

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 9

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT L. KOVACH and
ROBERT A. KOVACH

Appeal No. 98-0064
Application 29/043,747¹

ON BRIEF

Before THOMAS, HAIRSTON, and KRASS, Administrative Patent Judges.
KRASS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of
the single design claim pending:

The ornamental design for a SPOILER WITH LEGS as shown and
described.

The examiner relies on the following reference:

J.C. Whitney & Co. (Whitney), Catalog No. 540J, p. 74, **8**1992,
Curved Wing Spoiler - Item C, Reference Nos. 86-5755A and
20-0544T.

¹ Application for patent filed September 11, 1995.

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The sole claim on appeal, directed to the ornamental design for a spoiler with legs, stands rejected under 35 U.S.C. ' 103 as unpatentable over Whitney. The examiner contends that the instant claimed invention is not patentably distinct over the curved wing spoiler of Whitney.

Reference is made to the brief and answer for the respective positions of appellants and the examiner.

OPINION

We reverse.

At the outset, we note that a rejection of a design claim under 35 U.S.C. ' 103 requires that there must be a reference, a something in existence, the design characteristics of which are basically the same as the claimed design in order to support a holding of obviousness. In other words, the basic reference design must look like the claimed design. See In re Harvey, 12 F.3d 1061, 1063; 29 USPQ2d 1206, 1208 (Fed. Cir. 1993) and In re Rosen, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982).

Notwithstanding the examiner's contention to the contrary, there is simply no evidence of record that Whitney constitutes a Rosen-type reference. The only differences recognized by the examiner [bottom of page 3 to the top of page 4 of the answer] are in the slight upward curving of the top of the spoiler in instant Figure 7 and a suggestion of a curve on the bottom, but the examiner considers these differences "so minor that the final

effect does not affect the appearance of the design as a whole and the impression that the design would make to the eye of a designer of ordinary skill."

The examiner has simply not made out a prima facie case of obviousness. The claimed design covers all views shown in the drawing. For example, Figure 6 shows a bottom view of the spoiler wherein the corner edges of the rear of the spoiler (bottom left and right in Figure 6) each have a larger radius than the corner edges of the front of the spoiler (top left and right in Figure 6). As appellants point out, from the bottom of page 2 to the top of page 3 of the brief,² the "underbelly and the shoulder (top) of the instant invention do not at all resemble the" Whitney reference. Also, "[n]one of the contours in the instant invention are illustrated" by Whitney. Appellants also note how difficult it is to view the reference.

Clearly, the single, small view the examiner points to in Whitney is insufficient for any meaningful conclusions to be reached regarding the overall design of the Whitney spoiler. But, in any event, no bottom or side view of that spoiler is shown. Thus, we do not know what the underbelly of the Whitney spoiler looks like and we cannot tell what the specific contour of the shoulder looks like in Whitney. Therefore, even when the

² We note that appellants refer to the J.C. Whitney reference repeatedly as the "J.C. Penney" reference.

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Whitney spoiler is viewed in the best light, we would need to resort to speculation in order to find the instant claimed design patentably indistinct thereover. From the limited view we have of the Whitney spoiler, it does not appear to have the differing contours of the instant claimed design and we will not speculate that it does.

Contrary to the examiner's position, we do not view these differences between the instant claimed design and that shown by Whitney to be de minimus. The examiner has provided us with no cogent rationale as to why the overall effect of the Whitney spoiler would have made the instant claimed design obvious thereover.

The examiner's decision is reversed.

REVERSED

James D. Thomas)	
Administrative Patent Judge)	
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Kenneth W. Hairston)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
)	
Errol A. Krass)	
Administrative Patent Judge)	

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