

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte TODD P. STRAND and PETER J. BLOMQUIST

Appeal No. 99-1018
Application No. 29/054,175¹

ON BRIEF

Before COHEN, ABRAMS and GONZALES, *Administrative Patent Judges*.

ABRAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of the following design claim:

¹ Application for patent filed May 10, 1996. According to appellants, this application is a continuation of Application No. 29/026,710 filed August 4, 1994, now abandoned.

Appeal No. 99-1018
Application No. 29/054,175

The ornamental design for a Retaining Wall Block as shown and described.

The design is depicted in a front perspective view (Figure 1), and in front, side, rear, top and bottom elevational and plan views (Figures 2-7).

THE REFERENCES

The references cited by the examiner are:

Blomquist et al. (Blomquist) Des. 341,215 Nov. 9,
1993

Minitalus Universel (Minitalus), Permacon, April 1993.

THE REJECTION

The design claim stands rejected under 35 U.S.C. § 103 being unpatentable over Minitalus in view of Blomquist.

The rejection is explained in Paper No. 10.²

The opposing viewpoints of the appellants are set forth in the Brief.

OPINION

² This paper erroneously is numbered as "19" in the application file.

Appeal No. 99-1018
Application No. 29/054,175

We begin our analysis by pointing out that the standard for evaluating the patentability of a design is whether it would have been obvious to a designer of ordinary skill in the art involved. See *In re Nalbandian*, 661 F.2d 1214, 1215, 211 USPQ 782, 784 (CCPA 1981). In rejecting a claim to an ornamental design under 35 U.S.C. § 103, the examiner must supply a basic design reference, i.e. there must be a reference, a something in existence, the design characteristics of which are basically the same as the claimed design. Once a reference meets this test, reference features may reasonably be interchanged with or added from those in other pertinent references. See *In re Rosen*, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982).

As we interpret the rejection, the examiner is of the view that Minitalus constitutes a *Rosen* reference because it shows a retaining block wall "similar in appearance" to the claimed design "except for the three beveled edges." The examiner concludes, however, that "[i]t would have been

Appeal No. 99-1018
Application No. 29/054,175

obvious to one of ordinary skill in the art"³ to have modified the Minitalus design by using a flat face having three beveled edges "as shown and suggested by Blomquist." See Paper No. 10, page 2.

After consideration of the positions and arguments presented by both the examiner and the appellants, we have concluded that the rejection cannot be sustained. Our reason for arriving at this conclusion is as follows.

Even conceding, *arguendo*, Minitalus to be a *Rosen* reference, it is our view that combining the references would not result in the claimed design. Minitalus has a bevel only on the top edge of the front face. Blomquist has bevels on both side edges and on the top edge of the front face. Thus, there is no showing in either of the references of the appearance of a bevel on the bottom edge of the front face, as is required in the appellants' claimed design. This being the case, from our perspective the references clearly would not

³ Of course, the standard is not that which is stated by the examiner, but whether it would have been obvious to a designer of ordinary skill in the art involved (*In re Nalbandian, supra*), which we shall assume is what the examiner actually applied.

Appeal No. 99-1018
Application No. 29/054,175

have suggested this feature to a designer of ordinary skill in the articles involved. We are not persuaded otherwise by the examiner's unsupported conclusion on page 4 of the Answer that "since both Minitalus and Blomquist show a mixture of beveled and non-beveled front face edges, a different combination . . . for the four front edges would be obvious to one of ordinary skill in the art."

Appeal No. 99-1018
Application No. 29/054,175

The decision of the examiner is reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
)	
)	
)	
)	BOARD OF PATENT
NEAL E. ABRAMS)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
JOHN F. GONZALES)	
Administrative Patent Judge)	

bae

Appeal No. 99-1018
Application No. 29/054,175

James L. Young
Kinney & Lange, P.A.
The Kinney & Lange Building
312 South Third Street
Minneapolis, MN 55415-1002