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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/421,178	05/31/2006	DANNY L. TOOMEY	P07239US01	2210
22885	7590	03/14/2013	EXAMINER	
MCKEE, VOORHEES & SEASE, P.L.C. 801 GRAND AVENUE SUITE 3200 DES MOINES, IA 50309-2721			WELCH, GARY L	
			ART UNIT	PAPER NUMBER
			4100	
			NOTIFICATION DATE	DELIVERY MODE
			03/14/2013	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DANNY L. TOOMEY and ROXANNE L. PROCTOR-TOOMEY

Appeal 2011-004592
Application 11/421,178
Technology Center 4100

Before TONI R. SCHEINER, ERIC GRIMES, and ULRIKE W. JENKS,
Administrative Patent Judges.

GRIMES, *Administrative Patent Judge.*

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to shirts. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

The Specification discloses “a pocketed sweatshirt, in which the pocket is accessible from outside of the sweatshirt, yet remains on the inside of the sweatshirt” (Spec. 3:22-23). “It is preferred, but not necessary, that there be ribbing 32 adjacent to the opening 30 [of the pocket]. The ribbing

32 adds support to the opening area 30, thereby creating a stronger, more sag resistant opening 30. In addition, the ribbing 32 adds a decorative design to the opening 30.” (*Id.* at 4:12-15.)

Claims 1, 2, 4, 5, 9, 12, and 17-27 are on appeal. Claim 9 is representative and reads as follows:

9. A pocketed shirt comprising:
a shirt having a front panel with outside and inside surfaces;
an opening in a breast area of the front panel from the outside surface to the inside surface;
a free-floating pocket attached to the front panel so as to reside inside the shirt and accessible from outside the shirt through the opening;
the pocket is attached to the shirt only with stitching both above and below the opening;
the pocket having an open top end without closures; and
first ribbing attached to the front panel adjacent the opening.

Issue

The Examiner has rejected claims 1, 2, 5, 9, 12, and 18-27 under 35 U.S.C. § 103(a) as obvious in view of Krall¹ and Rabinowicz.² The Examiner has also rejected claims 1, 4, 9, 17, and 27 under 35 U.S.C. § 103(a) as obvious in view of Krall, Rabinowicz and either Burr³ or Grushlaw.⁴ Since Appellants have not provided any arguments based on Burr or Grushlaw, we will consider the rejections together.

The Examiner finds that Krall discloses the pocketed sweatshirt of claim 9 except for a “pocket opening, having ribbing attached thereto”

¹ Krall, US 7,051,373 B1, issued May 30, 2006.

² Rabinowicz et al., US 6,993,940 B2, issued Feb. 7, 2006.

³ Burr, US 1,714,491, issued May 28, 1929.

⁴ Grushlaw, US 1,092,144 issued Apr. 7, 1914.

(Answer 4-5). The Examiner finds that Rabinowicz discloses “a tennis vest having knit-in ball pockets comprising, as visible in Figures 9 and 10, two openings 36 on body portion 22 leading to pockets 26, said openings 36 having a plurality of courses on either side of each opening 36 knitted in a wide rib pattern 38” (*id.* at 5).

The Examiner concludes that it would have been obvious to provide the pockets of Krall with the rib knit construction, as taught by Rabinowicz, because, in addition to reinforcing the pocket as is known within the apparel arts, said ribbing around the pocket opening tends to cause opposite edges of each opening to roll up, thus making the pocket easier to access.

(*Id.*)

Appellants contend that Rabinowicz requires its pocket to open easily because they are for holding tennis balls, but “there is no such need in either Applicant’s or Krall’s sweatshirts... In view of these different functions of front breast pockets and tennis ball pockets, it is not obvious to use [the] Rabinowicz ribbing, which tends to open the pocket, on the front breast pocket of Krall, which normally is closed.” (Appeal Br. 5-6.)

The issue presented is: Does the evidence of record support the Examiner’s conclusion that it would have been obvious to modify Krall’s shirt to include “ribbing attached to the front panel adjacent the opening,” as recited in claim 9?

Findings of Fact

1. Krall discloses “a new breast pocket for sweatshirts” (Krall, col. 1, ll. 8-9).

2. Krall discloses “a pouch type pocket positioned on an interior of the garment and minimizing the visual observability of the pocket” (*id.* at col. 1, ll. 35-37).

3. Figure 1 of Krall is shown below:



Figure 1 shows a sweatshirt with Krall’s pocket (*id.* at col. 2, ll. 8-9).

4. Krall discloses that the “front panel **22** ... has a slit **24** therein” (*id.* at col. 2, ll. 29-30).

5. Krall discloses that “the opening **42** of the pouch member **40** is secured to and aligned with the slit **24** in the front panel **22** by stitching a perimeter edge of the pouch member **40** encompassing the opening **42** to a perimeter edge of the slit **24**” (*id.* at col. 2, ll. 43-47).

6. Krall discloses that the “pouch member **40** is preferably positioned to abut an interior portion of the front panel **22**” (*id.* at col. 2, ll. 32-34).

7. Krall discloses that “[i]n at least one embodiment a closure means **50** is provided to selectively close the opening **42** of the pouch member **40**” (*id.* at col. 2, ll. 37-41).

8. Rabinowicz discloses “a tennis vest having one or more pockets for holding tennis balls” (Rabinowicz, col. 1, ll. 7-10).

9. Fig. 6 of Rabinowicz is shown below:

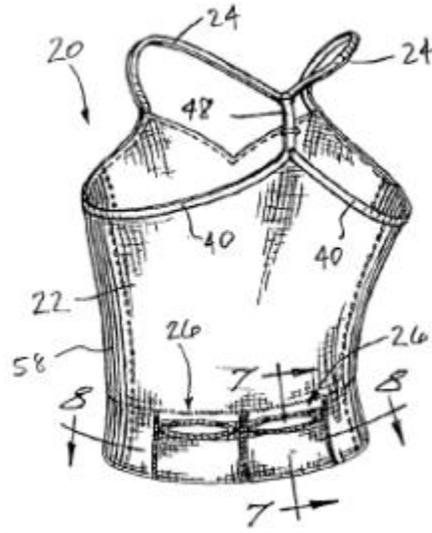
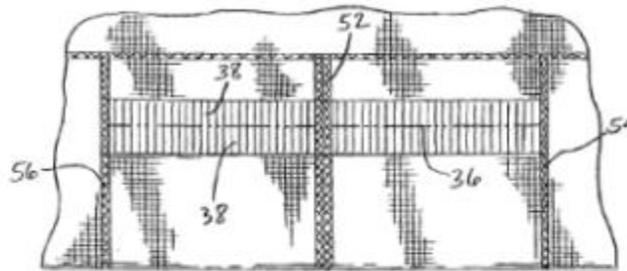


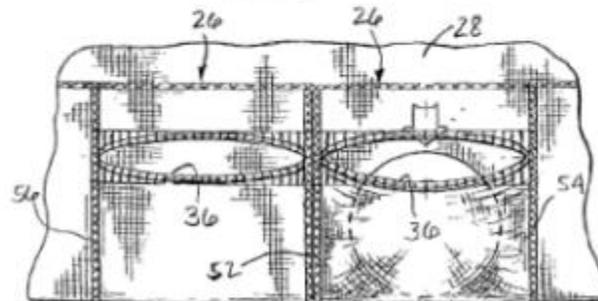
Figure 6 shows a rear view of a tennis garment (*id.* at col. 2, ll. 20-34).

10. Rabinowicz discloses that “body portion **22** includes two pockets **26** on the rear side of the body portion for holding tennis balls” (*id.* at col. 3, ll. 10-12).

11. Figures 9 and 10 of Rabinowicz are shown below:



—FIG. 9.



—FIG. 10.

Figures 9 and 10 show the rear pocket region of the garment with the pockets closed and open, respectively (*id.* at col. 2, ll. 40-44).

12. Rabinowicz discloses that “a plurality of courses on either side of each opening **36** can be knitted in a wide rib pattern **38**...; this tends to cause the opposite edges of the opening **36** to roll up and open the opening ..., which makes it easier to insert a ball into the pocket **26**” (*id.* at col. 3, ll. 40-43).

Principles of Law

In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls.... [A]ny need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 419-20 (2007).

Analysis

The Examiner finds, and Appellants do not dispute, that Krall discloses a shirt meeting the limitations of claim 9 except for the “first ribbing attached to the front panel adjacent the [pocket] opening.” Rabinowicz discloses a garment with a pocket having a knitted wide rib pattern on either side of the opening that causes the edges of the opening to roll up and makes it easier to insert an object such as a tennis ball. Thus, it would have been obvious to one of ordinary skill in the art to include Rabinowicz’s ribbing on the pocket of Krall’s sweatshirt in order to make it easier to insert objects into the pocket.

Appellants argue that the Specification discloses that the claimed shirt includes ribbing to make the opening sag-resistant, whereas “Rabinowicz seeks to roll up and open the opening 36 to make it easier to put a ball into the pocket. Therefore, the Rabinowicz ribbed opening function is opposite the function of Applicant’s ribbed opening.” (Appeal Br. 4.) Appellants argue that neither Krall nor the claimed shirt have a need for an easily opened pocket because “there is no need to put a tennis ball or similar object in the front breast pocket” (*id.* at 5). Appellants argue that “[i]n view of these different functions . . . , it is not obvious to use [the] Rabinowicz ribbing, which tends to open the pocket, on the front breast pocket of Krall, which normally is closed” (*id.* at 5-6).

This argument is not persuasive. Claim 9 does not require the ribbing to have any particular function or properties, only that the shirt include “ribbing attached to the front panel adjacent the [pocket] opening.” Thus, the pocketed shirt suggested by the combination of Krall and Rabinowicz is within the scope of claim 9, even if the ribbing is suggested for a different function than is intended by Appellants. As expressly recognized in *KSR*, any art recognized need or problem can provide a reason for combining claim elements. Here, although Krall discloses that its pocket can include a closure, it would have been obvious to include ribbing in order to obtain the alternative benefit of a pocket that opens easily.

Appellants also argue that “Krall teaches away from a pocket opening which rolls up and opens by providing a closure, such as the zipper shown in Figure 1” (Reply Br. 2). However, Krall does not disclose that a closure is critical or necessary to its shirt, only that “[i]n at least one embodiment a

closure means **50** is provided” (FF 7, emphasis added). Krall therefore does not suggest that its shirt would be nonfunctional with a pocket that opened easily. *Cf. In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004) (“The prior art’s mere disclosure of more than one alternative does not constitute a teaching away from . . . alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed.”).

Finally, Appellants argue that “the Examiner's statement that Rabinowicz asserts that ribbing around a pocket opening provides easier access to the contents of ‘any pocket’ is overly broad and not supported by Rabinowicz. Rabinowicz is directed towards an exterior pocket, contrary to Applicant’s pocket or Krall’s pocket, both of which are internal pockets.” (Appeal Br. 6.)

This argument is also not persuasive. Appellants have not provided evidence or any persuasive technical reasoning to show that the location of the pocket on the inside, rather than the outside, of a garment changes the effect of ribbing around the opening. We agree with the Examiner that “the opening structures of the pockets of Rabinowicz and Krall, which is the pocket structure relevant to the application of ribbing, comprise similar components including a slit opening and fabric of the garment forming an upper edge and a lower edge of said opening” (Answer 10) and therefore ribbing would be expected to have a similar effect on both.

Thus, we affirm the rejection of claim 9 as being obvious in view of Krall and Rabinowicz. Claims 1, 2, 5, 12, and 18-27 have not been argued separately and therefore fall with claim 9. 37 C.F.R. § 41.37(c)(1)(vii).

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We also affirm the rejection of claims 1, 4, 9, 17, and 27 under 35 U.S.C. § 103(a) in view of Krall, Rabinowicz and either Burr or Grushlaw, because Appellants have waived any arguments based on Burr or Grushlaw.

Conclusion of Law

The evidence of record supports the Examiner's conclusion that it would have been obvious to modify Krall's shirt to include "ribbing attached to the front panel adjacent the opening," as recited in claim 9.

SUMMARY

We affirm the rejection 1, 2, 4, 5, 9, 12, and 17-27 under 35 U.S.C. § 103(a).

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

cdc