to have been made less clear by the Supreme Court's rejuvenation of "invention" as a standard of patentability.[1426]

Procedure in Issuing Patents

The standard of patentability is a constitutional standard, and the question of the validity of a patent is a question of law.[1427] Congress may authorize the issuance of a patent for an invention by a special, as well as by general, law, provided the question as to whether the patentee's device is in truth an invention is left open to investigation under the general law.[1428] The function of the Commissioner of Patents in issuing letters patent is deemed to be quasi-judicial in character. Hence an act granting a right of appeal from the Commission to the Court of Appeals for the District of Columbia is not unconstitutional as conferring executive power upon a judicial body.[1429] The primary responsibility, however, for weeding out unpatentable devices rests in the Patent Office.[1430] The present system of "de novo" hearings before the Court of Appeals allows the applicant to present new evidence that the Patent Office has not heard,[1431] thus making somewhat amorphous the central responsibility.

Nature and Scope of the Right Secured for Copyright

The leading case on the nature of the rights that Congress is authorized to "secure" under the Copyright and Patent Clause is *Wheaton v. Peters*.[1432] Wheaton was the official reporter for the Supreme Court from 1816 to 1827, and Peters was his successor in that role. Wheaton charged Peters with having infringed his copyright in the twelve volumes of "Wheaton's Reports" by reprinting material from Wheaton's first volume in "a volume called 'Con-

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[1426] Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969). "The question of invention must turn on whether the combination supplied the key requirement." Id. at 60. But the Court also appeared to apply the test of nonobviousness in the same decision: "We conclude that the combination was reasonably obvious to one with ordinary skill in the art." Id. *See also* McClain v. Ortmayer, 141 U.S. 419, 427 (1891), where, speaking of the use of "invention" as a standard of patentability the Court said: "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not."

[1427] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Mahn v. Harwood, 112 U.S. 354, 358 (1884). In Markman v. Westview Instruments, Inc., 517 U.S. 348 (1996), the Court held that the interpretation of terms in a patent claim is a matter of law reserved entirely for the courts. The Seventh Amendment does not require that such issues be tried to a jury.

[1428] Evans v. Eaton, 16 U.S. (3 Wheat.) 454, 512 (1818).

[1429] United States v. Duell, 172 U.S. 576, 586–89 (1899). *See also* Butterworth v. United States ex rel. Hoe, 112 U.S. 50 (1884).

[1430] Graham v. John Deere Co., 383 U.S. 1, 18 (1966).

[1431] In Jennings v. Brenner, 255 F. Supp. 410, 412 (D.D.C. 1966), District Judge Holtzoff suggested that a system of remand be adopted.

[1432] 33 U.S. (8 Pet.) 591 (1834).