

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 33

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOSEPH H. MATTHEWS, III,
DAVID WM. PLUMMER,
and DAVID A. BARNES

Appeal No. 2003-0789
Application 09/422,654

HEARD: October 21, 2003

Before BARRETT, FLEMING, and BLANKENSHIP, Administrative Patent Judges.

BARRETT, Administrative Patent Judge.

DECISION ON REQUEST FOR REHEARING

Appellants timely filed a request for rehearing¹ (Paper No. 31) by facsimile on December 31, 2003, of our decision (Paper

¹ The facsimile copy was not matched with the file and a notice of abandonment (Paper No. 29) was sent out on February 24, 2004. A request to withdraw the notice of abandonment (Paper No. 30) was filed on March 24, 2004, which was granted by a petition decision (Paper No. 32) on April 21, 2004.

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No. 28) entered October 31, 2003, in which we affirmed the rejection of claims 40-48.

Appellants refer to the following statement at page 9 of our decision in which we suggested how the examiner could meet a presently unclaimed limitation of "controlling" the spacing between shapes based on "border parameters":

The examiner could also apply an additional reference to show that the size, shape, and spacing of graphical items on a display are controlled by setting of parameters, which appears to be something that assignee Microsoft could admit to be known. [Emphasis added by appellants.]

It is argued that the underlined language improperly singles out the assignee of the present application to be held to a higher standard than any other applicant in this area (request, p. 1).

It is argued that the language "[i]t in essence requires an admission from the assignee that anything related to 'size, shape, and spacing of graphical items on a display are controlled by the setting of parameters' is old and well known in the art" (request, p. 2). It is further argued that the language eliminates the ability of the assignee to traverse any reliance on common knowledge or "well known" prior art as described in MPEP § 2144.03 (request, p. 2). Appellant suggests that the underlined language be eliminated or changed to read "in accordance with the procedure set forth in MPEP 2141-2144."

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We modify our original decision to eliminate the underlined language above. The examiner should not consider the underlined language above in our original decision.

In addition, in the case of further prosecution, we suggest that the examiner investigate HTML tables for teachings of controlling the spacing between shapes based on border parameters. While we do not have access to an HTML book with a good date, we note that the table in HTML has a CELLPADDING attribute indicating how many pixels there should be between a cell's contents and the border, and a CELLSPACING attribute indicating how much whitespace (in pixels) there should be between individual cells, where the cell is an object.

See, e.g., www.htmlhelp.com/reference/wilbur/table/table.html (copyright 1997) and www.w3.org/TR/REC-html40/struct/tables.html at section 11.3.3. Since Microsoft makes Internet Explorer which displays HTML, it is presumed that this would be known.

With respect to appellants' comment about MPEP § 2144.03, it is noted that a traverse of a finding of Official Notice requires more than just a statement that the fact is not supported by a reference. A "traverse" is "[a] formal denial of a factual allegation in the opposing party's pleading," Black's Law Dictionary (7th ed. 1999). That is, a traverse is similar to answering the factual allegations in a complaint in a civil action. Cf. Fed. R. Civ. P. 8(b) ("A party shall . . . admit or

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deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial."). An applicant may traverse a finding of Official Notice by simply averring that "those of ordinary skill in the art were not aware of [the fact]" or that "applicant is without any knowledge or information as to whether those of ordinary skill in the art were aware of [the fact]." This avoids putting the Office to the task of proving a fact over which applicant may know.

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CONCLUSION

The request for rehearing is granted. Our original decision is modified to eliminate the phrase "which appears to be something that assignee Microsoft could admit to be known" on page 9.

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

GRANTED

LEE E. BARRETT)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
MICHAEL R. FLEMING)	APPEALS
Administrative Patent Judge)	AND
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)	
HOWARD B. BLANKENSHIP)	
Administrative Patent Judge)	

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