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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* IRIT TURBOVICH

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Appeal 2019-005832  
Application 13/848,303  
Technology Center 3700

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Before JENNIFER D. BAHR, STEFAN STAICOVICI, and  
LISA M. GUIJT, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 1, 9–13, 37, and 39. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Irit Turbovich. Appeal Br. 2.

CLAIMED SUBJECT MATTER

Appellant's invention is directed to "a sensory stimulating artifact in general and in particular to a garment for stimulating tactile stimulation."

Spec. 1. Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. A method for designing a tactile stimulation garment for providing tactile stimulation, the tactile stimulation garment being an item of clothing made primarily for wearing, the method comprising:

providing a garment, the garment being an item of clothing designed for wearing in fixed positional arrangement relative to body regions of a baby, and the garment being one member of the group consisting of:

a sleeved garment,

a garment having legs,

a garment having a neck opening within shoulders,

a shirt,

pants,

a dress,

a skirt,

an overall,

a coat,

a jacket,

a sweatshirt,

a sweater, and

a belt,

said garment having a plurality of surfaces;

observing involuntary baby movements-, and finding locations on said garment when worn which correspond to those of said body regions which are observed to be more frequently reached by said involuntary movements;

selecting at least one of said more frequently reached locations as a selected location on said garment to serve as a tactile stimulating surface of said garment; and applying a texture to a surface at said selected location to provide a textured surface, said texture being applied differing from a surrounding texture of a remainder of said garment, said textured surface providing said tactile stimulating surface on said garment to form said tactile stimulation garment.

#### REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Sugimoto	US 4,419,396	Dec. 6, 1983
Rocher	FR 2 824 707 A1	Nov. 22, 2002
Vincent	WO 2010/045499 A1	Apr. 22, 2010

#### REJECTIONS

Claims 1, 9–13, 37, and 39 stand rejected under 35 U.S.C. § 112, second paragraph, as indefinite.<sup>2</sup>

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<sup>2</sup> The Examiner issues a new ground of rejection in the Answer clarifying that the dependent claims are also rejected. Ans. 3. The Examiner also withdraws several of the rejections under 35 U.S.C. § 112, second paragraph, set forth in the Non-Final Action. *See id.* at 8–10.

Claims 1, 12, 13, 37, and 39 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Vincent.<sup>3</sup>

Claims 9 and 10 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Vincent and Rocher.

Claim 11 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Vincent and Sugimoto.

## OPINION

### *Indefiniteness*

The Examiner determines that claims 1 and 39, and their dependent claims, are indefinite because “[i]t is unclear how an observer can distinguish voluntary movements from involuntary movements of a baby.” Ans. 3. The Examiner states that “[a]n involuntary movement is a jerk, tick, muscle spasm, tremor or seizure,” and queries whether this is “what the observer is observing.” *Id.*

Appellant agrees with the Examiner’s interpretation of “involuntary movements” and, thus, submits that “the rejection is not justified as clearly the Examiner . . . recognizes involuntary movements and these are clearly observable and distinguished from voluntary movements of a baby.” Reply Br. 2; *see also* Appeal Br. 12 (asserting that “[a] person of ordinary skill in the art would easily know how to observe involuntary movements of a baby, a concept which is well-represented in the scientific literature”). Appellant also contends that “[i]t is very clear to the observer whether a particular motion is intended or is merely random. For example, by observing whether

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<sup>3</sup> This is a new ground of rejection set forth in the Answer. *See* Ans. 4 (explaining that the new ground includes “the proper motivational statement”).

the movement has a clear end point or whether there is a clear intention to the motion or does it appear to the observer to be random.” Appeal Br. 12.

There does not appear to be any dispute between Appellant and the Examiner as to the meaning of “involuntary movements” or “involuntary baby movements,” and, thus, the metes and bounds of the claims are clear in this regard. Accordingly, we do not sustain the rejection of claims 1 and 39, or of their dependent claims, under 35 U.S.C. § 112, second paragraph, as indefinite on this basis.

The Examiner also rejects dependent claim 37 as indefinite because “[i]t is unclear how the location is selected in accordance with [statistics], if the statistics are based on involuntary movements.” Advisory Act. 2. This rejection is predicated on the Examiner’s determination that the scope of “involuntary movements” is unclear. For the reasons discussed above, the Examiner does not persuade us that this is the case. Accordingly, we do not sustain the rejection of claim 37 under 35 U.S.C. § 112, second paragraph, as indefinite.

*Obviousness—Vincent*

In contesting the rejection of claims 1, 12, 13, 37, and 39 under 35 U.S.C. § 103(a), Appellant argues independent claims 1 and 39 together and relies on the arguments presented for claims 1 and 39 in contesting the rejection of dependent claims 12 and 13. *See* Reply Br. 3–4. Appellant argues dependent claim 37 separately. *Id.* at 4–5. We decide the appeal of this rejection of claims 1, 12, 13, and 39 on the basis of claim 1, and claims 12, 13, and 39 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv) (permitting the Board to select a single claim to decide the appeal as to a

single ground of rejection of a group of claims argued together). We address the rejection of claim 37 separately.

*Claims 1, 12, 13, and 39*

The Examiner finds that Vincent teaches a method for designing a tactile simulation garment for providing tactile simulation including, in pertinent part, “designing based upon developmental stage and developmental level of the intended baby, and determining locations of tactile stimulation based upon the developmental stage of the baby,” “selecting at least one of said more frequently reached locations as a selected location on said garment to serve as a tactile stimulating surface of said garment,” and applying to a surface at said location a texture that differs from a surrounding texture of a remainder of the garment to provide a “textured surface providing said tactile stimulating surface on said garment to form said tactile stimulation garment.” Ans. 4–5 (citing Vincent 1:23–26, 3:13–26, 4:1–5, claim 1). The Examiner finds that “Vincent fails to specifically teach observing involuntary baby movements and finding locations on said garment when worn which correspond to body locations observed to be more frequently reached by said involuntary movements.”

*Id.* at 5. The Examiner determines:

It would have been obvious to one having ordinary skill in the art, at the time the invention was made, that determining a baby’s developmental stage as taught by Vincent to identity the proper locations on the garment to provide stimulation would include observing a baby and their movements, both voluntary and involuntary. These observations would ensure that the garment design would provide properly positioned enhancements for further development and stimulation of the intended baby.

*Id.* at 5.

Appellant argues that “Vincent has a different goal than the claimed inventions” in that, according to Appellant, “Vincent is interested in encouraging physical movements of the baby and uses textured surfaces for such encouragement.” Reply Br. 3 (*italics omitted*). Appellant contends that Vincent’s “only criteria . . . on where to attach textured attachments is what the baby is **capable** of doing and how to encourage the baby to make these movements.” *Id.* at 3–4. Appellant submits that, by contrast, Appellant “has found that providing tactile stimulus by itself is important in development of the sense of touch of the baby” and contends that “[t]actile stimulation **by itself** or development of sense of touch is not a target of Vincent, rather, Vincent uses tactile stimulation only as a means to achieve his target, which is enhancing motor skills and physical movements.” *Id.* at 4 (*italics omitted*). In summary, Appellant argues that “Vincent is not interested in involuntary movements and would have no motivation to observe them or to provide tactile stimulus on locations reached by such involuntary movements.” *Id.* (*italics omitted*). Thus, Appellant concludes that the Examiner’s rationale for modifying Vincent “constitutes impermissible hindsight.” *Id.*

Vincent discloses “a method for stimulating babies with clothing that has a design that is adjusted to the baby’s intellectual and physical development phase.” Vincent 1:5–7. More particularly, Vincent’s “method is for stimulating a child with carefully selected attachments that are placed on the clothing based on the development stage of the child.” *Id.* at 1:23–26. Vincent emphasizes that both the selection of the attachments and the physical position of the selected attachments on the clothing are based on the development stage of the child to provide the optimal stimuli. *Id.* at 2:7–12.

By way of example, Vincent discloses three different attachments 100, 110, 130, illustrated in Figures 1–3, appropriate for three illustrative development phases of babies, the first of which (typically age 2–4 months) is the phase in which “babies start to recognize shapes and like to look at their own fingers and distinct color contrasts such as black and white.” Vincent 2:26–5:15. However, Vincent emphasizes that “the various attachments and development phases are only used as illustrative of the method.” *Id.* at 3:3–5. Further, Vincent teaches that “[i]t is . . . possible to provide tactile stimuli in each developmental stage.” *Id.* at 3:25–26. For example, the attachment may have texture created by print or surfaces at different levels, thereby stimulating the tactile senses of the baby. *Id.* at 4:1–5.

As admitted in Appellant’s Specification, in an early developmental stage, a young baby whose motor skills are not yet developed will reach surfaces of a garment by involuntary movements. *See* Spec. 9. In light of Vincent’s teaching that it is possible to provide *tactile* stimuli in *each* developmental stage, with the three specifically disclosed phases being “only used as illustrative of the method” (Vincent 3:3–5, 25–26), one of ordinary skill in the art would have readily appreciated that Vincent’s method could also be used to provide tactile stimuli for an earlier developmental stage in which the baby has not yet developed motor skills but can reach surfaces of the garment by involuntary movements, as well as for a developmental stage in which the baby has developed some motor skills but also reaches some surfaces of the garment by involuntary movements. Thus, in order to determine the developmental stage of the baby, it would have been obvious to observe both voluntary and involuntary

baby movements. Further, in applying Vincent's teachings to the aforementioned early stage of development, in which the baby has not yet developed motor skills, a person having ordinary skill in the art would have been prompted to place the tactile stimulation attachments at locations on the garment corresponding to body regions observed to be more frequently reached by such involuntary baby movements.

For the above reasons, the Examiner's articulated reason for the proposed modification of Vincent has rational underpinnings. Appellant does not identify any flaw in the Examiner's reasoning or point to any knowledge relied on by the Examiner that was gleaned only from Appellant's disclosure and that was not otherwise within the level of ordinary skill in the art at the time of the invention, thereby failing to support Appellant's hindsight assertion. *See In re McLaughlin*, 443 F.2d 1392, 1395 (CCPA 1971) ("Any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper.").

Accordingly, we sustain the rejection of claim 1 and claims 12, 13, and 39, which fall with claim 1, as unpatentable over Vincent.

*Claim 37*

Appellant's arguments in contesting the rejection of claim 37 under 35 U.S.C. § 103(a) are predicated on Appellant's position that "the observation and use of involuntary movements or statistics thereof are of no interest to Vincent." Reply Br. 5 (italics omitted). Appellant contends that "Vincent does not relate to a method as claimed since Vincent is not

observing involuntary movements” and that a person having ordinary skill in the art “reading Vincent would have no motivation in observing involuntary movements or using statistics of involuntary movements when deciding on locations for tactile stimulating attachments.” *Id.* at 6 (italics omitted).

This line of argument does not apprise us of error in the rejection of claim 1, for the reasons discussed above, and, likewise, fails to apprise us of error in the rejection of claim 37. Accordingly, we sustain the rejection of claim 37 as unpatentable over Vincent.

*Obviousness—Vincent and Rocher*

Appellant groups claims 9 and 10 together in contesting the rejection based on Vincent and Rocher. Appeal Br. 17. We decide the appeal of this rejection on the basis of claim 9, and claim 10 stands or falls with claim 9. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that “Rocher teaches a garment that has selected location surfaces that are repeatedly detachable and attachable to said garment” and determines it would have been obvious to provide Vincent’s garment “with removable and interchangeable stimulating surfaces as taught by Rocher” in order to “provide a garment that could adapt the surface properties based on the baby’s developmental stage as to progresses.” Non-Final Act. 10–11. The Examiner adds that making Vincent’s stimulating surfaces removable and interchangeable would “allow for removal of the surfaces for cleaning as needed.” Ans. 12.

Appellant argues that “Rocher relates to learning aids for children and is irrelevant to observation of involuntary movements or baby stimulation,” and that the Examiner fails “to provide a proper reason for adding features to Vincent.” Appeal Br. 17 (boldface and italics omitted). In particular,

Appellant contends that “Vincent provides the stimulating surfaces on locations based upon developmental stage and that, “[a]s babies grow fast[,] their clothing size is expected to change upon change of developmental stage and therefore there would be no need to adapt the surface on the same clothing based on developmental stage.” Reply Br. 7. Appellant also argues that it would not be necessary to clean the tactile stimulating surface without cleaning the garment because babies’ clothes are cleaned regularly. *Id.*

Appellant’s argument that Rocher is not relevant to involuntary movements is unavailing because the Examiner does not rely on Rocher for this feature. Appellant’s argument that Rocher is not relevant to baby stimulation is incorrect. Rocher teaches a child’s garment provided with one or more elements, designed to give a “tactile reaction,” attached to the garment by, for example, “Velcro (contact bonding strips).” Rocher, Abstract.<sup>4</sup>

Appellant’s argument that there would be no need to adapt the surface on the same garment because the baby’s clothing size is expected to change upon change of developmental stage presumes that a baby would not advance from one developmental stage to another developmental stage without also growing in physical size so as to transition to a larger garment size. However, Appellant does not direct our attention to any evidence in the record before us that this is the case, or that persons of ordinary skill in the art would expect this to be the case. Thus, Appellant’s argument does not apprise us of error in the Examiner’s articulated reason for the combination.

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<sup>4</sup> Appellant submitted an English language Abstract of Rocher with the Information Disclosure Statement of May 28, 2013.

The Examiner’s additional rationale that attaching Vincent’s stimulating surfaces to the garment in a removable and interchangeable manner would “allow for removal of the surfaces for cleaning as needed” (Ans. 12) is not necessary to support the conclusion of obviousness. Nevertheless, we note that Appellant’s observation about frequent washing of baby’s clothing does not identify error in the cleaning rationale. The fact that baby’s garments are washed frequently does not mean that there would be no reason to wash either the garment or a detachable attachment separately from the other if, for example, one became soiled and the other did not.

For the above reasons, Appellant does not apprise us of error in the rejection of claim 9 as unpatentable over Vincent and Rocher. Accordingly, we sustain the rejection of claim 9 and claim 10, which falls with claim 9, as unpatentable over Vincent and Rocher.

*Obviousness—Vincent and Sugimoto*

The Examiner finds that Vincent fails to teach, but Sugimoto teaches, “a smell for integrating thereof with said tactile stimulating surface,” as recited in claim 11. Non-Final Act. 11 (citing Sugimoto 3:42–65). The Examiner determines it would have been obvious to provide Vincent’s tactile stimulating surfaces “with an integrated smell as taught by Sugimoto, since the tactile stimulating surfaces of Vincent having an integrated smell would provide a surface on a garment that provides the baby with a comforting scent.” *Id.*

Appellant argues that “Sugimoto relates to three-dimensional perfumed seals and is irrelevant to observation of involuntary movements or baby stimulation.” Appeal Br. 17 (boldface and italics omitted).

Appellant’s argument regarding observation of involuntary movements appears to attack Sugimoto individually and, thus, is unavailing. The Examiner does not rely on Sugimoto for observing involuntary movements. As for baby stimulation, although Sugimoto does not specifically mention “stimulation,” Sugimoto teaches adapting a device for use by an infant to emit a scent by rubbing or scratching a capsulated perfume layer with a human finger nail or tip. *See* Sugimoto 3:43–65 (teaching that “a human finger or nail tip can closely contact the capsulated perfume layer 7 and thus, even an infant can use the seal without difficulties”). Thus, a person having ordinary skill in the art would have appreciated the applicability of Sugimoto’s teachings to sensory stimulating devices for baby garments, such as those of Vincent.

For the above reasons, Appellant does not apprise us of error in the rejection of claim 11 as unpatentable over Vincent and Sugimoto, which we, thus, sustain.

### DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 9–13, 37, 39	112, 2 <sup>nd</sup> paragraph	Indefiniteness		1, 9–13, 37, 39
1, 12, 13, 37, 39	103(a)	Vincent	1, 12, 13, 37, 39	
9, 10	103(a)	Vincent, Rocher	9, 10	
11	103(a)	Vincent, Sugimoto	11	
<b>Overall Outcome</b>			1, 9–13, 37, 39	

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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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED