

UNITED STATES PATENT AND TRADEMARK OFFICE

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

Ex parte MELANIE D. ALLEN

Appeal 2008-4258
Application 10/899,257
Technology Center 3700

Decided: November 17, 2008

Before TONI R. SCHEINER, ERIC GRIMES, and FRANCISCO C. PRATS, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a diaper, which the Examiner has rejected as anticipated or obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

The Specification describes absorbent articles, such as diapers, having permanent graphics and an “active character graphic” printed on them (Spec. 2). An *active* graphic is “an appearing graphic, a fading graphic, or a combination of appearing and fading graphics” (*id.* at 4). A *character* graphic is “a graphic containing an anthropomorphous image, and in particular an image having or suggesting human form or appearance which ascribes human motivations, characteristics or behavior to inanimate objects, animals, natural phenomena, cartoon characters, or the like” (*id.* at 5). An *object* graphic, by contrast, is “a graphic representing an object or thing, which can include an inanimate object or an alpha-numeric character (e.g., the letter ‘J’, the number ‘3’)” (*id.*).

Claims 1-8 and 10-14 are pending and on appeal. The claims subject to each rejection have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 11 is representative and reads as follows:

11. An absorbent article comprising: an outer cover having an interior surface and an opposite exterior surface; an absorbent assembly disposed on the interior surface; a permanent graphic disposed on the outer cover; and at least one active character graphic, wherein said active character graphic is related in subject matter with said permanent graphic.

The claims stand rejected as follows:

- Claims 1-6 and 10-14 under 35 U.S.C. § 102(b) as anticipated by Olson;¹ and

¹ Olson et al., U.S. Patent 6,297,424 B1, issued Oct. 2, 2001.

- Claims 7 and 8 under 35 U.S.C. § 103(a) as obvious in view of Olson and Sosalla.²

ANTICIPATION

Issue

The Examiner's position is that the smiling fish on Olson's diaper are "active character graphics" as defined in the instant Specification, and therefore Olson anticipates claims 1-6 and 10-14.

Appellant contends that the fish on Olson's diaper are object graphics, not character graphics, and therefore Olson does not anticipate the rejected claims.

The issue with respect to this rejection is: Do the fish on Olson's diaper meet the Specification's definition, and therefore the claim limitation, of "character graphics"?

Findings of Fact

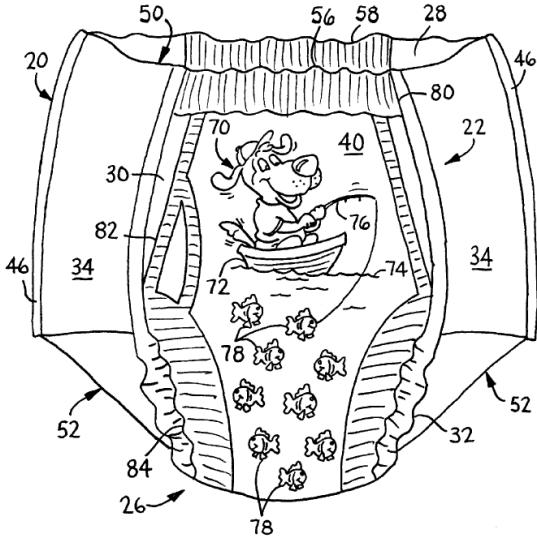
1. The Specification defines "character graphic" to mean "a graphic containing an anthropomorphous image, and in particular an image having or suggesting human form or appearance which ascribes human motivations, characteristics or behavior to inanimate objects, animals, natural phenomena, cartoon characters, or the like" (Spec. 5).

2. Olson discloses "an absorbent article . . . that provides toilet training aid benefits through the use of interactive graphics that inform the caregiver and child when an accident has occurred. The interactive graphics

² Sosalla et al., US 2005/0148961 A1, published July 7, 2005.

can include a permanent character graphic and one or more active object graphics.” (Olson, col. 1, ll. 42-47.)

3. Olson’s Figure 1 is reproduced below:



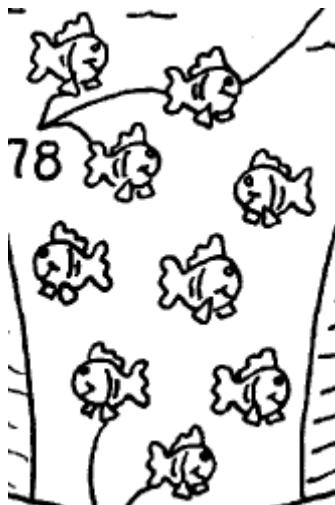
The figure is said to show “a front perspective view of a training pant incorporating the principles of [Olson’s] invention, showing both permanent graphics and active graphics” (Olson, col. 10, ll. 37-39).

4. Olson describes the illustrated training pant as

includ[ing] a permanent character graphic **70** in the form of a dog having human-like expressions and wearing a shirt and a hat, permanent object graphics **72**, **74** and **76** in the form of a boat, curved line segments denoting the surface of water, and a fishing pole, respectively, and a plurality of active object graphics **78** representing fish.

(Olson, col. 13, ll. 17-23.)

5. An enlarged view of the fish shown in Olson’s Figure 1 is reproduced below:



Olson's figure shows fish that are smiling.

Principles of Law

[T]he PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification.

In re Morris, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).

Analysis

The present Specification defines “character graphic” to include an image having an appearance “which ascribes human . . . behavior to . . . animals.” Olson’s diaper includes “active graphics” that are smiling fish. Humans smile; fish don’t. The fish on Olson’s diaper therefore have an

appearance that ascribes human behavior to animals, and meet the claim limitation of “character graphics” as that term is defined in the present Specification.

Appellant argues, though, that “[r]ather than disclosing active character graphics, Olson et al. discloses only active object graphics” (Appeal Br. 4). “Column 13, lines 22-23 of the Olson specification states that Figures 1-3 show a training pant having ‘a plurality of active object graphics 78 representing fish’ (emphasis added)” (Reply Br. 3).³ Appellant argues that “the fish are drawn similar to a typical sketch of fish and do not have any anthropomorphous features. Further, the fish are swimming in the picture and are not participating in an activity that is human in nature. Thus, the fish in Figures 1-3 are animal-like, rather than human-like” (*id.*).

These arguments are not persuasive. The fact that Olson intended the fish in its figures to be viewed as object graphics is not germane to the rejection on appeal. What is important is how those of ordinary skill in the art would interpret the instant claims, when they are given their broadest reasonable meaning consistent with the present Specification. The instant Specification does not define a character graphic as a graphic that is more human-like than animal-like, nor does it require that the character be participating in an activity that is human in nature. All it requires is an image having an “appearance which ascribes human . . . behavior to

³ Appellant also argues that certain statements made during prosecution of a patent application related to Olson support her position (Appeal Br. 5; Reply Br. 3). Appellant has not explained, however, how the prosecution history of an application unrelated to the present one would have been understood to limit the scope of the instant claims.

inanimate objects, animals,” etc. (Spec. 5.) Smiling fish are encompassed by the broadest reasonable interpretation of that definition.

Appellant also argues that she has submitted a declaration under 37 C.F.R. § 1.132 that describes research showing that consumers prefer training pants having active character graphics to those having active object graphics (Appeal Br. 5-7).

Appellant’s declaration does not persuade us of any error in the Examiner’s rejection. Appellant provides no cogent explanation of how the research described in the declaration supports a conclusion that Olson’s smiling fish are not character graphics, or shows that the claims differ in any other way from the product described in the prior art. Since the declaration does not show any difference between what is claimed and what was known in the art, it does not rebut the Examiner’s rejection.

OBVIOUSNESS

The Examiner has rejected claims 7 and 8 under 35 U.S.C. § 103(a) as obvious in view of Olson and Sosalla (Answer 4). Appellants do not dispute that Sosalla would have suggested the additional limitations recited in claims 7 and 8, but argue that these claims depend on claim 1 and “Sosalla does not cure the deficiencies noted above with respect to Claim 1. Therefore, even assuming the combination of Sosalla and Olson is proper in the first instance, the resulting combination would not teach or suggest all elements of Claims 7 and 8.” (Appeal Br. 7.)

For the reasons discussed above, we do not agree with Appellant’s position that Olson is deficient in teaching all the limitations of claim 1.

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Appellant has not pointed to any other error in the Examiner's rejection of claims 7 and 8 as obvious in view of Olson and Sosalla.

CONCLUSIONS OF LAW

Olson anticipates claim 1 because the broadest reasonable interpretation of the limitation "active character graphic" encompasses the smiling fish on the diaper disclosed by Olson.

SUMMARY

We affirm the rejection of claims 1-6 and 10-14 as anticipated by Olson and the rejection of claims 7 and 8 as obvious in view of Olson and Sosalla.

AFFIRMED

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