties before the Board, they should be addressed. However, nowhere does the Federal Circuit remotely suggest that the Board undertake to resolve an issue over which it lacks jurisdiction.

With regard to Schulze v. Green and Perkins v. Kwon, supra, Sauer asserts:

[T]he Federal Circuit was telling the board to look

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beyond its narrow, parochial interest in minimizing its own work load and to serve the public interest in resolving issues within the board's special expertise in the forum specifically set up to decide such issues. The board's goal should not be to duck work whenever it can; it should be to serve the public by deciding genuine issues that needed to be decided in a just, speedy, and inexpensive manner.

It could be argued (and no doubt there will be those in the trial section [of the Board] who will argue) that, if the board does not permit patentee-interferents to file 37 CFR 1.635/1.642 motions to bring into interferences patents owned by applicant-interferents, the issues that would be presented by such motions will never be "fully presented and developed" and that, accordingly, the board will never have to decide them. In response, Sauer submits that that argument is unworthy of the board. Perhaps more importantly, it is clearly contrary to the thrust of the Federal Circuit's repeated admonitions to the board. To take that position would be, to use the vernacular, "cruising for a bruising." (Emphasis in original.)

In our view, the Board is without jurisdiction under 35 U.S.C. § 135(a) to adjudicate a conflict between two issued patents. That is so no matter how far the parties have developed the issues, how much special expertise the members of the Board may have in determining them, or how quickly and inexpensively the Board may determine the issues as compared to a U.S. District Court in an action under 35 U.S.C. § 291. Even if both parties as well as the Board desire to have a conflict between patents adjudicated by the Board, the Board is without power to do so.

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Congress imposed these limitations on our jurisdiction in interferences.

Section 135(a) contains nothing to the effect that while the Board may not adjudicate conflicts between issued patents, if one of the patentees also happens to have a pending application drawn to the same patentable invention, then the Board may declare and conduct an interference involving an application versus patent and a cancellation proceeding involving a patent versus a patent. Such an exception makes little sense on its face and would seem to owe its existence in Sauer's argument to creative hindsight analysis for salvaging a forum within the Patent and Trademark Office for adjudicating conflicts between issued patents. We are not persuaded that any such exception exists in 35 U.S.C. § 135(a), and we decline to open a back door to admit conflicts between issued patents into the jurisdiction of the Patent and Trademark Office when Congress has clearly not opened the front door.

A conflict between two patents is no less a conflict between two patents simply because another conflict exists between one of the patents and a separate application. Under 35 U.S.C. § 135(a), the Board is without jurisdiction to adjudicate a conflict between two patents and that is unchanged by having

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another conflict, one between an application and one of the conflicting patents, in the same mixing bowl. This interpretation of 35 U.S.C. § 135(a) is not contrary to any decision of the Court of Appeals for the Federal Circuit which Sauer has called to our attention.

Our interpretation is also consistent with the following pronouncement in Notice of Final Rule, Patent Interference Proceedings, 49 Fed. Reg. 48416, 48419 (December 12, 1984):

The definition of "interference" permits an interference between one or more applications and one o[r] more patents. Thus, these new rules follow the policy of Wilson v. Yakel, 1876 Dec. Comm'r. Pat. 245 (Comm'r. Pat. 1876) and, to the extent inconsistent therewith, do not follow the policy announced in Touval v. Newcombe, 194 USPQ 509 (Comm'r. Pat. 1976). However, in view of the statutory requirement for the presence of at least one application in an interference, if an applicant were to concede priority or otherwise be terminated from an interference involving only one application and more than one patent, the interference would have to be terminated for lack of subject matter jurisdiction unless one or more of the patentees filed an application for reissue which could be added to the interference under § 1.633(h).

In Wilson v. Yakel, 1876 Dec. Comm'r. Pat. 245 (Comm'r. Pat. 1876), a single application of Wilson interfered with a patent of Yakel and also with a patent of Rogers. The Commissioner sanctioned an interference proceeding involving all three parties, which in effect represented a merger of two underlying

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interferences each involving the applicant Wilson and a patentee. In this case between junior party Sauer and senior party Kanzaki, only one of the multiple underlying interferences would be between an applicant and a patentee. The other one(s) would be between Kanzaki as a patentee and Sauer as a patentee. The 1984 Notice of Final Rulemaking made clear that even in the sanctioned circumstance of Wilson v. Yakel, supra, if the applicant drops out for whatever reason, the interference would have to be terminated between the remaining patentees for lack of subject matter jurisdiction.

For the foregoing reasons, Sauer's Motions 6 and 7 cannot be granted. The Board is without jurisdiction to declare or conduct an interference to resolve a conflict between a Sauer patent and a Kanzaki patent even if a Kanzaki application is drawn to the same invention and would be included in the same proceeding.

2.

Alternatively, even if we have jurisdiction to conduct a patent versus patent interference under the circumstances urged by Sauer, i.e., when an application drawn to the same patentable subject matter is included in the same proceeding, we exercise our discretion under 37 CFR § 1.642 to not add any additional patents to this particular interference.

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This interference, as declared, is solely between Sauer's Patent No. 5,513,717, and Kanzaki's application 08/818,964. The interference was necessary because the examiner could not issue a patent to Kanzaki based on its application as long as the Sauer patent was viable. On the addition of an application or patent to a pending interference, 37 CFR § 1.642 states as follows:

During the pendency of an interference, if the administrative patent judge becomes aware of an application or a patent not involved in the interference which claims the same patentable invention as a count in the interference, the administrative patent judge may add the application or patent to the interference on such terms as may be fair to all parties.

The operative word in the above-quoted section is "may" -- a discretionary term. Sauer's own motion acknowledges that addition of patents and applications under 37 CFR § 1.642 is "discretionary with the APJ." See also Theeuwes v. Bogentoft, 2 USPQ2d 1378, 1379 (Comm'r Pats. 1986) ("37 CFR 1.642 generally concerns actions to be taken at the discretion of the Examiner-in-Chief [Administrative Patent Judge]"). Sauer additionally cites 37 CFR § 1.601, which states:

This subpart shall be construed to secure the just, speedy, and inexpensive determination of **every interference**. (Emphasis added.)

According to Sauer, the addition of Kanzaki's additional

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patents to this interference represents a more speedy and more inexpensive determination of the parties' possible overall disputes involving the yet uninvolved Kanzaki patents as compared to the prospect of a civil action in a U.S. District Court. But 37 CFR § 1.601 refers to a more speedy and inexpensive determination of "every interference," not of all conflicts between the parties across multiple applications and patents allegedly claiming the same invention.

The term "every interference" as is referred to in 37 CFR § 1.601 is directed to interferences already declared or about to be declared under 35 U.S.C. § 135(a). Each such "interference" does not necessarily involve all applications and patents having a claim drawn to the same invention. Merely two cases, either an application and a patent, or two applications, are sufficient to support the declaration of an interference under 35 U.S.C. § 135(a). Not all applications and patents claiming the same patentable invention may be known to the parties or to the administrative patent judge, and even if all such cases are known it may not be necessary to have all of them involved in an interference proceeding, much less the same interference. For instance, claims in additional applications of the non-prevailing party in an interference, drawn to the same invention, may be

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rejected over the lost count, or alternatively, additional interferences may be declared to settle those other conflicts.

If the meaning of "every interference" in 37 CFR § 1.601 is ambiguous, which it is not, an agency's interpretation of its own regulations is entitled to substantial deference. E.g., Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."). The agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. Id. See also Princess Cruises, Inc. v. United States, 201 F.3d 1352, 1359-60 (Fed. Cir. 2000) ("If the court must now accord Chevron deference to Customs regulations interpreting statutes, we must accord at least as much deference to that agency's interpretation of its own regulations."); Torrington Co. v. United States, 156 F.3d 1361, 1364 (Fed. Cir. 1998) ("In determining that the two Route B freight costs at issue in this case were selling expenses properly the subject of a COS adjustment, Commerce was simply interpreting its own regulations. We give substantial deference to that interpretation.").

Thus, assuming that the claims of Kanzaki's Patent Nos. 5,950,500 and 5,473,964, are drawn to the same patentable



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invention as the count in this interference, we nonetheless exercise our discretion not to add either patent to this on-going interference, to keep this interference simple, as one solely between junior party Sauer's Patent No. 5,513,717 and senior party Kanzaki's application 08/818,964. This interference can be conducted in a more speedy and inexpensive manner without the addition of Kanzaki's issued patents, and nothing makes the determination of the interference between Sauer's Patent No. 5,513,717 and Kanzaki's application 08/818,964 unjust simply because Kanzaki's patents are not included. Nor does our exercise of discretion not to add the Kanzaki patents leave Sauer without a remedy given the availability of a civil action under § 291.

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In this interference, we are addressing the conflict between Sauer's Patent No. 5,513,717 and Kanzaki's application 08/818,964, nothing more. The Sauer patent stands in the way of issuance of the Kanzaki application. An interference has been declared in order to provide an answer as to whether the Sauer patent precludes the issuance of the Kanzaki application. The proposed addition of Kanzaki patents into this interference does not help in any way in resolving the bar which Sauer may provide to the allowance of the Kanzaki application.

Moreover, if the uninvolved Kanzaki patents are added to this interference and then the interference proceeding does not continue in a way that bodes well for Kanzaki, nothing prevents Kanzaki from abandoning its involved application at any time. Then, the interference will have to be terminated with respect to the parties' involved patents. Such a development will have resulted in a significant waste of Sauer's as well as the Board's resources at the sole control of Kanzaki. That possibility gives us pause. Even if Sauer does not mind spending its resources that way, the Board must be mindful of the potential waste of its scarce resources.

During oral argument, counsel for Sauer indicated that Sauer has pending applications which can be the basis of a separate

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interference with Kanzaki's Patent Nos. 5,950,500 and 5,473,964 on the same subject matter. If there is a Sauer application pending and the examiner believes that it cannot be issued due to the existence of certain Kanzaki patents, the possibility exists that an additional interference may be declared to resolve the issue between that application and the Kanzaki patents. Thus, in addition to possible relief under § 291, it appears that Sauer has other remedies in the agency for resolving priority regarding the Kanzaki patents Sauer seeks to add to this proceeding.

3.

The Supreme Court has long ago affirmed the notion that whether an interference will be declared is determined solely upon the "opinion" of the Commissioner, and that if the Commissioner is not of such an opinion and if two patents have issued for the same invention, then the parties may resort to a civil action between themselves to address the conflict. See Ewing v. United States ex rel. The Fowler Car Co., 244 U.S. 1, 37 S. Ct. 494 (1917). In Ewing, the Court stated, 244 U.S. at 7-8, 37 S. Ct. at 496:

Section 4904, Rev. Stat. Comp. Stat. 1913, § 9449 provides: "Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with an unexpired patent, he shall give notice thereof to the

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applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention.  
(Emphasis in original.)

Similar language is contained in 35 U.S.C. § 135(a) which, in pertinent part, states:

Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, an interference may be declared and the Commissioner shall give notice of such declaration to the applicants, or applicant and patentee, as the case may be.

In Ewing, supra, the Commissioner declined to declare an interference between two applications claiming the same invention. Some of the same arguments advanced by party Sauer in this case were addressed by the Supreme Court. For instance, the Court stated, 37 S.Ct. at 497:

[P]etitioner [the junior party applicant desiring the declaration of an interference] contends that "there is a fundamental and basic right of opposition on the part of any applicant, whether junior or senior, to prevent the wrongful grant of a patent to his opponent." . . . There indeed seems to be a less personal right claimed, -- the right of opposition in the interest of the public, displacing the superintendency of the Commissioner constituted by the law. It is to be remembered that the law gives the Commissioner both initial and final power. It is he who is to cause the examination of an asserted invention or discovery and to judge of its utility and importance; [footnote omitted] it is he who is to judge (be of opinion) whether an application will interfere with a pending one; [footnote omitted] and it is he who, after an

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interference is declared and proceedings had, is the final arbiter of its only controversy, priority of invention. [Footnote omitted]

The contentions of petitioner put these powers out of view, -- put out of view the fact that the so-called "judgment of record" is, as the action of the Commissioner may be said to be, but a matter of administration. A suit in equity may follow and be instituted by either party, and even in it nothing can be determined but priority of invention. . . .

Such suit, therefore, is the judicial remedy the law provides. Section 4904 (Comp. Stat. 1913, § 9449) concerns and regulates the administration of the Patent Office, and the utility of the discretion conferred upon the Commissioner is demonstrated by his answer in this case.

The situation is similar today. Discretion is conferred upon the Director through 35 U.S.C. § 135(a), and either Sauer or Kanzaki may initiate a civil action under 35 U.S.C. § 291 to resolve the issue of two interfering patents.

4.

We exercise our discretion not to add Kanzaki's Patents to this interference, for still yet another reason, i.e., Sauer's Motions 6 and 7 suffer from a procedural defect. Note that Paragraph 13 of the NOTICE DECLARING INTERFERENCE states in rather plain terms (Paper 1, page 10):

Arguments presented in one paper shall not be incorporated by reference to another paper.

A footnote associated with ¶ 13 explicitly states (Paper 1,

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page 10 n.7):

The purpose of this requirement is to minimize the chance that an argument will be overlooked and to maximize the efficiency of the decision-making process.

The entirety of Sauer's substantive analysis in Motion 6 comparing the claimed subject matter of Kanzaki's Patent No. 5,473,964 and the count of this interference is reproduced below:

That the subject matter defined by the claims in the Okada [Kanzaki] '964 patent is not patentably distinct from the subject matter defined by Louis' claim 1 is demonstrated in section V of the first 37 CFR 1.639(b) declaration of Staffan I. Kaempe.

The entirety of Sauer's substantive analysis in Motion 7 comparing the claimed subject mater of Kanzaki's Patent No. 5,950,500 and the count of this interference is reproduced below:

That the subject matter defined by the claims in the Okada [Kanzaki] '500 patent is not patentably distinct from the subject matter defined by Louis' claim 1 is demonstrated in section VI of the first 37 CFR 1.639(b) declaration of Staffan I. Kaempe.

Party Sauer, contrary to ¶ 13 of the NOTICE DECLARING INTERFERENCE, has incorporated "arguments" from the first Staffan Kaempe declaration (Ex 2018) into Sauer's motions 6 and 7. Sauer misperceives the role of motions and evidence. Declarations are evidence. A motion is supposed to (1) lay out all relevant facts, with reference to the evidence which supports the facts, and (2) present an argument why the facts justify any relief

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requested in the motion. In this case, the parties were also given express notice in the NOTICE DECLARING INTERFERENCE (Paper No. 1, Paragraph No. 13) that incorporation by reference is not permitted. The following statement in DeSilva v. DiLeonardi, 181 F.3d 865, 867 (7th Cir. 1999), is especially fitting here:

Even when a litigant has unused space (as appellants did not [footnote omitted]), incorporation is a pointless imposition on the court's time. A brief must make all arguments accessible to the judges, rather than ask them to play archeologist with the record.

Sauer's Motions 6 and 7 do not themselves identify any difference between the claims of Kanzaki's Patent Nos. 5,950,500 and 5,473,964 and the count of this interference. Nor do they themselves explain why the claims of Kanzaki's Patent Nos. 5,950,500 and 5,473,964 would have been obvious from the subject matter of the count in this interference. This procedural defect in Sauer's Motions 6 and 7 is an independent ground for our exercising discretion not to add Kanzaki's Patent Nos. 5,950,500 and 5,473,964 to this on-going interference.

C. Conclusion

For all of the foregoing reasons, party Sauer's Motions 6 and 7 are herein dismissed.

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BRUCE H. STONER, Jr., Chief )  
Administrative Patent Judge )

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FRED E. McKELVEY, Senior )  
Administrative Patent Judge )

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RICHARD E. SCHAFER )  
Administrative Patent Judge )

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JAMESON LEE )  
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