

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

***Ex parte*** GARY K. MICHELSON

---

Appeal No. 1995-4105  
Application No. 08/108,908<sup>1</sup>

---

Before CALVERT, ABRAMS, and FRANKFORT, ***Administrative Patent Judges***.

ABRAMS, ***Administrative Patent Judge***.

ON REQUEST FOR REHEARING

This case comes before us again on request for rehearing by Examiner Thaler of our decision mailed December 30, 1998,

---

<sup>1</sup> Application for patent filed August 18, 1993. According to appellant, this application is a continuation-in-part of Application No. 07/905,127, filed June 24, 1992, now abandoned; which is a continuation of Application No. 07/398,987, filed August 28, 1989, now abandoned; which is a continuation-in-part of Application No. 07/341,849 filed April 24, 1989, now U.S. Patent No. 5,009,661 issued April 23, 1991.

wherein he brings to our attention an error regarding the disposition of claim 37.

Claim 37 depends from independent claim 1, and was grouped by the examiner with claim 1 in a rejection under 35 U.S.C. § 103 as being unpatentable over Linovitz in view of Niederer, along with independent claim 17 and others. In our decision, we sustained this rejection of claim 1, but did not sustain the rejection of claim 17. Inadvertently, however, in our recapitulations of rejections sustained and not sustained, we treated claim 37 as though it depended from claim 17 instead of claim 1, and therefore in our summaries on pages 15 and 21, claim 37 was among the claims listed whose rejection had not been sustained. This was in error.

The fact is that the appellant chose not to argue before this panel of the Board of Patent Appeals and Interferences the patentability of claim 37 apart from that of claim 1, and it therefore should have been grouped with claim 1, from which it depends. Since we sustained the Section 103 rejection of claim 1, it follows that the rejection of claim 37 on the same basis also should have been indicated as being sustained, as was our intention. We hereby modify our decision to that effect, that

is, the rejection of claim 37 as being unpatentable over  
Linovitz in view of Niederer is sustained.

To the extent set forth above, the request for rehearing  
is granted.

**GRANTED**

IAN A. CALVERT	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
NEAL E. ABRAMS	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
CHARLES E. FRANKFORT	)	
Administrative Patent Judge	)	

NEA/jlb

Appeal No. 1995-4105  
Application No. 08/108,908

Page 4

LEWIS ANTEN  
16830 VENTURA BLVD., STE. 411  
ENCINO, CA 91436