

**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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 11

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* BENJAMIN L. GARFINKLE

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Appeal No. 97-1085  
Application 08/369,712<sup>1</sup>

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ON BRIEF

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Before ABRAMS, FRANKFORT and STAAB, *Administrative Patent Judges*.  
ABRAMS, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This is an appeal from the decision of the examiner finally rejecting claims 1 through 9, which constitute all of the claims of record in the application.

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<sup>1</sup> Application for patent filed January 6, 1995. According to appellant, this application is a continuation-in-part of Application 08/125,522 filed September 22, 1993, now U.S. Patent No. 5,402,897 issued April 4, 1995.

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The appellant's invention is directed to an article support and display device. The subject matter before us on appeal is illustrated by reference to claim 1, a copy of which can be found in an appendix to the Brief on Appeal.

#### **THE REFERENCES**

The references relied upon by the examiner to support the final rejection are:

Fast <i>et al.</i> (Fast '189)	5,123,189	Jun. 23, 1992
Fast <i>et al.</i> (Fast '766)	5,235,766	Aug. 17, 1993

#### **THE REJECTION**

Claims 1 through 9 stand rejected under 35 U.S.C. § 103 as being unpatentable over either of the Fast patents.

The rejection is explained in the Examiner's Answer.

The opposing viewpoints of the appellant are set forth in the Appeal Brief.

#### **OPINION**

In reaching our decision on the issues raised in this appeal, we have carefully assessed the claims, the prior art applied against the claims, and the respective views of the

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examiner and the appellant as set forth in the Examiner's Answer and the Appeal Brief.

The claims all stand rejected 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)), which is established when the teachings of the prior art itself would appear to have suggested the claimed subject matter to one of ordinary skill in the art (see *In re Bell*, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993)).

Independent claim 1 is directed to an article support and display device for use with a support fixture, which has two components. The first is "at least two spaced apart merchandise pegs" supported at their proximal ends by the support fixture and having free distal ends to receive merchandise. In view of the explanation of the invention in the appellant's disclosure, we have interpreted "spaced apart" to mean spaced laterally apart, rather than vertically. The second component is a planar sheet material "having a length greater than the distance between said spaced apart merchandise pegs and a width proximate the distance between said support fixture and the distal ends of said merchandise pegs." The planar sheet is provided at its proximate

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end with a means for attaching it to the support fixture, and at its distal end with a tag molding for receiving and displaying product information.

It is the examiner's view that the subject matter recited in the claims would have been obvious in view of the teachings of either of the Fast references, recognizing that "[t]he width of the baffle is considered as an obvious matter of engineering choice" (Answer, page 3). The appellant argues that the claim requires two spaced apart merchandise pegs, which is not present in either of the applied references, and that the planar sheet material must have a particular relationship with respect to the pegs, which also is not taught by the applied references.

We agree with the appellant. Neither Fast reference is concerned with the problem addressed by the appellant, that is, the movement of air in the space adjacent to the claimed device. In both of the references, a single merchandise peg is disclosed, with a single sheet of planar material associated therewith. Thus, it is our view that one of ordinary skill in the art would not have been taught by either Fast reference to utilize a single planar sheet with a plurality of merchandise pegs. Furthermore, while the planar sheets shown in these references appear to meet the width limitation of claim 1, they certainly do not meet the

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length limitation, for that requires the presence of more than one merchandise peg. From our perspective, the only suggestion for modifying the Fast systems in such a manner as to meet the terms of claim 1 is found in the luxury of the hindsight accorded one who first viewed the appellant's disclosure. It is well settled that the teachings of the prior art must suggest making the modification which the examiner proposes. See *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992).

It is our conclusion that the teachings of either of the two applied Fast references fail to establish a *prima facie* case of obvious with respect to the subject matter of independent claim 1 or, it follows, of dependent claims 2 through 6.

Independent claim 7 contains the same two limitations discussed above, and thus we reach the same result with respect to claims 7 through 9.

The rejection is not sustained.

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The decision of the examiner is reversed.

**REVERSED**

NEAL E. ABRAMS	)	
Administrative Patent Judge)	)	
	)	
	)	
CHARLES E. FRANKFORT	)	BOARD OF PATENT
Administrative Patent Judge)	)	APPEALS AND
	)	INTERFERENCES
	)	
	)	
LAWRENCE J. STAAB	)	
Administrative Patent Judge)	)	

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