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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRIESE LICHTTECHNIK VERTRIEBS GMBH
Patent Owner and Appellant

Appeal 2016-002120
Reexamination Control 90/013,005
United States Patent 5,841,146
Technology Center 3900

Before JAMES T. MOORE, JOHN A. JEFFERY, and
DENISE M. POTHIER, *Administrative Patent Judges*.

JEFFERY, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. §§ 134 and 306 the Examiner’s decision to reject claims 1, 4, 5, 6, 8, and 11–13. Claim 7 has been indicated as containing patentable subject matter, and claims 2, 3, 9, 10, and 14–18 are not subject to reexamination. Final Act. 1; App. Br. 5.¹ We have jurisdiction under 35 U.S.C. §§ 134 and 306, and we heard the appeal on November 2, 2016. We reverse.

STATEMENT OF THE CASE

This proceeding arose from a request for *ex parte* reexamination filed on September 24, 2013, of United States Patent 5,841,146 (“the ’146 patent”), issued to Briese on November 24, 1998.

The ’146 patent describes a reflector that can be opened like an umbrella. A tubular carrying element is inserted in a bearing body so that the element is displaceably held within the bearing body. *See generally* ’146 patent, Abstract; col. 1, ll. 4–13, 49–51; Fig. 1. Claim 1 is illustrative of the invention and is reproduced below:

1. An umbrella reflector, comprising:
 - a bearing body (5) into which a tubular carrying means (1) is inserted so that said tubular carrying means is displaceably held within said bearing body (5);
 - a ring of articulated joints (10) arranged on said bearing body (5) and to which umbrella stretchers (11) are hingedly attached, a reflecting umbrella covering (18) fastened to umbrella stretchers (11);

¹ Throughout this opinion, we refer to (1) the Final Rejection mailed May 21, 2014 (“Final Act.”); (2) the Appeal Brief filed October 21, 2014 (“App. Br.”); (3) the Examiner’s Answer mailed September 10, 2015 (“Ans.”); and (4) the Reply Brief filed November 10, 2015 (“Reply Br.”).

a sliding means (15) being displaceable on said tubular carrying means (1)

a ring of toggle joints (14) arranged on said sliding means to which expanding stretchers (13) are mounted, the end of expanding stretchers (13) being secured to umbrella stretchers (11) by articulated expanding joints (12), said expanding stretchers (13) being dimensioned so that when opening the reflectors, said sliding means (15) is displaceable to a point past the plane of said articulated expanding joints (12), where the resilient restoring forces provide an arrestment holding the reflector in an open position, and

an element (2) emitting electromagnetic or acoustic waves which is arranged at the end of said tubular carrying means (1) facing the interior of said umbrella reflector so that by displacing said tubular carrying means (1) within said bearing body (5) said element (2) is moved into different positions in relation to the opened reflector.

RELATED PROCEEDINGS

This appeal is said to be related to the following litigation involving the '146 patent: *Briese Lichttechnik Vertriebs GmbH & Hans-Werner Briese v. Brent Langton, B2PRO, Key Lighting, Inc., and Sergio Ortiz*, Case No. 1:09-cv-09790-SC-MHD (S.D.N.Y. Jan. 22, 2014), where a jury found, among other things, the '146 patent to be valid and enforceable. App. Br. 4, 52 (Rel. Proc. App.). Appellant adds that this case was appealed to the U.S. Court of Appeals for the Federal Circuit. App. Br. 4. Although not indicated in Appellant's Briefs, the appeals court affirmed the lower court's judgment on January 9, 2015. *See Briese Lichttechnik Vertriebs GmbH v. Langton*, 589 F. App'x 536 (Fed. Cir. 2015) (citing Fed. Cir. R. 36).

THE REJECTIONS

The Examiner rejected claims 1, 4, 8, and 11–13 under 35 U.S.C. § 103(a) as unpatentable over Intrator (US 3,851,164; Nov. 26, 1974) and Hilzen (US 3,294,962; Dec. 27, 1966). Final Act. 11–15.

The Examiner rejected claims 5 and 6 under 35 U.S.C. § 103(a) as unpatentable over Intrator, Hilzen, and Olds (US 2,205,860; June 25, 1940). Final Act. 15–18.

THE OBVIOUSNESS REJECTION OVER INTRATOR AND HILZEN

The Examiner finds that Intrator’s umbrella reflector has every recited element of claim 1 including (1) a “bearing body” (ring 56) into which a “tubular carrying means” (shaft 12) is held; (2) “sliding means” (slider 59) displaceable on the tubular carrying means; and (3) “expanding stretchers” (short ribs 62) dimensioned so that the sliding means is displaceable to a point past the plane of “articulated expanding joints” (rib ends 64), where resilient restoring forces are said to provide an arrestment holding the reflector in an open position. Final Act. 11–12. The Examiner also finds that Intrator’s “element” (unit 11) emits electromagnetic or acoustic waves and is arranged at the end of the tubular carrying means facing the interior of the reflector, so that by displacing the tubular carrying means, the element is moved into different positions in relation to the opened reflector. *Id.* at 12.

Although the Examiner acknowledges that Intrator’s tubular carrying means is not *displaceably* held within the bearing body, the Examiner cites Hilzen as teaching this feature in concluding that the claim would have been obvious. *Id.* at 12–14.

Appellant argues the cited prior art does not teach or suggest (1) when opening the reflectors, the sliding means is displaceable to a point past the plane of the articulated expanding joints, where resilient restoring forces provide an arrestment holding the reflector in an open position. App. Br. 15–24, 32–35; Reply Br. 5–14, 22–24. Appellant further contends that the cited prior art also does not teach or suggest arranging the recited element at the end of the tubular carrying means, let alone that such an element can be moved into different positions in relation to the opened reflector by displacing the tubular carrying means. App. Br. 24–32, 36–44; Reply Br. 14–22. Appellant adds that the Examiner’s proposed combination of Intrator and Hilzen is improper because it is based on impermissible hindsight reconstruction. App. Br. 44–47; Reply Br. 24–25.

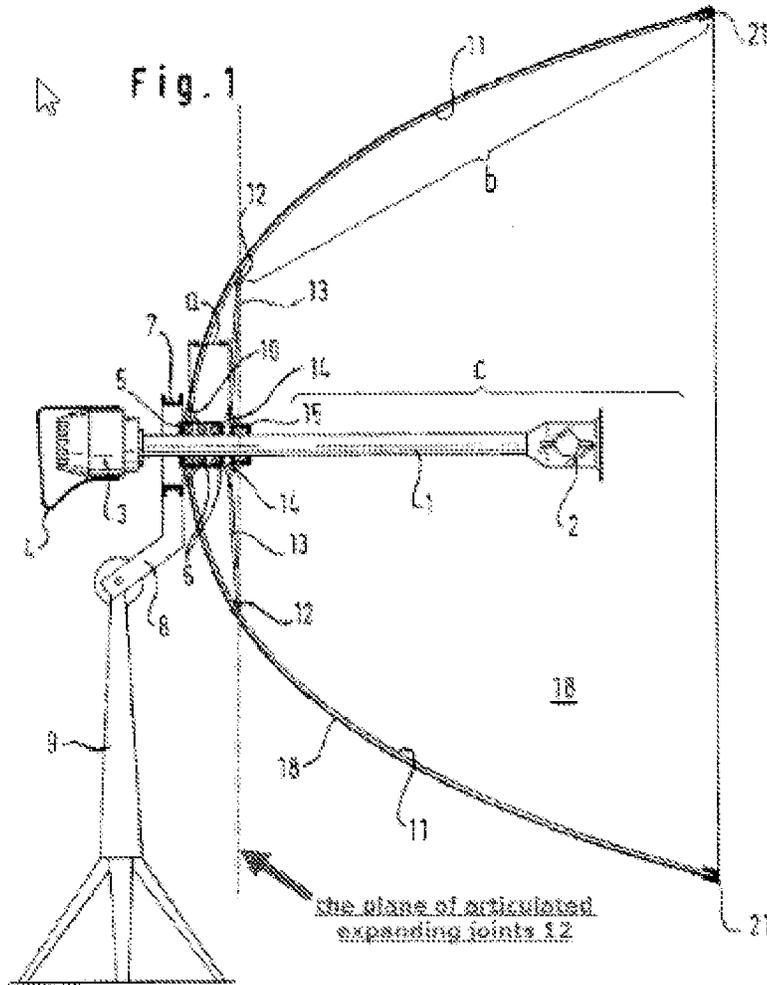
ISSUE

Under § 103, has the Examiner erred in rejecting claim 1 by finding that Intrator and Hilzen collectively would have taught or suggested (1) a sliding means that is displaceable to a point past a plane of articulated expanding joints, where resilient restoring forces provide an arrestment holding the reflector in an open position, and (2) arranging the recited element at the end of the tubular carrying means, such that the element can be moved into different positions in relation to the opened reflector by displacing the tubular carrying means?

ANALYSIS

We begin by noting that despite the '146 patent's forthcoming expiration in April 2017, we nonetheless construe the claims with their broadest reasonable interpretation consistent with the Specification—the proper standard for unexpired patents under reexamination. *See In re ICON Health & Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007). We emphasize this point, for after the '146 patent expires, the claims are construed differently, namely under the claim construction standard set forth in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). *See In re Rambus, Inc.*, 753 F.3d 1253, 1256 (Fed. Cir. 2014); *see also Facebook, Inc. v. Pragmatus AV*, 582 F. App'x 864, 866 (Fed. Cir. 2014) (unpublished) (applying the *Phillips* standard to construe terms in patents that expired after the decision of the Board which applied the broadest reasonable interpretation standard to the then-unexpired patents).

Turning to claim 1, a key recited aspect is that the umbrella reflector's expanding stretchers are dimensioned so that when the reflector is opened, a sliding means is displaceable to a point past a plane of the articulated expanding joints, where resilient restoring forces provide an arrestment that holds the reflector in an open position (“the resilient restoring force limitation”). On pages 7 and 8 of the Appeal Brief, Appellant cites column 4, lines 12 to 25 and Figure 1 of the '146 patent as supporting this limitation. Although Figure 1 does not identify this plane, Appellant nonetheless contends that it corresponds to the vertical line connecting articulated expanding joints 12 as indicated in the annotated version of Figure 1 on page 32 of the Appeal Brief reproduced below.



Appellant's Annotated Figure 1 of the '146 patent

In the above-cited passage, the '146 patent explains that expanding stretchers 13 are dimensioned so that they can be easily moved into the plane of articulated expanding joints 12 by actuating sliding means 15, thus overcoming the resilient restoring forces of umbrella stretchers 11 and covering 18. '146 patent, col. 4, ll. 12–17. Notably, the disclosed construction is also dimensioned so that the sliding means can be slightly

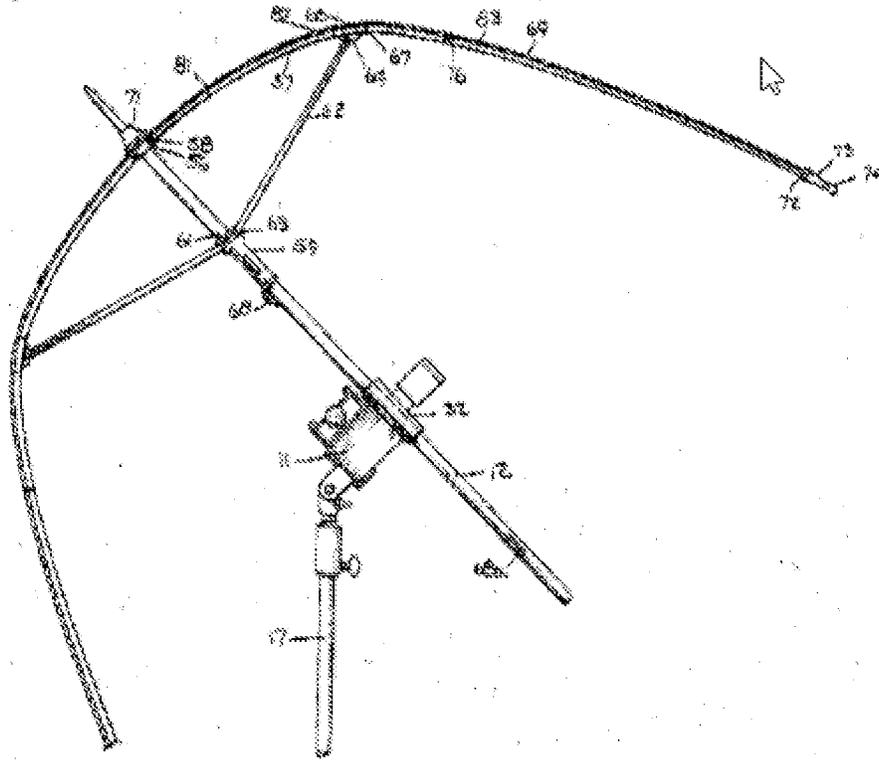
moved *beyond* this position corresponding to a dead center of the articulated levers towards the bearing body 5 *to engage the latter*. *Id.* at col. 4, ll. 17–21. Therefore, as a result of (1) the restoring forces, *and* (2) the impact effect of the bearing body, the sliding means is reliably retained in a position corresponding to the reflector’s open position. *Id.* at col. 4, ll. 21–25.

Our emphasis on the term “and” underscores the fact that the restoring forces alone do not retain the sliding means beyond the described “dead center,” but *also* the impact effect of the bearing body resulting from the sliding means’ engagement with that body. Therefore, to the extent that Appellant contends that *only* the resilient restoring forces hold the reflector in an open position when the sliding means is displaced past the plane of the articulated expanding joints (*see* App. Br. 19–21; Reply Br. 22–23), such an argument is not only not commensurate with the claim which is not so limited, but also runs counter to the Specification which, as noted above, identifies *two* factors—not just one—that cause the sliding means to be retained when it is moved beyond “dead center” to hold the reflector in an open position. *See* ’146 patent, col. 4, ll. 17–25. That claim 1’s preamble uses the term “comprising” which does not exclude additional, unrecited elements only bolsters this conclusion.²

Turning to the rejection, the Examiner relies principally on the umbrella light structure shown in Intrator’s Figure 5, and cites Intrator’s

² “‘Comprising’ is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim.” *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501 (Fed. Cir. 1997) (citation omitted).

column 4, lines 13 to 24 and column 5, lines 25 to 41³ for teaching the resilient restoring force limitation. Final Act. 12 (citing col. 4, ll. 13–24 and col. 5, ll. 25–41). Intrator’s umbrella light structure in Figure 5 is reproduced below.



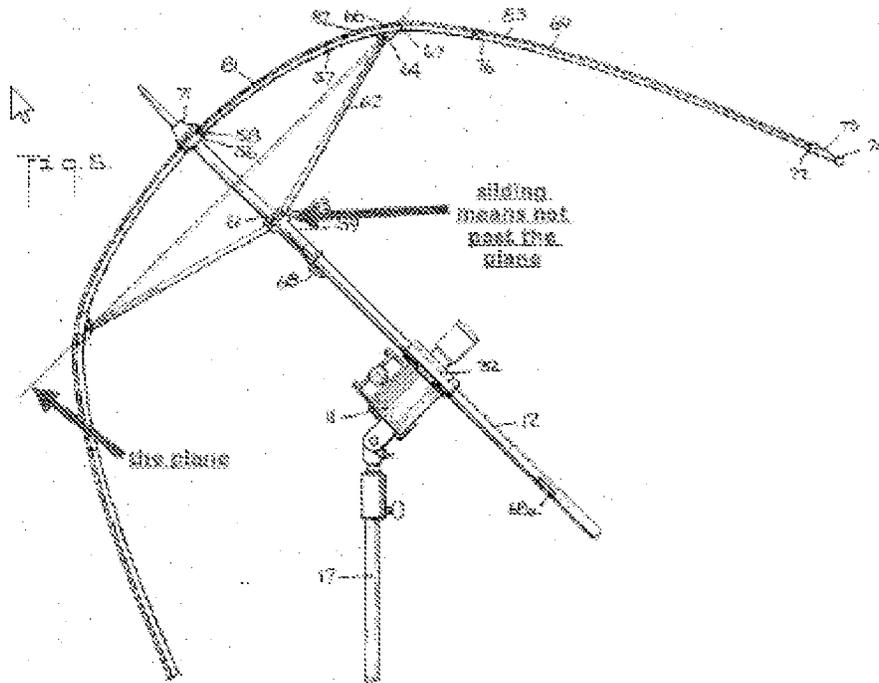
Intrator’s umbrella light structure in Figure 5

³ Although the Examiner cites column 5, lines “25–4” on page 12 of the Final Rejection, we presume that this citation was intended to be column 5, lines 25 to 41, and treat the Examiner’s apparent typographical error as harmless.

Intrator's umbrella is opened by moving slider 59⁴ axially until the umbrella's mouth attains its greatest circumference and diameter. Intrator, col. 5, ll. 27–34. Further axial slider movement does not increase the mouth's diameter, but rather causes outward bending of intermediate portions of the umbrella's ribs. *Id.* at col. 5, ll. 34–41. As shown in Figure 5, latch 68 holds the slider in a position on shaft 12 in which the umbrella is open. *Id.* at col. 4, ll. 20–21.

According to Appellant, because the recited plane in Intrator corresponds to the line drawn by Appellant on the annotated version of Intrator's Figure 5 on page 33 of the Appeal Brief reproduced below, Intrator's slider is not past that plane in that figure.

⁴ As the Examiner indicates (Ans. 12), Appellant does not dispute the Examiner's construing the recited "sliding means" as invoking 35 U.S.C. § 112, sixth paragraph which is interpreted in light of the corresponding structure in the Specification or its equivalents. *See In re Donaldson Co., Inc.*, 16 F.3d 1189, 1193 (Fed. Cir. 1994) (en banc). Nor does Appellant dispute the Examiner's mapping Intrator's slider 59 to the recited sliding means under this interpretation. *Accord* App. Br. 33 (labeling slider 59 as a "sliding means" in the annotated version of Intrator's Figure 5).



Appellant's Annotated Version of Intrator's Figure 5

To be sure, Intrator's slider is before that plane in Figure 5—not past it—and latch 68 holds the slider in that position as Appellant indicates. App. Br. 33; Reply Br. 14. Still, the Examiner finds that Intrator's structure allows the user to push the slider not only to the position shown in Figure 5, but *any other* position along the shaft. Ans. 27. Notably, Intrator's structure is said to enable the user to push the slider *towards ring 56*, which the Examiner characterizes as a "bearing." Ans. 27–28.

These findings seem plausible and have not been persuasively rebutted on this record. Although Appellant asserts that Intrator's ribs 62 are not dimensioned such that the slider is displaceable to a point past the recited plane (Reply Br. 13), Appellant provides no persuasive evidence on this

record to substantiate this assertion, let alone rebut the Examiner's findings to the contrary apart from attorney argument which has little probative value. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997). To the extent that Appellant's arguments regarding the dimensions of Intrator's ribs are based solely on their depiction in Figures 6 and 7 of that reference (*see* Reply Br. 13), such a basis is unsubstantiated, for it is well settled that patent drawings are not drawn to scale and do not precisely define relative proportions of the elements where, as here, there is no evidence to the contrary. *See Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000).

Nevertheless, the Examiner's position is problematic on this record. Even assuming, without deciding, that the user can push the slider past the plane of articulated expanding joints, namely rib ends 64, as the Examiner indicates (Final Act. 12), the Examiner has still not shown—nor do we see—how resilient restoring forces provide an arrestment that holds the reflector in an open position in this condition—a key aspect of the claimed invention.

That the Examiner acknowledges that the *user would have to hold the slider* in this scenario (Ans. 28) only further undercuts the Examiner's position in this regard. That is, even if Intrator's umbrella is held open by forces created by the slider and ribs under this condition as the Examiner indicates (Ans. 28), the fact that *the user must also hold the slider* suggests that the user's hand is needed to overcome the forces that tend to restore the umbrella to its *closed*—not open—position. Otherwise, there would be no need for the user to hold the slider in this condition. That Intrator “[f]urther axial movement of the slider causes outward bending of the intermediate

portions of the ribs as noted in column 5, lines 34 to 39 further suggests a resilient restoring force that urges closing of the umbrella reflector rather than an arrestment to hold the reflector open.

Nevertheless, to the extent that the user need not continually hold the slider to keep Intrator's umbrella open via *opposite* resilient restoring forces after the slider is pushed past the recited plane, the Examiner does not explain how or why this is the case, nor will we speculate in that regard here in the first instance on appeal. Rather, the Examiner seems to suggest just the opposite: that the slider must be held to keep the umbrella open under this condition.

To be sure, Appellant's contention that Hilzen's slider is also not displaceable past the plane of the joints connecting the link members in that reference (App. Br. 35) is unavailing. In short, this argument is not germane to the limited purpose for which Hilzen was cited, namely that *displaceably* holding a tubular carrying means within a bearing body via set screws is known in the art, and that providing such a structure to *displaceably* hold Intrator's shaft within the identified "bearing body" (ring 56) would have been obvious. *See* Final Act. 12–14.

Nor are we persuaded of error in the Examiner's findings regarding the recited element arrangement, at least to the extent that arranging Intrator's electromagnetic-wave-emitting element, namely light source unit 11, at the end of the tubular carrying means (shaft 12) would have been at least an obvious variation. *See* Final Act. 12; Ans. 34. Notably, the Examiner finds that Intrator's light source unit can be adjusted to place it *at any point* on the shaft, including *at the end* of that shaft (*id.*)—a finding

consistent with Intrator's teaching that the light source unit can be secured *at any suitable position* along the length of the shaft via spring clamp 32 whose structural details are shown in Figure 3. *See* Intrator, col. 2, ll. 39–45, 55–63.

Notably, Appellant does not persuasively rebut the Examiner's finding in this regard, apart from merely alleging that Intrator's figures do not show the lamp unit at the end of the shaft, and that further structure on the shaft, namely latch 68, allegedly obstructs the element from being arranged at the end of the shaft. *See* App. Br. 36–37; Reply Br. 18. But leaving aside the fact that Intrator's latch 68 is located in a direction *opposite* to the lower end of the shaft in Figure 5, we still see no error in the Examiner's finding that the light source unit can be adjusted to place it at the end of the shaft, even assuming, without deciding, that Appellant's argument also applies to latch 68a. That Intrator states, quite broadly, in column 2, lines 39 to 42 that the light source unit can be secured at *any* suitable position along the length of the shaft—a position that includes the end—only bolsters the Examiner's position in this regard.

To the extent that Appellant contends that latch 68a would somehow prevent positioning the light source unit at the end of the shaft via the spring clamp (*see* Reply Br. 18), there is no persuasive evidence on this record to substantiate such a theory. Although Intrator's latch 68a holds the *slider* in a position on the shaft in which the umbrella is closed as noted in column 4, lines 21 to 23, Intrator says nothing about this latch's impeding—or otherwise preventing—arranging the light source unit at the end of the shaft

with the spring clamp. Nor has Appellant shown otherwise on this record apart from unsubstantiated arguments which have little probative value. *See Geisler*, 116 F.3d at 1470.

In short, we see no error in the Examiner's findings in this regard at least to the extent that arranging Intrator's electromagnetic-wave-emitting element at the end of the tubular carrying means would have been at least an obvious variation. *See* Final Act. 12; Ans. 34. We reach this conclusion even under Appellant's interpretation of the recited element arrangement that requires the element to be located *at* the end—not *near* the end.⁵ App. Br. 26; Reply Br. 16. Here again, Intrator at least suggests this arrangement.

⁵ This construction is consistent with a District Court's construction of claim 1's element limitation as "[s]ource emitting light or sound, such as a lamp head with at least one lamp and *attached at the end* of the tubular carrying means facing the interior of the umbrella reflector so that by displacing the tubular carrying means within the bearing body the source is moved into different positions in relation to the opened reflector." *Briese Lichttechnik Vertriebs, GmbH v. Langton*, No. 09 Civ. 9790, 2011 WL 5075379, at *6–7 (S.D.N.Y. Oct. 25, 2011) (unpublished) (emphasis added). Although the court's construction informs our understanding of the recited element arrangement in the context of the claimed invention, we are not bound by this interpretation, for like the Examiner, we apply a different standard to interpret claims, namely the broadest reasonable interpretation. *See Power Integrations, Inc. v. Lee*, 797 F.3d 1318, 1326 (Fed. Cir. 2015); *see also In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1369 (Fed. Cir. 2004) ("[I]t is error for the Board to 'appl[y] the mode of claim interpretation that is used by courts in litigation, when interpreting the claims of issued patents in connection with determination of infringement and validity.'" (quoting *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989))). Nevertheless, we find that Intrator at least suggests attaching the element at the end of the tubular carrying means even under the court's interpretation.

Nor do we find error in the Examiner's reliance on Hilzen merely to show that *displaceably* holding a tubular carrying means within a bearing body via set screws is known in the art, and that providing such a structure to hold Intrator's shaft *displaceably* within the identified "bearing body" (ring 56) would have been obvious. *See* Final Act. 12–14. Specifically, the Examiner finds that Hilzen's tubular carrying means, namely rod 23, is displaceably held within "bearing body" (hinge coupling 32) such that the element (frame part) 15 is moved into different positions in relation to the opened reflector 25. Final Act. 13; Ans. 38–39 (citing Hilzen, col. 1, l. 59 – col. 2, l. 19; Figs. 1–2).

We acknowledge that Hilzen's Figures 1 and 2 show different embodiments: one of which has an umbrella-form reflector 25, and the other hingedly-related panels 30, 30'. *See* Hilzen, col. 1, l. 59 – col. 2, l. 19. But both embodiments have (1) a frame part 15 containing quartz lamps facing an opposing reflector, and (2) a rod 23 positioned through the frame part. *Compare* Hilzen, Fig. 1 *with* Fig. 2. Although Hilzen's Figure 2 does not detail the frame part as in Figure 1, skilled artisans would nevertheless understand that the two structures are substantially similar, including the frame part's associated set screw 24 and slide bearing 18. *See* Hilzen, col. 1, l. 59 – col. 2, l. 19.

So although Hilzen does not state explicitly that rod 23 is slideably positioned through slide bearing 18 and is releaseably fixable by set screw 24 in the Figure 2 embodiment as indicated in connection with the Figure 1 embodiment in column 1, lines 70 to 72, skilled artisans would nonetheless

understand that this feature is likewise present in the Figure 2 embodiment, or that it would have been at least an obvious variation.

But a key element unique to Hilzen's Figure 2 embodiment is hinge coupling 32 which is movable along the rod and fixed thereto via set screws. *See Hilzen*, col. 2, ll. 16–19 (noting that hinge coupling 32 is moved along rod 23, and any desired setting is secured by set screws). *Accord* Final Act. 14 (noting that “bearings” 31 and 32 are fixed to rod 23 by set screws, but are movable by releasing the screws).

Also, Hilzen suggests that a rod slideably positioned through slide bearing 18 would have been an obvious variation given the preponderance of set-screw-based elements positioned along the rod in Figure 2, and the teaching that any desired setting is secured via set screws. *See Hilzen*, col. 2, ll. 15–19. That is, skilled artisans would understand from Hilzen's disclosure that not only are the elements mounted on the rod 23 in Figure 2 slideably positionable on that rod, but also that Hilzen at least suggests that the *rod itself* is slideably positionable with respect to those elements by releasing their respective set screws. *Accord* Ans. 43 (finding that Hilzen's tubular carrying means 23 is displaceable). That Hilzen's rod is slideably positioned through slide bearing 18 and is releaseably fixable by set screw 24 in the Figure 1 embodiment as explained in column 1, lines 70 to 72, and this teaching is applicable to the Figure 2 embodiment as noted above, only bolsters this conclusion.

A key aspect of the Examiner's rejection is that, in light of Hilzen, it would have been obvious to replace Intrator's “bearing body” (ring 56) that *fixes* the shaft thereto with a “bearing body” that would enable the shaft to

be displaceably held therein, using, for example, a set screw, such as a structure similar to Hilzen's hinge coupling 32. *See* Final Act. 13–14. Despite Appellant's arguments to the contrary (App. Br. 39–47), we see no error in this position, for the Examiner's proposed enhancement to Intrator uses prior art elements predictably according to their established functions—an obvious improvement. *See KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 417 (2007). Nor do we find error in the Examiner's position at least to the extent that by providing a structure that enables Intrator's shaft to be moved relative to such a bearing body in lieu of the fixed arrangement, the light source unit 11 arranged at the end of that moveable shaft would likewise be moved in different positions in relation to the opened reflector. *See* Final Act. 13–14.

Nevertheless, we find the Examiner's rejection problematic on this record even if we accept the Examiner's position that ordinarily skilled artisans could have (1) displaced Intrator's slider 59 to a point past the plane of the articulated expanding joints; (2) arranged Intrator's light source unit 11 at the end of the shaft 12; and (3) in light of Hilzen, replaced Intrator's ring 56 that fixes the shaft thereto with a bearing body that would enable the shaft to be displaceably held therein via a set screw and, in doing so, enable the light source unit arranged at the end of that shaft to be moved as the shaft is moved.

That is, despite these seemingly plausible findings and conclusions, the Examiner has still not shown how resilient restoring forces provide an arrestment that holds the reflector in an open position when Intrator's slider

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is displaced past the plane of the articulated expanding joints—a key aspect of the claimed invention.

Therefore, we are persuaded that the Examiner erred in rejecting independent claim 1, and dependent claims 4, 8, and 11–13 for similar reasons.

THE OTHER OBVIOUSNESS REJECTION

Because the Examiner has not shown that Olds cures the foregoing deficiencies regarding the rejection of independent claim 1, we will not sustain the obviousness rejection of dependent claims 5 and 6 (Final Act. 15–18) for similar reasons.

CONCLUSION

The Examiner erred in rejecting claims 1, 4, 5, 6, 8, and 11–13 under § 103.

DECISION

The Examiner's decision rejecting claims 1, 4, 5, 6, 8, and 11–13 is reversed.

REVERSED

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