

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BELL'O INT'L CORP.
Third Party Requester
v.

WHALEN FURNITURE MFG., INC.
Patent Owner/Appellant

Appeal 2015-004778
Reexamination Control 95/002,164
Patent US 8,191,485¹
Technology Center 3900

Before STEVEN D.A. MCCARTHY, DANIEL S. SONG, and
BRETT C. MARTIN, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* SONG.

Opinion Concurring filed by *Administrative Patent Judge* McCARTHY.

MARTIN, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

¹ Issued to Whalen et al. on June 5, 2012 (hereinafter the '485 patent).

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STATEMENT OF THE CASE

The Patent Owner filed Patent Owner[’s] Request for Rehearing on September 30, 2016 (hereinafter “Rehearing Request” or “Reh’g. Req.”) under 37 C.F.R. § 41.79 seeking rehearing of our Decision mailed September 1, 2016 (hereinafter “Decision” or “Dec.”), which affirmed the final rejection of the claims. The Requester filed no response.

The Patent Owner asserts that the Board misapprehended four points in the Decision. Each of the arguments made in support of the alleged subjects of misapprehension were, however, addressed in the Decision and therefore were not misapprehended. The Patent Owner, via its Rehearing Request, merely seeks to reargue points already fully addressed in the Decision.

Regarding the first (and second) point as to the status of the FAVS-02 instruction sheet as prior art, not only was this point fully addressed in the Decision (Dec. 5-7), but Judge McCarthy wrote a concurring opinion detailing his reasoning for changing his opinion on FAVS-02 as prior art. As to the third point, the Decision clearly lays out the basis for construing the term “back side” in a broad manner and not restricting it only to the back edge as the Patent Owner would have us do. *See* Dec. 8.

Lastly, the Patent Owner attempts to distinguish case law used in the concurring opinion, but again misstates the facts surrounding the FAVS-02 document by asserting that “[t]he only testimony concerning their [sic] availability of the FAVS-02 document comes from the biased statements of the Requester.” Reh’g Req. 5. As stated in the Decision, “[i]n addition to Steven Sculler’s statements, we are also presented with the fact that the

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FAVS-02 console is shown in Brateck's 2006 product catalog, thus, providing evidence of the availability of the product with which the FAVS-02 instruction sheet would have been included." Dec. 6. Furthermore as we stated, "[t]aking all of the evidence before us into consideration we are not persuaded that FAVS-02 should be excluded as a printed publication." Dec. 7. The Patent Owner focuses on the testimony, but fails to acknowledge that the testimony was not the sole evidence and the testimony only further supported other evidence of record that FAVS-02 was properly considered prior art. Our Decision did not rely solely on the Scullers' testimony, and when considered with the other evidence of record, we concluded that any supposed bias in the testimony at hand was overcome by the additional supporting evidence. As such, no misapprehension occurred regarding any of the four points alleged by the Patent Owner.

DECISION

While we have considered the Decision in light of the Rehearing Request, we decline to modify it in any respect.

Pursuant to 37 C.F.R. § 41.79(d), this decision is final for the purpose of judicial review. A party seeking judicial review must timely serve notice on the Director of the United States Patent and Trademark Office. *See* 37 C.F.R. §§ 90.1 and 1.983.

DENIED

PL: peb

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Patent of WHALEN FURNITURE MFG., INC.
Patent Owner/Appellant

Appeal 2015-004778
Inter Partes Reexamination Control 95/002,164
Patent No. US 8,191,485 B1
Technology Center 3900

Before STEVEN D.A. McCARTHY, DANIEL S. SONG and
BRETT C. MARTIN, *Administrative Patent Judges*.

McCARTHY, *Administrative Patent Judge*, concurring.

1 In Ground 2, the Examiner rejects claims 1 and 2 under pre-AIA 35
2 U.S.C. § 103(a) as being unpatentable over an untitled and undated
3 instruction sheet for assembling an FAVS02 glass audio/visual stand
4 (“FAVS-02 Instruction Sheet”). In Ground 3, the Examiner rejects claims
5 3–8 under § 103(a) as being unpatentable over the FAVS-02 Instruction
6 Sheet and a product catalog entitled “Bratech Bracket Technology”
7 (“Brateck”), bearing the trade names “Lumi Legend Corporation” and
8 “Brateck Enterprises Ltd.,” as well as the year “2006.” Brateck and the
9 FAVS-02 Instruction Sheet are reproduced in Exhibits A and B,

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1 respectively, to the “Declaration of Steven Sculler,” executed September 8,
2 2012 (“Steven Sculler Declaration” or “S. Sculler Decl.”). Relying on the S.
3 Sculler Decl. and on a “Declaration of Marc Sculler,” executed September 7,
4 2012 (“Marc Sculler Declaration” or “M. Sculler Decl.”), my colleagues
5 affirm the Examiner’s decision to reject claims 1–8 on grounds 2 and 3; and
6 maintain that affirmance on rehearing.¹ I write separately to address
7 arguments made in the “Patent Owner Request for Rehearing,” dated
8 September 30, 2016 (“Rehearing Request” or “Reh’g Req.”)

9
10 THE PRIOR ART STATUS OF BRATECK AND
11 THE FAVS-02 INSTRUCTION SHEET

12 In the Final Decision, mailed September 1, 2016 (“Decision”), my
13 colleagues find that the “Requester, via the Declaration of Steven Sculler,
14 has . . . shown that the FAVS-02 product was a commercial product ‘shown
15 at page 26 of the Brateck 2006 Catalog’ and that Steven Sculler ‘received
16 the FAVS-02 Instruction Sheet at Brateck’s customer showroom in April,
17 2006.” (Decision 5 & 6, citing S. Sculler Decl., para. 3). My colleagues
18 further explained that, apart from the testimony of Steven Sculler, they were
19 “also presented with the fact that the FAVS-02 console is shown in
20 Brateck’s 2006 product catalog, thus, providing evidence of the availability

¹ I rely on the January 5, 2006 edition of the 2006 International CES Daily (“CES Daily”), a copy of which is reproduced in Exhibit D to the Declaration of Marc Sculler, solely as evidence supporting my finding that Brateck was disseminated at the 2006 International Consumer Electronics Show; and my finding that the FAVS-02 Instruction Sheet was publically accessible at Brateck Enterprises’ show room in China prior to the critical date. (*See, e.g.*, Ans. 6). I do not rely on any teachings of the document as evidence that the subject matter of claims 1–8 would have been obvious.

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1 of the product with which the FAVS-02 instruction sheet would have been
2 included well before the critical date of August 8, 2007.” (*Id.* at 6).
3 Commenting on the latter finding, the Patent Owner argues in the Rehearing
4 Request that the “availability of the instruction sheet is speculation based on
5 statements by the Requester. There are no receipts evidencing that a unit
6 was purchased and no evidence that the instruction sheet was ever available
7 with the product.” (Reh’g Req. 2).

8 I agree with the Patent Owner. The Patent Owner did not make this
9 argument explicitly in the Appeal Brief or the Rebuttal Brief (*see e.g.*, App.
10 Br. 12), but the argument is consistent with what the Patent Owner did
11 argue. In addition, the argument was the reason I concurred in the original
12 decision.

13 My colleagues find that FAVS02 glass audio/visual stands were a
14 commercial product as of 2006 (*see* Decision 5 “Requester [has] shown that
15 the FAVS-02 product was a commercial product ‘shown at page 26 of the
16 Brateck 2006 Catalog.’”); and that “FAVS-02 is an instruction sheet for
17 assembly of a commercial product, the type that would be included with the
18 product for use by the customer to assemble after purchase” (Decision 6).
19 The upshot of these findings appears to be that the FAVS-02 Instruction
20 Sheet was disseminated prior to August 8, 2007 by virtue of being included
21 with FAVS02 glass audio/visual stands distributed to the consuming public
22 prior to that date. I disagree. Neither Marc nor Steven Sculler testifies to
23 actual knowledge that any FAVS02 glass audio/visual stand was distributed
24 to a consumer prior to August 8, 2007. Marc Schuller did not testify to
25 purchasing an FAVS glass audio/visual stand prior to 2012 (*see* M. Sculler

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1 Decl., para. 8), well after the critical date. Neither the Examiner nor the
2 Requester offers any evidence outside the two declarations, such as receipts,
3 suggesting that the FAVS02 glass audio/visual stand was a commercial
4 product prior to the critical date.

5 Instead, my colleagues rely on Brateck as evidence that the FAVS02
6 glass audio/visual stand was a “commercial product” prior to the critical
7 date. Once again, I disagree. Although Brateck provides photographs, as
8 well as drawings with marked dimensions, for various brackets and
9 mounting structures, it lists neither prices nor delivery terms for those
10 products. This deficiency suggests that Brateck is not a consumer catalog.
11 Instead, Brateck may have been a sales tool for use in attracting a
12 representative to sell products manufactured or brokered by Brateck
13 Enterprises, Ltd. in the United States. The latter possibility is consistent
14 with the fact that Steven Sculler apparently did not purchase an FAVS02
15 glass audio/visual stand in the United States prior to the critical date, but
16 instead had to travel to Brateck Enterprises’ customer showroom in China in
17 order to obtain a copy of the FAVS-02 Instruction Sheet in 2006 (*See S.*
18 *Sculler Decl.*, para. 3). In any event, Brateck does not prove that the
19 FAVS02 glass audio/visual stand was a commercial product prior to August
20 8, 2007.

21 Neither the Examiner nor the Requester has proven that any FAVS02
22 glass audio/visual stand was distributed to the consuming public prior to the
23 critical date. As such, neither the Examiner nor the Requester has proven
24 that the FAVS-02 was a printed publication as of the critical date by virtue
25 of being distributed with FAVS02 glass audio/visual stands. It is for this

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1 reason that I turned, on pages 7–9 of my concurring opinion, to paragraph 3
2 of the Steven Sculler Declaration as proof that the FAVS-02 Instruction
3 Sheet was publically accessible at Brateck Enterprises’ show room in China
4 prior to August 8, 2007.

5 The Patent Owner challenges the panel’s reliance on the “self-
6 serving” declaration testimony of Steven Sculler as evidence that the FAVS-
7 02 Instruction Sheet was a printed publication. (*See* Reh’g Req. 2). The
8 Patent Owner also seeks to distinguish *In re Klopfenstein*, 380 F.3d 1345
9 (Fed. Cir. 2004), and *Deep Welding, Inc. v. Sciaky Bros., Inc.*, 417 F.2d
10 1227 (7th Cir. 1969), two cases on which I relied while finding that Brateck
11 was disseminated to attendees at the 2006 International Consumer
12 Electronics Show, based on the Patent Owner’s assertion that those cases did
13 not rely on declaration testimony to establish distribution of the challenged
14 documents. (*See* Reh’g Req. 5). I note that our reviewing court has relied
15 on declaration testimony to affirm the Board’s finding that a document at
16 issue in an *ex parte* reexamination was a printed publication. *See In re*
17 *Enhanced Sec. Research, LLC*, 739 F.3d 1347 (Fed. Cir. 2014).

18

19 INTERPRETATION OF THE TERM “BACK SIDE”

20 Claim 1 recites that, in the third configuration, “said second long
21 spine is secured to said back side of said console to support said flat panel
22 television above said console.” I find that the FAVS-02 Instruction Sheet
23 discloses a kit including a long spine *G*. I agree with my colleagues that
24 “the long spine in [the FAVS02 glass audio/visual stand as depicted in the
25 FAVS-02 Instruction Sheet] is fastened to a mounting stud projecting

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1 through an opening in the top shelf.” (Decision 8; *see also* FAVS-02
2 Instruction Sheet, step 7). The drawing figures in the FAVS-02 Instruction
3 Sheet indicate that, when the long spine is so fastened, it stands adjacent the
4 back edge or surface of the upper shelf.

5 On both page 8 of the Decision and page 13 of my concurrence, the
6 term “back side” was interpreted as the side of the console near the back
7 edge or surface of the upper shelf. The Patent Owner argues that this
8 interpretation is not consistent with the written description of Patent US
9 8,191,485 B1 (the “’485 patent”). (*See* Reh’g Req. 4 & 5).²

10 The term “back side” does not appear in the written description of the
11 ’485 patent. The Patent Owner points to column 2, lines 25–31, and column
12 5, lines 8–12, as indicating that the term “back side” must be interpreted
13 more narrowly than in the Decision. (*See* Reh’g Req. 4 & 5). Column 2,
14 lines 25–31, teach that:

15 The kit also includes a long spine, horizontal offset support arm
16 (offset arm) with a panel TV mounting structure on the arm. In
17 one configuration the long spine is used instead of the short
18 spine. Since it attaches to the shelf supports, it provides for the
19 transfer of loads carried on the shelves, but in addition extends
20 above the console to provide an elevated support for a panel TV.

² The prosecution history of Application 13/316,792, from which the
’485 patent issued, is not of significant use in interpreting claim 1. Claim 1,
as it stands on appeal, corresponds to claim 9 of Application 13/316,792.
Claim 9 of Application 13/316,792 was allowed in the first office action.
The applicant in Application 13/316,792 responded to the first office action
by cancelling the claims that were not allowed in the first office action
without providing any substantive arguments. The Examiner did not provide
reasons for allowance. As such, nothing in the prosecution history limits or
defines the term “back side.”

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1 Column 5, lines 8–12, teach that:

2 Spine **22**, in combination with the side panels **48** and **50**, supports
3 the TV **12** and the shelf supports **24**, **26** and **28** (partially visible).
4 The shelf supports in turn carry the shelves **30**, **32**, and **34**. The
5 spine contains the wire and cable openings **36**, **38**, **40** and **42**.

6 The Patent Owner also directs the attention of the panel to Figure 1, which
7 depicts an embodiment in which a long spine 22 appears to be secured along
8 the back surfaces of three shelves 30, 32, 34 in a console 10.

9 These passages do not indicate any formal definition or clear
10 disclaimer of scope that might limit the scope of the term “back side.” The
11 passage at column 2, lines 25–31, merely says that the long spine of the
12 invention attaches to the shelf supports. The passage at column 5, lines 8–
13 12, says that the long spine 22 of one embodiment carries the shelves 30, 32,
14 34. Neither passage says that the spine is attached to any particular side,
15 edge or surface of those shelves. An interpretation of the term “back side”
16 that would encompass a kit allowing the long spine to be secured adjacent
17 the back edge or surface of the upper shelf would be consistent with these
18 passages.

19 Although Figure 1 depicts the spine 22 secured along the back
20 surfaces of three shelves 30, 32, 34, Figure 1 merely depicts one
21 embodiment of the claimed subject matter. Nothing in the ’485 patent
22 indicates that the claims are limited to the embodiment of Figure 1.

23 In *Re LF Centennial Ltd.*, 654 Fed. Appx. 491 (Fed. Cir. June 29,
24 2016), our reviewing court held that the panel’s interpretation of the term
25 “spine” as used in a related patent was unreasonably broad because the panel
26 failed to consider the contrast drawn in the written description between a
27 “spine” and a “side panel.” Although the Patent Owner reminds us of that

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1 holding in its Rehearing Request (*see* Reh'g Req. 4 (“Like ‘leg’ versus
2 ‘spine’, one of ordinary skill in the art would not interpret a ‘back side’ to
3 include a surface or area forward of or, otherwise, not on the rear of the
4 console”)), the Patent Owner fails to point out any contrast in the written
5 description of the ’485 patent that might parallel that on which the court in
6 *LF Centennial* based its holding. I agree with my colleagues that the term
7 “back side” is sufficiently broad to read on the position at which the long
8 spine *G* depicted in the FAVS-02 Instruction Sheet is secured to the upper
9 shelf.

10
11 CONCLUSION

12 Although my reasoning differs in some respects from that of my
13 colleagues, I agree that the Examiner properly rejected claims 1 and 2 on
14 Ground 2; and claim 3–8 on Ground 3.

15
16
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