

## § 41.206

agreement be kept separate from the interference file. The request must be filed with or promptly after the agreement is filed.

(d) *Access to agreement.* Any person, other than a representative of a Government agency, may have access to an agreement kept separate under paragraph (c) of this section only upon petition and on a showing of good cause. The agreement will be available to Government agencies on written request.

### § 41.206 Common interests in the invention.

An administrative patent judge may decline to declare, or if already declared the Board may issue judgment in, an interference between an application and another application or patent that are commonly owned.

### § 41.207 Presumptions.

(a) *Priority*—(1) *Order of invention.* Parties are presumed to have invented interfering subject matter in the order of the dates of their accorded benefit for each count. If two parties are accorded the benefit of the same earliest date of constructive reduction to practice, then neither party is entitled to a presumption of priority with respect to the other such party.

(2) *Evidentiary standard.* Priority may be proved by a preponderance of the evidence except a party must prove priority by clear and convincing evidence if the date of its earliest constructive reduction to practice is after the issue date of an involved patent or the publication date under 35 U.S.C. 122(b) of an involved application or patent.

(b) *Claim correspondence.* (1) For the purposes of determining priority and derivation, all claims of a party corresponding to the count are presumed to stand or fall together. To challenge this presumption, a party must file a timely substantive motion to have a corresponding claim designated as not corresponding to the count. No presumption based on claim correspondence regarding the grouping of claims exists for other grounds of unpatentability.

(2) A claim corresponds to a count if the subject matter of the count, treated as prior art to the claim, would have

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anticipated or rendered obvious the subject matter of the claim.

(c) *Cross-applicability of prior art.* When a motion for judgment of unpatentability against an opponent's claim on the basis of prior art is granted, each of the movant's claims corresponding to the same count as the opponent's claim will be presumed to be unpatentable in view of the same prior art unless the movant in its motion rebuts this presumption.

### § 41.208 Content of substantive and responsive motions.

The general requirements for motions in contested cases are stated at § 41.121(c).

(a) In an interference, substantive motions must:

(1) Raise a threshold issue,

(2) Seek to change the scope of the definition of the interfering subject matter or the correspondence of claims to the count,

(3) Seek to change the benefit accorded for the count, or

(4) Seek judgment on derivation or on priority.

(b) To be sufficient, a motion must provide a showing, supported with appropriate evidence, such that, if un rebutted, it would justify the relief sought. The burden of proof is on the movant.

(c) *Showing patentability.* (1) A party moving to add or amend a claim must show the claim is patentable.

(2) A party moving to add or amend a count must show the count is patentable over prior art.

## PART 42—TRIAL PRACTICE BEFORE THE PATENT TRIAL AND APPEAL BOARD

### Subpart A—Trial Practice and Procedure

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42.1 Policy.

42.2 Definitions.

42.3 Jurisdiction.

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