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Stanley Black & Decker, Inc. 6201 Greenleigh Avenue, MR045 Middle River, MD 21220			TECCO, ANDREW M	
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DANIEL N. LOPANO, GABRIEL N. CONCARI,  
SION N. NETZLER, and DUSTIN LEE

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Appeal 2017-000100  
Application 13/570,676  
Technology Center 3700

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Before JOHN C. KERINS, EDWARD A. BROWN, and  
ARTHUR M. PESLAK, *Administrative Patent Judges*.

PESLAK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Daniel N. Lopano et al. (“Appellants”)<sup>1</sup> appeal under 35 U.S.C. § 134(a) from the Examiner’s decision rejecting claims 1–16 and 18–20. An oral hearing was held on January 8, 2019. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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<sup>1</sup> Black & Decker Inc. is identified as the real party in interest. Appeal Br. 4.

THE CLAIMED SUBJECT MATTER

Appellants' invention "relates to an ergonomic handle for a power tool, such as a drill or impact driver." Spec. ¶ 2. Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. A handle for a power tool that includes a housing having a working region defining a working axis with a forward direction extending toward the working region and a rearward direction extending away from the working region, the handle comprising:
  - a proximal end portion coupled to the housing;
  - a top region adjacent to and distal of the proximal end portion, and having a generally oval cross section with a major axis and a minor axis;
  - a middle region adjacent to and distal of the top region, and having a generally oval cross section with a major axis and a minor axis;
  - a bottom region adjacent to and distal of the middle region, and having a generally oval cross section with a major axis and a minor axis; and
  - a distal end portion adjacent to and distal of the bottom region,wherein the cross section having the longest major axis is in the middle region and the cross section having the longest minor axis is in the bottom region.

## REJECTIONS<sup>2</sup>

- 1) Claims 1–8, 10–16, and 18–20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Sakakibara (US 2006/0175069 A1, published Aug. 10, 2006) and Leasure (US D504,604 S, issued May 3, 2005).
- 2) Claim 9 is rejected under 35 U.S.C. § 103(a) as unpatentable over Sakakibara, Leasure, and Mooty (US 6,308,378 B1, issued Oct. 30, 2001).

## DISCUSSION

### *Rejection 1*

#### *Independent Claims 1 and 10*

The Examiner finds that Sakakibara discloses all the limitations of claim 1 except for “the cross section having the longest minor axis is in the bottom region.” Final Act. 6–7. The Examiner finds that Leasure discloses “a handle for a similar power tool . . . wherein . . . the cross section having the longest minor axis is in the bottom region.” *Id.* at 7. The Examiner provides an annotated version of Figures 3 and 4 of Leasure in support of this finding. *Id.* at 8. The Examiner concludes that it would have been obvious to modify the handle of Sakakibara “with the alternative axis proportions and handle shape of Leasure” because “[i]t is common and well-known in the tool art to make adjustments to handles to accommodate

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<sup>2</sup> The Examiner withdrew a rejection of claims 1–16 and 18–20 on the ground of non-statutory double patenting and also a rejection of claim 14 under 35 U.S.C. § 112, first paragraph. Ans. 2.

particular user needs” and “[m]aking this modification would provide an alternative gripping means that might be desirable to particular users as hand sizes and preferred gripping techniques are known to be quite variable between different users.” *Id.* at 8–9. The Examiner makes substantially similar findings and conclusions for independent claim 10. *Id.* at 10–12.

Appellants contend that Leasure does not disclose a handle wherein the bottom region has the shortest minor axis. Appeal Br. 9–12. In support of this contention, Appellants submit an annotated version of Leasure’s Figure 3. *Id.* at 11. Appellants submit numerical values of lengths of the minor axis in each of the three handle regions in Leasure identified by the Examiner, which were measured using Microsoft® PowerPoint® 2013. *Id.* According to Appellants’ measurements, the length of the minor axis of the top region is 1.91”, the length of the minor axis of the middle region is 2.21” and the length of the minor axis of the bottom region is 2.19”. *Id.* Appellants argue that regardless of whether their measurements are correct or the Examiner’s measurements are correct, “it is improper for the Office Action to rely on ‘measurements’ of the drawings because Leasure does not indicate that the drawings are to scale and is silent as to relative dimensions.” *Id.* at 12 (citing MPEP § 2125).

The Examiner responds that “drawings can be used as prior art when they ‘clearly show the structure which is claimed.’” Ans. 3 (citing *In re Mraz*, 455 F.2d 1069 (CCPA 1972)). The Examiner submits that the Office Action does not rely on specific measurements from Leasure’s drawings, but rather “the clearly shown feature of the tool of Leasure where the bottom region of the handle has the longest minor axis.” *Id.* For the following reasons, we do not sustain the rejection of claim 1.

Appellants' Specification describes the minor axes in connection with Figure 3. Spec. ¶ 34, Fig. 3. Axes 60, 66, and 68 are described as the minor axes. *Id.* In order to evaluate the length of the minor axes, as described, we view the handle from the rear such as in Appellants' Figure 2 or Leasure's Figure 3.

We agree with the Examiner, based on Figure 3 of Leasure, that the minor axis of Leasure's bottom region is clearly longer than the minor axis of Leasure's top region. *See* Final Act. 8. However, we don't agree that Leasure's Figure 3 shows that the minor axis of the bottom region is clearly longer than the minor axis of the middle region. *Id.* It appears that the bottom region and the middle region of Leasure, as defined by the Examiner, may have minor axes that are approximately equal in length. Because Leasure is a design patent, it provides no written description that might support the Examiner's finding. Consequently, we determine that the Examiner's finding that Leasure clearly discloses a handle for a power tool wherein "the cross section having the longest minor axis is in the bottom region" is not supported by a preponderance of the evidence. Therefore, we do not sustain the rejection of claim 1 or claims 2–8 which depend directly or indirectly from claim 1. We do not sustain the rejection of claim 10 and claims 11–16 which depend directly or indirectly from claim 10 for the same reasons stated for claim 1.

#### *Independent Claim 18*

The Examiner relies on Leasure to disclose the limitation "the left and right edges tapering away from each other from the top region to the bottom region." Final Act. 15. The Examiner relies on the same annotated version of Leasure's Figures 3 and 4 as for claim 1. *Id.*

Appellants contend that Leasure discloses that “the left and right edges of the handle taper away from each other from the top region to the middle region, but taper toward one another from the middle region to the bottom region.” Appeal Br. 11. The Examiner does not address Appellants’ contention in the Answer. *See Ans. passim.*

We agree with Appellants that Leasure’s drawings fail to clearly show the limitation “left and right edges tapering away from each other from the top region to the bottom region.” We, thus, do not sustain the rejection of claim 18 and of claims 19 and 20 which depend directly or indirectly from claim 18.

#### *Rejection 2*

Claim 9 depends from claim 1. Appeal Br. 19 (Claims App.). The Examiner rejects claim 9 based on the combination of Sakakibara and Leasure with additional disclosure from Mooty. Final Act. 16–17. The Examiner does not rely on the additional disclosure from Mooty to cure the deficiencies in the combination of Sakakibara and Leasure discussed above in connection with the rejection of claim 1. We, thus, sustain the rejection of claim 9 for the same reasons discussed above.

#### DECISION

The Examiner’s decision rejecting claims 1–16 and 18–20 is reversed.

REVERSED