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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte IRIT TURBOVICH

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

Before JENNIFER D. BAHR, STEFAN STAICOVICI, and SUSAN L. C. MITCHELL, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge.*

DECISION ON REQUEST FOR REHEARING

STATEMENT OF THE CASE

On August 3, 2020, Appellant[1] filed a Request for Rehearing (hereinafter "Request" or "Req. Reh'g) under 37 C.F.R. § 41.52 of the Decision on Appeal (hereinafter "Decision" or "Dec.") dated June 2, 2020.

In the Decision, the Board reversed a rejection of claims 1, 9–13, 37, and 39 under 35 U.S.C. § 112, second paragraph, and affirmed rejections of claims 1, 9–13, 37, and 39 under 35 U.S.C. § 103(a). More specifically, the

[1] 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.

Board affirmed a rejection of claims 1, 12, 13, 37, and 39 as unpatentable over Vincent; a rejection of claims 9 and 10 as unpatentable over Vincent and Rocher; and a rejection of claim 11 as unpatentable over Vincent and Sugimoto. Appellant's Request seeks reconsideration of the Board's Decision affirming the rejections under 35 U.S.C. § 103(a).

REQUIREMENTS FOR REQUEST FOR REHEARING

A Request for Rehearing must comply with the following requirements:

> The request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board. Arguments not raised, and Evidence not previously relied upon, pursuant to §§ 41.37, 41.41, or 41.47 are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) through (a)(4) of this section.

37 C.F.R. § 41.52(a)(1).

OPINION

Appellant asserts that the Board made "an error in misapprehending [Appellant's] argument, which misapprehension is based on a gross misreading of Vincent." Req. Reh'g 3. According to Appellant, the argument made by Appellant and misapprehended by the Board was:

> Contrary [to Vincent], the appealed claims . . . require observing involuntary movements of a baby to decide on the locations being frequently reached or touched. The inventors of the present application found out that tactile stimulation may positively affect a baby's development even when such stimulation is provided by the baby making involuntary movements.

> Therefore, the claims of the present application define that such involuntary movements are observed in order to define the locations for the textured surface to be applied on. Vincent as correctly understood specifically rejects such a concept. Vincent is entirely based on the principle that the baby's hand-eye coordination finds the texture surface.

Id. at 4.

Appellant contends that Vincent's reference to *determining* a *first* development stage of the child indicates that Vincent is not talking about involuntary movement. Req. Reh'g 2. According to Appellant, "[i]f Vincent were talking about involuntary movement it would begin at birth so there is nothing to be determined." *Id.*

Appellant cites Vincent's description of "[a] first attachment for 2-4 month old babies" for providing tactile sensation as evidence that "there is no contemplation of attachments for younger babies." Req. Reh'g 2. Presumably as further evidence to support this position, Appellant also draws our attention to the sentence bridging pages 2 and 3 of Vincent, which refers to "the development phase of babies that are 2-4 months old which may be characterized as a first development phase 101." *Id.*; *see id.* at 3 (calling attention to the fact that, on page 3, in lines 18–21, Vincent defines the development stage in which babies start to recognize shapes, like to look at their own fingers, recognize distinct color contrasts such as black and white, and can support themselves on their forearms and stretch their hands to touch and grab or release items as "the first" development stage). Appellant reiterates the position that Vincent has no interest in any earlier development stage where there would be involuntary movement. *Id.* at 3.

Appellant argues that the statement "that the various attachments and development phases are only illustrative examples of *the method* of the

present invention" on page 3 "of Vincent indicates that there is *a single method* in Vincent" based on voluntary movement and that "[t]here is not an undisclosed method which is not taught in Vincent and which the skilled person is directed to uncover" based on involuntary movement. Req. Reh'g 3–4.

Appellant does not persuade us that the Board misread or misapprehended either the teachings of Vincent or Appellant's argument. Rather, it appears that Appellant either misapprehends the rejection or urges us to insist on an explicit teaching, suggestion, or motivation to modify Vincent's method as proposed in the rejection. The Supreme Court has stated that a rigid insistence on teaching, suggestion, or motivation is incompatible with its precedent concerning obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007).

The Examiner did not find, nor does the Board, that Vincent explicitly discloses or teaches a method including observing involuntary baby movements and finding locations on the garment when worn which correspond to body locations observed to be more frequently reached by such involuntary movements. *See* Ans. 5 (the Examiner expressly finding that Vincent fails to specifically teach these steps). Rather, the Examiner determined, and we agree, that it would have been obvious to a person of ordinary skill in the art to observe both voluntary and involuntary movements of a baby to determine the baby's development stage as taught by Vincent in order to identify the proper locations on the garment to place attachments to provide stimulation. *See id.* at 5; Decision 6.

Appellant maintains that Vincent is not concerned with involuntary movements and is not directed to development stages prior to the

development phase of babies that are 2–4 months old referred to by Vincent as "first development phase 101." Req. Reh'g 2–3. As noted in the Decision, however, Vincent expressly emphasizes that "the various attachments and development phases are only used as illustrative examples of the method of the present invention wherein the attachments are correctly adjusted to the particular development phase of the baby so that real and right stimulations are provided." Vincent 3:3–8; *see* Decision 8. As further noted in the Decision, "Vincent teaches that '[i]t is . . . possible to provide tactile stimuli in each developmental stage'" and that, "[f]or example, the attachment may have texture created by print or surfaces at different levels, thereby stimulating the tactile senses of the baby." Decision 8 (first alteration in original) (citing Vincent 3:25–4:5). Thus, like Appellant, Vincent also recognizes the importance of providing tactile stimulation in each development phase. Although Vincent does not expressly mention involuntary movements or describe development phases in which a baby's movements include and may even be limited to involuntary movements, Vincent does not reject such a concept as Appellant contends. Rather, by emphasizing that the various attachments and development phases are only used as illustrative examples and the importance of providing the right stimulation in each development phase, Vincent conveys that the teachings should be viewed as expansive and inclusive, and not as being restricted to the particular embodiment disclosed, with its illustrative attachments and development phases.

Appellant argues in the Appeal Brief, and reiterates in the Request, that Vincent intends to develop motor skills by stimulating the baby to perform movements which the baby is capable of performing based on the

development stage, and that Vincent provides this stimulation by providing textured surfaces on locations that the baby should be able to reach at this stage. Appeal Br. 14; Req. Reh'g 7. Appellant contends that Vincent's whole purpose is to cause the baby to make movements to reach the textured surfaces and concludes from this that Vincent has no interest in the baby's involuntary movements. Appeal Br. 15; Req. Reh'g 7. According to Appellant, "it is only the baby's **capability** which interests *Vincent*." Appeal Br. 15; Req. Reh'g 7.

Appellant's observations about Vincent's objectives to stimulate the baby based upon the baby's capabilities to encourage the baby to make certain movements do not undermine the Examiner's reasoning in determining that it would have been obvious to observe both voluntary and involuntary movements of a baby to determine the baby's development stage as taught by Vincent in order to identify the proper locations on the garment to place attachments to provide stimulation. At early stages of development, a baby's capabilities may include, or even be primarily limited to, involuntary movements, which, at later stages of development, may become voluntary movements. As explained in the Decision:

> 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.

Decision 8–9.

Appellant interprets the Board's Decision as finding "that Vincent does contemplate involuntary motion, since he teaches that the method provided by him may be more generally applicable." Req. Reh'g. 8. Appellant misinterprets the Board's Decision. Neither the Examiner nor the Board finds that Vincent expressly contemplates involuntary motion. Rather, the Board finds that Vincent emphasizes that the teachings of the reference are applicable to all stages of a baby's development and are not restricted to the particular stages of development discussed in the illustrative embodiment disclosed. A person having ordinary skill in the art would have appreciated that various stages of development of a baby include both voluntary and involuntary movements, and may in fact be limited primarily to involuntary movements. *See* Spec. 9. Thus, the Board determined that the Examiner's articulated reason for the proposed modification of Vincent (i.e., to observe a baby and the baby's movements, both voluntary and involuntary, to determine the baby's development stage to identify the proper locations on the garment to provide stimulation) has rational underpinnings. *See* Decision 6, 8–9.

Appellant argues that modifying Vincent by observing involuntary movements, in addition to voluntary movements, "consists of impermissible hindsight." Req. Reh'g 8. This simply rehashes the hindsight argument presented in the Appeal Brief and is not persuasive. *See* Appeal Br. 15; *see also* Reply Br. 4 (asserting that the Examiner's reasoning "constitutes impermissible hindsight"). As pointed out on page 9 of the Decision,

> 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.").

For the above reasons, Appellant's Request does not persuade us that the Board misapprehended or overlooked Appellant's argument or the teachings of Vincent, or otherwise erred in sustaining the rejections of claims 1, 9–13, 37, and 39 under 35 U.S.C. § 103(a).

CONCLUSION

Outcome of Decision on Rehearing:

Claims	35 U.S.C §	Reference(s)/Basis	Denied	Granted
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	

Overall Outcome			1, 9–13, 37, 39	

Final Outcome of Appeal after Rehearing:

Claims	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 9–13, 37, 39	112, second 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	
Overall Outcome			1, 9–13, 37, 39	

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).

DENIED