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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* GEOFFREY RUSSELL ARCHER

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Appeal 2019-001182  
Application 14/350,757  
Technology Center 2800

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Before LINDA M. GAUDETTE, MICHAEL P. COLAIANNI, and LILAN REN, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

The Appellant<sup>2</sup> appeals under 35 U.S.C. § 134(a) from the Examiner's decision finally rejecting claims 1, 3–5, and 7–10.<sup>3</sup>

We AFFIRM.

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<sup>1</sup> This Decision includes citations to the following documents: Specification filed April 9, 2014, as amended (“Spec.”); Final Office Action dated June 16, 2017 (“Final”); Appeal Brief filed November 6, 2017 (“Appeal Br.”); Examiner’s Answer dated March 27, 2018 (“Ans.”); and Reply Brief filed April 6, 2018 (“Reply Br.”).

<sup>2</sup> We use the word “Appellant” to refer to the “Applicant” as defined in 37 C.F.R. § 1.42(a). The Appellant and the real party in interest is the inventor, Geoffrey Russell Archer. Appeal Br. 1.

<sup>3</sup> We have jurisdiction under 35 U.S.C. § 6(b).

### CLAIMED SUBJECT MATTER

The invention relates to an improved traffic management device, e.g., a parking or traffic cone, that incorporates “integrated carrying means whereby a worker can grasp and carry a plurality of stacked devices and, in preferred forms, do so using a single hand.” Spec. ¶ 6. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A traffic management device comprising:
    - a body generally defining an exterior surface and an interior space;
    - a base supporting the body, the base including a portion extending laterally outward from the body and disposed as to support the device on a surface when in use; and
    - a handhold formed in the body and including at least a first opening in the body, the opening extending from the exterior surface to the interior space and being configured for receiving a hand there through for grasping and carrying the device;
- wherein the device and handhold are configured to permit a plurality of said devices to be stacked such that the exterior body surface of an inferior-positioned one of said plurality of said devices is receivable within the interior space of a superior-positioned one of said plurality of said devices;
- wherein the devices are stackable in a predetermined orientation with at least a portion of the openings of said devices being overlapping to permit grasping of said plurality of said devices simultaneously thereby; and
- wherein the interior space is defined by an interior surface of the body and the device further includes a registration structure that includes an interior structure disposed on the interior surface of the device and an exterior structure disposed on the exterior surface of the device such that the interior structure of a superior-positioned device cooperates with the exterior structure of an inferior-

positioned device, to assist in bringing the devices into said predetermined orientation during stacking.

Amended claims filed November 4, 2016.

#### REFERENCES

The Examiner relies on the following references as evidence of unpatentability:

Gagliano	US 5,305,705	Apr. 26, 1994
Johanson et al.	US 2004/0007612 A1	Jan. 15, 2004
Mohelsky et al.	US 2004/0159280 A1	Aug. 19, 2004
Kuo	US 7,056,055 B1	June 6, 2006
Nezu	JP 2001172928 A	June 26, 2001

#### REJECTIONS

1. Claims 1, 3–5, 7, and 8 are rejected under 35 U.S.C. § 103(a) as unpatentable over Nezu in view of Mohelsky.
2. Claim 9 is rejected under 35 U.S.C. § 103(a) as unpatentable over Nezu in view of Mohelsky, Gagliano, and Kuo.
3. Claim 10 is rejected under 35 U.S.C. § 103(a) as unpatentable over Nezu in view of Mohelsky, Gagliano, Kuo, and Johanson.

#### OPINION

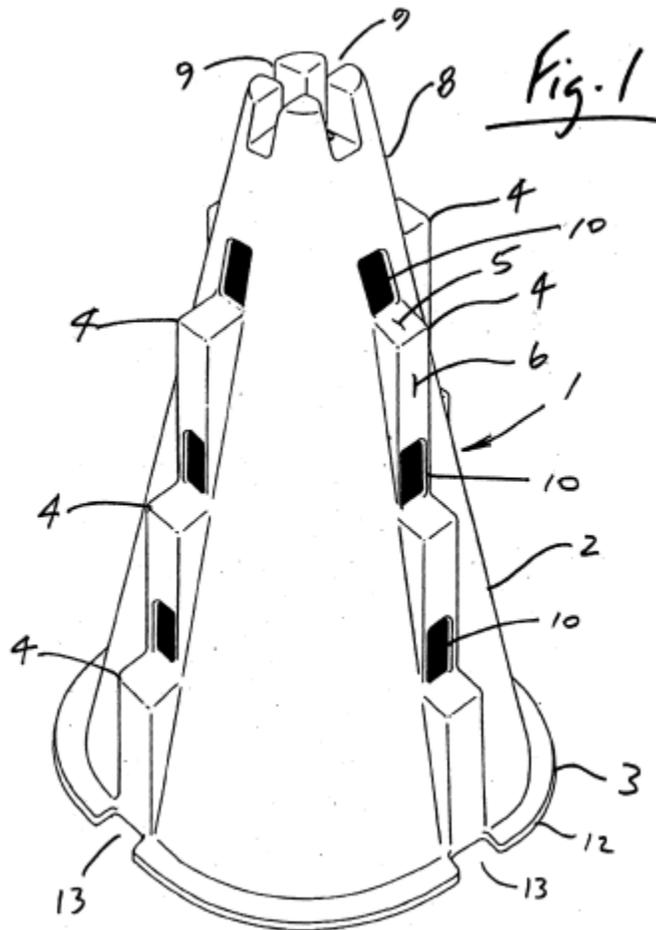
As to the rejection of claims 1, 3–5, 7, and 8, the Appellant argues in support of patentability of claims 1, 3, and 5. Appeal Br. 3–5. As to the rejections of claims 9 and 10, the Appellant argues only that the additional references cited in these rejections do not cure the deficiencies in the Examiner’s rejection of claim 1. *Id.* at 6. For the reasons stated in the Final Office Action, the Answer, and below, we sustain all grounds of rejection.

*Claim 1*

The Examiner found that Nezu discloses a traffic management device as recited in claim 1 with the exception of

a registration structure that includes an interior structure disposed on the interior surface of the device and an exterior structure disposed on the exterior surface of the device such that the interior structure of a superior-positioned device cooperates with the exterior structure of an inferior-positioned device, to assist in bringing the devices into [a] predetermined orientation during stacking

(Claim 1 *supra* pp. 2–3). Final 4–6. The Examiner found that Mohelsky discloses a pylon that includes a registration structure as recited in claim 1, i.e., steps 4 (*id.* at 6), illustrated in Mohelsky Figure 1, reproduced below.



Mohelsky Figure 1 is a perspective view of pylon 1. Mohelsky ¶ 20. Pylon 1 has a hollow, tapered body with inclined side wall 2 extending upwardly from base 3. *Id.* ¶ 29. A plurality of molded steps 4 in side wall 2 define alternating horizontal step surfaces 5 and vertical step surfaces 6. *Id.* ¶ 30. “Rectangular apertures 10 above the horizontal step surfaces 5 permit insertion through the pylon of the standard lumber sizes to form a fence or barrier between adjacent pylons for example.” *Id.* Mohelsky discloses that pylon 1 “is light weight, relatively flexible, durable, able to return to its original shape, stackable, user friendly, easy to transport and store with adjustable carrying handle.” *Id.* ¶ 12; *see also id.* ¶ 31, Fig. 3.

The Examiner found that one of ordinary skill in the art would have modified Nezu’s traffic management device to include a registration structure “to assist in bringing the devices into the predetermined orientation during stacking as disclosed by Mohelsky.” *Id.* The Examiner found that the modification of Nezu to include a registration structure would have “allow[ed] the cones of Nezu to stay in the appropriate orientation to allow the user to grip multiple handholds at the same time.” *Id.*

The Appellant argues that Nezu, if modified to include Mohelsky’s steps, would not have resulted in the claim 1 device. Appeal Br. 3. Specifically, the Appellant argues that “[t]he sides of the steps 4 are parallel. Simple geometry makes it impossible for such a configuration to stack on itself — . . . [the sidewalls] would occupy the same space when stacked. This is why cones taper — to allow for stacking. The cones of Mohelsky do not taper.” *Id.* The Appellant acknowledges that Mohelsky Figure 3 illustrates pylons in a stacked configuration, but contends that “[i]f Mohelsky’s pylons are identically sized, the configuration shown in Figure 3

is either 1) impossible or 2) destructive to the pylons. An artisan would not modify Nezu in a way which causes damage to the invention.” *Id.* at 4.

“[A] prior art printed publication cited by an examiner is presumptively enabling barring any showing to the contrary by a patent applicant or patentee.” *In re Morsa*, 713 F.3d 104, 109 (Fed. Cir. 2013) (quoting *In re Antor Media Corp.*, 689 F.3d 1282, 1288 (Fed. Cir. 2012)); see also *Antor Media*, 689 F.3d at 1288 (“Unlike claimed disclosures in a patent, unclaimed disclosures are thus not examined by the PTO at all. As these unclaimed, unexamined disclosures still receive a presumption of enablement during prosecution of a later patent, there is no reason why printed publications, which of course also lack the scrutiny of examination, should not logically receive the same presumption and for the same reasons.”). “The presumption in *Antor* is a procedural one—designed to put the burden on the applicant in the first instance to challenge cited prior art; the PTO need not come forward with evidence of enablement before it may rely upon a prior art reference as grounds for a rejection.” *Morsa*, 713 F.3d at 110 (citing *Antor Media*, 689 F.3d at 1288).

The Appellant’s arguments are not persuasive of error in the Examiner’s conclusion of obviousness as to claim 1 as they are not supported by sufficient evidence. First, contrary to the Appellant’s contention that Mohelsky’s cones “do not taper” (Appeal Br. 3), Mohelsky explicitly describes pylon 1 as “a hollow tapered body having an inclined side wall 2” (Mohelsky ¶ 29).

Second, there is insufficient support for the Appellant’s assertion that “the sides of steps 4 are parallel” (Appeal Br. 3). Mohelsky describes steps 4 as “defin[ing] alternating horizontal step surfaces 5 and vertical step surfaces

6.” Mohelsky ¶ 30. To the extent that the Appellant is arguing that “vertical” means step surfaces 6 cannot be inclined, we are not persuaded that the ordinary artisan would have understood this term as being so limited. Mohelsky, does not define the term “vertical.” The American Heritage Dictionary of the English Language defines “vertical” as “1. Being or situated at right angles to the horizon; upright.” Ahdictionary.com (accessed Oct. 8, 2019), <https://ahdictionary.com/word/search.html?q=vertical>. According to the American Heritage Dictionary, “vertical” typically is used to mean “approximately at right angles to the horizon or to level ground.” *Id.* (“*Vertical* and *upright* are often used to signify contrast with what is horizontal: *wallpaper with vertical stripes; an upright column. Perpendicular* and *plumb* are generally used to specify an angle of precisely 90 degrees . . .”).

Finally, even if the ordinary artisan would have understood Mohelsky’s description of “vertical” step surfaces 6 as meaning that step surfaces 6 are not inclined, we are not convinced that the ordinary artisan would have been dissuaded from modifying Nezu’s device to include steps—a registration structure—as taught by Mohelsky. Mohelsky discloses that pylon 1 is relatively flexible and able to return to its original shape. Mohelsky ¶ 12. From this disclosure, the ordinary artisan would have understood that any deformation that might occur to steps 4 upon stacking pylons 1 would not be permanent. Although Nezu does not appear to specify the material used to construct its traffic management device, it is reasonable to assume that one of ordinary skill in the art would have constructed the device from a flexible material, as taught by Mohelsky, and as was known in the art at the time of the invention, e.g., the ordinary artisan would have been

aware that orange traffic cones are flexible (*see* Spec. ¶ 2 (“Traffic management devices in the form of cones, commonly-known as parking cones, traffic cones, orange cones, etc., are well-known.”)). Moreover, given the Appellant’s statement that “[s]imple geometry” would make stacking Mohelsky’s pylons 1 impossible if step surfaces 6 were not at an incline, we find that it would have been within the skill level of the ordinary artisan to modify Nezu’s cone to include steps that would allow stacking (*see* Ans. 4–5<sup>4</sup>), e.g., by using inclined step surfaces 6.

In sum, because we are not convinced of reversible error in the Examiner’s conclusion of obviousness as to claim 1, we sustain the rejection of this claim, as well as the rejection of claims 4 and 8, which depend from claim 1.

### *Claim 3*

Claim 1 recites “a handhold formed in the body and including at least a first opening in the body, the opening extending from the exterior surface to the interior space and being configured for receiving a hand there through for grasping and carrying the device.” Claim 1 *supra* p. 2. Claim 3 depends from claim 1, and recites that “the handhold includes a pair of openings.” Appeal Br., Appendix 1, 1. The Examiner determined that including a second opening in Nezu’s device would have been obvious as it would have amounted to nothing more than a mere duplication of parts. Final 7.

The Appellant argues that adding a second opening amounts to more than a duplication of parts because the combination of first and second openings does not perform the same function as the first opening. Appeal Br.

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<sup>4</sup> The pages of the Answer are not numbered. We have numbered the pages such that the Examiner’s Response to Appellant Argument begins on page 3.

4. More specifically, the Appellant contends the combination of first and second openings creates a handle structure. *Id.*

“It is well settled that the mere duplication of parts has no patentable significance unless a new and unexpected result is produced.” *In re Harza*, 274 F.2d 669, 671 (CCPA 1960). As noted by the Examiner, a handle structure is not claimed. Ans. 5. The Examiner found, and the Appellant does not dispute, that Nezu discloses “a handhold (finger recess 4) formed in the body (2) and including at least a first opening (window opening 5) in the body (2)” (Final 5). Thus, consistent with *Harza*, the Examiner had a reasonable basis for finding that it would have been obvious to have formed a second opening in the body of Harza’s device. The Appellant’s arguments, absent persuasive, supporting evidence, are insufficient to demonstrate a new and unexpected result in the addition of a second opening. *See In re Geisler*, 116 F.3d 1465, 1470–71 (Fed. Cir 1997) (attorney characterization of improved results as “surprising” was insufficient to establish unexpected results).

Because we are not convinced of reversible error in the Examiner’s conclusion of obviousness as to claim 3, we sustain the rejection of this claim.

#### *Claim 5*

Claim 5 depends from claim 1 and recites “wherein the registration structure comprises a slot and a groove cooperatively engageable one with the other.” Appeal Br., Appendix 1, 2. The Examiner found that “Mohelsky discloses a device wherein the registration structure comprises a slot

(exterior surface of molded steps 4) and a groove (interior surface of molded steps 4) cooperatively engageable one with the other (allowing for the stacking orientation shown in Figure 3).” Final 7–8.

The Appellant argues that the Examiner reversibly erred in finding Mohelsky discloses a registration structure as recited in claim 5. Appeal Br. 5. The Appellant contends that the cavities on the interior surface of Mohelsky’s steps are not “grooves” because they are not long, narrow depressions. *Id.* This argument is not persuasive because the Appellant has not identified evidence to support its contention that Mohelsky’s cavities fail to meet the definition of a groove because (1) they are less than a third of the side wall length, and (2) the depths of the cavities is never constant over their lengths (*see id.*). *See generally* Spec. (providing no definition of “groove” or “slot”); *see, e.g.*, Ahdictionary.com (accessed Oct. 8, 2019), <https://ahdictionary.com/word/search.html?q=groove> (groove: “a long narrow furrow or channel”).

The Appellant also argues that for the reasons given with respect to claim 1, “the geometry of Mohelsky is such that the cavities don't guide motion, because they do not ‘receive’ a corresponding ridge without deformation.” Appeal Br. 5. This argument is unpersuasive for the reasons discussed above as to claim 1 (*see supra* p. 7), and because the Appellant has not identified evidentiary support for its contention that “[a]n artisan wouldn’t consider a groove to ‘receive’ a ridge if the ridge causes the groove or ridge to deform” (*id.*).

In sum, because we are not convinced of reversible error in the Examiner’s conclusion of obviousness as to claim 5, we sustain the rejection

of this claim, as well as the rejection of claim 7, which depends from claim 5.

*Claims 9 and 10*

As indicated above, the Appellant's arguments in support of patentability of claims 9 and 10 are based on limitations in claim 1. *See* Appeal Br. 6. For the reasons discussed in connection with the rejection of claim 1, we are not persuaded of reversible error in the Examiner's conclusion of obviousness as to claims 9 and 10. Accordingly, we sustain the rejections of these claims.

CONCLUSION

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 3-5, 7, 8	103(a)	Nezu, Mohelsky	1, 3-5, 7, 8	
9	103(a)	Nezu, Mohelsky, Gagliano, Kuo	9	
10	103(a)	Nezu, Mohelsky, Gagliano, Kuo, Johanson	10	
<b>Overall Outcome</b>			1, 3-5, 7-10	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED