

material only under conditions imposed for safety, public health or similar reasons.

(c) The reference to a biological material in a specification disclosure or the actual deposit of such material by an applicant or patent owner does not create any presumption that such material is necessary to satisfy 35 U.S.C. 112 or that deposit in accordance with these regulations is or was required.

§ 1.803 Acceptable depository.

(a) A deposit shall be recognized for the purposes of these regulations if made in

(1) Any International Depository Authority (IDA) as established under the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, or

(2) Any other depository recognized to be suitable by the Office. Suitability will be determined by the Commissioner on the basis of the administrative and technical competence, and agreement of the depository to comply with the terms and conditions applicable to deposits for patent purposes. The Commissioner may seek the advice of impartial consultants on the suitability of a depository. The depository must:

- (i) Have a continuous existence;
- (ii) Exist independent of the control of the depositor;
- (iii) Possess the staff and facilities sufficient to examine the viability of a deposit and store the deposit in a manner which ensures that it is kept viable and uncontaminated;
- (iv) Provide for sufficient safety measures to minimize the risk of losing biological material deposited with it;
- (v) Be impartial and objective;
- (vi) Furnish samples of the deposited material in an expeditious and proper manner; and
- (vii) Promptly notify depositors of its inability to furnish samples, and the reasons why.

(b) A depository seeking status under paragraph (a)(2) of this section must direct a communication to the Commissioner which shall:

(1) Indicate the name and address of the depository to which the communication relates;

(2) Contain detailed information as to the capacity of the depository to comply with the requirements of paragraph (a)(2) of this section, including information on its legal status, scientific standing, staff and facilities;

(3) Indicate that the depository intends to be available, for the purposes of deposit, to any depositor under these same conditions;

(4) Where the depository intends to accept for deposit only certain kinds of biological material, specify such kinds;

(5) Indicate the amount of any fees that the depository will, upon acquiring the status of suitable depository under paragraph (a)(2) of this section, charge for storage, viability statements and furnishings of samples of the deposit.

(c) A depository having status under paragraph (a)(2) of this section limited to certain kinds of biological material may extend such status to additional kinds of biological material by directing a communication to the Commissioner in accordance with paragraph (b) of this section. If a previous communication under paragraph (b) of this section is of record, items in common with the previous communication may be incorporated by reference.

(d) Once a depository is recognized to be suitable by the Commissioner or has defaulted or discontinued its performance under this section, notice thereof will be published in the Office Gazette of the Patent and Trademark Office.

§ 1.804 Time of making an original deposit.

(a) Whenever a biological material is specifically identified in an application for patent as filed, an original deposit thereof may be made at any time before filing the application for patent or, subject to § 1.809, during pendency of the application for patent.

(b) When the original deposit is made after the effective filing date of an application for patent, the applicant must promptly submit a statement

from a person in a position to corroborate the fact, stating that the biological material which is deposited is a biological material specifically identified in the application as filed.

[54 FR 34880, Aug. 22, 1989, as amended at 62 FR 53202, Oct. 10, 1997]

§ 1.805 Replacement or supplement of deposit.

(a) A depositor, after receiving notice during the pendency of an application for patent, application for reissue patent or reexamination proceeding, that the depository possessing a deposit either cannot furnish samples thereof or can furnish samples thereof but the deposit has become contaminated or has lost its capability to function as described in the specification, shall notify the Office in writing, in each application for patent or patent affected. In such a case, or where the Office otherwise learns, during the pendency of an application for patent, application for reissue patent or reexamination proceeding, that the depository possessing a deposit either cannot furnish samples thereof or can furnish samples thereof but the deposit has become contaminated or has lost its capability to function as described in the specification, the need for making a replacement or supplemental deposit will be governed by the same considerations governing the need for making an original deposit under the provisions set forth in § 1.802(b). A replacement or supplemental deposit made during the pendency of an application for patent shall not be accepted unless it meets the requirements for making an original deposit under these regulations, including the requirement set forth under § 1.804(b). A replacement or supplemental deposit made in connection with a patent, whether or not made during the pendency of an application for reissue patent or a reexamination proceeding or both, shall not be accepted unless a certificate of correction under § 1.323 is requested by the patent owner which meets the terms of paragraphs (b) and (c) of this section.

(b) A request for certificate of correction under this section shall not be granted unless the certificate identifies:

- (1) The accession number for the replacement or supplemental deposit;
- (2) The date of the deposit; and
- (3) The name and address of the depository.

(c) A request for a certificate of correction under this section shall not be granted unless the request is made promptly after the replacement or supplemental deposit has been made and the request:

(1) Includes a statement of the reason for making the replacement or supplemental deposit;

(2) Includes a statement from a person in a position to corroborate the fact, and stating that the replacement or supplemental deposit is of a biological material which is identical to that originally deposited;

(3) Includes a showing that the patent owner acted diligently—

(i) In the case of a replacement deposit, in making the deposit after receiving notice that samples could no longer be furnished from an earlier deposit; or

(ii) In the case of a supplemental deposit, in making the deposit after receiving notice that the earlier deposit had become contaminated or had lost its capability to function as described in the specification;

(4) Includes a statement that the term of the replacement or supplemental deposit expires no earlier than the term of the deposit being replaced or supplemented; and

(5) Otherwise establishes compliance with these regulations.

(d) A depositor's failure to replace a deposit, or in the case of a patent, to diligently replace a deposit and promptly thereafter request a certificate of correction which meets the terms of paragraphs (b) and (c) of this section, after being notified that the depository possessing the deposit cannot furnish samples thereof, shall cause the application or patent involved to be treated in any Office proceeding as if no deposit were made.

(e) In the event a deposit is replaced according to these regulations, the Office will apply a rebuttable presumption of identity between the original and the replacement deposit where a patent making reference to the deposit