

Chapter 1200 Appeal

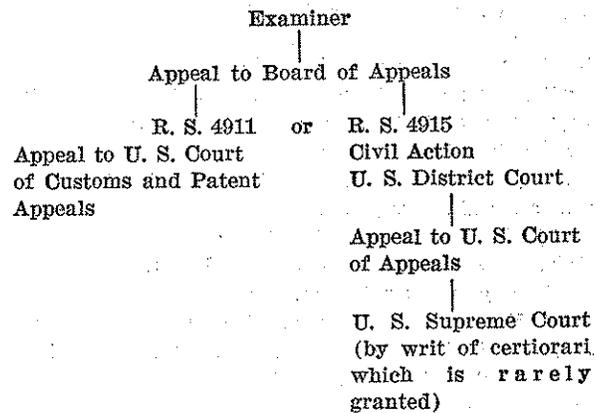
- 1201 Introductory
- 1202 Ex Parte Review of Matters Pertaining to Merits
- 1203 Constitution of Board
- 1204 Administrative Handling
- 1205 Prerequisites for Appeal
- 1206 Time for Filing Brief
- 1207 Amendment Filed With or After Appeal But Before Examiner's Answer
- 1208 Examiner's Answer
- 1208.01 Discovery of New Ground of Rejection After Appeal
- 1208.02 Withdrawal of Final Rejection
- 1209 Oral Hearing
- 1210 Actions Subsequent to Examiner's Answer But Before Board's Decision
- 1211 Remand by Board to Consider Amendment
- 1212 Remand by Board to Consider Affidavits
- 1213 Decision by Board
- 1213.01 Recommendations of Board
- 1214 Actions following Decision by Board
- 1214.01 New Ground of Rejection
- 1214.02 Procedure after Decision
- 1214.03 Rehearing and Reconsideration
- 1214.04 Examiner Reversed
- 1214.05 Cancellation of Withdrawn Claims
- 1214.06 Examiner Sustained in Whole or in Part
- 1214.07 Reopening of Prosecution
- 1215 Withdrawal or Dismissal of Appeal
- 1215.01 Withdrawal of Appeal
- 1215.02 Claims Standing Allowed
- 1215.03 Partial Withdrawal
- 1215.04 Failure to Prosecute Appeal
- 1215.05 Case Before the Court
- 1216 Appeals to Courts
- 1216.01 To Court of Customs and Patent Appeals
- 1216.02 Suits under R. S. 4915

1201 Introductory

The Patent Office in administering the Patent Laws makes many decisions of a discretionary nature which the applicant may feel deny him the patent protection to which he is entitled. The differences of opinion on such matters can be justly resolved only by prescribing and following judicial procedures. Where the differences of opinion concern the denial of patent claims because of prior art or material deficiencies in the disclosure set forth in the application or because several divisible inventions are joined in the same case, the questions thereby raised are said to relate to merits, and appeal procedure within the Patent Office and to the courts has long been provided by statute.

The line of demarcation between appealable matters for the Board and petitionable matters for the Commissioner should be carefully observed. The Board will not ordinarily hear a question which it believes should be decided by the Commissioner, and the Commissioner will not ordinarily entertain a petition where the question presented is an appealable matter (except, of course, when he is sitting as one member of a Board of Appeals).

1202 Ex Parte Review of Matters Pertaining to Merits



1203 Constitution of Board

Sec. 482 R. S.; 35 U. S. C. 7, provides for constitution of the Board of Appeals as follows:

The Commissioner of Patents, the first assistant commissioner, the assistant commissioners, and the examiners in chief shall constitute a board of appeals, whose duty it shall be, on written petition of the appellant, to review and determine upon the validity of the adverse decisions of examiners upon applications for patents and for reissues of patents and in interference cases. Each appeal shall be heard by at least three members of the board of appeals, the members hearing such appeal to be designated by the commissioner.

1204. Administrative Handling

Ex parte appeals to the Board of Appeals and all papers relating thereto will be forwarded by the Mails and Files Branch directly to the Board of Appeals for docketing. On receipt of the brief, the case is sent to the Primary Examiner having jurisdiction of the case for the answer required by Rule 193.

The dates of the appeal and brief and of the Examiner's answer thereto are entered in the clerk's register. When the Examiner's answer is mailed, the file, together with three photographic copies of the drawings, if any, is returned to the Board of Appeals, which sets the case for hearing. It is not necessary to send copies of the references relied upon as these are ordered by the Administrative Officer to the Board.

(Order No. 2893, Revised.)

If the brief is not filed within the time designated by Rule 192, the Administrative Officer to the Board will notify the appellant that the appeal stands dismissed.

1205 Prerequisites for Appeal

Rule 191 Appeal to Board of Appeals. (a) Every applicant for a patent or for reissue of a patent, any of the claims of which have been twice rejected, or who has been given a final rejection (rule 113), and every applicant who has been twice required to divide his application (rule 143), may, upon the payment of the fee required by law, appeal from the decision of the primary examiner to the Board of Appeals within the time allowed for response.

(b) The appeal must identify the rejected claim or claims appealed, and must be signed by the applicant or his duly authorized attorney or agent.

(c) Except as otherwise provided by rules 144 and 206, appeal when taken must be taken from the rejection of all claims under rejection which applicant proposes to contest. Questions relating to matters not affecting the merits of the invention may be required to be settled before an appeal can be considered.

It is to be observed that such appeal to the Board lies only from a rejection of claims, a requirement to divide being considered as a rejection of the claims for misjoinder of invention.

In addition, such appeal must include all the finally rejected claims or claims twice rejected in the case at the time appeal is taken and the appeal will not ordinarily be forwarded where only some of the rejected claims have been twice or finally rejected. *Ex parte Brown*, 1902 C. D. 51; 98 O. G. 1705.

Exceptions:

A. Rule 144 permits an appeal from a final requirement for division in advance of any further action on the claims. The prosecution of the elected claims may be continued during such appeal.

B. Rule 206 permits partial appeal in cases where there are finally rejected claims copied from a patent.

1206 Time for Filing Brief

Rule 192 Appellant's brief. The appellant shall, within sixty days from the date of the appeal, or within six months from the date of the action appealed from if such time is later, file a brief of the authorities and arguments on which he will rely to maintain his appeal, including a concise explanation of the invention and a copy of the claims involved, at the same time indicating if he desires an oral hearing.

On failure to file the brief within the time allowed, the appeal shall stand dismissed.

Where the brief is not filed but an amendment is presented within the period allowed for filing the brief which places the case in condition for allowance, the amendment may be entered as the application retains its pending status during said period. See 1215.01 and 1215.02.

1207 Amendment Filed With or After Appeal but Before Examiner's Answer

If an amendment is filed with or after appeal but before the Examiner's answer is forwarded, it should be considered at the time of preparing the answer. Since an applicant has the right to petition from an adverse holding as to the entry of any amendment, irrespective of the status of the case at the time of filing the amendment, he is entitled to be advised as to its entry or non-entry. Such notification may be given in the Examiner's answer if the amendment is entered; but where entry is denied, the appellant should ordinarily be advised to this effect in advance of the Examiner's answer and the preparation of the Examiner's answer delayed for twenty days to enable the appellant to petition, if he so desires, from the Examiner's refusal to admit the amendment.

However, where the amendment is presented before the filing of the brief and it can be readily determined on inspection that the amendment materially simplifies or clarifies the issues on appeal, the Examiner need not wait until he prepares the answer, but may enter the same forthwith and notify the appellant as soon as practicable in order that the appellant may be so advised before preparing the brief.

In the case of papers other than amendments, such as affidavits, the procedure with respect to their consideration should be the same.

1208 Examiner's Answer

Rule 193 Examiner's answer. (a) The primary examiner may, within such time as may be directed by the Commissioner, furnish a written statement in answer to the appellant's brief including such explanation of the invention claimed and of the references and

grounds of rejection as may be necessary, supplying a copy to the appellant. If the primary examiner shall find that the appeal is not regular in form or does not relate to an appealable action, he shall so state and a petition from such decision may be taken to the Commissioner as provided in rule 181.

(b) The appellant may file a reply brief directed only to such new points as may be raised in the examiner's answer, within twenty days from the date of such answer.

The Examiner should furnish the appellant with a written statement in answer to the appellant's brief within sixty calendar days after the filing of the brief.

The answer should contain a response to any allegations or arguments in the brief not sufficiently treated in the final action, and should call attention to any errors in appellant's copy of the claims. The Examiner should treat affidavits or exhibits in accordance with Rule 195, reporting his conclusions only on those admitted. If the Examiner finds that the applicability of the references to the appealed claims or the grounds of rejection have not been sufficiently explained in the final rejection, he should further explain the same. To the extent that is specified in Rule 106, he shall designate the particular part of each reference relied on.

The Board has authority to remand a case to the Examiner for a fuller description of the claimed invention and, in the case of a machine, a statement of the mode of operation. In certain cases where the pertinence of the references is not clear, the Board may call upon the Examiner for a further explanation.

The Board may also remand a case to the Examiner for further search where it feels that the most pertinent art has not been cited.

No soft copies of references not cited in the Examiner's answer should be left in the file.

A form suitable for such answer is as follows:

Entitled in Application	Appeal No. BEFORE THE BOARD OF APPEALS
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EXAMINER'S ANSWER

This is an appeal from the final rejection of claims 1, 3, 5, and 7 which are all the claims in the case.

(If there are allowed claims in the case this fact should be stated thus: Claims 2, 4, and 6 have been allowed. The introductory sentence would be modified to meet the situation accordingly. If appeal is also taken from a requirement to divide between certain groups of claims, that fact should also be recited in the opening paragraph.)

The references relied upon are as follows:
 Jones ----- 1, 000, 001 Jan. 3, 1910
 Smith ----- 2, 000, 002 Dec. 13, 1935

(Here follows a concise explanation of the invention claimed.)

(Following above is a discussion of the several grounds of rejection of the claims involved, and a detailed application of the references.)

Examiner.

Attorney with whom
correspondence is had.

1208.01 Discovery of New Ground of Rejection After Appeal

In the event that a reference or ground of rejection is discovered after appeal has been taken, the matter should be called to the attention of the Supervisory Examiner.

1208.02 Withdrawal of Final Rejection

The Examiner may withdraw the final rejection at any time prior to the hearing. It is possible that after reading the brief that Examiner may be convinced that some or all of the finally rejected claims are allowable. Where he is of the opinion that some of the claims are allowable he should so specify in the Examiner's answer and confine his arguments to the remaining rejected claims. If he finds, upon reconsideration, that all the rejected claims are allowable, or where the applicant in his brief withdraws the appeal as to some of the rejected claims and the Examiner finds the remaining claims to be allowable, he should notify the Administrative Officer of the Board of this fact so that the appeal may be removed from the records. See 706.07 (c) to 706.07 (e).

1209 Oral Hearing

Rule 194 Hearing. If no request for oral hearing has been made by the appellant, the appeal will be assigned for consideration and decision. If the appellant has requested an oral hearing, a day of hearing will be set, and due notice thereof given to the appellant. Hearing will be held as stated in the notice, and oral argument will be limited to one-half hour unless otherwise ordered before the hearing begins.

[Old Rule 137]

1210 Actions Subsequent to Examiner's Answer but Before Board's Decision

JURISDICTION OF BOARD

With the mailing of the Examiner's answer on appeal, jurisdiction of the case passes to the

Board of Appeals; and any amendment or affidavit filed thereafter but prior to the decision of the Board will be considered by the Examiner only in the event the case is remanded to him by the Board.

DIVIDED JURISDICTION

Where appeal is taken from the final rejection of a copied patent claim or claims only, jurisdiction of the rest of the case remains with the Examiner, and prosecution of the unallowed claims may proceed as though the entire case was under the jurisdiction of the Examiner.

Divided jurisdiction is also present in those cases where appeal is taken from a final requirement for division only. The prosecution of the claims to the elected claims may simultaneously proceed before the Examiner as if no appeal had been taken.

1211 Remand by the Board to Consider Amendment

There is no obligation resting on the Board to consider new or amended claims submitted while it has jurisdiction of the appeal. *Ex parte Moore*, 1923 C. D. 13; 307 O. G. 4. In re *Sweet*, 1943 C. D. 535; 556 O. G. 726. In re *Shea*, 1944 C. D. 535; 568 O. G. 201. In unusual situations a proposed amendment may be remanded for such consideration as the Examiner may see fit to give. In such cases the amendment will be treated in the same way as an amendment after final rejection (see 714.12 and 1210).

If the proposed amendment is in effect an abandonment of the appeal, as, by canceling the appealed claims, other claims being present which are patentable in the opinion of the Examiner, the amendment will be entered, the Administrative Officer to the Board of Appeals being so notified in order that the case may be stricken from the Board's docket.

1212 Remand To Consider Affidavits

Rule 195 Affidavits after appeal. Affidavits or exhibits submitted after the case has been appealed will not be admitted without a showing of good and sufficient reasons why they were not earlier presented.

[Old Rule 138]

Affidavits filed with or after appeal but before the mailing of the Examiner's answer will be treated in the same manner as affidavits filed after final rejection. Authority from the Board is not necessary to consider such affidavits. See 1210.

In the case of affidavits filed after the mailing of the Examiner's answer, the Examiner is with-

out authority to consider the same in the absence of a remand by the Board.

When a case is remanded to the Examiner for the consideration of affidavits, the Examiner, after having given the affidavits such consideration as the facts in the case require, will return the case to the Board of Appeals with his report, a copy of which should be forwarded to the applicant's attorney.

If an affidavit under Rule 131 is not accompanied by the showing required by Rule 195, the Examiner will not consider the merits of such affidavit.

If, however, the delay in filing such affidavit is satisfactorily explained, the Examiner will then admit the same and consider its merits. If this affidavit is accepted as overcoming the reference, or references, used in the final rejection, and a new reference having a filing date prior to the date of invention established in the affidavit, or having a publication date more than one year prior to the applicant's filing date, is found, it may be substituted by the Examiner for the one overcome without thereby reopening the case to further prosecution before the Examiner. *Ex parte Bowyer*, 1939 C. D. 5; 505 O. G. 759.

It is not the custom of the Board to remand affidavits offered in connection with a request for reconsideration of its decision. Affidavits submitted for this purpose, not remanded to the Examiner, are considered only as arguments. In re *Martin*, 1946 C. D. 180; 586 O. G. 347.

1213 Decision by Board

Rule 196 (first paragraph). Decision by the Board of Appeals. (a) The Board of Appeals, in its decision, may affirm or reverse the decision of the primary examiner in whole or in part on the grounds and on the claims specified by the examiner. The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the primary examiner on that claim, except as to any ground specifically reversed.

1213.01 Recommendations of Board

Rule 196 (third paragraph). Decision by the Board of Appeals. (c) Should the decision of the Board of Appeals include an explicit statement that a claim may be allowed in amended form, applicant shall have the right to amend in conformity with such statement, which shall be binding on the primary examiner in the absence of new references or grounds of rejection.

[Old Rule 139]

However, if the Examiner knows of references or reasons which were not before the Board, such a favorable recommendation is not binding upon him. Likewise, should applicant make any change in a favorably recommended claim (other than the amendments recommended),

the same would tend to destroy the force of such recommendation. *Ex parte Young*, 18 Gour. 24: 31.

In the absence of an express recommendation, a remark by the Board that a certain feature does not appear in a claim is not to be taken as a recommendation that the claim be allowed if the feature is supplied by amendment. *Ex parte LeBlanc*, 1902 C. D. 1; 98 O. G. 225. *Ex parte Norlund*, 1913 C. D. 161; 192 O. G. 989.

1214 Actions Following Decision by Board

1214.01 New Ground of Rejection

Rule 196 (second paragraph) Decision by the Board of Appeals. (b) Should the Board of Appeals have knowledge of any grounds not involved in the appeal for rejecting any claim, it may include in its decision a statement to that effect with its reasons for so holding, which statement shall constitute a rejection of the claims. The appellant may submit an appropriate amendment of the claims so rejected or a showing of facts, or both, and have the matter reconsidered by the primary examiner. The statement shall be binding upon the primary examiner unless an amendment or showing of facts not previously of record be made which, in the opinion of the primary examiner, avoids the additional ground for rejection stated in the decision. The applicant may waive such reconsideration before the primary examiner and have the case reconsidered by the Board of Appeals upon the same record before them. Where request for such reconsideration is made the Board of Appeals shall, if necessary, render a new decision which shall include all grounds upon which a patent is refused. The applicant may waive reconsideration by the Board of Appeals and treat the decision, including the added grounds for rejection given by the Board of Appeals, as a final decision in the case.

The request for reconsideration by the Board must of course be filed while the case is still within the Board's jurisdiction. The time during which the request may be filed is fixed by Rule 197. By proceeding in this manner the applicant waives his right to further prosecution before the Examiner. *In re Greenfield*, 1930 C. D. 531; 400 O. G. 226.

Where the applicant elects to proceed before the Examiner, the statement of the Board stands as a rejection and the application is placed in the files awaiting action by applicant which action must be taken within six months from the date of the Board's decision. *Ex parte King*, 1928 C. D. 1; 366 O. G. 3. *Ex parte Buchenberg*, 1924 C. D. 55; 327 O. G. 216.

The applicant may amend the claims involved, or substitute new claims to avoid the art or reasons adduced by the Board. *Ex parte*

Burrowes, 1904 C. D. 155; 110 O. G. 599. Such amended or new claims must be directed to the same subject matter as the appealed claims, *Ex parte Comstock*, 1923 C. D. 82; 317 O. G. 4.

Argument without amendment of the claims so rejected can result only in a final rejection of the claims, since the Examiner is without authority to allow the claims unless amended or unless the rejection be overcome by a showing of facts not before the Board. The new ground of rejection raised by the Board does not reopen the prosecution except as to that subject matter to which the new rejection was applied.

As a third option, applicant may treat such decision of the Board as final and file either a direct appeal therefrom to the C. C. P. A., or a civil suit under R. S. 4915, 35 U. S. C. 63. *In re Growell*, 1930 C. D. 360; 397 O. G. 3. Where the applicant avails himself of the third option, he waives his right to reconsideration by the Board, or by the Examiner, discussed above. *In re Heinz*, 1910 C. D. 292; 151 O. G. 1014.

1214.02 Procedure After Decision

After an appeal to the Board of Appeals has been decided, a copy of the decision is mailed to the appellant and the original placed in the file. The Administrative Officer to the Board notes the decision on the file wrapper and in the record of appeals, and then forwards the file to the Primary Examiner through the office of the Supervisory Examiner.

Any request or petition for rehearing or reconsideration must be filed before the limit of appeal to the U. S. Court of Customs and Patent Appeals expires. (See Rule 302 for statement of time for appeal to the court.)

1214.03 Rehearing and Reconsideration

Where there is an affirmance of the Examiner on any claim, the soft copies of the patents used in the original appeal should be left in the file for at least sixty calendar days following an adverse decision by the Board for the convenience of the Board in the event that the appellant requests reconsideration.

1214.04 Examiner Reversed

A complete reversal of the Examiner's rejection brings the case up for immediate action by the Examiner.

The Examiner should never regard such a reversal as a challenge to make a new search to uncover other and better references. This is particularly so where the application has meanwhile been transferred or assigned to an Examiner other than the one who finally rejected

the claims. The second Examiner should give full faith and credit to his predecessor's search. Of course, if the Examiner has specific knowledge of the existence of a particular reference which obviously meets the terms of any of the appealed claims as to which the Examiner was reversed, he should submit the matter to the Supervisory Examiner to determine whether the Commissioner should be requested to authorize the reopening of prosecution under Rule 198 for the purpose of entering the new rejection.

1214.05 Cancellation of Withdrawn Claims

Where an appellant withdraws some of the appealed claims, and the Board reverses the Examiner on the remaining appealed claims, the withdrawal is treated as an authorization to cancel the withdrawn claims. It is not necessary to notify the applicant of the cancellation of the withdrawn claims.

1214.06 Examiner Sustained in Whole or in Part

If the Examiner was sustained either in whole or in part, the next action must be taken by the applicant, either by way of further appeal or civil action or by cancellation of the rejected claims if there be an allowed claim in the case. It is improper to notify applicant of the status of the cases unless asked to do so. See *Ex parte Buchenberg*, 1924 C. D. 55; 327 O. G. 216. (Notice of Nov. 12, 1923, revised.)

1214.07 Reopening of Prosecution

Rule 198 Reopening after decision. Cases which have been decided by the Board of Appeals will not be reopened or reconsidered by the primary examiner, except under the provisions of rule 196, without the written authority of the Commissioner, and then only for the consideration of matters not already adjudicated, sufficient cause being shown.

[Old Rule 140]

Sometimes an amendment is filed after the Board's decision which does not carry into effect any recommendation made by the Board and which presents a new or amended claim or claims. In view of the fact that the prosecution of the case is definitely closed, the applicant clearly is not entitled to have such amendment entered as a matter of right. However, if the amendment obviously places the case in condition for allowance, the Primary Examiner should endorse on the amendatory paper a recommendation that the amendment be admitted, and on approval by the Supervisory Examiner the amendment will be entered.

Where the amendment cannot be entered, the Examiner should write to the applicant notify-

ing him that the amendment cannot be entered and stating the reason why. The refusal should never be made to appear arbitrary or capricious. A letter such as the following might be used:

The amendment filed _____ after the Board's decision is refused entry because the prosecution is closed and the new claims (or claims as amended) raise new issues which require further consideration or search.

1215. Withdrawal or Dismissal of Appeal

1215.01 Withdrawal of Appeal

Where, after appeal has been filed and before decision by the Board of Appeals, an appellant withdraws the appeal more than six months after the date of the final rejection, the application is to be considered abandoned as of the date on which the appeal was withdrawn unless there are allowed claims in the case.

Where a letter abandoning the application is filed in accordance with Rule 138, the effective date of abandonment is the date of filing of such letter. (Extract from Notice, Sept. 3, 1948.)

1215.02 Claims Standing Allowed

If the application contains allowed claims, as well as claims appealed, the withdrawal of the appeal does not operate as an abandonment of the application, but is considered a withdrawal of the appealed claims and authority to the Examiner to cancel the same. An amendment canceling the appealed claims is equivalent to a withdrawal of the appeal.

(Extract from Notice, Sept. 3, 1948.)

1215.03 Partial Withdrawal

A withdrawal of the appeal as to some only of the claims on appeal operates to withdraw those claims from the case and the appeal continues as to the remaining claims. The withdrawn claims will be cancelled by the Examiner when necessary without further action by the applicant.

(Extract from Notice, Sept. 3, 1948.)

1215.04 Failure To Prosecute Appeal

If a brief is filed within the time allowed, failure to appear at the hearing will result only in the case being considered on brief. If no brief is filed the appeal stands dismissed and the application is considered as abandoned on the date set for the filing of the brief regardless of whether there are allowed claims. The letter from the Board of Appeals notifying the appellant that the appeal stands dismissed is not an action in the case and does not start a new period for reply.

(Extract from Notice, Sept. 3, 1948.)

1215.05 Case Before the Court

When the case is before the court either on appeal or in a civil action under R. S. 4915, 35 U. S. C. 63, the status of the application in the event of a dismissal must be determined according to the circumstances leading to the dismissal. In no event will the application be considered abandoned as of a date prior to the date of the dismissal by reason of the dismissal alone.)

(Extract from Notice, Sept. 3, 1948.)

1216 Appeals to Courts

Files of cases carried to the courts, either by appeal to the Court of Customs and Patent Appeals or by civil action in the District Court for the District of Columbia, are not opened by the Patent Office to the public.

During the pendency of a suit, while the file is retained in the examining division until the case comes up for trial, the application is not under the jurisdiction of the Examiner; and any amendment, as one copying claims from a patent for interference purposes, can be admitted only under the provisions of Rule 198.

1216.01 To Court of Customs and Patent Appeals

If, from an adverse decision by the Board, appeal is taken to the U. S. Court of Customs and Patent Appeals, the Chief of the Docket Branch, to whom the appeal is sent, obtains the file from the Primary Examiner and selects those papers which in his opinion should form the transcript of record, notifies appellant of the papers selected, and forwards a list of the references to the Manuscript and Lithographic Branch.

After the court has heard and decided the appeal, a copy of the decision is sent to the Patent Office and one to the appellant. Where the appellant files a petition for rehearing, the court's ruling thereon is communicated to the Office and to the appellant by the clerk of the court.

Finally, the clerk of the court forwards to the Office a certified copy of the court's decision

on the appealed claims. This copy is a duplicate of the uncertified copy first forwarded, unless modified as a result of the petition for rehearing or, possibly, altered to correct some minor error.

The Docket Branch enters the other copy in the application file. The Solicitor makes a copy for publication in the Official Gazette.

The file is then returned to the Primary Examiner. Further action, if any, on the part of the Examiner is determined by the court's decision.

In the case of an appeal to the Court of Customs and Patent Appeals, a transcript of the record must be filed with the court within a specified time after filing the reasons for appeal. The decision of the court is published; but unless the application becomes a patent, the public is not given access to the application file itself. Since a transcript of the application becomes a part of the court record, it may of course be inspected by anyone.

1216.02 Suits Under R. S. 4915

When a suit under R. S. 4915, 35 U. S. C. 63, is filed a notice thereof signed by the Solicitor of the Patent Office is placed in the application file. The file, however, is returned to the examining division and remains in the custody of the Examiner until the case comes up for trial, after which the file is kept in the Solicitor's office pending termination of the suit. The applicant is required to furnish the court a certified copy of the file wrapper and contents at the time of the trial. If the suit is dismissed before coming to trial, no disclosure of the application to the public necessarily results from the filing of the suit. Unlike an appeal to the U. S. Court of Customs and Patent Appeals, the filing of a suit in equity does not require the immediate filing of a transcript of the application. The complaint is open to the public.

Files subpoenaed by the court may be sent to the court in care of a Patent Office employee along with a certified copy, under stipulation that the copy be retained by the court and the original brought back to the Office by said employee.