

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

Paper No. 36

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex Parte HERBERT M. REYNOLDS, ROBERT KERR,
RAYMOND BRODEUR, KHALDOUN RAYES,
DOUGLAS NEAL and YUNTAO CUI

Appeal No. 2002-0586
Application 08/949,213

ON BRIEF

Before WALTZ, DELMENDO and JEFFREY T. SMITH, *Administrative Patent Judges*.

JEFFREY T. SMITH, *Administrative Patent Judge*.

Decision on appeal under 35 U.S.C. § 134

Applicants appeal the decision of the Primary Examiner finally rejecting claims 1 to 6, 8 to 10 and 12 to 32.^{1,2} We have jurisdiction under 35 U.S.C. § 134.

CITED REFERENCE

¹ According to Appellants, claims 7 and 11 contain allowable subject matter. (Brief, p. 2).

² In rendering our decision we have considered Appellants' position present in the Brief, filed July 23, 2001 and the Reply Brief, filed October 01, 2001.

posture of the occupant. Claim 1 which is representative of the invention is reproduced below:

1. A design template comprising:
a torso for at least one of designing, evaluating and measuring human occupant accommodation being one of a group comprising a 95th percentile male, 50th percentile male and 5th percentile female having each being one of a group comprising an ERECT posture, a NEUTRAL posture and a SLUMPED posture, said torso containing indicia of skeletal landmarks relative to a seated human body occupant.

Our initial inquiry is directed to the scope of the claimed subject matter. During patent prosecution, claims are to be given their broadest reasonable interpretation consistent with the specification, and the claim language is to be read in view of the specification as it would be interpreted by one of ordinary skill in the art. *In re Morris*, 127 F.3d 1048, 1053-54, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989); *In re Sneed*, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983); *In re Okuzawa*, 537 F.2d 545, 548, 190 USPQ 464, 466 (CCPA 1976).

Claim construction is a legal issue which is reviewed *de novo*. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456, 46 USPQ2d 1169, 1174 (Fed. Cir. 1998) (en banc); *In re Freeman*, 30 F.3d, 1459, 1464, 31 USPQ2d 1444, 1447 (Fed. Cir. 1994). Here claim 1 recites the term “percentile.” The only description that sheds light to this term in the specification is at page 15, which enlightens one skilled in the art that the

torso section is “dimensionally accurate to simulate or represent [the] body size of a human male who is 95th percentile in weight and stature, a human male who is 50th percentile in weight and stature or a human female who is 5th percentile in weight and stature.” (emphasis added). Further, we find from the description that the term “torso” is limited to those which are manufactured.

The subject matter of claim 1 is directed to a design template comprising a torso. The torso contains indicia of skeletal landmarks relative to a seated human body. The design template is used for designing, evaluating and measuring human occupant accommodation. The design template is designed to evaluate human occupant accommodation selected from the group consisting of a 95th percentile male, 50th percentile male and 5th percentile female. The selected design template has a posture selected from the group consisting of an ERECT posture, a NEUTRAL posture and a SLUMPED posture.

The Examiner rejected claims 1 to 6, 8 to 10, 12 to 17, and 19 to 32 as unpatentable under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over Kaptur.

Anticipation under § 102 requires that the identical invention that is claimed was previously known to others and thus is not new. *See Scripps Clinic & Research Found. v. Genentech Inc.*, 927 F.2d 1565, 1576, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991). A

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principal question in the § 102 rejection is whether the Examiner has established that the accommodation checking device described in Kaptur is identical to the claimed design template. We answer this question in the negative.

In comparing the subject matter of appealed claim 1 against the accommodation checking device disclosed in Kaptur, we find that the Appellants' claimed design template represents or simulates the human male in the 95th percentile in weight and stature, a human male who is 50th percentile in weight and stature or a human female who is 5th percentile in weight and stature. Also, we find that Kaptur discloses "the specific device shown represents or simulates the human male in the 50th percentile in weight and the 90th percentile in stature". (Col. 5, ll. 40-43). Further, we find the Examiner has not addressed the percentile in stature of Kaptur's accommodation device in the Answer. Thus, we determine that Kaptur's accommodation device is not the same as the claimed design template. The 35 U.S.C. § 102(b) rejection is therefore reversed.

The Examiner rejected the claims under 35 U.S.C. § 103(a) as obvious over Kaptur. However, the Examiner has not provided the proper factual basis to support a legal conclusion of obviousness as set forth in *Graham v. John Deere Co.*, 383 U.S. 1 (1966). Consequently, the Examiner has not met the initial burden of establishing a *prima facie* case of unpatentability under section 103. The 35 U.S.C. § 103(a) rejections of the claims are therefore reversed.

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OTHER ISSUES

Prior to disposition of this application the Examiner should re-evaluate the patentability of the claimed subject matter over the Kaptur reference under 35 U.S.C. § 103. Specifically, the Examiner should address whether it would have been obvious to a person of ordinary skill in the art to modify Kaptur's accommodation device to simulate a human male in the 50th percentile in weight and stature.

CONCLUSION

The rejection of claims 1 to 6, 8 to 10, 12 to 17, and 19 to 32 as unpatentable under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over Kaptur; and claim 18 as unpatentable under 35 U.S.C. § 103(a) as obvious over Kaptur are reversed.

REVERSED

THOMAS A. WALTZ
Administrative Patent Judge

ROMULO H. DELMENDO
Administrative Patent Judge

JEFFREY T. SMITH
Administrative Patent Judge

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