

***THIS OPINION WAS NOT WRITTEN FOR PUBLICATION***

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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***Ex parte*** RONALD A. RODGERS  
and PAUL SILSBY

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Appeal No. 1997-1343  
Application 29/039,800<sup>1</sup>

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ON BRIEF

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Before KRASS, BARRETT and FLEMING, *Administrative Patent Judges*.

FLEMING, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This design application is on appeal from a final rejection of the sole claim.

The subject matter of the invention is a design for a weighing platform for a scale shown in figures 1-10 in the application. The sole claim is reproduced as follows:

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<sup>1</sup> Application for patent filed May 25, 1995.

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1. The ornamental design for a weighing platform for a scale as shown and described.

The Examiner relies on the following reference:

Dahlstrom Metal Moulding and Shapes (Dahlstrom); Cat. No. 12; 1969; p. 36.

The claim stands rejected under 35 U.S.C. § 102 as being anticipated by Dahlstrom article #1623. In addition, the claim stands rejected under 35 U.S.C. § 103 as being unpatentable over Dahlstrom article #1623.

Rather than reiterate the arguments of Appellants, reference is made to the briefs<sup>2</sup> and answer for the respective details thereof.

### OPINION

We will not sustain the rejection under either 35 U.S.C. §§ 102 or 103.

In determining the patentability of a design, it is the overall appearance, the visual effect as a whole of the design, which must be taken into consideration. *In re Leslie*, 547 F.2d 116, 120, 192 USPQ 427, 429 (CCPA 1977). In determining whether a design patent application is properly rejected under 35 U.S.C. § 102, the prior art reference must show the same subject matter as that of Appellants' claim and must be identical in all material respects. *See Hupp v. Siroflex of America*,

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<sup>2</sup> Appellants filed an appeal brief on August 5, 1996. Appellants filed a reply brief on December 9, 1996. On June 17, 1997, the Examiner mailed a communication stating that the reply brief has been entered and considered but no further response by the Examiner is deemed necessary.

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122 F.3d 1456, 1461, 43 USPQ2d 1887, 1890 (Fed. Cir. 1997). It is axiomatic that anticipation of a claim under § 102 can be found only if the prior art reference discloses every element of the claim. *See In re King*, 801 F.2d 1324, 1326, 231 USPQ 136, 138 (Fed. Cir. 1986) and *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.*, 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984).

In regard to the rejection under 35 U.S.C. § 102, Appellants argue on pages 4 and 5 of the brief, that the Examiner has incorrectly focused on the cross-sectional shape of the scale weighing platform of the invention when comparing it to article #1623 of Dahlstrom. Appellants argue that article #1623 of Dahlstrom does not show the appearance of the entire scale weighing platform of the invention. In particular, Appellants argue that article #1623 of Dahlstrom does not show the length of the article. On page 6 of the brief, Appellants argue that the length and width of the embodiments of the scale weighing platform of Appellants' invention are relatively the same magnitude. Appellants argue that article #1623 of Dahlstrom does not show the length to be relatively the same magnitude. Appellants argue that the compact, substantially equilateral shape of the scale weighing platform of Appellants' invention as can be seen in figures 3, 5, 8 and 10 of Appellants' drawings imparts an aesthetic appearance of strength and rigidity.

Upon our review of Dahlstrom, we find that Dahlstrom only shows the cross section of article #1623. Dahlstrom shows another article #655 cross-section as well as an isometric drawing of #655 in

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which the length of the article is undefined. We would infer from this disclosure that article #1623 would also be shown similarly as a length that is undefined. Thus, we fail to find that Dahlstrom discloses every element of Appellants' claim. Therefore, we will not sustain the Examiner's rejection under 35 U.S.C. § 102 of the sole claim.

In regard to the rejection under 35 U.S.C. § 103, Appellants argue on page 9 of the brief that a designer of weighing platforms for scales would not be motivated to consider the design of the elongated clip for the bead trim shown as article 1623 of Dahlstrom in designing a weighing platform. On pages 5 and 6 of the answer, the Examiner responds by stating that one of ordinary skill in the art would look at extruded members of prior art since the claimed design appears to be nothing more than an extruded sheet of metal. The Examiner argues that Appellants have failed to set forth a convincing argument of why Dahlstrom is non-analogous art.

The instant claim is for a "ornamental design for a **weighing platform for a scale** as shown and described" (emphasis ours). "In design cases we will consider that the fictitious person identified in § 103 as 'one of ordinary skill in the art' to be the designer of ordinary capability who designs articles of the type presented in the application." *In re Nalbandian*, 661 F.2d 1214, 1216, 211 USPQ 782, 784 (CCPA 1981). "This approach is consistent with *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), which requires that the level of ordinary skill *in the pertinent art be determined.*" *Id.*

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We fail to find that the Examiner has shown that a designer of ordinary capability which designs weighing scales would look to the bead trim art for designs of such articles. We fail to find that the Examiner's argument that the claimed design for a platform scale would be pertinent to a bead trim because both designs appear nothing more than excluded sheets of metal. Merely because the general shape was *per se* known in unrelated art does not make the claimed ornamental design for a platform for a weighing scale obvious within the meaning of 35 U.S.C.

§ 103. Furthermore, we note that it is the Examiner's burden of showing that the art is pertinent.

In view of the foregoing, the Examiner's decision rejecting the sole claim under 35 U.S.C. §§ 102 and 103 is reversed.

**REVERSED**

ERROL A. KRASS	)
Administrative Patent Judge	)
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	) BOARD OF PATENT
LEE E. BARRETT	)
Administrative Patent Judge	) APPEALS AND
	)
	) INTERFERENCES
	)
MICHAEL R. FLEMING	)
Administrative Patent Judge	)

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