

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board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

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Appeal No. 2006-1189  
Application 10/707,148

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ON BRIEF

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Before FRANKFORT, OWENS and CRAWFORD, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 2 through 10, all of the claims remaining in the application. Claim 1 has been cancelled.

Appellant's invention relates to a method for limiting the movement of an infant in a particular direction by creating a low profile barrier on a floor, which barrier has on its top surface a plurality of upwardly extending, very short studs that each have a dull point or short flat upper surface that is intended to provide temporary discomfort when the infant touches and applies its own weight to the studs in attempting to cross the barrier. As noted

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in paragraph [007] of the specification, the barrier is designed to have a low profile so that adults and older children will have no difficulty stepping across or reaching over the barrier. In paragraph 0016, it is further noted that the required depth or width of the barrier “is only to be of a distance which is only slightly more than the step or two of an infant” and that therefore, older children and adults will have no difficulty stepping over the barrier or reaching across the barrier. Independent claims 2, 5 and 6 are representative of the subject matter on appeal and a copy of those claims can be found in Appendix A attached to appellant’s brief.

The sole prior art reference of record relied upon by the examiner in rejecting the appealed claims is:

Marshall	4,431,166	Feb. 14, 1984
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Claims 6, 9 and 10 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite.

Claims 2 through 10 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Marshall.

Rather than reiterate the examiner's commentary regarding the above-noted rejections and the conflicting viewpoints advanced by the examiner and appellant regarding the rejections, we make reference to the examiner's answer (mailed January 11, 2006) for the reasoning in support of the rejections, and to appellant’s brief (filed December 1, 2005) and reply brief (filed February 6, 2006) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied Marshall patent, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we have made the determination that the examiner's above-noted rejection under 35 U.S.C. § 102(b) will be sustained, but that the rejection under 35 U.S.C. § 112, second paragraph, will not. Our reasons follow.

The examiner's position concerning the rejection of claims 6, 9 and 10 under 35 U.S.C. § 112, second paragraph, is set forth on page 3 of the answer and further discussed on page 6 thereof. Essentially, the examiner is of the view that the recitation in claim 6 that the barrier has a low profile top surface design "having a limited height which permits older children and adults to step over" the barrier, renders the metes and bounds of the claim uncertain, because it is unclear which children are older and which adults are capable of stepping over. The examiner asserts that claim 6 does not appear to cover all instances for all children and adults (able or disabled), and especially the elderly, and therefore the claim would be uncertain and thus indefinite. On page 6 of the answer, the examiner contends that there is no "standardized depth" which prevents an infant from attempting to cross the barrier while still allowing older children and adults to step across, and further that the specification and claims do not provide "the prerequisite to determine if one using the method has obtained such depth."

As set forth in 35 U.S.C. § 112, second paragraph, it is a requirement for obtaining a patent that the specification must conclude with one or more claims "particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." In

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evaluating claims under 35 U.S.C. § 112, second paragraph, the examiner should always keep in mind that this section of the Statute essentially requires that claims set out and circumscribe a particular area with a reasonable degree of precision and particularity, and that in making this determination, the definiteness of the language employed in the claims under consideration must be analyzed, not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as such would be interpreted by one possessing the ordinary level of skill in the pertinent art. See In re Johnson, 558 F.2d 1008, 1015, 194 USPQ 187, 193 (CCPA 1977).

The reasonableness standard for evaluating clarity and precision under 35 U.S.C. § 112, second paragraph, provides an applicant with some latitude in the manner of expression and the aptness of terms used in the claims, even though the claim language may not be as precise as the examiner might desire. Thus, if the scope of the invention sought to be patented can be determined from the language of the claims with a reasonable degree of certainty, a rejection of such claims under 35 U.S.C. § 112, second paragraph, is not appropriate. In addition, it should be kept in mind that mere claim breadth is not to be equated with indefiniteness. See In re Miller, 441 F.2d 689, 693, 169 USPQ 597, 600 (CCPA 1971).

We recognize that in the present case the appellant has not defined the structure of the barrier used in the claimed method by specifying a fixed range of height, length and width dimensions, but has instead defined at least the height and width of the barrier in terms of the infant and/or older children and adults that might encounter the barrier and seek to cross

it. However, such expression alone, while somewhat imprecise, does not automatically render appellant's claims 6, 9 and 10 indefinite under 35 U.S.C. § 112, second paragraph. If one of ordinary skill in the art would understand what is claimed upon consideration of the claim as a whole, in light of the specification, and thus would be reasonably informed as to the boundaries of what constitutes infringement, then the claim serves the notice function and meets the statutory requirements of 35 U.S.C. § 112, second paragraph.

The specification and claim 6 on appeal define the barrier as having a "low profile" and as including a plurality of upwardly extending sections or studs (12) that are of "limited height," which is defined in claim 6 as meaning that the upwardly extending sections are "sufficiently short so that an infant would not be able to grab and detach any of said upwardly extending sections," and further as being such as to permit older children and adults to step over the barrier. Paragraph [0011] of the specification indicates that the upwardly extending sections or studs are "of a very short length" and are designed so that contact with the studs will result in temporary discomfort sufficient to discourage an infant from further movement in a predetermined direction. Regarding the depth/width of the barrier, claim 6 indicates that the sheeting material of the barrier is "sized for older children and adults to step over while still providing sufficient depth to discourage an infant from attempting to cross." The specification (paragraph [0016]) provides further insight and indicates that the required depth or width of the barrier "is only to be of a distance which is only slightly more than the step or two of an infant" and notes that, therefore, older children and adults will have no difficulty stepping over the barrier or reaching across a barrier. Paragraph [0018] makes clear that the method of the present invention is intended to apply

to “small toddlers preferably from the age they begin to crawl to approximately 16 months old.”

In contrast to the examiner’s position, we see claims 6, 9 and 10 as defining appellant’s invention somewhat broadly, but with a reasonable degree of clarity and particularity when viewed from the perspective of one of ordinary skill in the art who has read and understood the claims in light of appellant’s specification and the teachings of the prior art. In our opinion, such an artisan would understand the barrier used in the method claims on appeal as being of low profile with very short upwardly extending sections or studs that are “sufficiently short so that an infant would not be able to grab and detach any of said upwardly extending sections,” and of such limited height as to permit older children and adults to step over the barrier (e.g., as having a height of approximately 1 to 1 ½ inches, or less). Regarding the depth/width of the barrier, we consider that an artisan would have viewed the barrier as being no wider than a distance equal to one to two steps of an infant/toddler less than 16 months old (e.g., a width of approximately 12 to 24 inches), which distance would allow older children and adults to step over and/or reach across the barrier. Thus, the height and depth/width of the barrier are adequately defined in terms of the infant attempting to cross it, with the reference to older children and adults merely providing a further understanding of the barrier dimensions. Logic dictates that the older children and adults in question are able-bodied, not handicapped or disabled, or so elderly as to be feeble. Thus, we will not sustain the rejection of claims 6, 9 and 10 under 35 U.S.C. § 112, second paragraph.

As for the examiner’s rejection of claims 2 through 10 under

35 U.S.C. § 102(b) as being anticipated by Marshall, we agree with the examiner that one performing the method of creating a barrier on a floor or surface as in Marshall would inherently also perform appellant's method set forth in the claims on appeal of preventing movement of an infant from one area of a house to another, notwithstanding that Marshall does not specifically mention use of the barrier, e.g., that seen in Figure 9, for precluding an infant from moving from outside the barrier (one area of a house) to the interior of the barrier (another area).

Looking to independent claims 1 and 5 on appeal as being representative, we note that Marshall teaches a method of creating a barrier on a floor comprising the steps of: providing a sheeting material having a low profile top surface design, which design includes a plurality of upwardly extending sections or spikes (2) that have a limited height (col. 4, lines 12-14) which permits older children and adults to step over the barrier. As noted in column 3, lines 66-67, the sheeting material and spikes of Marshall are formed of a semi-rigid plastic or rubber-based material and thus would provide temporary discomfort when a dog or infant touches and applies its own weight to a portion of the sheeting material, without puncturing the skin of the dog or an infant (col. 5, lines 59-63). The sheeting material is sized for the portion of a floor or surface upon which is to be placed and is sized so as to allow older children and adults to step over the barrier (see, col. 4, lines 10-12), while still providing sufficient depth/width (e.g., 24 inches) to discourage an infant from attempting to cross. The final step of the method in Marshall is to place the sheeting material upon a floor or surface in a substantially desired location (e.g., around trash cans as seen in Figure 9 thereof), thereby creating a barrier that would prevent a dog from closely approaching the trash cans

and knocking them over, and also inherently prevent movement of an infant from one area (outside the barrier) to another (inside the barrier). Independent claim 6 is not in any meaningful way different from claim 1 and 5 on appeal.

Appellant's method, like that of Marshall, addresses a method of creating a barrier on a floor, wherein the barrier has a low profile, and has a size and top surface design that is intended to prevent movement across the barrier by creating discomfort to the exposed skin/flesh of one attempting to cross it. The subjective intent in Marshall is to provide the barrier so as to prevent dogs from knocking over trash cans located within the barrier area. However, in performing the method of Marshall, one also performs appellant's method, and prevents movement of an infant from one area of a house (outside the barrier) to another (inside the barrier). The only difference resides in the subjective intent of the user, not in the steps of the actual method of creating a barrier on a floor to prevent movement from one area to another. In that regard, we also note that appellant's own specification [paragraph 0004] indicates that "[m]y method can also be used for small domesticated pets such as small dogs."

Thus, we find that the examiner has established a *prima facie* case of anticipation with regard to the subject matter of the claims on appeal. For that reason, we will sustain the rejection of claims 2 through 10 under 35 U.S.C. § 102(b).

In Summary: we have not sustained the rejection of claims 6, 9 and 10 under 35 U.S.C. § 112, second paragraph, but have sustained the rejection of claims 2 through 10 under 35 U.S.C. § 102(b). Since at least one rejection of all of the claims on appeal has been sustained, the decision of the examiner is affirmed.

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

AFFIRMED

CHARLES E. FRANKFORT ) Patent Judge ) )	Administrative
) )	)
TERRY J. OWENS ) Administrative Patent Judge ) ) AND	) BOARD OF PATENT APPEALS
)	) INTERFERENCES
MURRIEL E CRAWFORD ) Administrative Patent Judge )	)

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