

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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Ex parte BRIAN BOESCH and JON L. ROBERTS

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Appeal No. 2005-1305  
Application No. 10/078,890

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ON BRIEF

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Before THOMAS, HAIRSTON, and SMITH, Administrative Patent Judges.  
JERRY SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on the appeal under 35 U.S.C. § 134 from the examiner's rejection of claims 1, 4, 10 and 12, which constitute all the claims pending in the application.

The disclosed invention pertains to a method and apparatus for training an animal not to pull on a lead which is secured about the animal's neck.

Representative claim 1 is reproduced as follows:

1. An animal worn training device comprising:  
a lead adapted to secure about the neck of an animal to be trained;

a power source;

a transducer connected to the power source and coupled to the lead, the transducer adapted to measure the strength of pull placed on the lead by the animal;

a processor connected to the power source and the transducer to receive signals from the transducer indicative of the strength of pull and implementing instructions to send a shock signal when the strength of pull exceeds a set shock threshold;

a shock producer connected to the power source and the processor to receive the shock signal and administer a shock to the animal when the shock threshold is exceeded; and

a sound producer connected to the processor;

wherein the processor further implements instructions to send a sound signal to the sound producer when the strength of pull exceeds a set sound production threshold, whereby the sound producer emits a sound when the sound production threshold is exceeded;

wherein the sound production threshold is indicative of a strength of pull less than that indicated by the shock threshold.

The examiner relies on the following references:

Slater et al. (Slater)	6,003,474	Dec. 21, 1999
Stapelfeld et al. (Stapelfeld)	6,079,367	June 27, 2000

Claims 1, 4, 10 and 12 stand rejected under 35 U.S.C. § 103(a). As evidence of obviousness the examiner offers Slater in view of Stapelfeld.

Rather than repeat the arguments of appellants or the examiner, we make reference to the brief and the answer for the respective details thereof.

OPINION

We have carefully considered the subject matter on appeal, the rejection advanced by the examiner and the evidence of obviousness relied upon by the examiner as support for the rejection. We have, likewise, reviewed and taken into consideration, in reaching our decision, the appellants' arguments set forth in the brief along with the examiner's rationale in support of the rejection and arguments in rebuttal set forth in the examiner's answer.

It is our view, after consideration of the record before us, that the evidence relied upon and the level of skill in the particular art would have suggested to one of ordinary skill in the art the obviousness of the invention as set forth in the claims on appeal. Accordingly, we affirm.

Appellants have indicated that for purposes of this appeal the claims will all stand or fall together as a single group [brief, page 5]. Consistent with this indication appellants have made no separate arguments with respect to any of the claims on appeal. Accordingly, all the claims before us will stand or fall

together. Note In re King, 801 F.2d 1324, 1325, 231 USPQ 136, 137 (Fed. Cir. 1986); In re Sernaker, 702 F.2d 989, 991, 217 USPQ 1, 3 (Fed. Cir. 1983). Therefore, we will consider the rejection against independent claim 1 as representative of all the claims on appeal.

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and to provide a reason why one having ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. Such reason must stem from some teaching, suggestion or implication in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988); Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 293, 227 USPQ 657, 664 (Fed. Cir. 1985), cert. denied, 475 U.S. 1017 (1986); ACS Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572,

1577, 221 USPQ 929, 933 (Fed. Cir. 1984). These showings by the examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). If that burden is met, the burden then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. See Id.; In re Hedqes, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976). Only those arguments actually made by appellants have been considered in this decision. Arguments which appellants could have made but chose not to make in the brief have not been considered and are deemed to be waived [see 37 CFR § 41.37(c)(1)(vii)(2004)].

With respect to representative claim 1, the examiner finds that Slater teaches an animal worn training device which produces both a sound warning when a sound threshold of pull is reached and a shock when a shock threshold of pull is reached. The examiner asserts, therefore, that Slater teaches the claimed invention except for disclosing that the sound production

threshold is indicative of strength of pull less than that indicated by the shock threshold. The examiner cites Stapelfeld as teaching that it was well known in the art to use a sound stimulus as a warning before resorting to the shock stimulus. The examiner finds that it would have been obvious to the artisan to apply a lower threshold than the shock threshold to the sound transducer of Slater to provide a warning signal before the corrective shock is produced [answer, pages 3-4].

Appellants argue that Stapelfeld does not teach a separate sound production threshold that is indicative of a strength of leash pull that is less than that indicated by the separate shock threshold. Appellants argue that Stapelfeld teaches a single variable threshold only. Appellants also argue that the examiner has provided no factual basis to support the proposed combination of teachings. Appellants assert that there is no motivation to combine the threshold structure of Stapelfeld's invisible fence invention with Slater's device for training a dog to walk on a leash. Finally, appellants argue that Stapelfeld is non-analogous art because it is directed to an invisible buried fence which is a divergent field of endeavor from an animal which is restrained on a leash [brief, pages 5-11].

The examiner responds that Slater teaches using both a sound warning and a shock stimulus. The examiner notes that Stapelfeld was cited only to show that it was known to apply a sound stimulus before the shock stimulus. The examiner notes that Stapelfeld clearly teaches that an auditory signal is known to be a warning and that only after a warning is issued would the corrective shock be delivered. The examiner also responds that Stapelfeld provides the motivation for using two thresholds in Slater, and that Stapelfeld is analogous art because it is directed to the common problem of training animals in their behavior [answer, pages 4-6].

We will sustain the examiner's rejection of claims 1, 4, 10 and 12 for essentially the reasons argued by the examiner in the answer. First, we agree with the examiner that Stapelfeld is analogous art with respect to Slater and the claimed invention because Stapelfeld relates to animal training which is the problem addressed by the claimed invention. Second, we disagree with appellants' argument that Stapelfeld fails to disclose the use of two thresholds. In the background section of the patent, Stapelfeld discloses that "[t]his can be preceded by a buzzing sound or other auditory warning. In time, the dog learns to turn back simply on hearing the auditory warning and without receiving

other stimulus" [column 1, lines 19-22, emphasis added]. This section on Stapelfeld clearly teaches that it was well known to provide an auditory warning before resorting to a shock stimulus in training a dog. Stapelfeld also discloses that "[w]hen the animal enters the warning zone, only an auditory signal is delivered. If the animal continues beyond the warning zone, however, and proceeds into the avoidance zone, a shock may be delivered" [column 5, line 67 to column 6, line 3]. Thus, we agree with the examiner that Stapelfeld clearly teaches using a sound warning before resorting to a shock stimulus. Appellants' argument that there is no motivation to combine the teachings of Stapelfeld and Slater is not convincing. As noted above, Stapelfeld teaches that an ordered use of sound followed by a shock teaches the dog to react to the sound stimulus alone so that the shock stimulus is not required. This provides sufficient motivation for the artisan to use a lower leash pull threshold for the sound warning in Slater than the leash pull threshold for the shock stimulus.

In summary, we have considered each of appellants' arguments set forth in the brief, but we are not persuaded by any of these arguments that the examiner's rejection is in error. Therefore,

the decision of the examiner rejecting claims 1, 4, 10 and 12 is affirmed

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv).

AFFIRMED

JAMES D. THOMAS	)	
Administrative Patent Judge	)	
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	)	BOARD OF PATENT
KENNETH W. HAIRSTON	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
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	)	
JERRY SMITH	)	
Administrative Patent Judge	)	

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