

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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAMELA R. BAILEY and ROBERT D. BAILEY

Appeal No. 2000-0856
Application No. 08/676,623

ON BRIEF

Before COHEN, FRANKFORT, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claim 2, which is the only claim pending in this application.

We REVERSE.

BACKGROUND

The appellants' invention relates to a toilet seating system for use by adults and children upon a commode assembly. A copy of claim 2 under appeal is set forth in the appendix to the appellants' brief.¹

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Alexander 8, 1866	54,480	May
Grunz 1984	4,451,940	June 5,
Miller 1995	5,448,781	Sep. 12,
Hancock 1947	124,022	May 1,
	(Australia)	

Claim 2 stands rejected under 35 U.S.C. § 103 as being unpatentable over Hancock in view of Alexander, Miller and Grunz.

¹ In the last paragraph of claim 2, the word "thickens" should be amended to be --thickness-- for consistency within the claim.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejection, we make reference to the answer (Paper No. 19, mailed September 16, 1999) for the examiner's complete reasoning in support of the rejection, and to the brief (Paper No. 18, filed October 18, 1998) for the appellants' arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification² and claims, to the applied prior art references, and to the respective positions articulated by the appellants and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claim under appeal. Accordingly, we will

² The following change to the specification is suggested: On page 21, line 6, amend "Figure 4" to read --Figure 3-- since Figure 3 depicts the second embodiment of the invention.

not sustain the examiner's rejection of claim 2 under 35 U.S.C.

§ 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

Claim 2 recites a toilet seating system comprising, inter alia, (1) a substantially circular adult seat having an aperture centrally formed therein, (2) a substantially circular child seat having an aperture formed therein which is substantially smaller than the aperture centrally formed within the adult seat and oriented more toward the forward

extent of the child seat whereby a midpoint of the aperture of the child seat is offset with respect to a midpoint of the aperture of the adult seat, and
(3) a substantially circular lid.

The examiner's rejection under 35 U.S.C. § 103 (answer, pp. 4-5) is based on his ascertainment that Hancock teaches all of the above-noted limitations and that the only differences are the limitations that the child seat overhangs the adult seat and the provision of magnets in the child seat and the lid. With regard to these differences, the examiner then determined that such differences would have been suggested by the teachings of Alexander, Miller and Grunz.

The appellants argue (brief, p. 3-4) that Hancock does not teach the aperture of the child seat being oriented more toward the forward extent of the child seat whereby a midpoint of the aperture of the child seat is offset with respect to a midpoint of the aperture of the adult seat. In fact, the appellants urge that Figure 3 of Hancock shows that the

aperture in the child seat is oriented more toward a rearward extent than the aperture in the adult seat.

The examiner's response (answer, p. 6) to this argument of the appellants is that Figure 2 of Hancock "clearly illustrates the 'rearward extent' 12 of the child seat to be wider than the 'forward extent' thereof (at 14)."

After reviewing the disclosure of Hancock, it is our opinion that Hancock does not disclose the aperture 11 of the child seat 10 being oriented more toward the forward extent of the child seat whereby a midpoint of the aperture 11 of the child seat 10 is offset with respect to a midpoint of the aperture 6 of the adult seat 5. The examiner's position that this limitation is disclosed by Hancock is sheer speculation. In that regard, the drawings of Hancock are schematic in nature and therefore cannot be relied upon in the manner set forth by the examiner. Furthermore, the specification of Hancock is silent as to the location of the respective midpoints of the aperture 11 of the child seat 10 and the aperture 6 of the adult seat 5. The conclusion that the

claimed subject matter is prima facie obvious must be supported by evidence. Rejections based on § 103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. The examiner may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. See In re Warner, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967), cert. denied, 389 U.S. 1057 (1968).

Since the combination of references as set forth in the rejection would not have suggested the claimed invention for the reasons set forth above, the decision of the examiner to reject claim 2 under 35 U.S.C. § 103 is reversed.³

CONCLUSION

³ The examiner's reference to Figure 4 of Miller in the answer (p. 7) is not germane to the rejection under appeal since the examiner has not made the determination that it would have been obvious at the time the invention was made to a person having ordinary skill in the art to modify the location of Hancock's aperture 11 in the child seat 10 based upon Figure 4 of Miller. We leave it to the examiner to determine if this would or would not be obvious under 35 U.S.C. § 103.

To summarize, the decision of the examiner to reject
claim 2 under 35 U.S.C. § 103 is reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	
)	BOARD OF PATENT
CHARLES E. FRANKFORT)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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JEFFREY V. NASE)	
Administrative Patent Judge)	

Appeal No. 2000-0856
Application No. 08/676,623

Page 9

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Appeal No. 2000-0856
Application No. 08/676,623

Page 10

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