Appellee's Brief

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CERTIFICATE OF INTEREST

Counsel for the Appellees certifies the following:

1. The full name of every party or amicus represented by me is:

   TRI Industries, Inc., Jay Paulson,
   Paulson Marketing and Tim Galligan

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   None.

3. The publicly-held affiliates of any corporate party or amicus represented by me are:

   None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

   Gerald E. Helget
   H. Dale Palmatier
   Paul L. Sjoquist
   PALMATIER & SJOQUIST, P.A.

STATEMENT OF RELATED CASES

No other appeal in or from this civil action in the district court was previously before this or any other appellate court under the same or similar title. Appellees know of no other cases pending in this or any other court that will directly affect or be directly affected by this Court's decision in this appeal.

STATEMENT OF JURISDICTION

The district court in this action has original jurisdiction of appellant's claim for patent infringement pursuant to 28 U.S.C. § 1338(a) and appellees' counterclaim for patent noninfringement and patent invalidity pursuant to 28 U.S.C. §§ 2201 and 2202.

This Court has appellate jurisdiction over this interlocutory appeal by virtue of 28 U.S.C. §§ 1292(b), 1291 and 1295(a)(1).

Appellant's petition for leave to appeal was filed in a timely manner and granted by this Court.

STATEMENT OF THE ISSUE

The District Court of Minnesota certified the following question of law for interlocutory appeal:

> Whether an application for a design patent filed as a division of an earlier-filed application for utility patent is entitled to the benefit of the earlier filing date of the utility application under 35 U.S.C. § 120 and 35 U.S.C. § 121.

STATEMENT OF THE CASE

This appeal arises out of an application for a temporary restraining order (TRO) brought by plaintiff (appellant herein) in the United States District Court for the District of Minnesota, Fourth Division. The hearing on the application for a TRO was held just two weeks after a complaint (App., pp. 3-12) for design patent infringement was served upon the defendants (appellees herein).

Therefore, there was no discovery in this action conducted prior to the hearing on the TRO application, and very little time for factual investigation and legal research. However, appellees were able to ascertain that the design patent in question purported to be a division of a prior-filed utility application, and the utility application was filed nearly a year after the first sale of a device allegedly covered by both applications.

Appellees' brief legal research uncovered the case of *In re Campbell*,[1] which squarely holds that a design patent application cannot be a division of a prior-filed utility application. Appellees' research further revealed that *In re Campbell* has never been overruled, and certiorari had been denied by the Supreme Court. Further, appellees' research uncovered § 201.06 (App., p. 81) of the *Manual of Patent*

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[1] *In re Campbell*, 212 F.2d 606, 101 USPQ 406 (CCPA), *cert. denied.*, 348 U.S. 858 (1954).

Examining Procedure (1988) (MPEP), which directed the patent examining staff to follow the rule of *In re Campbell*. Without entitlement to the benefit of the earlier filing date of the utility application under 35 U.S.C. §§ 120 and 121, appellant admits its design patent is invalid (App., p. 18).

Appellees presented this information to the district court, and appellant presented the cases of *KangaRoos v. Caldor*[2] and *Ex parte Duniau*,[3] and argued that these cases overruled *In re Campbell*. The district court held that neither case overruled *In re Campbell*. The district court denied appellant's application for a TRO, at least in part upon appellant's inability to show a reasonable likelihood of a success on the merits.

It is to be emphasized that the district court did not find or hold that the design patent was either valid or invalid, or either infringed or not infringed. The court merely denied appellant's application for a TRO.

Contrary to the assertion of the appellant, the district court did not state that it felt compelled by *stare decisis* to follow *In re Campbell*. The district court merely stated that neither *KangaRoos v. Caldor*, nor *Ex parte Duniau* overrules *Campbell* and the design patent would likely be held invalid at trial.

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[2]*KangaRoos v. Caldor, Inc.*, 778 F.2d 1571, 228 USPQ 32 (Fed. Cir. 1985).

[3]*Ex parte Duniau*, 1 USPQ 2d 1652 (PTO Bd. App. 1986).

The appellant is, in substance, requesting the Court to provide an advisory opinion concerning the continuing efficacy of the rule of *In re Campbell*. There is simply no record below to enable this Court to go much beyond providing this advisory opinion, for at the time the district court denied appellant's application for a TRO, neither party had yet had an opportunity for discovery.

Appellees believe that this matter is not ripe for decision at this time, but should await the district court's decision on a motion for summary judgment of patent invalidity, which appellees would unquestionably bring after developing its case for such a motion. Appellees' motion would not only include the rule of *In re Campbell* as grounds for summary judgment, but would also include whatever other grounds are developed as this case progresses.

SUMMARY OF THE ARGUMENT

Appellant's design patent filed as a division of an earlier filed application for a utility patent is not entitled to the benefit of the earlier filing date of the utility application under 35 U.S.C. §§ 120 and 121. For nearly a century, it is quite obvious that many authorities have held that a design patent filed as a division of an earlier filed application for a utility patent is not entitled to the benefit of the earlier filing date of the utility application under 35 U.S.C. §§ 120 and 121. Deference to long-continued uniform administrative practice, the doctrine of legislative reenactment, the expressed legislative intent compel this ruling and that *In re Campbell* be upheld. There is no substantial ground for difference of opinion concerning the legal or controlling question of law. The public interest compels that appellant's design patent filed as a division of an earlier filed utility application is not entitled to the earlier filing date. The case of *In re Campbell* should be upheld.

ARGUMENT

I. FOR NEARLY ONE HUNDRED YEARS, A DESIGN PATENT FILED AS A DIVISION OR CONTINUATION OF AN EARLIER-FILED UTILITY APPLICATION HAS NOT BEEN ENTITLED TO THE EARLIER FILING DATE

Appellant's design patent should not be entitled to the benefit of the earlier filing date of the utility application because nearly one hundred years of well-reasoned case precedents support this conclusion.

In the 1902 the case of *Ex parte Waterman*[4] the Commissioner of Patents and Trademarks held that the filing of a design application is not and cannot be under any circumstances the filing of an allowable application for the mechanical device.

Waterman filed a design application for a fountain pen and later filed a mechanical patent application containing claims to the same structure disclosed in the earlier design application. The Commissioner affirmed the primary examiner's refusal to treat the later-filed application as a division of the earlier design application based on sound reasoning. The Commissioner reasoned that "a proper divisional application does and can contain only matter carved out of the original case",[5] citing *Ex parte Henry*. The Commissioner deduced that the subject matter of the divisional application must be

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[4] *Ex parte Waterman*, 1902 C.D. 235, 100 O.G. 233.

[5] *Id.* at 237 (citing *Ex parte Henry*, 1893 C.D. 88, 64 O.G. 299).

such matter as might have been claimed in the original application to be awarded the earlier priority filing date.

> There is no warrant for a requirement for a division in such a case, because, as stated above, a divisional application must contain such matter as might have been claimed in the original application. Since claims for mechanical functions cannot be made in a design application, it follows that such claims cannot be divided out of such an application.[6]

The Commissioner also recognized the statutory differences which inherently exist between design patents and mechanical patents:

> Design patents and mechanical patents cover different monopolies. They are granted under different sections of the statute for different terms. It is true that the procedure in obtaining a design patent is very similar to that in obtaining a mechanical patent, but nevertheless the monopolies granted in such cases, as above stated, are different. It is possible to obtain a design patent and a mechanical patent for the same article of manufacture.[7]

The 1904 case of *McArthur v. Gilbert*[8] involved an interference between two design patent applicants wherein one applicant sought the benefit of the prior filing date of his earlier mechanical patent application for his electric light shade. The continuity between the later-filed design application and earlier-filed mechanical application was denied by the primary examiner, who was affirmed by the Commissioner, because design and mechanical patents cover different monopolies

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[6] *Id.* at 237.

[7] *Id.* at pp. 236-237.

[8] *McArthur v. Gilbert*, 1904 C.D. 245, 110 O.G. 2509.

and are granted under different sections of the patent statute for different terms. The Commissioner stated:

> It is well established that an application for a patent is only a constructive reduction to practice when the claims for the "invention" can be made in that application.[9]

The next well-reasoned treatment concerning continuity between a design patent application and an earlier-filed mechanical patent application was the 1954 case of *In re Campbell*.[10] The applicant for a design patent application for a helicopter was faced with an intervening reference necessitating his assertion that his design application is a division of his earlier-filed mechanical application. The examiner consistently refused to acknowledge that the design was a proper division of the earlier-filed mechanical application citing *Waterman* and *McArthur* which the Patent Office Board of Appeals affirmed.[11]

On appeal, the Court of Customs and Patent Appeals (CCPA), with its panel of five distinguished justices, reached a solution without any great difficulty despite the relatively few prior cases on point.[12] The CCPA found that it appeared obvious that the earlier-filed mechanical application described the mechanical invention in full, clear, concise and exact terms

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[9] *Id.* at 246.

[10] *In re Campbell, supra.*

[11] *Ex parte Waterman, supra;* and *McArthur v. Gilbert, supra.*

[12] *In re Campbell, supra* 101 USPQ at 409.

as to enable any person skilled in the art to make and use the invention, the usual oath required in mechanical applications was filed, and the helicopter improvements were distinctly claimed. The court held:

> Clearly, if there was any 'new, original, and ornamental design' invention disclosed in such application it could not be claimed therein. Nor do we think that the application could have been amended to correspond to a design application.[13]

The CCPA went on to say that to amend the mechanical patent application and put it in the form of a design patent application would necessitate that the applicant completely delete the specification originally filed, file the usual form of design specification, cancel all of the mechanical claims, substitute the usual formal design claim, cancel the original oath, substitute the usual design oath and cancel and substitute some of the drawings.

Although any one or more of these cancellations and substitutions may be made at some time during the prosecution of an application,

> to do all of the necessary cancellations and substitutions at the same time would be, in effect, the filing of a new application and not merely the amending of a previously filed application. And such new application would not, in our opinion be a continuation or division of the first, but an application for an alleged invention not previously disclosed in the earlier application.[14]

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[13] *Id.* at 409.

[14] *Id.*

The CCPA found additional support for its holding by reasoning that a filing in the Patent Office of drawings, which may show an alleged design invention, in the usual mechanical application could not be considered a constructive reduction to practice of the alleged design invention.[15] The CCPA reviewed its earlier case of *Dieterich v. Leaf*[16] wherein it held that mere paper drawings of an alleged inventive design for a three-dimensional article could not constitute actual reduction to practice. The court held that

> we think it follows that the filing of the drawings, without the necessary complete parts of a design application, could not constitute constructive reduction to practice of the alleged design invention.[17]

It is well known that this Court has adopted the body of law represented by the holdings of the CCPA. Such holdings cannot be discredited but rather are to be adopted.[18]

In the 1975 case of *Ex parte McGraw*,[19] the Patent and Trademark Office Board of Appeals was faced with an appeal from an examiner's final rejection wherein the applicant claimed mechanical claims and a design claim in one application. The applicant justified the presence of his design claim in his mechanical application on the ground that the application

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[15] *Id.*

[16] *Dieterich v. Leaf*, 89 F.2d 226, 33 USPQ 237 (CCPA 1937).

[17] *Ex parte Waterman*, *supra* at 409.

[18] *South Corp. v. United States*, 690 F.2d 1368, 215 USPQ 657, 658 (Fed. Cir. 1982).

[19] *Ex parte McGraw*, 193 USPQ 751 (PTO Bd. App. 1975).

conforms to all requirements of 35 USC §§ 171-173 as filed and it was his intent to obtain both design and utility patent protection. The Examiner rejected applicant's application citing *In re Campbell*[20] as support for his position that

> a design invention disclosed in an application for a mechanical patent cannot be claimed therein.[21]

The Board in affirming the examiner believed that because design and mechanical patents were authorized under different statutory sections and it was the clear intent of the lawmakers to provide for the granting of separate patents. Concerning applicant's intent, such was not a valid basis for ignoring what the Board believed to be the clear import of the law and the *Campbell* decision that a design invention disclosed in an application for a mechanical patent cannot be claimed therein.[22]

A review of the *Manual of Patent Examining Procedure* (1988) (MPEP), particularly Chapter 200, Section 201.06, will reveal that codified Patent Office procedure further compels a conclusion that:

> A design application is not to be considered to be a division of a utility application, and is not entitled to the filing date thereof, even though the drawings of the earlier-filed utility application show the same article as that in the design application. *In re Campbell*, 1954 C.D. 191, 101 USPQ 406; Certiorari denied 348 US 858.[23]

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[20] *In re Campbell, supra.*

[21] *Ex parte McGraw, supra* at 752.

[22] *Id.*

[23] *Manual of Patent Examining Procedure*, Section 201.06 (1988) Appendix, pp. 78-81.

For nearly one hundred years it is quite obvious that many authorities have held that a design patent filed as a division of an earlier-filed application for a utility patent is not entitled to the benefit of the earlier filing date of the utility application under 35 USC §§ 120 and 121.

II. DEFERENCE TO ADMINISTRATIVE PRACTICE, DOCTRINE OF LEGISLATIVE REENACTMENTS AND LEGISLATIVE INTENT COMPEL THAT CAMPBELL BE UPHELD

A. Long Continued Uniform Administrative Practice

From the early Commissioner decisions of *Ex parte Henry, Waterman* and *McArther* to the 1988 version of the MPEP, it is crystal clear that the Patent Office for nearly a century has maintained that a design patent filed as a division of an earlier-filed application for a utility patent is not entitled to the benefit of the earlier filing date of the utility application. The CCPA, with its distinguished justices now sitting on this Court, have held that:

> A long-continued, uniform administrative practice, if not contrary to or inconsistent with the law, is entitled to great weight[24]

The long continued, uniform Patent Office practice of denying a later filed design application the entitlement of the filing date of the earlier filed utility application compels that *In re Campbell*[25] be upheld.

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[24]*United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1219 (CCPA 1977) (citing *Saxbe v. Bustos*, 419 U.S. 65, 95 S.Ct. 272, 42 L.Ed.2d 231 (1976)).

[25]*In re Campbell, supra.*

B. Doctrine of Legislative Reenactment--Congressional Reenactments Without Change

The Supreme Court of the United States[26] has long recognized that Congress must regulate the exclusive rights of inventors because Article 1, § 8, Cl. 8, of the Constitution of the United States gives Congress the power "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." It is for Congress to determine if the present system of design and utility patents is ineffectual in promoting the useful arts in the context of industrial design.[27] Indeed, since the first Patent Act of 1790, Congress has repeatedly reenacted and amended the Patent Act.[28]

The Congress, despite repeated opportunities, has not enacted a statute or reenacted 35 U.S.C. § 120, 121 or 171 to expressly entitle a design application to a continuation or divisional status of an earlier filed utility application to obtain the earlier filing date of the utility application.

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[26]*Bonito Boats, Inc. v. Thundercraft Boats, Inc.*, ___ U.S._____, 109 S.Ct. 971, 103 L.Ed.2d 118, USPQ 2d 1847, 1850-51 (1989).

[27]*Bonito Boats, supra* 9 USPQ 2d at 1859.

[28]Concerning Chapter 16 (designs including § 171) of Title 35, enacted July 19, 1952, Ch. 950, 66 Stat. 805; based on Title 35, U.S.C. 1946 ed., § 73 (R.S. 4929 [derived from Acts July 8, 1870, Ch. 230, § 71, 16 Stat. 209; June 18, 1874, Ch. 301, 18 Stat. 78], amended (1) May 9, 1902, Ch. 783, 32 Stat. 193, (2) August 5, 1939, Ch. 450, § 1, 53 Stat. 1212; R.S. 4933).

Regarding Ch. 11 (Applications for Patents including §§ 120 and 121) of Title 35; enacted July 19, 1952, Ch. 950, 66 Stat. 800, amended November 14, 1975, Public Law 94-131, § 9, 89 Stat. 691; amended November 8, 1984, Public Law 98-622 § 104(b), 98 Stat. 3385.

The long continued denial of entitlement of priority and continuity between design and mechanical patent applications by the courts and the Patent Office is entitled to great weight especially when Congress has repeated reenacted the statute without change and in the face of past administrative practices.[29] Justice Holmes in *Copper Queen Mining Co. v. Territorial Board of Equalization,*[30] wrote

> [W]hen for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed.[31]

Customarily, Congress is thought to be aware of an existing statutory construction. Absence some evidence of an attempt to change that construction, a substantial reenactment of law incorporating its preexisting phraseology is usually the functional equivalent of codifying the earlier construction into the statute.[32] Where Congress has reenacted a statute that

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[29]*United States v. Zenith Radio Corp., supra,* at 121 (citing *Massachusetts Mutual Life Insurance Co. v. United States,* 288 U.S. 269, 273, 53 S.Ct. 337, 77 L.Ed. 739 (1933); *Komada v. United States,* 215 U.S. 392, 30 S.Ct. 136, 54 L.Ed. 249 (1910); *United States v. Midwest Oil Co.,* 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915); and *C. J. Tower and Sons v. United States,* 44 CCPA 41, 4 C.A.D. 634 (CCPA 1957)).

[30]*Copper Queen Mining Co. v. Territorial Board of Equalization,* 206 U.S. 474, 479, 27 S.Ct. 695, 696, 51 L.Ed. 1143 (1909).

[31]*Id. (cited by Zenith Radio Corp., supra, at 1219, n. 20).*

[32]*Sierra Club v. Secretary of Army,* 820 F.2d 513, 522 (1st Cir. 1987) (citing *Lorillard v. Pons,* 434 U.S. 575, 580, 98 S.Ct. 866, 869, 55 L.Ed.2d 40 (1978) and *Saxbe v. Bustos,* 419 U.S. 65, 74, 95 S.Ct. 272, 278, L.Ed.2d 231 (1974)).

has in fact been given consistent judicial interpretation, such a reenactment generally includes the settled judicial interpretation.[33]

Where the *Campbell* construction has prevailed and been acted on for several years and where the provisions have been reenacted by the Congress without any change indicative of a disapproval of the prior construction, the Supreme Court has often pointed out that reenactment operates as an implied legislative approval of the prior construction.[34] Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.[35]

The doctrine of legislative reenactment compels this Court to uphold *In re Campbell*[36] with the nearly 100 years construction of statutory sections 35 U.S.C. §§ 120, 121 and 171 wherein appellant's design patent is not to be considered a division of a utility application and is not to be entitled to filing date of the earlier filed utility application even though the drawings of the earlier filed utility application may show the same article as in the design patent. Appellant is seeking a judicial amendment to §§ 120 and 121 by asking this Court to

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[33]*Pierce v. Underwood*, ___ U.S. ___, 108 S.Ct. 2541, 2551 (1988) (citing *Lorillard v. Pons*, 434 U.S. at 580-581, 98 S.Ct. at 870).

[34]*Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 53 S.Ct. 721, 729 (1933).

[35]*Lorillard v. Pons, supra* 43 U.S. at 870.

[36]*In re Campbell, supra.*

overrule its predecessor CCPA Court in *In re Campbell*. Amendments by judicial implication are disfavored.[37]

C. The Legislative Intent of the 1952 Reenactment of the Patent Act Compels the Conclusion that a Design Patent Application Cannot be Entitled to the Benefit of an Earlier Filing Date of the Utility Application

An application for a design patent filed as a division of an earlier filed application for a utility patent is not entitled to the benefit of an earlier filing date of the utility application under 35 U.S.C. §§ 120 and 121. In the 1952 reenactment of the Patent Act, particularly §§ 120 and 121, Congress expressly stated its legislative intent and purpose:

> Sections 120 and 121 express in the statute certain matters which exist in the law today but which had not before been written into the statute, and in so doing making some minor changes in the concepts involved.[38]

In view of the long continued uniform Patent Office practice of denying continuity and priority between design and mechanical applications, the courts' approval thereof, doctrine of legislative reenactment, the legislative intent of the United States Congress, it is clear that appellant's design patent filed as a division of an earlier filed application for a utility patent is not entitled to the benefit of the earlier filing date of the utility application under 35 U.S.C. §§ 120 and 121.

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[37] *United States v. Welden*, 377 U.S. 95, 103 n. 12, 84 S.Ct. 1082, 1087 n. 12, 12 L.Ed.2d 152 (1964).

[38] 1952 U.S. Code Cong. and Adm. News, p. 2400.

III. THERE IS NO SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION CONCERNING THE LEGAL OR CONTROLLING QUESTION OF LAW

Appellant relies on the cases of *KangaRoos U.S.A., Inc. v. Caldor, Inc.*[39] and *Ex parte Duniau*[40] for the proposition that a design patent filed as a division of an earlier filed utility patent application is entitled to the benefit of the earlier filing date of the utility application under 35 U.S.C. § 120.

Appellant's reliance on these cases is misplaced, for they do not hold as alleged by Appellant. *KangaRoos* was a vacation and remand of a district court's summary judgment adjudication, finding fraud for inequitable conduct practiced upon the Patent Office. This Court held the district court erroneously did not permit testimony concerning the reasons and intent of the patentee's attorney, which are necessary elements for fraud or inequitable conduct. This case is often cited for its holdings concerning fraud, inequitable conduct and summary judgment. This Court was clear in its expressed statement that

> The issue is not whether Gamm's divisional application is entitled to the priority date of the design application. The issue is whether Gamm's claim to the priority date constituted fraudulent or inequitable conduct, according to law . . .[41]

Concerning *Ex parte Duniau*, the Patent Board of Appeals refused to grant the benefit of the earlier filing date,

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[39] *KangaRoos U.S.A., Inc. v. Caldor, Inc.*, 778 F.2d 1571, 228 USPQ 32 (Fed. Cir. 1985).

[40] *Ex Parte Duniau*, 1 USPQ 2d 1652 (PTO Bd. App. 1986).

[41] *Kangaroos, supra* at 1575, 228 USPQ at 34.

due to lack of disclosure in the earlier filed application. Neither did the Board, nor could the Board, overrule *In re Campbell*. The Board of Appeals simply stated they could not agree that a grandparent design application could not be considered to be a continuation of a prior utility application.[42]

In 1981 the CCPA, with its distinguished justices now sitting on this Court, were faced with the continuity question between an earlier-filed design patent application and a later-filed utility application in the case of *In re Berkman*[43]. The utility application had claims that were allowed but the examiner would not consider the application to be a continuation-in-part of the earlier-filed design application for two reasons:

> (1) The disclosure in the present utility application is not the same as that in the design applications, and
>
> (2) The logic of the *Manual of Patent Examining Procedure* (MPEP), 201.06, which states that a design application may not be considered a division of a utility application, would preclude utility applications being a continuation-in-part of a design application.[44]

The Patent Office Board of Appeals affirmed the examiner's rejection and likewise the CCPA affirmed both the examiner and the board.[45]

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[42] *Ex parte Duniau, supra* at 1654.

[43] *In re Berkman*, 642 F.2d 427, 209 USPQ 45 (CCPA 1981).

[44] *Id.* at 46.

[45] *Id.* at 46-47 (affirmance without discussion on MPEP § 201.06).

Quite importantly, in reading *In re Duniau*, the Board of Appeals, in its disagreement with the Examiner's rejection, did not apparently have before it the knowledge and guidance of its earlier 1981 decision and that of the CCPA in *In re Berkman*,[46] *Ex parte McGraw*,[47] the Patent Office's MPEP 201.06 section, or the other cases cited in this brief. Otherwise, the Board likely would have not made such a statement.

There is no substantial ground for difference of opinion warranting a hearing *in banc*. The panel should simply affirm *In re Campbell*.

IV. THE PUBLIC INTEREST COMPELS THAT THE DESIGN PATENT FILED AS A DIVISION OF AN EARLIER FILED UTILITY APPLICATION IS NOT ENTITLED TO THE EARLIER FILING DATE

For nearly one hundred years it has been held that an application for a design patent filed as a division for an earlier filed application for a utility patent is not entitled to the benefit of the earlier filing date of the utility application. Public interest compels consistency in interpreting the law as enacted and construed in view of the long case precedence, continuing practice of the Patent Office, legislative reenactment doctrine and legislative intent--all which compel that the *In re Campbell* case be upheld.

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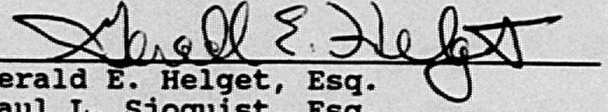
[46] *In re Berkman*, supra.

[47] *Ex Parte McGraw*, *supra*.

V. CONCLUSION

Appellant's design patent filed as a division of an earlier filed application for a utility patent is not entitled to the benefit of the earlier filing date of the utility application under 35 U.S.C. §§ 120 and 121. For nearly a century, it is quite obvious that many authorities have held that a design patent filed as a division of an earlier filed application for a utility patent is not entitled to the benefit of the earlier filing date of the utility application under 35 U.S.C. §§ 120 and 121. Deference to long-continued uniform administrative practice, the doctrine of legislative reenactment, the expressed legislative intent compel this ruling and that *In re Campbell* be upheld. There is no substantial ground for difference of opinion concerning the legal or controlling question of law. The public interest compels that appellant's design patent filed as a division of an earlier filed utility application is not entitled to the earlier filing date. The case of *In re Campbell* should be upheld.

Respectfully submitted,



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