

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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NETAPP, INC. and HEWLETT PACKARD ENTERPRISE CO.,  
Petitioner,

v.

KOM SOFTWARE, INC.,  
Patent Owner.

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Case IPR2019-00605  
Patent 7,536,524 B2

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Before KIMBERLY McGRAW, DANIEL J. GALLIGAN, and  
BRENT M. DOUGAL, *Administrative Patent Judges*.

GALLIGAN, *Administrative Patent Judge*.

DECISION  
Denying Institution of *Inter Partes* Review  
35 U.S.C. § 314

## I. INTRODUCTION

NetApp, Inc. and Hewlett Packard Enterprise Co. (collectively “Petitioner”) filed a Petition requesting *inter partes* review of claims 1–4, 9, 11, 18, 19, 24, and 29–32 of U.S. Patent No. 7,536,524 B2 (“the ’524 patent,” Ex. 1001). Paper 3 (“Pet.”). KOM Software, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 9 (“Prelim. Resp.”). Under 37 C.F.R. § 42.4(a), we have authority to determine whether to institute review.

The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted unless the information presented in the Petition and the Preliminary Response shows “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”

For the reasons explained below, we do not institute an *inter partes* review.

### A. *Related Matters*

As required by 37 C.F.R. § 42.8(b)(2), the parties identify various related matters. Pet. 75; Paper 4, 2–3; Paper 8, 2–3.

### B. *Real Parties in Interest*

The parties identify themselves as the real parties in interest. Pet. 75; Paper 4, 2; Paper 8, 2.

### C. *The ’524 Patent and Illustrative Claim*

The ’524 patent generally relates to providing access privileges for a computer storage medium. Ex. 1001, 2:35–38. Of the challenged claims, claims 1, 29, and 32 are independent. Claim 32 is illustrative and is reproduced below.

32. A system for applying an operation access privilege to a storage medium, comprising:
- means for associating an access privilege with at least a portion of the storage medium;
  - means for intercepting an attempted operation on said at least a portion of the storage medium, wherein said intercepting occurs regardless of an identity of a user attempting the attempted operation;
  - means for comparing the attempted operation to the access privilege;
  - means for allowing, or denying the attempted operation based on comparing the attempted operation to the access privilege; and
  - means for enforcing at least one retention policy comprising applying a restricted state to said at least a portion of the storage medium and preventing modification of the restricted state portion of the storage medium.

#### *D. References*

Petitioner relies upon the following references:

Kung	US 5,265,159	Nov. 23, 1993	Ex. 1008
Vossen	US 6,026,402	Feb. 15, 2000	Ex. 1005
McGovern	US 2005/0097260 A1	May 5, 2005	Ex. 1007
Walker	CA 2,270,651	Jan. 31, 2000	Ex. 1013
Dorothy Elizabeth Robling Denning, <i>Cryptography and Data Security</i> © 1982 (“Denning”)			Ex. 1006

#### *E. Asserted Grounds of Unpatentability*

Petitioner asserts the following grounds of unpatentability<sup>1</sup>:

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<sup>1</sup> The Leahy-Smith America Invents Act (“AIA”) included revisions to 35 U.S.C. §§ 102, 103, and 112 that became effective after the filing of the application for the ’524 patent. Therefore, we apply the pre-AIA versions of these sections.

Reference(s)	Basis	Claim(s)
Walker	§ 102(b)	1
Walker and Denning	§ 103	2–4, 18, and 19
Walker, Denning, and McGovern	§ 103	9, 11, and 29–32
Walker and Kung	§ 103	24
Vossen and McGovern	§ 103	32

## II. ANALYSIS

### A. Claim Construction

The Petition was accorded a filing date of January 28, 2019. Paper 6, 1. In an *inter partes* review for a petition filed on or after November 13, 2018, a claim “shall be construed using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. 282(b).” 37 C.F.R. § 42.100(b); *see* Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board, 83 Fed. Reg. 51,340 (Oct. 11, 2018) (amending 37 C.F.R. § 42.100(b) effective November 13, 2018).

#### 1. Means-Plus-Function Limitations

A petition for *inter partes* review must

[p]rovide a statement of the precise relief requested for each claim challenged. The statement must identify . . . [h]ow the challenged claim is to be construed. Where the claim to be construed contains a means-plus-function or step-plus-function limitation as permitted under 35 U.S.C. 112(f), the construction of the claim must identify the specific portions of the specification that describe the structure, material, or acts corresponding to each claimed function . . . .

37 C.F.R. § 42.104(b). Construing a means-plus-function limitation includes two steps: (1) identifying the claimed function, and (2) identifying the corresponding structure in the specification of the patent that performs

the function. *IPCom GmbH & Co. v. HTC Corp.*, 861 F.3d 1362, 1370 (Fed. Cir. 2017). Petitioner provides proposed constructions for limitations of independent claim 32 it contends are means-plus-function limitations, as set forth in the table below.

<b>Limitation</b>	<b>Petitioner’s Proposed Function and Structure</b>
<p>means for associating an access privilege with at least a portion of the storage medium</p>	<p><b><u>Function:</u></b> Associating an access privilege with at least a portion of a storage medium</p> <p><b><u>Structure:</u></b> Storage medium, and Windows NT filter driver logically disposed between the application layer and the file system layer. Pet. 17–18 (citing Ex. 1001, 1:41–51, 2:47–48, 2:58–61, 6:54–60, 9:53–58, 9:65–10:1, 10:5–7, 10:34–38, 11:58–12:1, Figs. 1, 3, 4, 6).</p>
<p>means for intercepting an attempted operation on said at least a portion of the storage medium, wherein said intercepting occurs regardless of an identity of a user attempting the attempted operation (hereinafter the “means for intercepting” limitation)</p>	<p><b><u>Function:</u></b> Intercepting in a trap layer an attempted operation on at least a portion of a storage medium</p> <p><b><u>Structure:</u></b> Windows NT filter driver logically disposed between the application layer and the file system layer. Pet. 18 (citing Ex. 1001, 9:56–58, 10:34–38, 11:41–47, 12:32–50).</p>

<b>Limitation</b>	<b>Petitioner’s Proposed Function and Structure</b>
<p>means for comparing the attempted operation to the access privilege</p>	<p><b><u>Function:</u></b> Comparing the attempted operation to the access privilege</p> <p><b><u>Structure:</u></b> Windows NT filter driver logically disposed between the application layer and the file system layer. Pet. 18–19 (citing Ex. 1001, 2:48–57, 2:58–63, 11:45–47).</p>
<p>means for allowing, or denying the attempted operation based on comparing the attempted operation to the access privilege</p>	<p><b><u>Function:</u></b> Allowing, or denying the attempted operation based on comparing the attempted operation to the access privilege</p> <p><b><u>Structure:</u></b> Windows NT filter driver logically disposed between the application layer and the file system layer. Pet. 19 (citing Ex. 1001, 11:45–47).</p>
<p>means for enforcing at least one retention policy comprising applying a restricted state to said at least a portion of the storage medium and preventing modification of the restricted state portion of the storage medium</p>	<p><b><u>Function:</u></b> Enforcing at least one retention policy comprising applying a restricted state to said at least a portion of the storage medium and preventing modification of the restricted state portion of the storage medium</p> <p><b><u>Structure:</u></b> Storage medium, and Windows NT filter driver logically disposed between the application layer and the file system layer. Pet. 19–20 (citing Ex. 1001, 11:45–47, 12:40–42, 12:48–50).</p>

Each of the limitations reproduced above recites “means” and further

recites a function, thus creating a presumption that 35 U.S.C. § 112, ¶ 6 applies. *See* 35 U.S.C. § 112, ¶ 6 (“An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.”); *see also Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1349 (Fed. Cir. 2015) (en banc in relevant part) (quoting *Personalized Media Commc’ns, LLC v. Int’l Trade Comm’n*, 161 F.3d 696, 703 (Fed. Cir. 1998)) (holding that “use of the word ‘means’ creates a presumption that § 112, ¶ 6 applies”). We agree with Petitioner that these limitations are means-plus-function limitations subject to 35 U.S.C. § 112, ¶ 6. For this Decision, we analyze Petitioner’s contentions for the “means for intercepting” limitation.

As for the first step in construing the “means for intercepting” limitation, we disagree with Petitioner’s identification of the claimed function as “[i]ntercepting in a trap layer an attempted operation on at least a portion of a storage medium” because Petitioner inserts “in a trap layer” into the claimed function. Pet. 18. Neither Petitioner nor Petitioner’s declarant explains why they include this phrase in the function identification. *See id.*; *see also* Ex. 1002 ¶ 61 (Petitioner’s declarant stating he has not construed certain claim terms, including the “means for intercepting” limitation). The term “trap layer” does not appear in claim 32 or in any other claim of the ’524 patent, and we see no reason to include it. We determine the claimed function is “intercepting an attempted operation on said at least a portion of the storage medium, wherein said intercepting occurs regardless of an identity of a user attempting the attempted operation,” as recited in claim 32.

As for the second step in construing the “means for intercepting” limitation, Petitioner’s identification of “Windows NT filter driver logically disposed between the application layer and the file system layer” is insufficient. *See* Pet. 18 (citing Ex. 1001, 9:56–58, 10:34–38, 11:41–47, 12:32–50). As an initial matter, none of the cited passages from the ’524 patent specification mentions a Windows NT filter driver, and, therefore, Petitioner’s citation to these passages fails to show the required linkage between structure and function. *See Medical Instrumentation & Diagnostics Corp. v. ElektaAB*, 344 F.3d 1205, 1220 (Fed. Cir. 2003) (“[S]tructure corresponding to the claimed function must be disclosed in the specification with clear linkage between the structure and the claimed function . . .”).

Furthermore, Petitioner’s identification of software—“Windows NT filter driver”—without identification of some description of how the software operates to perform the function is insufficient. As the Court of Appeals for the Federal Circuit has stated, “[s]imply reciting ‘software’ without providing some detail about the means to accomplish the function is not enough.” *FinisarCorp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1340–41 (Fed. Cir. 2008) (citing *Aristocrat Techs. v. Int’l Game Tech.*, 521 F.3d 1328, 1333 (Fed. Cir. 2008)). Furthermore, merely disclosing “a black box that performs a recited function” without disclosing “how it does so” is not sufficient. *Blackboard, Inc. v. Desire2Learn, Inc.*, 574 F.3d 1371, 1383 (Fed. Cir. 2009); *see also ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 518 (Fed. Cir. 2012) (holding that “black box” labeled “Purchase Orders” was insufficient structure to perform the “generate purchase orders” function); *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1317 (Fed. Cir. 2012) (“[T]he *disclosure* must identify the method for performing the

function, whether or not a skilled artisan might otherwise be able to glean such a method from other sources or from his own understanding.”).

The cited passages of the ’524 patent specification do not describe how the Windows NT filter driver operates to perform the recited “intercepting” function. Rather, the cited passages state that a “trap layer” intercepts requests. *See* Ex. 1001, 9:56–58, 10:34–38, 11:41–47, 12:32–50. For example, one cited passage states that “[e]ach file system access request that is transmitted from the application layer to the file system layer is intercepted by the trap layer.” Ex. 1001, 9:56–58. Another cited passage states that, “by indicating to the trap layer that delete operations are not supported, all delete requests passed from the application layer for the specific data store are intercepted by the trap layer and an error message is returned to the application layer.” Ex. 1001, 10:34–38. These passages merely restate the function of “intercepting” but do not explain how the software operates to perform the “intercepting” function recited in the claim. The remaining two passages cited by Petitioner state that a “trap layer” intercepts requests but do not provide the required explanation of how the recited “intercepting” is performed. *See* Ex. 1001, 11:41–47, 12:32–50. In addition, Petitioner does not provide any substantive argument in support of its proposed construction for this limitation explaining the manner in which the software operates to perform the recited function. *See* Pet. 18 (stating only that “[t]he ’524 patent supports this construction” and referring to four passages in the ’524 patent and to its proposed construction of “trap layer,” which is not a claim term).

Petitioner’s contentions, therefore, fail to identify structure in the ’524 patent specification sufficient to perform the recited “intercepting” function.

## 2. Remaining Claim Terms

For purposes of this Decision, we do not find it necessary to address the proper interpretation of any other claim terms.<sup>2</sup> See, e.g., *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (“[W]e need only construe terms ‘that are in controversy, and only to the extent necessary to resolve the controversy’ . . . .” (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

### B. Alleged Obviousness over Vossen and McGovern (Claim 32)

Petitioner asserts independent claim 32 is unpatentable under 35 U.S.C. § 103 based on the combined teachings of Vossen and McGovern. Pet. 16, 62–74. To assess this obviousness contention as to claim 32, which recites means-plus-function limitations, we must “engage[] in a comparison of the asserted prior art’s disclosure to the ‘structure’ disclosed in the” specification of the ’524 patent. *IPCom*, 861 F.3d at 1371 (citing *In re Donaldson Co., Inc.*, 16 F.3d 1189, 1195 (Fed. Cir. 1994) (en banc)). As discussed above in the section addressing claim construction, for the “means for intercepting” limitation, Petitioner does not “identify the specific portions of the specification that describe the structure, material, or acts corresponding to each claimed function,” as required by our Rules (37 C.F.R. § 42.104(b)), to enable us to determine if the asserted prior art teaches such structure. Thus, Petitioner fails to demonstrate a reasonable

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<sup>2</sup> Petitioner proposes to incorporate the term “trap layer” into the function for the “means for intercepting” limitation and separately proposes a construction for the term “trap layer.” As noted above, “trap layer” does not appear in any claim in the ’524 patent. Therefore, we determine there is no need to construe this term.

likelihood of prevailing in its challenge to independent claim 32 based on Vossen and McGovern.

*C. Grounds Based on Walker*

Petitioner asserts that Walker anticipated claim 1 and that combinations of Walker and other references render obvious the remaining challenged claims. Pet. 15, 27–62. For the reasons explained below, we determine Walker does not qualify as prior art, and, therefore, Petitioner has not established a reasonable likelihood of prevailing on any challenge based on Walker.

Petitioner asserts that due to a break in the chain of priority, Walker qualifies as prior art to the '524 patent. *See* Pet. 5–12. The '524 patent claims priority to U.S. Patent 7,076,624, which in turn claims priority to U.S. Patent 6,654,864 (“the '864 patent”). The '864 patent issued from U.S. Application No. 10/032,467, which was filed on January 2, 2002, and claims priority to U.S. Application No. 09/267,787 (“the parent '787 application”), which was filed on March 15, 1999, and issued as U.S. Patent No. 6,336,175 on January 1, 2002.<sup>3</sup> *See* Ex. 1001, [30], [62]. Thus, if the '864 patent is entitled to claim priority to the March 15, 1999, filing date of its parent '787 application, Walker does not qualify as prior art under § 102(b).

Petitioner asserts that, because the continuing application giving rise to the '864 patent was filed the day *after* the parent '787 application issued as a patent, the continuing application was not timely filed *before the*

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<sup>3</sup> The parent '787 application claims priority to Canadian Patent Application 2,244,626 (“CA '626”) filed on July 31, 1998. The '864 patent, however, cannot directly claim priority to CA '626 because the '864 patent was not filed within 12 months from the earliest date on which CA '626 application was filed. *See* 35 U.S.C. § 119(a).

*patenting* of the parent '787 application, as required by 35 U.S.C § 120, and is, therefore, not entitled to claim the benefit of a filing date any earlier than its own January 2, 2002, filing date. *See* Pet. 5–12. Petitioner recognizes that 35 U.S.C. § 21(b)—referred to by the parties as the “holiday exception” or the “holiday rule”—“provides that when the last day ‘for taking any action or paying any fee in the [USPTO]’ falls on a holiday, the action be taken on the next secular or business day.” Pet. 8 (quoting 35 U.S.C. § 21(b)). Petitioner, however, contends that the holiday exception of § 21(b) cannot apply to 35 U.S.C. § 120 because § 120 requires the continuing application be filed *before* the application to which it claims priority issues as a patent. Pet. 7–10. Petitioner also argues the filing of a continuing application after issuance of the parent violates 37 C.F.R. § 1.78(d) for the same reasons it failed to meet the requirements of 35 U.S.C. § 120. Pet. 10–12.

Patent Owner responds that the '864 patent properly claims priority to its parent '787 application because 35 U.S.C. § 21(b) expressly provides that when the last day for taking any action or paying any fee in the USPTO falls on a holiday, the action may be taken on the next secular or business day. *See* Prelim. Resp. 9–12. Patent Owner contends that, because January 1, 2002, was a holiday, the applicants had until January 2, 2002, to file the continuing application that ultimately became the '864 patent. Prelim. Resp. 10–11.

We agree with Patent Owner that the application giving rise to the '864 patent is entitled to claim priority to the parent '787 application's March 15, 1999, filing date.

Section 21(b) of the Patent Act states in relevant part:

When the day, or the last day, *for taking any action* or paying any fee in the United States Patent and Trademark Office falls on Saturday, Sunday, or a Federal holiday within the District of Columbia, the action may be taken, or the fee paid, on the next succeeding secular or business day.

*See* 35 U.S.C. § 21(b) (emphasis added).

Because January 1, 2002, was a Federal holiday within the District of Columbia, the day for taking any action that was due that day was extended to January 2, 2002, “the next succeeding secular or business day.” *See id.* Here, the ’787 application issued as a patent on January 1, 2002; therefore, the last day for taking the legal act of filing a continuing application that claims priority to the ’787 application, fell on January 1, 2002. *See Immersion Corp. v. HTC Corp.*, 826 F.3d 1357, 1365 (Fed. Cir. 2016) (determining that a continuing application that is filed on the same day that its parent application issues as a patent is timely filed under § 120). The holiday rule of § 21(b) applies to “the day . . . for taking any action” and does not make any distinction among the types of “action” to which it applies. 35 U.S.C. § 21(b). We agree with Patent Owner that the legal act of filing of a continuation is an “action” as set forth in § 21(b). *See Immersion*, 826 F.3d at 1359 (stating that the “filing” of a continuing application and the “patenting” of a parent application are “both legal acts”). Petitioner has not directed us to persuasive legal authority to support its argument that the filing of a continuing application is a “condition-precedent” to which § 21(b) does not apply. *See* Pet. 8 (stating “there is a distinction between taking an ‘action’ relative to an existing application and the existence of a condition-precedent for the filing of a continuing application under § 120”). Thus, we determine that, if the last day for taking the action of filing a continuing application falls on a Federal holiday

(e.g., January 1, 2002), the action of filing such a continuing application can be taken on the following business day (e.g., January 2, 2002).

We disagree with Petitioner’s argument that application of the holiday exception would “violate the plain text of § 120,”<sup>4</sup> which affords a continuing application the priority date of its parent only if the continuing application is filed *before the patenting* of the parent. *See* Pet. 7–10. The Federal Circuit in *Immersion* determined that the “filed before patenting” requirement of § 120 does not strictly require that the continuing application be filed *before* the first application issues as a patent, as the Federal Circuit determined that a filing that occurs *on the same day* that the first application issues as a patent satisfies the “before the patenting” requirement. *See Immersion*, 826 F.3d at 1365. The Federal Circuit explained that § 120 should be read to accommodate “obvious practical considerations” such as when the filing of the continuing application does not occur “before patenting” of the parent, but rather occurs “within a single day.” *Id.* Here, when the holiday rule is applied to § 120, the “day” for compliance expands to include the next business day as the day for taking any action. Thus, under the facts before us, the day for taking action included January 2, 2002.

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<sup>4</sup> Section 120 of the Patent Act states, in relevant part:

An application for patent for an invention . . . in an application previously filed in the United States . . . shall have the same effect, as to such invention, as though filed on the date of the prior application, if *filed before the patenting* or abandonment of or termination of proceedings on the first application . . . and if it contains or is amended to contain a specific reference to the earlier filed application.

35 U.S.C. § 120 (emphasis added).

We also are not persuaded by Petitioner’s argument that, because Congress amended § 119<sup>5</sup> to expressly extend the 12-month pendency “for claiming priority to a provisional application that would otherwise end in a holiday,” but did not similarly amend § 120, we should infer that Congress intended § 21(b) should not apply to § 120. *See* Pet. 9–10; *see also* Pet. 9 (stating the “absence of a similar holiday exception in § 120 creates an inference that none exists for § 120”). Given the differences between the types of deadlines set forth in §119(e) (e.g., “not later than 12 months after the date on which the provisional application was filed”) and § 120 (e.g., “before the patenting or abandonment of or termination of proceedings on the first application”), and, most importantly, the plain language of § 21(b), we are not persuaded that § 21(b) should not apply to § 120.

We also are not persuaded by Petitioner’s argument that 37 C.F.R. § 1.78 precludes the ’864 patent from claiming priority to the filing date of its parent ’787 application because the rule-based holiday exception set forth in 37 C.F.R. § 1.7(a)<sup>6</sup> applies only to “time periods,” and

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<sup>5</sup> In 1999, Congress made a “Technical Amendment Relating to Weekends and Holidays” and amended 35 U.S.C. § 119(e) to add the following: “(3) If the day that is 12 months after the filing date of a provisional application falls on a Saturday, Sunday, or Federal holiday within the District of Columbia, the period of pendency of the provisional application shall be extended to the next succeeding secular or business day.” *See* Consolidated Appropriations Act, Pub L. No. 106–113, 113 Stat. 1501, § 4801 (1999).

<sup>6</sup> 37 C.F.R. § 1.7(a) states, in pertinent part, that, “[w]henver periods of time are specified in this part in days, calendar days are intended. When the day, or the last day fixed by statute or by or under this part for taking any action or paying any fee in the United States Patent and Trademark Office falls on Saturday, Sunday, or on a Federal holiday within the District of Columbia, the action may be taken, or the fee paid, on the next succeeding business day which is not a Saturday, Sunday or a Federal holiday.”

like the statute, does not apply to the “copending” requirement. *See* Pet. 10–12. Petitioner has not identified a single instance when the Patent Office has applied 37 C.F.R. § 1.78 to preclude an application from claiming priority under 35 U.S.C. § 120.

Rather, the Patent Office has repeatedly stated that the holiday exception of 35 U.S.C. § 21(b) and 37 C.F.R. § 1.7(a) applies to the filing of continuing applications under § 120, deeming filings to be timely when filed the next business day after the Federal Government offices in the Washington, D.C. metropolitan area are officially closed. *See, e.g.*, <https://www.uspto.gov/learning-and-resources/operating-status> (stating that Patent Office will consider various dates that the Federal government offices in the Washington, D.C., metropolitan area were officially closed, including January 14, 2019, December 24, 2018, and December 5, 2018, to be Federal holidays within the District of Columbia under, *inter alia*, 35 U.S.C. § 21, and that any action or fee taken on these dates “will be deemed as timely for the purposes of, e.g., [35 U.S.C. § 120] if the action is taken, or the fee paid, on the next succeeding business day on which the USPTO is open”); <https://www.uspto.gov/web/offices/com/sol/og/2015/week18/TOC.htm#ref20> (stating that in view of the official closing of the Federal government offices in the Washington, D.C. metropolitan area on Tuesday, February 17, 2015, the USPTO will consider Tuesday, February 17, 2015, to be a Federal holiday within the District of Columbia under, *inter alia*, 35 U.S.C. § 21 and that any “action or fee due on Tuesday, February 17, 2015, will be considered as timely for the purposes of, e.g., [35 U.S.C. § 120] if the action is taken, or the fee paid, on the next succeeding day on which the USPTO is open”); *see also* [16](https://www.uspto.gov/about-us/news-updates/dec-22-</a></p></div><div data-bbox=)

[2015-power-outage-updates##electronicsystemsDec2015](#) (stating that in light of an “emergency situation, the USPTO will consider each day from Tuesday December 22, 2015, through Thursday, December 24, 2015, to be a ‘Federal holiday within the District of Columbia’ under 35 U.S.C. § 21 . . . .” and that any “action or fee due on these days will be considered as timely for the purposes of, e.g., [35 U.S.C. § 120] if the action is taken, or the fee paid, on the next succeeding day on which the USPTO is open”). Petitioner provides no persuasive argument for overturning the Patent Office’s practice of permitting continuation applications to claim the holiday exception under 35 U.S.C. § 21(b) and 37 C.F.R. § 1.7. *See* Pet. 11–12.

Thus, for the foregoing reasons, we determine the ’864 patent is entitled to claim priority to the March 15, 1999, filing date of its parent ’787 application. Therefore, the chain of priority for the ’524 patent was not broken, and Walker does not qualify as § 102 prior art to the ’524 patent. Because we determine Petitioner has not shown persuasively that Walker qualifies as prior art under § 102(b) to the ’524 patent, Petitioner has not established a reasonable likelihood of prevailing on any challenge based on Walker.

### III. CONCLUSION

For the foregoing reasons, Petitioner has not established a reasonable likelihood of prevailing on any ground presented, and we therefore deny institution.

IV. ORDER

Based on the foregoing, it is hereby:

ORDERED that the Petition is *denied*, and no trial is instituted.

IPR2019-00605  
Patent 7,536,524 B2

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