

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* NATALYA B. DANILOVA

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Appeal No. 2008-1171  
Application No. 11/007,788  
Technology Center 3700

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Decided: June 10, 2008

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Before WILLIAM F. PATE, III, LINDA E. HORNER and DAVID B. WALKER,  
*Administrative Patent Judges.*

PATE, *Administrative Patent Judge.*

DECISION ON APPEAL

This is an appeal from the final rejection<sup>1</sup> of claims 4 and 5. These are the only claims remaining in the application. We have jurisdiction under 35 U.S.C. §§ 134 and 6.

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<sup>1</sup> Appellant's statement in the Brief that an amendment after final rejection has been entered is erroneous.

The claimed invention is directed to a cylindrical enclosure worn by a person so that the person can change clothes modestly. Claim 4, reproduced below, is further illustrative of the claimed subject matter.

4. A personal portable expandable/collapsible cubicle which comprising a cylindrical enclosure of a nontransparent flexible material, supported by flexible substantially circular lower and upper hoops, axially spaced from each other, an upper hoop connected with rectangular top section, circularly shaped by said hoop, said section with an opening in at least the center thereof; elastic inserted in to casing provided by turned over and sewn upper edge of the said rectangular section surrounding the opening, the top section engaging the person's shoulders when the enclosure is being used for supporting of said top section with opening surrounded by said elastic loosely fit over the person's neck, means diameter of stretched elastic inserted in to the upper side of rectangular top section would be allowed to the user substantially stretch opening when taking clothes over the head and affording admission of the person.

The references of record relied upon by the Examiner as evidence of obviousness are:

Younghusband	2,698,944	Jan. 11, 1955
Ingram, III	3,921,224	Nov. 25, 1975
Bowers	5,101,513	Apr. 7, 1992

Claims 4 and 5 stand rejected under 35 U.S.C. § 112, second paragraph, as indefinite.

Claim 4 stands rejected under 35 U.S.C. § 103 as unpatentable over Bowers in view of Younghusband.

Claim 5 stands rejected under 35 U.S.C. § 103 as unpatentable over Bowers and Younghusband as applied to claim 4 and further in view of Ingram.

## ISSUES

Appellant has failed to address or argue in any manner the rejection under 35 U.S.C. § 112, second paragraph. Accordingly, the rejection of claims 4 and 5 under 35 U.S.C. § 112, second paragraph, will be summarily affirmed.

With respect to the rejection of claim 4 under 35 U.S.C. § 103, Appellant has several arguments. Appellant first argues that there is no disclosure that the Bowers fabric is non-transparent. Appellant further argues that the top panel of Bowers is not formed of a rectangular piece of fabric. Finally, the Appellant argues that the opening of Bowers is not shirred and elastic and does not permit opening far enough to allow the user to extract clothing over the user's head. With respect to claim 5, Appellant argues that the Velcro closure shown at the end of the zippers in the Ingram reference has a different function from that of Appellant's Velcro closure. Appellant also argues that Ingram is from a nonanalogous art.

Accordingly, the issue presented is whether Appellant has shown error on the part of the Examiner in rejecting claims 4 and 5 under § 103 of the statute on the ground of obviousness.

## FINDINGS OF FACT

Bowers discloses foul weather apparel for protecting a person from inclement weather without inhibiting the person's body movements (see column 1, ll. 1-7). The basic device is formed of a hood portion 11, a circular panel 12, and a tubular enclosure 13 made from a material that can withstand the particular weather conditions to which a person might be exposed. (See column 2, ll. 3-8). Bowers does not state that the material is not transparent, but there is no reason to suspect that the material is transparent. As shown in Figures 1 and 2 the wearer's underlying garments are not illustrated in phantom. Furthermore, Bowers

discloses that in extremely hot or sunny conditions a reflective metal foil or Mylar film might be used as the fabric. (See column 2, ll. 14-18). In such case, the fabric of Bowers would certainly be non-transparent.

The tubular portion of Bowers is constructed of two hoops 17 and 18, and, as noted above, circular panel 12 is provided at the top with a radial split (unnumbered) that is selectively openable or closeable by a closure means such as Velcro closure or a zipper 14 (See column 2, ll. 27-31 and 47-52).

Younghusband discloses a multipurpose garment formed of a square of material 21. The garment is configured to be used as an apron, a turban or a vanity cape. As such, it shows a radial or diagonal slit 27 with an opening 22 surrounded by a binding 23. At least a portion of the binding comprises an intermediate elastic portion 24 folded over elastic tape 32 and sewn to provide a stretchy opening at the wearer's neck when the garment is used as a cape. (See column 2, ll. 58-69 and column 2, at ll. 73-75).

Finally, Ingram discloses a weather suit for a motorcycle rider which has a front zipper. The flap 27 covering the zipper has a Velcro closure 29 at the collar. (See column 3, ll. 47-50). Thus, Ingram teaches that both Velcro closure and zippers can be used together to provide a closure for a weatherproof garment.

#### PRINCIPLES OF LAW

A claimed invention is unpatentable if the differences between it and the prior art are “such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” 35 U.S.C. § 103(a) (2000); *KSR Int’l v. Teleflex Inc.*, 127 S.Ct. 1727 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

In *Graham*, the Court held that that the obviousness analysis is bottomed on several basic factual inquiries: “[(1)] the scope and content of the prior art are to be determined; [(2)] differences between the prior art and the claims at issue are to be ascertained; and [(3)] the level of ordinary skill in the pertinent art resolved.” 383 U.S. at 17. *See also KSR Int’l v. Teleflex Inc.*, 127 S.Ct. at 1734. “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR*, at 1739.

“When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *Id.* at 1740, 82 USPQ2d at 1396.

“For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *Id.*

“Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.* at 1742.

## ANALYSIS

As noted above, Appellant has not included any argument with respect to the 35 U.S.C. § 112, second paragraph, rejection. This rejection is summarily affirmed.

We will also affirm the obviousness rejections of claims 4 and 5. In our view one of ordinary skill would have found it obvious to use a shirred elastic

opening 22, 23, 24 disclosed by Younghusband to provide an expansible and contractible opening in the foul weather apparel of Bowers for adjustable and comfortable fit around the neck or face of the wearer. We see this to be a simple combination of prior art elements combined in a known manner to yield predictable results. *See KSR*, 127 S. Ct. at 1739. Note that Younghusband shows the elastic opening surrounding the face similar to a hood in Figures 5, 6 and 13, and also shows the opening surrounding the neck in Figures 4 and 12. Thus, the teaching of the shirred elastic opening is clearly applicable to the opening of Bowers.

Appellant first argues that Bowers does not disclose non-transparent material. As we noted above, there is no reason to suspect that the waterproof material of Bowers is transparent, and the drawings of Bowers do not indicate that the material is transparent by illustrating the underlying garments in phantom. Furthermore, we are in agreement with the Examiner that Bowers' disclosure of a thin reflective metal foil or metallic coated Mylar film is a disclosure of a non-transparent material. In the Reply Brief, Appellant argues that fabrics with metallic coating are "transparent, perfectly shear [sic], and see through." The Appellant provides no evidence that this is the case, however. Arguments of Appellant cannot take the place of evidence in the record. In our experience, metal foils, for example, are not transparent. Furthermore, a reflective metal foil or film, as disclosed in Bowers, used for its ability to reflect sunlight, would function poorly, if at all, were it to be transparent.

Appellant further argues that Bowers' top section is not formed of a rectangular panel and asserts that Bowers discloses a circular panel. We are in agreement with the Examiner that this argument relates to the manner in which the

device is made, while Appellant's claims are directed to an article of manufacture. We further agree with the Examiner that when comparing the finished article of Bowers and the instant invention, the shape of the top panel is the same in that it is an annular panel of fabric with an opening in the center having one radial slit closed by a zipper and/or a Velcro closure. Thus, Appellant's limitation to a rectangular panel or piece of material does not serve to differentiate Appellant's claimed subject matter over that of Bowers modified as taught by Younghusband.

We further note, that Appellant's claim calls for a rectangular top section circularly shaped by said hoop with said section having an opening in at least the center thereof. As can readily be seen there is no opening in the rectangular top section as Appellant claims. Instead, the opening is formed when the rectangular top portion is sewn together in a circular manner similar to the top panel 12 of Bowers.

With respect to the Younghusband reference, we are in agreement with the Examiner that the relied upon feature Appellant argues to distinguish Younghusband, that is, the opening for the neck shirred by elastic tape inserted into the full length of the casing of the rectangular panel, is not to be found in claim 4. We are in agreement with the Examiner that limitations from the specification and drawings are not to be read into the claims.

With respect to Appellant's argument that Younghusband is from a non-analogous art, we must first point out that in column 1 of Bowers, Bowers discusses rain capes (see l. 20). Thus, the cape of Younghusband, while not specifically, mentioning foul weather, is, after all, a cape and can be seen to be from the Bowers field of endeavor. Furthermore, the elastic around the central opening of Younghusband is seen to be a prior art element useful for capes and garments that

are placed on or over the head, and thus Younghusband is relevant to the problem of securing articles to the head and/or neck, a problem with which Bowers is concerned. Therefore, the combination of Bowers and Younghusband is combining prior art elements according to known methods to yield predictable results. *See KSR* at 1739.

Appellant further argues that the expandable top opening provides a new and unexpected result in that it allows the taking off of clothes over the head. Bowers describes removing the hood and opening the slit 14 when weather conditions improve. See col. 4, ll. 35-40. It is clear that clothes could be removed from over the wearer's head in such conditions.

With respect to the disclosure of Ingram, here again, foul weather garments for motorcycle riding are seen to be in the same field of endeavor as the foul weather apparel shown in Bowers. The fact that Bowers discloses either a Velcro closure or zipper and that Ingram discloses a zipper and a Velcro closure used together is evidence that a known technique, i.e., one of using double closures, as in Ingram, is equally applicable to the foul weather apparel of Bowers as a ready improvement that yields predictable results. We note that it is immaterial whether the function of the Velcro closure of Ingram is the same as or different from that of Appellant's Velcro closure, as long as it would have been obvious to use the Velcro closure and zipper disclosed in Ingram in the device of Bowers. "[T]he law does not require that the references be combined for the reasons contemplated by the inventor." *Princeton Biochemicals, Inc. v. Beckman Coulter, Inc.*, 411 F.3d 1332, 1337 (Fed. Cir. 2005). Consequently, the Appellant has failed to show that the Examiner's rejection of claim 5 is in error.

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### CONCLUSION

For the foregoing reasons, it is our legal conclusion that the Appellant has failed to show that the Examiner's obviousness rejections are in error. Thus the rejections of claims 4 and 5 under 35 U.S.C. § 103 are affirmed.

The rejection under 35 U.S.C. § 112, second paragraph, is also summarily affirmed.

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

AFFIRMED

JRG

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