

## United States Code Annotated - 2000

35 U.S.C.A. § 102

UNITED STATES CODE ANNOTATED

TITLE 35. PATENTS

**PART II—PATENTABILITY OF INVENTIONS AND GRANT OF PATENTS****CHAPTER 10—PATENTABILITY OF INVENTIONS**

§ 102. Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless—

- (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or
- (c) he has abandoned the invention, or
- (d) the invention was first patented or caused to be patented, or was the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States, or
- (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent, or
- (f) he did not himself invent the subject matter sought to be patented, or
- (g)(1) during the course of an interference conducted under section 135 or section 291, another inventor involved therein establishes, to the extent permitted in section 104, that before such person's invention thereof the invention was made by such other inventor and not abandoned, suppressed, or concealed, or (2) before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of invention under this subsection, there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

CREDIT(S)

1984 Main Volume

(July 19, 1952, c. 950, 66 Stat. 797; July 28, 1972, Pub.L. 92-358, § 2, 86 Stat. 502; Nov. 14, 1975, Pub.L. 94-131, § 5, 89 Stat. 691.)

2006 Pocket Part Update

(As amended Nov. 29, 1999, Pub.L. 106-113, Div. B, § 1000(a)(9) [S. 1948, Title IV, § 4806], 113 Stat. 1536, 1537-\_\_\_\_.)

AMENDMENT OF PAR. (E)

<Pub.L. 106-113, Div. B, § 1000(a)(9) [S. 1948, Title IV, §§ 4505, 4508], Nov. 29, 1999, 113 Stat. 1536, 1537-\_\_\_\_, 1537-\_\_\_\_, provided that, effective 1 year after November 29, 1999, and applicable to all applications filed under section 111 of Title 35, on or after that date, and all applications complying with section 371 of title 35, that resulted from international applications filed on or after that date, and applicable to any such application voluntarily published by the applicant under

procedures established under sections 4501 to 4508 of S. 1948 [see Tables for classification] that is pending 1 year after that date, par. (e) is amended to read as follows:>

<(e) The invention was described in—>

<(1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effect under this subsection of a national application published under section 122(b) only if the international application designating the United States was published under Article 21(2)(a) of such treaty in the English language; or>

<(2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that a patent shall not be deemed filed in the United States for the purposes of this subsection based on the filing of an international application filed under the treaty defined in section 351(a); or>

#### HISTORICAL AND STATUTORY NOTES

Paragraphs (a), (b), and (c) are based on [35 U.S.C., 1946 ed., § 31](#) (R.S. 4886 [derived from Act July 8, 1870, c. 230, § 24, 16 Stat. 201], amended (1) Mar. 3, 1897, c. 391, § 1, 29 Stat. 692, (2) May 23, 1930, c. 312, § 1, 46 Stat. 376, (3) Aug. 5, 1939, c. 450, § 1, 53 Stat. 1212).

No change is made in these paragraphs other than that due to division into lettered paragraphs. The interpretation by the courts of paragraph (a) as being more restricted than the actual language would suggest (for example, “known” has been held to mean “publicly known”) is recognized but no change in the language is made at this time. Paragraph (a) together with § 104 contains the substance of title 35 U.S.C., 1946 ed., § 72 (R.S. 4923 [derived from Act July 8, 1870, c. 230, § 62, 16 Stat. 208] ).

Paragraph (d) is based on [35 U.S.C., 1946 ed., § 32](#), first paragraph (R.S. 4887 [derived from Act July 8, 1870, c. 230, § 25, 16 Stat. 201] (first paragraph), amended (1) Mar. 3, 1897, c. 391, § 3, 29 Stat. 692, 693, (2) Mar. 3, 1903, c. 1019, § 1, 32 Stat. 1225, 1226, (3) June 19, 1936, c. 594, 49 Stat. 1529).

The section has been changed so that the prior foreign patent is not a bar unless it was granted before the filing of the application in the United States.

Paragraph (e) is new and enacts the rule of [Milburn v. Davis-Bourmonville, 270 U.S. 390](#), by reason of which a United States patent disclosing an invention dates from the date of filing the application for the purpose of anticipating a subsequent inventor.

Paragraph (f) indicates the necessity for the inventor as the party applying for patent. Subsequent sections permit certain persons to apply in place of the inventor under special circumstances.

Paragraph (g) is derived from title 35 U.S.C., 1946 ed., § 69 (R.S. 4920 [derived from Act July 8, 1870, c. 230, § 61, 16 Stat. 208], amended (1) Mar. 3, 1897, c. 391, § 2, 29 Stat. 692, (2) Aug. 5, 1939, c. 450, § 1, 53 Stat. 1212), the second defense recited in this section. This paragraph retains the present rules of law governing the determination of priority of invention.

Language relating specifically to designs is omitted for inclusion in subsequent sections.

1999 Acts. Statement by President, see 1999 U.S. Code Cong. and Adm. News, p. 290.

1999 Amendments. Par. (e). Pub.L. 106-113 [S. 1948, § 4505], rewrote par. (e) which formerly read: “the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent, or”

Par. (g). Pub.L. 106-113 [S. 1948, § 4806], revised par. (g). Prior to amendment, par. (g) read as follows: “before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.”

1975 Amendments. Par. (e). Pub.L. 94-131 inserted provision for nonentitlement to a patent where the invention was described in a patent granted on an international application by another who has fulfilled the requirements of pars. (1), (2), and (4) of § 371(c) of this title before the invention thereof by the applicant for patent.

1972 Amendments. Par. (d). Pub.L. 92-358 added reference to inventions that were the subject of an inventors' certificate.

1999 Acts. Amendment by Pub.L. 106-113, Div. B, § 1000(a)(9) [S. 1948, Title IV, § 4505], effective 1 year after November 29, 1999, and applicable to all applications filed under section 111 of Title 35, on or after that date, and all applications complying with section 371 of Title 35, that resulted from international applications filed on or after that date, and applicable to any such application voluntarily published by the applicant under procedures established under sections 4501 to 4508 of S. 1948] see Tables for classification] that is pending 1 year after that date, see Pub.L. 106-113, Div. B, § 1000(a)(9) [S. 1948, Title IV, § 4508] set out as a note under section 10 of this title.

1975 Acts. Amendment by Pub.L. 94-131 effective Jan. 24, 1978, and applicable on and after that date to patent applications filed in the United States and to international applications, where applicable, see § 11 of Pub.L. 94-131, set out as an Effective Date note under § 351 of this title.

1972 Acts. Section 3(b) of Pub.L. 92-358 provided that: “Section 2 of this Act [amending this section] shall take effect six months from the date when Articles 1-12 of the Paris Convention of March 20, 1883, for the Protection of Industrial Property, as revised at Stockholm, July 14, 1967, come into force with respect to the United States [Aug. 25, 1973] and shall apply to applications thereafter filed in the United States.”

Section 4 of Act July 19, 1952, c. 950, 66 Stat. 815, provided that subsec. (d) of this section should not apply to existing patents and pending applications, but that the law previously in effect, namely the first par. of R.S. 4887 [first par. of § 32 of former Title 35], should apply to such patents and applications. Said par. of § 32 provided that:

“No person otherwise entitled thereto shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented by the inventor or his legal representatives or assigns in a foreign country, unless the application for said foreign patent was filed more than twelve months, in cases within the provisions of section 31 of this title, and six months in cases of designs, prior to the filing of the application in this country, in which case no patent shall be granted in this country.”

Relief as to filing date of patent application or patent affected by postal situation beginning on Mar. 18, 1970, and ending on or about Mar. 30, 1970, but patents issued with earlier filing dates not effective as prior art under subsec. (e) of this section of such earlier filing dates, see note set out under § 111 of this title.

For legislative history and purpose of Pub.L. 92-358, see 1972 U.S. Code Cong. and Adm.News, p. 2873. See, also, Pub.L. 94-131, 1975 U.S. Code Cong. and Adm.News, p. 1220.

#### CROSS REFERENCES

Abandonment of application, see [35 USCA § 133](#).

Abandonment of invention for unauthorized disclosure, see [35 USCA § 182](#).

Application by other than inventor, see [35 USCA § 118](#).

Benefit of earlier filing date in foreign country; right of priority, see [35 USCA § 119](#).

Conditions for patentability; non-obvious subject matter, see [35 USCA § 103](#).

Effect under Patent Cooperation Treaty of—

International application designating United States at regularly-filed application for patent, see [35 USCA § 363](#).

Patent issued on international application designating United States as regularly-issued patent, see [35 USCA § 375](#).

Filing of application in foreign country, see [35 USCA § 184](#).

Interferences, see [35 USCA § 135](#).

Invention made abroad, see [35 USCA § 104](#).

Inventions patentable, see [35 USCA § 101](#).

Time of prior use or publication for design patents, see [35 USCA § 172](#).

#### FEDERAL PRACTICE AND PROCEDURE

Patents, Fed Proc, L Ed, §§ 60:1, 49, 205, 220, 297, 305, 546, 580, 600, 1022, 1023.

#### FEDERAL JURY PRACTICE AND INSTRUCTIONS

Instructions, background, procedures, see Devitt, Blackmar & Wolff: Civil § 97.01 et seq.

#### FEDERAL FORMS

13 Federal Procedural Forms L Ed, Patents §§ 52:2, 52:12-52:14, 52:72, 52:175, 52:192, 52:203, 52:209, 52:210, 52:212, 52:213, 52:220.

13A Fed Procedural Forms L Ed, Patents §§ 52:2, 21-26, 271, 376, 382, 396, 413, 420-424, 432, 433, 462.

14 Am Jur Legal Forms 2d, Patents, §§ 196:41-43.

19 Am Jur Pl & Pr Forms (Rev), Patents, Form 15.

#### WEST'S FEDERAL PRACTICE MANUAL

Filing and prosecution of patent application—prosecution of patent application, see West's Federal Administrative Practice § 3933.

General knowledge regarding patents—what constitutes patentable invention, see West's Federal Administrative Practice § 3922.

Importance of early filing of patent application, see West's Federal Administrative Practice § 3929.

Infringement—defenses in infringement suit, see West's Federal Administrative Practice § 3970.

Searches of prior art—preliminary search, see West's Federal Administrative Practice § 3925.

#### AMERICAN LAW REPORTS

Meaning of term “on sale” in [35 USCA § 102\(b\)](#), denying patentability to invention which has been on sale for more than one year prior to date of patent application. [25 ALR Fed 486](#).

Meaning of term “printed publication” under [35 USCA § 102\(a\) and \(b\)](#), denying patentability to invention described in printed publication before invention by applicant or more than one year prior to date of patent application. [70 ALR Fed 796](#).

Patentability of computer programs. [6 ALR Fed 156](#).

When does on-sale bar of [35 U.S.C.A. § 102\(b\)](#), which denies patentability to invention that has been on sale for more than one year prior to date of patent application, prevent issuance of valid patent. [155 ALR Fed 1](#).

#### CODE OF FEDERAL REGULATIONS

Abandonment of application, see [37 CFR § 1.135](#) et seq., set out in the Appendix.

Serial number, filing date, and completion of application, see [37 CFR § 1.53](#), set out in the Appendix.

#### LAW REVIEW COMMENTARIES

A critique of the use of secondary considerations in applying the section 103 nonobviousness test for patentability. Note, 28 B.C.L.Rev. 357 (1987).

Analyzing the new dangers of potential patent controversies: A general guide. Bill Schuurman and D.C. Toedt, III, 41 Bus.Law. 727 (1986).