
Proposed Changes to the Interference Rules¹

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I. INTRODUCTION

Excellence is achieved incrementally. The 1985 interference rules were an enormous improvement on the preexisting interference rules, and the 1995 amendments made significant improvements on the 1985 rules. However, there is obviously room for further improvements, and there is no reason to wait to 2005 to make them. The interference rules are procedural, not substantive, and they should be subject to continuous scrutiny and continuous tinkering.

Interferences proceed in secrecy, and there have been very few published opinions in recent years. Accordingly, any practitioner's proposals for improvements in the rules are, of necessity, largely the results of his or her own personal experience. We can all see the forest, but

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only through the underbrush in our immediate vicinity. However, I believe that the issues addressed in this paper are of general concern.

Note that my suggestions are in numerical order (i.e., in the order of the rules to which they apply), not in the order of the importance which I attach to the various suggestions.

II. 37 CFR 1.632

37 CFR 1.632 currently provides that, unless authorized otherwise by an APJ, a 37 CFR 1.632 notice of intent to argue suppression or concealment must be filed "within ten (10) days after the close of the testimony-in-chief of the opponent." In practice, the opponent (let's call it the party A) will ordinarily have put on its evidence of one or more pre-filing date actual reductions to practice (i.e., the earliest possible actual reduction to practice, followed by a series of fallback actual reduction to practice's until the party A has put on its evidence of its strongest possible actual reduction to practice), and there will be progressively shorter gaps of time between each successive alleged actual reduction to practice and the party A's filing date. The other party (let's call it the party B) waits until the party A's testimony-in-chief period is over and then files a 37 CFR 1.632 notice. The party A then has a choice. It can either (1) stand on the evidence that it has already put on² or (2) ask the APJ for a special testimony period in which to put in evidence to rebut the inference of suppression or concealment that the party B has indicated that it intends to argue should be drawn from the gaps between the party A's various alleged actual reduction to practices and its filing date.³

Of course, if the party A *has* no evidence of so-called *Peeler* diligence,⁴ its decision is easy. However, if it has some evidence that it could put in, its decision is very difficult indeed. In the first place, putting in the additional evidence will cost something—perhaps a good deal. In the second place, the special testimony period will inevitably

² Some practitioners choose to put in their evidence to rebut the inference of suppression or concealment during their initial testimony periods. However, the rules do not require that, and doing so means that they forfeit the possibility that their opponents will fail to file timely 37 CFR 1.632 notices.

³ The request for a special testimony period is treated as a pro forma request. That is, no showing of good cause other than the fact that one's opponent has filed a 37 CFR 1.632 notice is required to get the special testimony period.

⁴ So-called after *Peeler v. Miller*, 535 F.2d 647, 653-54, 190 USPQ 117, 122 (CCPA 1976) (Rich, J.). Evidence of *Peeler* diligence is evidence of activity during the period between an actual reduction to practice and a filing date offered to rebut the inference of suppression or concealment drawn from the length of the period.

extend the interference by two to four months.⁵ In the third place, there is a question whether the party A needs to put in the evidence. It can simply argue that the relevant gap (i.e., the gap between whichever alleged actual reduction to practice the board buys and its filing date) is not long enough to justify an inference of suppression or concealment—thereby placing on the party B the almost insurmountable burden of affirmatively proving (during *its* testimony period) that the party A *did* suppress or conceal the invention.⁶ If the board buys that argument, the party A is almost definitely safe. On the other hand, if the party A puts on its evidence of *Peeler* diligence, not only will that cost money and delay resolution of the interference, but, if the evidence is weak, it may wind up making a worse impression on the board than if the party A had declined to put in any evidence at all.

To compound the confusion, nobody knows how long a gap is required to switch the burden of proof. We only know the extremes. If the gap is less than three months, the party A can be pretty sure that it does not have the burden of justifying the delay.⁷ On the hand, if the gap is more than four years, the party A can be pretty sure that it *does* have the burden of justifying the delay. Anything in between those extremes is anybody's guess.

I have a two part solution to this problem.

The first part is to amend 37 CFR 1.632 to provide a rule of thumb gap that would automatically trigger an inference of suppression or concealment.⁸ Specifically, if the period between the alleged actual reduction to practice and the filing date is \leq the rule of thumb gap, the burden would be on the opponent to prove that the party which allegedly actually reduced the invention to practice did thereafter suppress or conceal the invention, whereas, if the period between the alleged actual reduction to practice and the filing date is $>$ the rule of thumb gap, the burden would be on the party to prove that it did not suppress or conceal the invention after having actually reduced it to practice. Such an ad hoc distinction would be similar in concept to (1) the ad hoc distinction between the \leq three month period of 37 CFR 1.608(a)

⁵ Of course, in many interferences delay benefits one of the parties. Accordingly, the party A may actually be delighted to have an excuse to extend the length of the interference by two to four months.

⁶ The reason that this is an almost insurmountable burden is that we don't have real discovery in interferences. See my suggestions for changes to 37 CFR 1.687.

⁷ See *Shindelar v. Holdeman*, 628 F.2d 1337, 207 USPQ 112 (CCPA 1980).

⁸ I have made this suggestion before, and the PTO currently has it under advisement. See 66 Fed. Reg. 14488 (March 17, 1995), 14505 col. 3, first full paragraph.

and the > three month period of 37 CFR 1.608(b) and (2) the three month and six month periods of MPEP § 2303.⁹

My proposal would do rough justice, and it would remove a contentious and unpredictable variable (namely, whether or not the burden of proof and/or the burden of persuasion had shifted) from suppression or concealment cases. Specifically, (1) a party such as the party A would know that, if the gap between each of its alleged actual reductions to practice and its filing date was greater than the rule of thumb gap, it had the burden of proving that it did not suppress or conceal the invention during that period; (2) the party A would know that it has to put on its evidence of *Peeler* diligence during its regular testimony period or not obtain the benefit of its alleged early actual reduction to practice date; and (3) the party B would not have to file a 37 CFR 1.632 notice. Thus, there would never be a second special testimony period for the purpose of putting in evidence of *Peeler* diligence.¹⁰

The second part of my suggestion is that the rule of thumb gap that would trigger the shift in burden should be three months. I suggest that length (1) in deference to *Shindelar v. Holdeman*, supra,¹¹ (2) by analogy to the period set in 37 CFR 1.608 and MPEP § 2303, and (3) because I think that it is a reasonable period, bearing in mind the importance of encouraging prompt disclosures of inventions to the PTO. However, I think it far more important that there be a set period than that the set period be three months.

III. 37 CFR 1.633(c)

Interferences are supposed to resolve *all* of the controversies between or among the opponents relating to the subject matter of the or each count. *Goutzoulis v. Athale*, 15 USPQ2d 1461, 1464 (Comm'r 1990); and *Shaked v. Taniguchi*, 21 USPQ2d 1285, 1287-88 (PTOB-PAI 1990). However, they don't. In many interferences, the major issue

⁹ MPEP §2303 reads in relevant part as follows:

Interferences will not be declared between pending applications if there is a difference of more than 3 months in the effective filing dates of the oldest and the next oldest applications, in the case of inventions of a simple character, or a difference of more than 6 months in the effective filing dates of the applications in other cases, except in exceptional situations, as determined and approved by the group director.

¹⁰ Of course, there are occasional special testimony periods for *other* purposes, but they are infrequent.

¹¹ In *Shindelar* the court said in dictum that:

In many circumstances, one month would be ample allowance to a patent attorney to draft the application. Another month could be ample for a draftsman to prepare the drawings. To be generous, perhaps another month could be allowed to have the application placed in final form, executed by the inventor and filed with the PTO. Thus a period of approximately three months could possibly be excused. . . . [628 F.2d at 1342, 207 USPQ at 116.]

is not which party is going to win on priority, but what the other party or parties will be able to salvage despite losing on priority.

37 CFR 1.633(c) (4) permits an interferent to file a motion to redesignate an application or patent claim originally designated as corresponding to a count as not corresponding to the or any count—i.e., to degroup a claim initially grouped with a count. However, no rule permits an applicant interferent (1) to amend a claim so that, *as amended*, it does not correspond to a count or (2) to add a claim and obtain a ruling that the added claim does not correspond to a count. *L'Esperance v. Nishimoto*, 18 USPQ2d 1534, 1537 (PTOBPAI 1991).

The effect of the absence of a rule permitting an applicant interferent to amend a claim or present a new claim and have the amended or new claim designated as *not* corresponding to the or any count is that applicant interferences present amended and added claims in post-interference ex parte practice. In the post-interference ex parte practice, the applicant argues that the amended or added claims are allowable despite the loss in the interference because they are patentably distinct from the subject matter defined by the or all counts in the interference. Such claims can be rejected under 37 CFR 1.658(c) if the examiner believes that they are not patentably distinct. However, application of 37 CFR 1.658(c) is inconsistent, and the ex parte action is no substitute for thrashing these important issues out in the inter partes context.

The solution to this problem is simple. 37 CFR 1.633(c) should be amended to permit an applicant interferent to file a motion “amending an application claim corresponding to a count or adding a claim in the moving party’s application and requesting an order designating the amended or added claim as *not* corresponding to a count.”

Such an amendment to the rules would *not* “introduce issues that APJ’s are not equipped to handle.” This is so, among other reasons, because the APJ’s already handle precisely the same types of issues on behalf of *patentee* interferences. A patentee interferent can file an application to reissue its patent in interference and a 37 CFR 1.633(h) motion to add the reissue application to the interference. Under 37 CFR 1.637(h) (3), the patentee has to identify all of the claims in the reissue application which it believes should be designated as corresponding to each count, but it doesn’t have to identify *all* of the claims in the reissue application as corresponding to the or any count. The practical effect of this rule is that a patentee interferent can amend the patent claims and/or add new claims and identify some reissue application claims as corresponding to the or each count and other reissue application claims

as not corresponding to the or any count.¹² If the patentee's opponent(s) disagree with the patentee's proposed claim grouping (as they normally do), the issue of which claim should be designated as corresponding to the or any count gets resolved *inter partes*.

If the APJ's can handle these issues for patentee interferences, they jolly well can handle them for applicant interferences.

IV. 37 CFR 1.633(h)

37 CFR 1.633 (h) provides that, "When a patent is involved in an interference and the patentee has on file or files an application for reissue under § 1.171, [the patentee interferent may file] a motion to add the application for reissue to the interference." However, the rules do *not* provide that the reissue application is automatically added to the interference. Some APJ's do in fact immediately and automatically add applications to reissue involved patents to the interference, thereby obtaining jurisdiction over the reissue applications, but others do not. In fact, some APJ's do not add such reissue applications to the interference even when they decide the preliminary motions! This leads to bizarre results, with prosecution in the reissue applications continuing independently of the interference. Needless to say, the results can be inconsistent, which can be frustrating for either the patentee interferent or its opponent(s), depending on how things go.

The solution is simple. The position of the APJ's who immediately and automatically add applications to reissue involved patents to their interferences should be adopted uniformly by rule. 37 CFR 1.660 (b) should be amended to require patentee interferences to notify the board *immediately* when they file a reissue application (not ten days later, as the rule currently provides), and 37 CFR 1.633 (h) should be amended to provide that the reissue application would be immediately and automatically added to the interference with all claims designated as corresponding to the count (if there is only one count) or to a count to be determined by the APJ¹³ (if there is more than one count).¹⁴ If the patentee interferent disagrees that all of the claims in the reissue ap-

¹² If (a) the patentee interferent identifies *all* of the reissue application claims as not corresponding to any count and (b) the patentee does not already have on file or file concurrently with the reissue application in question another reissue application containing at least one claim that *does* identify as corresponding to that count, judgment will be entered against it as to that count pursuant to 37 CFR 1.662(b).

¹³ The patentee interferent could of course suggest a claim grouping to the APJ.

¹⁴ Logically, it might make more sense to delete 37 CFR 1.633(h) and to provide in 37 CFR 1.660(b) that the reissue application is automatically added to the interference effective the date that it is filed.

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plication should be designated as corresponding to the or any count, it could file a 37 CFR 1.633(c)(4) motion asking to have one or more of its reissue claims designated as not corresponding to the or any count. Its opponent(s) could oppose that motion, and the issue of whether or not the reissue claims should be designated as not corresponding to the or a count would then be decided inter partes in the normal course.

V. 37 CFR 1.642

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37 CFR 1.642 authorizes a request (*not* a motion!) to the APJ that he or she exercise his or her discretion to add another patent or application to the interference. *Theeuwes v. Bogentoft*, 2 USPQ2d 1378 (Comm'r 1986). 37 CFR 1.642 is used in two very different situations. First, it is used to add to an interference a patent or application owned by an entity not already involved in the interference. Second, it is used to add to an interference *another* patent or application owned by an entity that already has one or more patents or applications involved in the interference.¹⁵ It is the latter use of 37 CFR 1.642 with which I am concerned. There are currently at least two problems with it.

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First, the practice is inconsistent from APJ to APJ. Some APJ's will consider requests to add other patents or applications owned by an opposing party, come to a reasoned judgment as to whether or not at least one claim in the other patent or application is drawn to the same subject matter as is defined by the or a count of the interference, and, if so persuaded, will add the other patent or application to the interference. Other APJ's refuse to consider the issue, asserting that the party filing the 37 CFR 1.642 request should attempt to provoke *a new interference* with the target patent or application even if the count of the new interference would not be patentably different (or even different at all!) from the count of the existing interference. This obviously has the potential of leading to inconsistent results and weird conflict problems—since the decision in the plural interferences would each give rise to an independent 37 CFR 1.658(c) estoppel.

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Second, to file a 37 CFR 1.642 request, one must know about *and be able to identify* the target patent or application. That is alright for patents, but applications are currently maintained in secrecy. That se-

¹⁵ In my experience, the entity whose patent or application is being added to the interference has always been the opponent of the party making the request. However, in theory there is no reason why a party could not request that one of its own patents or applications be added to the interference. Such a request should, of course, be distinguished from a 37 CFR 1.633(d) motion to *substitute* a different application owned by a party for an application already involved in the interference owned by that party.

crecy can be used to prosecute applications containing claims that arguably should be designated as corresponding to the or a count of the interference. If a claim that *should* be designated as corresponding to the or a count of the interference is allowed, and if a patent issues containing that claim, the successful applicant has, in effect, made an end run around the interference—and has obtained a license to sue its opponent on a patent which should not have issued, at least until it prevailed in the interference.

The solution, once again, is simple. A rule should be added providing that any application or patent that claims the benefit of the filing date of (a) any application or patent involved in the interference or (b) any application the benefit of the filing date of which is claimed by any application or patent involved in the interference be automatically and immediately added to the interference with all of its claims designated as corresponding to the count (if there is only one count) or to a count to be determined by the APJ¹⁶ (if there is more than one count).

If the owner of any patent or application so added disagrees that all of the claims in the case(s) so added should be designated as corresponding to the or a count, it could file a 37 CFR 1.633(c)(4) motion asking to have one or more of those claims designated as not corresponding to the or any count and/or a 37 CFR 1.633(b) motion asking to have one or more of the added cases released from the interference. Its opponent(s) could oppose those motions, and the issue of whether or not the claims in the patents and applications so added should be designated as corresponding to the or a count would then be decided *inter partes* in the normal course.

Of course, what I am proposing is based on the implicit presumption that all claims in all cases that claim the same priority date are either (1) not patentably distinct from each other (that is, that they are all drawn to the same patentable invention within the meaning of 37 CFR 1.601(n))¹⁷ or (2) not patentably distinct from the count or counts of the interference. Prior to June 08, 1995, that would not have been a reasonable presumption. However, now that claiming a priority date to

¹⁶ The party that owned any patent or application being added to the interference pursuant to this rule could of course suggest a claim grouping to the APJ.

¹⁷ It should be noted that saying that claims are drawn to "the same patentable invention" as one another does *not* imply that any of the claims are patentable. See *Maier v. Hanawa*, 26 USPQ2d 1606, 1609 (Comm'r 1992), for the definition of "same patentable invention" in this context. It is common to have unpatentable/invalid claims designated as corresponding to a count. See, e.g., *Orikasa v. Oonishi*, 10 USPQ2d 1996, 2002 n.19 (Comm'r 1990); and *Davis v. Uke*, 27 USPQ2d 1180, 1886 n.23 (Comm'r 1993).

which one is not entitled cuts down on the life of one's patent, I submit that it *is* a reasonable presumption. It is likely enough that all of the claims in the related patents or applications *should* be in the interference so that all of the related patents or applications should be put in the interference automatically, after which the owner of those patents or applications would have the right to try to persuade the APJ that certain of those patents or applications or certain claims in certain of those patents or applications should be allowed out of the interference.

VI. 37 CFR 1.687

There is no real discovery in interferences.

37 CFR 1.687(d) provides that "The parties may agree to discovery among themselves at any time." However, if one party has something really bad in its files, it is unlikely it will agree to discovery.

37 CFR 1.687(b) provides that "Where appropriate, a party may obtain production of documents and things during cross-examination of an opponent's witness or during the testimony period of the party's case-in-rebuttal." Besides the fact that none of us really knows what "Where appropriate" means, getting discovery *during* trial testimony is an abomination! In the first place, even if the witness will admit that a document exists, it is a rare day that the document has been brought to the deposition. In the second place, even if the requesting attorney gets the document handed across the table to him or her right then and there, either he or she has to ask ill-prepared questions on the spot or try to get the deposition continued to a later date. The former solution leads to poor questions, and the latter solution leads to unnecessary expenses.¹⁸ All in all, 37 CFR 1.687(b) is an invitation to childish and wasteful game playing!

37 CFR 1.687(c) says that, "Upon a motion (§ 1.635) brought by a party within the time set by an administrative patent judge under § 1.651 or thereafter as authorized by § 1.645 and upon a showing that the interest of justice so requires, an administrative patent judge may order additional discovery, as to matters under the control of a party within the scope of the Federal Rules of Civil Procedure, specifying the terms and conditions of such additional discovery." The trouble here is the "interest of justice" language. The APJ's read that language extraordinarily tightly, ensuring that very little 37 CFR 1.687(c) discovery takes place.

¹⁸ For one thing, if the deposition is continued to a later date, it may require another trip across the continent for the examining attorney.

Of course, there was a time that there was no discovery at all in interferences, so having *any* discovery is no doubt better than having *no* discovery.¹⁹ However, it's not much better. Why can't we have *real* discovery, as they do in inter partes proceedings before the TTAB?²⁰

Over the years, two reasons have been given for the difference in practice before the BPAI and the TTAB.

First, it has been suggested that the APJ's couldn't handle discovery issues because they are difficult and the APJ's have had no experience with such issues. In response, I point out that all of the APJ's who handle interferences are lawyers, that some of them have trial experience, and that all of them routinely handle legal issues that are far more complex than discovery issues. I don't see why they couldn't handle discovery issues—perhaps with a little help initially from their colleagues on the TTAB.

Second, it is argued that having real discovery would raise the average cost of interferences. That is, while having real discovery would no doubt cause some interferences to end more quickly and at reduced cost, the additional costs attributable to real discovery would, on average, outweigh the savings.

In response, I point out that there is *always* a tension between the desire to maximize the probability of obtaining a just result and the desire to minimize the cost of the proceeding. Discovery can indeed be expensive. However, we could minimize the costs of interferences by providing that they would be decided by flipping a coin. We haven't done that. We have decided to have relatively expensive proceedings to decide the relatively complicated issues (derivations, fraud, validity, etc., as well as priority!²¹) that we decide in interferences.²² The real question is whether the *additional* expenses that would result from having real discovery would be justified by the *enhanced* probability of obtaining a just and rationale result.

19 Actually, one prominent corporate patent attorney argues that there should be no discovery at all in interferences because (a) discovery is expensive and (b), in her experience, even discovery in district court litigation seldom produces anything useful, but can be (and often is) used simply as a tactic to harass the opposition. However, hers is a minority position. Moreover, at least in my opinion, she is simply wrong. That is, discovery often leads to finding really useful evidence—and, thus, to an increase in the probability of obtaining a just result.

20 See 37 CFR 2.120.

21 See generally Gholz, *How the United States Currently Handles the Interference Issues That Will Remain in a First-to-File World*, 18 AIPLAQJ 1 (1990).

22 I say "relatively expensive proceedings" because, although interferences now determine most of the same issues that patent infringement litigations do, they do so at approximately one-tenth of the cost of patent infringement litigations.

In my opinion, the answer is yes. A decision was made long ago in connection with conventional litigation that the expense of discovery is justified by the enhancement of the quality of the justice produced. Interferences are just a special form of litigation. I see no reason why the same judgment should not be made concerning interferences.²³

VII. A NEW RULE MODELED ON FRCP 50(a)(1)

Senior parties not infrequently *think* that the junior party or parties has or have failed to overcome their filing dates. That is, the senior party thinks that it will win as to priority even if it does not put in any priority evidence. However, such senior parties can seldom be sure, and, as things now stand, the decision *not* to put on their priority evidence is irrevocable. That is, if they elect *not* to put on their priority evidence, and if the board disagrees with the senior party's assessment (i.e., if the board holds that the junior party or any one of the junior parties *can* beat the senior party's filing date), the senior party is hosed. The result is that many senior parties wind up putting on priority evidence which is never considered—because the board *does* hold that the junior party or parties cannot beat the senior party's filing date. The result is a colossal waste of time and money for *all* of the parties.

There is, of course, a similar problem in conventional litigation—but there is a solution to the problem. That solution is a motion under FRCP 50(a)(1), which reads as follows:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

²³ If we do decide to have real discovery in interferences, then the next question is when the discovery should take place. I submit that, here again, the current system makes no sense. We currently file our preliminary motions (accompanied by declarations from our expert witnesses) before we have any discovery from the other side and then wait 18 to 24 months for a "decision on motions." However, in most cases the decision on motions is that all of the hard issues are deferred to final hearing. We then have our discovery period (such as it is!), after which we cross-examine each other's expert witnesses, re-brief the issues raised by our preliminary motions, and wait a year or two for final hearing.

I submit that it would make much more sense to have the discovery period first, followed by the filing of motions for summary judgment (*not* preliminary motions), followed by the testimony period (if and only if no motion for summary judgment proved dispositive), followed by the briefing period and the final hearing. That is, I think that, here again, the TTAB's practice makes a lot more sense than the BPAI's practice.

I submit that FRCP 50(a)(1) could be adapted for interference practice. The major argument that I have heard against doing so is that, if such motions were permissible, they would be filed in every case, thereby slowing down interference practice still further. (Of course, FRCP 50(a)(1) motions are usually oral, and they are usually denied on the spot by a judge who has sat through the testimony in question. However, the interference analog would have to be in writing, and, in order to decide such a motion, an APJ would have to familiarize himself or herself with written testimony that he or she had *not* sat through, which would of course require time.) That argument is not without force, but there is an answer to it which should gladden the hearts of PTO management: charge a whopping big fee for filing the motion. A \$10,000 fee would discourage the filing of such motions that were frivolous, but it would not discourage the filing of such motions that had a decent chance of success (since the cost of putting on a priority case would normally vastly exceed \$10,000). Moreover, the \$10,000 fee would presumably compensate the PTO for the extra expense of deciding such motions in most cases, and the PTO might even be able to turn a little profit on the exercise.

VIII. A PLEA FOR CONTINUED DIALOG

The presence of Commissioner Goffney and Judge Calvert here today is extremely gratifying. The willingness of PTO management to listen to and to act upon suggestions for changes to the interference rules has varied dramatically over the years. If we are once again entering a period during which the PTO is amenable to considering proposed changes in the interference system suggested by the principal users of the interference system, that will be a very good thing indeed.

I propose two ways of continuing this dialog.

First, I suggest that an APJ be designated to receive, to consider, and to respond to suggestions from members of the bar for changes in the interference rules. Some of those suggestions will be good! Moreover, if the PTO at least gives the bar the impression that it's listening politely, that will reduce the level of frustration that is now experienced by members of the bar in attempting to work with the current rules.

Second, I suggest that that APJ (and any other APJ who is interested) meet quarterly with members of the interference bar to discuss (1) proposed rule changes and (2) lesser changes to interference practice that might be conducive to "the just, speedy, and inexpensive determination of . . . [at least some] interference[s]"!