

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(2) is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANCO GARIBOLDI

Appeal No. 98-0494
Application No. 07/954,056¹

HEARD: May 5, 1998

Before COHEN, FLEMING, and HANLON, Administrative Patent Judges.
HANLON, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the final
rejection of the following design claim:

The ornamental design for a panty hose article as shown
and described.

¹ Application for patent filed September 28, 1992. According to
appellant, the application is a continuation-in part of Application
No. 07/403,569, filed September 6, 1989, now abandoned.

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The references relied upon by the examiner are:

Fillmore	D-215,641	Oct. 21, 1969
Harris	3,845,506	Nov. 5, 1974

The sole issue in this appeal is whether the design claim was properly rejected under 35 U.S.C. § 103 as unpatentable over the combination of Harris and Fillmore.² We reverse this rejection.

Discussion

According to appellant (Brief, pp.2-3):

The invention relates to a pantyhose, or stockings article, which is formed of a knitted piece which is uninterrupted except for the transverse portion between the upper ends of the legs and the horizontal end portion of each toe. . . .

² In the brief, appellant states the issue on appeal as "[w]hether the claim is obvious under 35 U.S.C. §103 as unpatentable over Harris" (Brief, p.3). However, the examiner points out (Answer, p.3):

The appellant's statement of the issues in the brief is incorrect in that it omits the secondary reference to Fillmore relied on in the rejection. In order to clarify the record in the 103 rejection of 7/[27]/94 [Paper No. 4], it is noted that while the initial sentence of the rejection cited only the reference to Harris, Fillmore was clearly relied on as a secondary reference in the body of the rejection. The references relied on were correctly stated in the initial sentence of the subsequent final rejection (1/10/95) [Paper No. 7].
See Paper No. 7, p.2 ("The claim is again and FINALLY REJECTED under 35 U.S.C. 103 as being unpatentable over Harris in view of Fillmore."). Nevertheless, we note that both the brief and the reply brief respond to the rejection of the design claim under 35 U.S.C. § 103 based on the combined teachings of Harris and Fillmore.

The continuous surface between the toe and the waistband of the garment, except for the line portion in the crotch area, results in an uninterrupted outer edge (see Figures 9, 10 and 13 as well as the figures wherein the article of the design takes the shape of a mannequin, Figures 11, 12, 1). Additionally, there is an uninterrupted, continuous inner edge from the toe line portion to the crotch line portion. . . .

Two alternate embodiments are proposed, according to the invention, namely one wherein the leg portion is substantially tubular and of substantially constant dimension (in unstretched state; see for example, Figure 9) as well as the embodiment of Figure 10, wherein a line as can be seen in Figure 6 is provided. As can be seen in Figure 10, the second embodiment provides a taper in the leg region of the article whereas the embodiment of Figure 9 has tubular leg regions. The thigh portion of the garment is wider than calf portion of the garment. This allows a person with larger thighs to wear the garment without unduly stretching the garment. In the embodiment of Figure 10 (also Figure 6), an additional widening stitch or line is provided to allow for the change in dimension (without stretching of the garment[]).

Appellant argues that Harris, either alone or in combination with Fillmore, fails to teach or suggest a pantyhose article having an uninterrupted, continuous appearance as claimed (Brief, pp.4 and 11). More specifically, appellant argues that the combination of Harris and Fillmore fails to teach or suggest the overall appearance of the claimed pantyhose article both in its stretched state as illustrated in Figures 1, 11 and 12 and its unstretched state as illustrated in Figures 9 and 10 (Brief, pp.5, 7-8 and 10-11).

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The design of the claimed pantyhose article at issue in this appeal has two aspects. The first aspect of the claimed pantyhose article is its appearance in an unstretched state as illustrated in Figures 9 and 10. See Specification, p.2 ("Figure 9 is a front view of a collant or pantyhose article design according to the invention . . . Figure 10 is a front view of another embodiment of the design . . ."). The second aspect of the claimed pantyhose article is its appearance in a stretched state as illustrated in Figures 1, 11 and 12. In this stretched state, the pantyhose article conforms to the legs of the wearer and its shape is defined thereby. Therefore, in order to render the overall appearance of the claimed pantyhose article obvious under 35 U.S.C. § 103, the combined teachings of Harris and Fillmore must teach or suggest both aspects of the claimed invention.

Although the examiner recognizes that there are two distinct aspects of the claimed invention (see Answer, p.2), it appears that the focus of the rejection at issue in this appeal is on the second aspect of the invention, i.e., the appearance of the claimed pantyhose article in its stretched state (Paper No. 4, p.4):

The basic reference to Harris shows pantyhose similar in general, overall appearance to the claimed design; and Fillmore is cited for the disclosure of an analogous

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article wherein the leg portion is seamless and uninterrupted.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make omit the circumferential band or welt on the leg portion of the reference hose, inasmuch as pantyhose with seamless legs are notoriously old and well known, as evidenced by the reference to Fillmore.

However, consistent with appellant's arguments, the combined teachings of Harris and Fillmore fail to render the overall appearance of the claimed pantyhose article, both in its unstretched state as illustrated in Figures 9 and 10 and in its stretched state as illustrated in Figures 1, 11 and 12, obvious to a designer of ordinary skill who designs articles of the type involved. Therefore, we cannot sustain the rejection of the design claim under 35 U.S.C. § 103. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992) (the examiner bears the initial burden of presenting a prima facie case of unpatentability).

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The decision of the examiner is reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
MICHAEL R. FLEMING)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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ADRIENE LEPIANE HANLON)	
Administrative Patent Judge)	

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APJ HANLON

APJ FLEMING

APJ COHEN

DECISION: REVERSED
Send Reference(s): Yes No
or Translation (s)
Panel Change: Yes No
Index Sheet-2901 Rejection(s): _____

Prepared: March 22, 2002

Draft Final

3 MEM. CONF. Y N

OB/HD GAU

PALM / ACTS 2 / BOOK
DISK (FOIA) / REPORT