



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/938,447	11/03/2010	Jason Klein	2010-034	3453
27569	7590	03/09/2018	EXAMINER	
PAUL AND PAUL 1717 Arch Street Three Logan Square SUITE 3740 PHILADELPHIA, PA 19103			ANNIS, KHALED	
			ART UNIT	PAPER NUMBER
			3765	
			NOTIFICATION DATE	DELIVERY MODE
			03/09/2018	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

INFO@PAULANDPAUL.COM
claire@paulandpaul.com
fpanna@paulandpaul.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JASON KLEIN

Appeal 2017-001003
Application 12/938,447
Technology Center 3700

Before PHILIP J. HOFFMANN, CYNTHIA L. MURPHY, and
KENNETH G. SCHOPFER, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellant¹ appeals under 35 U.S.C. § 134 from the Examiner's rejections of claims 1, 3, and 5–20. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

We REVERSE.

¹ The Appellant identifies the real party in interest as “F3 Tech, LLC.” (Appeal Br. 2.)

STATEMENT OF THE CASE

The Appellant’s invention “relates to an athletic sock having improved abrasion resistance, comfort and moisture management.” (Spec. ¶ 1.)

Illustrative Claim

1. An athletic abrasion resistant and comfortable athletic sock for covering the foot of a wearer and comprising a triple knit construction and having a continuous first compression zone in the form of a band around the circumference of the sock, located rearward of a toe portion of the sock and forward of an ankle of the sock, with a bottom portion of the compression band adapted to the foot of a wearer; with an elastic band neck portion of the sock being at an upper end of the sock and sufficiently elastic to engage the leg of a wearer above an ankle portion of the sock, said neck portion being continuous around the circumference of the sock with the band and non-band portions of the sock being comprised of yarn that by weight is of 35% to 75% polyester fiber, 15% to 35% cotton fiber and 10% to 30% polyurethane-polyurea copolymer fiber.

References

Strauss	US 5,033,276	July 23, 1991
Mori	US 2008/0041113 A1	Feb. 21, 2008
Mills	US 2008/0249454 A1	Oct. 9, 2008

Rejections

I. The Examiner rejects claims 1, 3, and 5–20 under 35 U.S.C. § 112, second paragraph, as failing to set forth the subject matter which the inventor regards as the invention. (Final Action 5.)

II. The Examiner rejects claims 1, 3, 7–12, 14–18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Mills and Strauss. (Final Action 6.)

III. The Examiner rejects claims 5, 6, 13, and 19 under 35 U.S.C. § 103(a) as unpatentable over Mills, Strauss, and Mori. (Final Action 10.)

ANALYSIS

Claims 1, 11, and 17 are the independent claims on appeal, with the rest of the claims on appeal (i.e., claims 3, 5–10, 12–16, and 18–20) depending therefrom. (*See* Appeal Br., Claims App.) The independent claims on appeal are drawn to a “sock” and recite limitations listing three fibers, namely “polyester fiber,” “cotton fiber,” and “copolymer fiber.” (*Id.*)

Rejection I

This rejection by the Examiner is based solely upon certain claims having “insufficient antecedent basis.” (Final Action 5.) We agree with the Appellant’s position that this rejection should not be sustained. (*See* Appeal Br. 7.) “[T]he failure to provide explicit antecedent basis for terms does not always render a claim indefinite” if “the scope of a claim would be reasonably ascertainable by those skilled in the art.” *Energizer Holdings, Inc. v. Int’l Trade Comm’n*, 435 F.3d 1366, 1370–71 (Fed. Cir. 2006). Here, the Examiner does not maintain, much less explain why, the claims would not be reasonably ascertainable by those skilled in the art.²

Thus, we do not sustain the Examiner’s rejection of claims 1, 3, and 5–20 under 35 U.S.C. § 112, second paragraph.

Rejections II–III

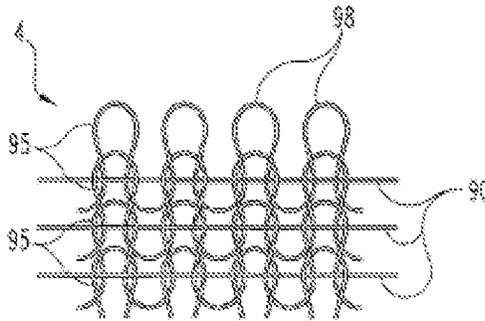
These rejections by the Examiner are based upon a finding that Mills discloses a sock “made of the same fibers as the claimed invention,” namely the three fibers listed in in the independent claims. (Final Action 8, 11.)

² We further note that the words at issue (e.g., “circumference,” “compression band,” “non-band portions,” “bottom portion,” “plantar region,” etc.) would seem to be commonly understood terms to one of ordinary skill in the “sock” art, even absent antecedent basis.

Mills discloses a knitted fabric 4 that can be constructed from “an elastic material 90” and “an elastic material 95.” (Mills, ¶ 28.) The Examiner maintains that Mills’s material 90 can be made from a first “yarn” of the listed copolymer fiber and a second “yarn” of the listed polyester fiber. (Final Action 8.) And the Examiner maintains that Mills’s material 95 can be made of a “yarn” of the listed cotton fiber. (*Id.*) Therefore, according to the Examiner, “the produced fabric making the sock of Mills will comprise materials 90 and 95 having three components as claimed.” (Final Action 8; *see also* Answer 4.)

We are persuaded by the Appellant’s position that the Examiner does not adequately establish that the claimed sock would have been obvious over the applied art. (*See* Appeal Br., 8–15.) We are persuaded because the independent claims on appeal require “yarn,” not “fabric” made of plural yarns, to include the three listed fibers. Specifically, independent claims 1 and 17 require designated sock portions to be “comprised of yarn that by weight is of [a certain percentage] polyester fiber, [a certain percentage] cotton fiber and [a certain percentage] polyurethane-polyurea copolymer fiber,” and independent claim 11 requires “three-component yarn comprising a combination of polyester fiber, cotton fiber and polyurethane-polyurea copolymer fiber.” (Appeal Br., Claims App.)

The Examiner only finds that Mills discloses a “fabric,” not “yarn,” having the listed fibers. Indeed, as shown in Mills’s Figure 4 reproduced below, the prior art fabric 4 is constructed from one yarn made of material 90 and another yarn made of material 95. Particularly, yarn made of material 90 runs “perpendicular” to “wales 98” formed by yarn made of material 95. (Mills, ¶ 27.)



Thus, while it may be true that Mills’s “produced fabric” will include the three fibers listed in the independent claims, this “produced fabric” is not made from “yarn” having all three fibers.

The Examiner maintains that Mills discloses, in paragraph 30, “that the various yarns can be used in combination.” (Answer 3.) We note that this paragraph pertains to the “various yarns” that can be used to make material 95. (*See* Mills ¶ 30.) The Examiner does not provide us with findings that Mills’s material 95, alone, would contain a yarn comprising all three listed fibers. (*See* Final Action 4, 8, *see also* Answer 3–4.)

The Examiner’s further findings and determinations with respect to the dependent claims and/or the additional prior art references (i.e., Straus and Mori) do not compensate for the above-discussed shortcoming. (*See* Final Action 9–12.) For example, Strauss is relied upon only for its teachings on a “triple knit construction” (*see id.* at 9–10); and Mori is relied upon only for its teachings on the “knitting structure” of “ground touching areas of the sock” (*see id.*, at 11–12).

Thus, we do not sustain the Examiner’s rejection of claims 1, 3, 7–12, 14–18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Mills and Strauss; and we do not sustain the Examiner’s rejection of claims 5, 6, 13, and 19 under 35 U.S.C. § 103(a) as unpatentable over Mills, Strauss, and Mori.

Appeal 2017-001003
Application 12/938,447

DECISION

We REVERSE the Examiner's rejections of claims 1, 3, and 5–20.

REVERSED