

LATE STAGE CONTINUING FILINGS: DR. TAFAS' CHALLENGE*

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I. OVERVIEW

Within twenty-four hours of publication of the *Continuation Rules*¹ a disgruntled inventor challenged to the authority of the U.S. Patent and Trademark Office (PTO) in *Tafas v. Dudas*.² This set of circumstances provides a good opportunity to rethink the role of the continuing application in U.S. patent procurement strategies. There is, indeed, basis for much of the outcry of the patent community against the imposition of arbitrary limits on the number of continuing applications that may be filed; yet, there also is some justification to restrict some of the varying uses of continuing applications – perhaps best manifested by the factual setting of the *Tafas* case itself.

This paper commences with the special problems of the biotechnology field where multiple priority filings are a fact of life, in some cases a necessity to obtain full and fair protection. *See* § II, *Global Biotechnology Needs Multiple Priorities*. Late stage continuing applications are also the reality today for biotechnology. This is particularly true where it is necessary to provide confirmation of a therapeutic indication only after testing approvals in cancer and other cutting edge, life saving areas. Provision of a distinguishing utility for purposes of an unobviousness showing has also received judicial approval. *See* § III, *Special Late Stage Continuing Application Filings*.

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¹ The more formal title is: *Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications*, 72 Fed. Reg. 46716 (August 21, 2007).

² *Tafas v. Dudas*, E.D. Va., filed August 22, 2007 (herein: "Original Complaint"). This has now been superseded by a First Amended Complaint.

Yet, more commonly, there are abuses of late stage continuing filings where claims keyed to new matter are presented too late, after a statutory bar event has occurred. *See* § IV, *Post-Statutory Bar Considerations*. Perhaps the most obvious pitfall for the unwary is where the patent applicant has failed to claim all the obvious variants of his basic technology in his original application. The improvements which are obvious from – or “stem from” – the basic application need to be included in the original application or in any event be part of an application filed before a statutory bar event creates a bar to patenting. *See* § IV-A, *Technical Trap, the “Obvious” Continuing Invention*.

A better approach during the late stage is to consider a filing that does not attempt to claim priority based upon the original application. *See* § IV-B, *Proper Late Stage Filing Strategies*.

Currently, a test case is pending in the Eastern District of Virginia that implicitly challenges the *Steenbock* and *Ruscetta* philosophy. *See* § V, *Tafas' Inventions “Stem[] from” a Parent Filing*.

II. GLOBAL BIOTECHNOLOGY NEEDS MULTIPLE PRIORITIES

In a first-to-file world – the reality everywhere outside the United States – a global patent filing strategy demands the option of filing numerous priority applications both inside and outside the Paris Convention year. The goal, here is to gain the earliest priority date for every aspect of an evolving biotechnology invention, both as to offensive and defensive rights. The priority goals are entirely independent of any issue of deferred examination or gaining the opportunity to craft amendments to capture intervening technology.

Thus, for purposes of global foreign protection for an evolutionary biotechnology invention it is absolutely essential to have the option to file multiple priority applications.³ This starts with plural filings during the Paris Convention priority year.⁴

³ Harold C. Wegner, *Patent Harmonization*, Am. L. Inst.-Am. Bar Ass'n – Cal. State Bar (Nov. 8, 1990), C554 A.L.I. 171 (1990)[Westlaw JLR database] (“Harmonization”)

⁴ The Paris Convention facilitates filing multiple priority applications and combining them into a jumbo application with varying priorities based upon when particular disclosure first appears. Harmonization, *supra*, § II-E, *Plural Prior Applications* (discussing Paris Convention Art. 4(F)). In

It has been hornbook law under the *Allopurinol* case for countries strictly interpreting the Paris Convention that priority should be denied where an application “stems from” a basic application that does not disclose the full scope of the claimed invention;⁵ which is consistent with domestic American priority principles.⁶

Even where there is a statutory bar event that would bar a claim in a later filing for an *offensive* patent right, it still may make good sense to claim priority to an earlier application for *defensive* patent rights.⁷

the early years of the international patent regime, there was no express provision permitting this practice which was internationally codified as part of the 1958 Lisbon Revision to the Paris Convention (1958).

⁵ Harmonization, *supra*, § II-G, *Support in the Priority Document* (interpreting Art. 4H of the Paris Convention)(1934 London Revision)(“The leading case interpreting Article 4H is the 1974 German Bundesgerichtshof decision, *Allopurinol*, 7 IIC 105 (1976), where a British ‘home country’ application disclosed the drug, *Allopurinol*, and an operative method for making that drug. The German application filed under the Paris Convention claimed several methods of making Allopurinol. Between the filing of the priority application and the German application the inventors published an article disclosing matters within the scope of their British priority application. Since everything disclosed in the intervening publication was identically disclosed in the British priority application, the argument at first blush could be made that the intervening publication was fully antedated. Indeed, it was. But, this was not the relevant inquiry: Since the relevant claims of the German application that included new methods for making Allopurinol were not supported in the British priority application, such claims could not benefit from priority, and such claims stood naked as of the German filing date, and thereby were killed by the intervening British scientific publication.”)

⁶ Harmonization, *supra*, § II-G., *Support in the Priority Document* (The Allopurinol case, was decided under the old German law, superseded by the law introduced to parallel the European Patent Convention, and is cited, here, as illustrative of the scope of the Paris Convention and not necessarily existing European law.)

⁷ See Harmonization, *supra*, § II-H, *Defensive Priority Patent Right* (discussing the *defensive* patent right of Paris Convention Art. 4B of the 1934 London Revision). Thus, “[t]he key is to file a patent application in the United States quickly to a single enabled embodiment of an area of new technology, and then file counterparts under the Paris Convention in Europe and Japan. Absent derivation, once automatically published at 18 months from the priority date, a Kokai – the published Japanese application – constitutes an absolute bar in Japan to any third party from obtaining a valid claim that reads on that single enabled embodiment. This patent-defeating effect is retroactive to the U.S. (or other) home country filing date.” *Id.*

With the advent of the Patent Cooperation Treaty (PCT), an optimum filing strategy for global protection includes numerous filings,⁸ including filings in the first year,⁹ both for offensive but also *defensive* patent rights.¹⁰

As noted nearly a full generation ago, “[u]ntil the United States does join [the first-to-file international] system, it is incumbent on every biotechnology company to unilaterally adopt the ways of the international system as to fail to do so seriously comprises an American company's patent rights in Europe, Japan, Canada and virtually everywhere else outside our national borders.”¹¹

III. SPECIAL LATE STAGE CONTINUING APPLICATION FILINGS

There are many *correct* reasons for a late stage continuing application filing.

Among such reasons are the inclusion in the specification of evidence confirming the operability of an invention. In the *Jolles* case an anti-cancer drug was denied by the Examiner because of a lack of proof of utility.¹² It took several years between the parent filing in 1968 and the completion of testing seven years later to verify the correctness of the utility statement.¹³ Manifestly, it would be entirely unethical to test a genus of cancer agents solely for patent purposes; rather, the testing should follow the purpose of testing of therapeutic effect.¹⁴

⁸ See Harmonization, *supra*, § IV-B, *Euro-PCT for a Premium Treatment*.

⁹ See Harmonization, *supra*, § IV-B-1, *U.S. (or Other) Priority Filings*.

¹⁰ *Id.*, *Creating a Patent-Defeating Effect*.

¹¹ Harmonization, *supra*, § IX, *Conclusion*.

¹² *In re Jolles*, 628 F.2d 1322 (CCPA 1980).

¹³ *Jolles*, 628 F.2d at 1324 (discussing declaration submitted January 31, 1975). In between there were several filings. *Jolles*, 628 F.2d at 1322 n.1 (“The claims appear in [an] application ... filed January 27, 1976, [which] is a division of [an application] filed November 20, 1972... which in turn is a continuation-in-part of [an application] filed October 7, 1971...which in turn is a continuation-in-part of [an application] filed October 17, 1968[.]”).

¹⁴ In the *Jolles* case itself, the principal means to present the evidence confirming the chemotherapeutic utility was by means of showings submitted under 37 CFR § 1.132 in the continuing applications.

Or, an applicant may also add information that shows a second utility upon which unexpected results may be shown. Thus, unobviousness was denied in the *Davies* case because unexpected results were keyed to a utility not disclosed in the specification as filed¹⁵ yet the court said that under *Kirchner* it would entirely appropriate to file a continuation-in-part adding the distinguishing utility.¹⁶

Or, additional species of an invention within the scope of an already disclosed genus may be discovered that should be included for defensive rights to preclude a third party from obtaining a patent to such species.

In each case, here, the key point is that the continuing application is supported by a parent disclosure that permits reliance upon that parent disclosure for priority under 35 USC § 120 if subject matter is to be *claimed*.

IV. POST-STATUTORY BAR CONSIDERATIONS

A. Technical Trap, the “Obvious” Continuing Invention.

There are also many *incorrect* reasons to file a continuing application, particularly to claim an innovation obvious from – or stemming from – the basic technology of a parent application, but where this obvious or derived newer technology lacks a written description in the original parent. Or, a preferred range of ingredients may be found that encompasses the original examples but where that

¹⁵ *In re Davies*, 475 F.2d 667 (CCPA 1973).

¹⁶ *Davies*, 475 F.2d at 672-73 (“We think such a compromise is possible as we see no impediment to the present appellants’ refiling their application and incorporating a discussion of the allegedly unobvious properties while retaining the effective date of the application involved here through § 120. That section requires that the prior application comply with the conditions set forth in the first paragraph of § 112 as regards the invention claimed in the later application. See *Martin v. Johnson*, 59 CCPA 769, 454 F.2d 746, 172 USPQ 391 (1972). As we have already noted, appellants’ application has ostensibly met the requirements of § 112 as no rejection has been made based upon that section. Since the subject matter to be claimed in a subsequently filed application would be identical to that claimed here, the later application would be entitled to the benefit of the filing date of the application we now consider. See *In re Kirchner*, 305 F.2d 897 (CCPA 1962). We certainly do not think the newly disclosed properties alter the subject matter sought to be patented.”)

range is not described in the parent. In each of these situations, the only proper time frame for filing a continuing application to achieve these goals is before the earlier of either (i) the first anniversary of publication, public use or other divulgation under 35 USC § 102(b); or (ii) the grant of a foreign counterpart patent where the foreign counterpart was filed more than one year before. In each of these situations, it is fatally flawed to claim any of these inventions to the extent that they are barred by intervening events under one of the two cited subsections of 35 USC § 102.

The classic situation of the improper use of a late stage continuation-in-part is manifested repeatedly in situations where the patent applicant originally discloses a narrow invention involving a species or a narrow genus, and then later – long after the publication of a foreign counterpart application – determines that *additional* species or a broader genus “stems from” or is “obvious” from the original species invention. Here, a continuation-in-part application is filed with added disclosure to support a broader genus. The rationale – misguided as it may be – is that because it is the *applicant's* species that is disclosed in the parent application the genus is not blocked in a continuation-in-part because the only intervening disclosure is the *applicant's* foreign counterpart that discloses the same species.

This reasoning is entirely fallacious where the continuation-in-part is filed after the statutory bar date anniversary of the publication of the foreign counterpart which discloses the same species. The claim of the continuation-in-part may be broader than the original claims, but nevertheless *reads on* the species of the parent – and the foreign counterpart. Thus, unless the continuation-in-part genus is entitled to priority based upon the parent, it is *barred* under 35 USC § 102(b) based upon the foreign counterpart publication of the species corresponding to the parent species. And, of course, if there is no written description basis for the generic claim in the parent, then the continuation-in-part application stands naked as of the continuation-in-part filing date and is barred. There is nothing new about this bar which is sometimes referred to as a “Ruscetta bar”.¹⁷

¹⁷ See Harold C. Wegner, *Patent Law Simplification and the Geneva Patent Convention*, 14 AIPLA Q.J. 154, 172 (1986) (“In [*In re Ruscetta*, 255 F.2d 68 (CCPA 1958)], a United States application was

The classic *Ruscetta* situation is manifested by the *Steenbock* case from more than seventy years ago.¹⁸ The original application supported a claim by Dr. Steenbock to a process of treating a *yeast*.¹⁹ Dr. Steenbock then published his invention in scientific journals and after the statutory bar date presented a claim to a process of treating *any fungus*.²⁰

The broader claim to treatment of any fungus was barred: “The principle is well established in chemical cases, and in cases involving compositions of matter, that the disclosure of a species in a cited reference is sufficient to prevent a later applicant from obtaining generic claims, although the disclosure in an application of a species may not be a sufficient basis for a generic claim.”²¹

The result of *Steenbock* is considered unfair to some. Yet, the law of *Steenbock* and *Ruscetta* has been maintained through the years:

filed with disclosure only of a narrow genus. Thereafter a foreign counterpart patent was published that was virtually identical in scope and content to the basic U.S. application. More than a year after this foreign counterpart publication, a continuation-in-part (CIP) application was filed with a claim broader than the originally disclosed genus. The court properly held that the generic claim was barred under [35 USC §] 102(b). Because the claim included matter outside the scope of the parent, the generic claim was not entitled to the benefit of the filing date of the parent application under 35 U.S.C. § 120. Yet the publication of the foreign counterpart barred the broader claim under Section 102(b) because of the basic principle of patent law that occurrence of species in the prior art anticipates any claim that covers or reads on that species.”).

¹⁸ *In re Steenbock*, 83 F.2d 912 (CCPA 1936).

¹⁹ Original claim 1 supported in the original disclosure: “The process of producing an antirachitically activated product which comprises: subjecting *yeast* to the action of light comprising ultra-violet rays for a period sufficient to effect substantial antirachitic activation of the yeast.”

²⁰ “The process ... which comprises subjecting *fungus material* in thinly distributed condition to irradiation by light comprising ultra-violet rays for a period sufficient to effect antirachitic activation in substantial degree.”

²¹ *Steenbock*, 83 F.2d at 913 (citations omitted).

“Appellants ... contend that ‘there is an inconsistency constituting an inequity in rejecting the claims as fully met by the [applicant’s counterpart] British patent under 35 USC 102[(b)], while at the same time holding that appellants cannot obtain the benefit of the filing date of the U.S. counterpart.’ What they are saying, in terms of the statute, is that if ‘the invention was * * * described’ in the British [counterpart] reference within the meaning of § 102(b), there must have been a ‘description of the invention’ in the corresponding grandparent application within the meaning of the first paragraph of § 112. This argument appears to overlook the law that the description of a single embodiment of broadly claimed subject matter constitutes a description of the invention for anticipation purposes (see, e.g., *In re Ruscetta*, 255 F.2d 68 (CCPA 1958)), whereas the same information in a specification might not alone be enough to provide a description of that invention for purposes of adequate disclosure. See, e.g., *In re Ahlbrecht*, [435 F.2d 908 (CCPA 1971)]. ... If the law in th[is] situation[] really produces inequities, the proper remedy is in Congress.”²²

More than thirty years after *Ruscetta*, the author of that opinion explained the *Ruscetta* doctrine yet again as the dean of the Federal Circuit:

“[A] subtle distinction [exists] between a written description adequate to *support* a claim under § 112 and a written description sufficient to *anticipate* its subject matter under § 102(b). The difference between “claim-supporting disclosures” and “claim-anticipating disclosures” was dispositive in *In re Lukach*, 442 F.2d 967 (CCPA 1971), where the court held that a U.S. “grandparent” application did not sufficiently describe the later-claimed invention, but that the appellant's intervening British application, a counterpart to the U.S. application, anticipated the claimed subject matter. As the court pointed out, “the description of a single embodiment of broadly claimed subject matter constitutes a description of the invention for anticipation purposes ..., whereas the same information in a

²² *In re Lukach*, 442 F.2d 967, 969-70 (CCPA 1971).

specification might not alone be enough to provide a description of that invention for purposes of adequate disclosure....”²³

The *Lukach* scenario is particularly revealing as it demonstrates that an originally enabled invention in some cases cannot even be *narrowed* to a meaningful subgeneric scope, absent precise written boundaries for the subgenus.

In the original *Lukach* parent case disclosure, the invention was disclosed as being a solid elastomeric copolymer of ethylene and propylene having but without a specific Mw/Mn ratio being stated in the claims. In the original parent case, the applicants clearly did have a working example with a Mw/Mn ratio of 2.6. In the *claims* introduced for the first time in the continuing application, the invention was expressed as covering a narrow subgeneric claim just slightly broader than the working example, but clearly far, far narrower than the original parent case which had no limitation as to this feature: Thus, the claim now expressed “[a] solid elastomeric copolymer of ethylene and propylene having ... a Mw/Mn ratio of at least 2.0 and less than about 3.0....”

Faced with denial of priority based upon the parent case, appellants “point[ed] out that the examiner has agreed that one of the working examples in the [parent case] inherently describes a co-polymer which would have a Mw/Mn ratio of 2.6. They then urge[d] that ... *In re Risse*, 378 F.2d 948 (CCPA 1967), stands for the proposition that an applicant is entitled, as to a claimed subgenus, to the benefit of the filing date of a parent application if the parent discloses a genus wholly encompassing the claimed subgenus and also discloses a species within that subgenus.”²⁴

The claim was held invalid because the foreign counterpart publication corresponding to the parent case – also with the 2.6 species disclosure – anticipates the subgenus: “We are thus left with the single example inherently disclosing a copolymer having a Mw/Mn ration of 2.6. This single example does not alone provide support for the recited range from 2.0 to 3.0, and nothing has been brought

²³ *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1562 (Fed. Cir. 1991)(Rich, J.)(quoting *Lukach*, 970 (citations omitted)).

²⁴ *Lukach*, 442 F.2d at 969.

to our attention to show that any other language in the [parent case], taken together with the knowledge of persons skilled in the art, points to the recited range. Accordingly, the [parent case] does not, either expressly or inherently, disclose the invention now claimed, and appellant is not entitled to the benefit of the grandparent filing date. It follows that appellants cannot overcome the § 102(b) time bar arising from publication of the [British counterpart of the parent case].”²⁵

While *Lukach* is an earlier case, it has stood the test of time. As pointed out in *Herscher* – citing *Lukach*, “[i]t is now well settled law that disclosure of a species is insufficient to provide descriptive support for a generic or sub-generic claim[.]”²⁶

The *Lukach* result is seen in some quarters as being unfair, because the “prior art” applied against the narrower 2.0~3.0 subgenus was held anticipated by the foreign counterpart of the parent case which disclosed the species 2.6 identical to the support in the parent case. But, the reason that the intervening foreign counterpart is a proper bar is explained in *Van Langenhoven*, where a claimed “breech” was not disclosed in the parent whereas other elements of the invention were properly disclosed in the parent:

“Since appellant cannot claim the benefit of the filing date of a [] prior application as to the breech claims, the [intervening, published foreign counterpart] patent is an available [35 USC] § 102(b) reference. It is of no avail to appellant that the [intervening, published foreign counterpart] patent is his own. See *In re Hafner*, 410 F.2d 1403 (1969); *In re Ruscetta*, 255 F.2d 687 (1958). In addition, the fact that some of the elements of the breech claims have the support of the parent and [the intervening, published counterpart] foreign applications does not change the result. As to given claimed subject matter, only one effective date is applicable. Whether or not the requirements of [35 USC §] 120 are satisfied is

²⁵ *Id.*

²⁶ *In re Herschler*, 591 F.2d 693, 696 (CCPA 1979)(citing *In re Ruscetta*, 255 F.2d 687 (CCPA 1958), *In re Lukach*, 442 F.2d 967 (CCPA 1971); *In re Smith*, 458 F.2d 1389 (CCPA 1972)).

determinative of that date, and in the case of the breach claims, those requirements have not been met. Accordingly, the [intervening, published foreign counterpart] patent may properly be relied upon for all it fairly teaches to establish obviousness, under 35 U.S.C. § 103, of the subject matter defined in the breach claims.”²⁷

A loose understanding of the mechanism of priority also extends to the concept that a provisional application will serve as a basis for establishing priority for an invention that is not disclosed in the provisional in a manner meeting the priority requirements keyed to 35 USC § 112, ¶ 1. This myth was shattered in *New Railhead*, where the court noted that “a provisional application need only include a specification conforming to the requirements of 35 U.S.C. § 112 ¶ 1 and at least one drawing filed under § 113; no claims are required. 35 U.S.C. §§ 111(b)(1), (2). However, for the non-provisional utility application to be afforded the priority date of the provisional application, ... *the written description of the provisional must adequately support the claims of the non-provisional application*[.]”²⁸

B. Proper Late Stage Filing Strategies

Particularly where there is already a statutory bar in place against any claim that is based upon new matter, there is an advantage to filing a claim in a new application without parent priority.

Here, what *would have been* a continuation-in-part application can be filed as a *provisional* application, except that the claims of the new provisional are limited to the new matter. Plural provisionals of this type can be filed within one year of the first of such provisionals: On the anniversary of the first such provisional, a new application can be filed that claims priority based upon each of these provisionals. The provisionals do not count toward the *new* two continuation limit: The nonprovisional that is filed on the first anniversary is a brand new case, a new “parent” for a new generation of continuing filings.

²⁷ *In re Van Langenhoven*, 458 F.2d 132, 137 (CCPA 1972).

²⁸ *New Railhead Mfg., L.L.C. v. Vermeer Mfg. Co.*, 298 F.3d 1290, 1294 (Fed. Cir. 2002)(Michel, J.).

There are two principal benefits to the filing of what amounts to a second generation of patent applications beyond compliance with the Continuation Rules.

First, to the extent that the first provisional in this second generation is filed within eighteen months of the earliest filing of the ultimate parent application, it is likely that this date will be *prior* to the publication of the first application at 18 months from the priority date. To the extent that this date is the first publication (or public use or other patent-defeating divulgation), then this second generation provisional can be basis for a second round of *global* filings. Thus, a Patent Cooperation Treaty (PCT) application can be filed for global rights on the first anniversary of the priority filing to start a new waving of global patent protection.

Second, the twenty year patent term for the second generation application will start with a fresh clock, whereas if the matter were part of a continuing application based upon the first set of applications, the term would be capped at twenty years from the earlier priority date.

V. DR. TAFAS' INVENTIONS "STEM[] FROM" A PARENT FILING

Within twenty-four hours of the publication of the *Continuation Rules*, a certain Dr. Tafas brought suit to block implementation of the new rules because of his concern that he would not be able to file patent applications on future innovations "stemming from" his basic application.²⁹

The basic thrust of Dr. Tafas' theory as stated in his *original* complaint is that because he has disclosed his basic invention in his original application he may file unlimited number of applications to future, "*potential* inventions that could flow from [his] original application. [T]here could be a number of valuable inventions that flow from [his] original work for which he will not be able to claim priority under the [Continuation Rules]..."³⁰ The plaintiff's theory is that he has a right to file continuing applications to later inventions that are based upon he

²⁹ *Tafas, supra*, p. 1 n.2.

³⁰ *Tafas* p.1 n.2, Original Complaint ¶ 40; emphasis added.

original “inventive concepts”³¹

In his first amended complaint, Dr. Tafas restates his position: “Under the law as it existed for over 100 years prior to the USPTO’s promulgation of the Revised Rules, an inventor was entitled to file an application to patent his original ideas and, *if at some future time the inventor discovered other patentable claims* arising from his original application, the inventor could file an application for a continuation ... application to patent those claims as well. There was no limit to the number of such continuing applications an inventor could file prior to the promulgation of the [Continuation] Rules.”³²

He further explains his understanding that “[t]he right to freely file multiple continuing applications is extremely valuable to an inventor like Dr. Tafas, *inter alia*, because the continuing application is deemed to relate back to the date of the inventor’s original application. Thus, *the filing of a continuation provides an inventor with a priority right against all others concerning patented claims stemming from the inventor’s original continuing application.*”³³

It remains to be seen whether Dr. Tafas is able to distinguish his situation from the rulings in *Steenbock* and *Ruscetta* that deny priority unless there is a full disclosure of the invention in the original application.

³¹ *Tafas* p.1 n.2, Original Complaint ¶ 39 (Dr. Tafas complains that he “will suffer an irreparable injury if an injunction is not granted as he has disclosed all the research related to his invention in the Tafas Patent Application believing he would be able to file multiple voluntary-divisional continuations and continuation-in-part applications based on those inventive concepts.”).

³² *Tafas’ First Amended Complaint*, § B, *Dr. Tafas Has Been Injured as a Result of the Enactment of the Revised Rules*, ¶ 21 (pp. 7-8)(emphasis added).

³³ *Tafas’ First Amended Complaint*, § B, *Dr. Tafas Has Been Injured as a Result of the Enactment of the Revised Rules*, ¶ 22 (p. 8).

VI. CONCLUSION

Surely, the *Continuation Rules* can be justly criticized as the worst rulemaking in the past thirty years. Indeed, there may also be basis to challenge the Director's authority to promulgate the current cap on continuing applications. Yet, constructively, the *Continuation Rules* may expose some weaknesses of continuation practice and lead to a better understanding of the proper use of the continuing application in daily practice.