

The opinion in support of the decision being entered today was **not** written for publication and is **not** precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DOUGLAS PETER MAGYARI
and DAVID KEITH MAGYARI

Appeal No. 2001-1923
Application No. 09/031,356

ON BRIEF

Before THOMAS, FLEMING and DIXON, **Administrative Patent Judges**.
THOMAS, **Administrative Patent Judge**.

DECISION ON APPEAL

Appellants have appeal to the Board from the examiner's final rejection of claims 26-28.

Representative claim 26 is reproduced below:

26. A sound capturing device, comprising:
a body portion geometrically configured to simulate the acoustic properties of a human head and torso;
a first microphone coupled to the body portion for generating a first signal corresponding substantially to a vibrational frequency of said body portion in response to a received sound wave; and
a second microphone affixed to the body portion and integral with the first microphone for generating a second signal corresponding substantially to a

frequency of said received sound wave such that said sound wave will reach the first and second microphones at substantially the same time.

The following references are relied on by the examiner:

Suzuki et al. (Suzuki)	3,870,820	Mar. 11, 1975
Yoshida et al. (Yoshida)	4,442,323	Apr. 10, 1984
Genuit	4,741,035	Apr. 26, 1988

Claims 26-28 stand rejected under 35 U.S.C. § 103. As evidence of obviousness, the examiner relies upon Genuit in view of Yoshida as to claims 26 and 27. Claim 28 is rejected twice. The first rejection is Suzuki in view of Yoshida and the second rejection is on the basis of Genuit alone. The rejection of claims 26-28 under the judicially created doctrine of obviousness-type double patenting in the final rejection is not repeated in the answer and not argued in the Brief.

Rather than repeat the positions of the appellants and examiner, reference is made to the brief and answer for the appellants' and the examiner's respective positions.

OPINION

On the one hand, while we reverse the rejection of claims 26 and 27 and the first stated rejection of claim 28, we sustain the second rejection of claim 28 as being obvious over Genuit alone.

We generally agree with appellants' views expressed in the Brief that the rejection of claims 26 and 27 and the first stated rejection of claim 28 are based upon rejections where the references have not been properly combined within 35 U.S.C. § 103. The examiner has not set forth a prima facie case obviousness for either rejection.

As expressed, the examiner's rejection of claims 26 and 27 based upon Genuit considered with Yoshida is defective on its face because it appears to set forth only a concept-type rejection: the claim language per se is not argued in any manner. The rejection does not refer to identifiable teachings and/or suggestions from each of the references relied upon. The examiner's approach appears to border on hindsight if not pure hindsight, since specific teachings and suggestions of both references have not been assessed on the record, thus leading us to question the examiner's basis of combinability. We must independently assess, from an artisan's prospective, teachings and suggestions and inferences to be derived from the respectively applied references and to do so prospectively to determine if there is a proper basis (without prohibited hindsight) to reject the noted claims on appeal within 35 U.S.C. § 103. The examiner has not expressed any rationale or basis to replace the single microphone of Genuit with that of Yoshida, just that the examiner considers that it would have been obvious to have done so. The reasoning appears presumptuous and not explained. The reasoning expressed in the statement of the rejection at pages 4 and 5 of the answer, which is substantially repeated in the responsive arguments portion of the answer as to this rejection at pages 6 and 7 of the answer, is couched in terms of the view that the modification "could" have been made and not that it necessarily "would" have been made by artisan within 35 U.S.C. § 103.

Essentially the same reasons for reversal exist for the separate, first stated rejection of claim 28 in light of Suzuki and Yoshida as expressed at page 5 of the answer. Again, the responsive arguments portion of the answer merely repeats this statement of the rejection at pages 7 and 8 of the answer.

The examiner's comments at pages 7 and 8 of the answer relating to appellants' prior patent, derived apparently from the parent application to this application, appear to be misplaced since they do not correspond responsively to any argument made by appellants in the brief.

Finally, we sustain the rejection of claim 28 under 35 U.S.C. § 103 as being obvious over Genuit alone. This rejection was set forth at page 4 of the final rejection and repeated in the answer beginning at the bottom of page 5. Appellants' brief contains no arguments directed at traversing this rejection. Therefore, we have no arguments from appellants' alleging any error in the examiner's rejection of this claim.

In view of the foregoing, the examiner's decision rejecting claims 26-28 under 35 U.S.C. § 103 is sustained only as to claim 28.

Therefore, the decision of examiner is affirmed-in-part.¹

¹ The examiner is free to re-institute rejections under 35 U.S.C. § 103 of the claims on appeal in subsequent Office actions using the same and/or additional prior art. We also note in passing that the claimed body portion relating to simulated human heads and torsos appears to be part of the prior art as noted in the paragraph bridging specification pages 1 and 2 relating to well-established prior art binaural recording techniques. It appears to be well established in the art that mannequins or similar dummy heads of humans were utilized as source recording devices.

Appeal No. 2001-1923
Application No. 09/031,356

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

JAMES D. THOMAS)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
)	APPEALS AND
MICHAEL R. FLEMING)	INTERFERENCES
Administrative Patent Judge)	
)	
)	
)	
)	
)	
JOSEPH L. DIXON)	
Administrative Patent Judge)	

JAT/sld

Appeal No. 2001-1923
Application No. 09/031,356

PAUL M. SCHWARTZ
BROOKS & KUSHMAN
TWENTY SECND FLOOR
1000 TOWN CENTER
SOUTHFIELD, MI 48075