

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

adidas AG
Petitioner,

v.

NIKE, Inc.
Patent Owner

Case IPR2013-00067
Patent No. 7,347,011

PATENT OWNER'S REPLY BRIEF ON SECOND REMAND

I. INTRODUCTION

adidas failed to identify any evidence that shows omitting stitches to form apertures was a well-known technique to the skilled artisan, or that the skilled artisan had reason to combine the prior art to achieve claim 49. adidas instead relies on attorney argument, including that the disputed limitation was “hardly a leap of innovation.” Its attorneys’ present-day conjectures regarding what was known to the skilled artisan sixteen years ago is not evidence. adidas failed to satisfy its burden.

II. ADIDAS FAILED TO PROVE SPENCER TEACHES THE DISPUTED LIMITATION OF CLAIM 49

adidas failed to identify any portions of Spencer that teach *omitting* stitches¹ to form apertures. (Paper 75, at 1-4.) Instead, adidas identified portions of Spencer that teach *creating* stitches to form various structures. (*Id.*)

adidas cited Section 6.8.4 of Spencer, which describes several types of open-work structures. (Ex. 1012, at 84-85.) Some of the structures have apertures and some do not. (*Id.*) Because not all of the structures have apertures, Spencer distinguishes between “open-work structures” and “open-work apertures.” (*Id.*)

Spencer teaches that apertures are formed by unbalanced tension in open-work structures. (Ex 1012, at 84.) Unbalanced tension is created where “certain adjacent wales are not as directly joined to each other . . . as they are to the wales on

¹ A “stitch” is “three or more intermeshed needle loops.” (Ex. 1012, p. 69.)

their other side.” (*Id.*) In other words, Spencer teaches forming apertures by joining or stitching certain wales more closely to their adjacent wales on one side than to their adjacent wales on the other side. (*Id.*) Spencer does not mention omitting stitches in this context. (*Id.*)

Spencer goes on to explain that open-work structures (not apertures) may be produced in several ways, including (i) the introduction of empty needles; (ii) using special elements to produce loop displacement; or (iii) selective press-off of fabric loops. (Ex. 1012, at 85.) Spencer never states that apertures may also be produced using any of these techniques. (*Id.*) Nor does Spencer state that any of these techniques involve omitting stitches. (*Id.*)

adidas also cited Sections 9.4 and 9.6 of Spencer, which describes float and tuck stitches. (Ex. 1012, at 119-126.) In these sections, Spencer teaches how to create these different types of stitches, not how to omit them. (*Id.*) Spencer never mentions omitting stitches in this context. (*Id.*) Spencer also never states that float and tuck stitches are used to form apertures. (*Id.*) Spencer lists many structures for which float and tuck stitches may be used, but an aperture is not one of them. (*Id.*)

If adidas’s argument is that the skilled artisan would have interpreted the above portions of Spencer to mean the same thing as omitting stitches, adidas failed to provide any evidence supporting that contention. As Nike explained in its opening brief, adidas did not present any expert testimony or other evidence linking

Spencer's teachings to the disputed limitation. (Paper 74, at 4, 8-9.) And adidas's attorney argument in its remand brief is not evidence. *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017).

III. ADIDAS FAILED TO PROVE THE SKILLED ARTISAN WOULD HAVE HAD REASON TO COMBINE THE PRIOR ART TEACHINGS TO ACHIEVE THE FOOTWEAR RECITED IN CLAIM 49

adidas parroted the Board's motivation arguments from the Decision on Remand. (Paper 75, at 4-8.) Those arguments fail for the reasons Nike provided in its opening brief. (Paper 74, at 8-10.)

adidas also argued the record identifies "a finite number of predictable solutions for forming holes." But the only evidence adidas cited is Spencer and Nike's expert testimony, neither of which identifies omitting stitches as a solution. Spencer teaches forming apertures by unbalanced tension. Nike's expert discussed forming holes by "punching out the openings." (Ex. 2010, ¶ 107.)

adidas also failed to establish the skilled artisan in the footwear industry would have known of Spencer and its teachings in the knitting industry. adidas argued only that Spencer pre-dates the '011 patent, that Spencer allegedly provided a useful reference to its "readers in education, industry, and commerce," and that the skilled artisan would have had an understanding of the materials, techniques, and processes for making shoes. But even if all of that is true, it does not qualify Spencer as analogous art the Board may consider. (See Paper 74, at 7.)

adidas also incorrectly argued—through attorney argument—that a skilled artisan would have combined Nishida, Schuessler I and II, and Spencer because of a desire to minimize waste and eliminate cutting. adidas did not cite any evidence regarding this alleged motivation as to Spencer. None exists—there is neither expert testimony nor any other evidence that Spencer’s teachings minimize waste or eliminate cutting. Attorney argument is not evidence. *Icon Health*, 849 F.3d at 1043.

Finally, adidas continues to incorrectly argue that Nishida teaches or suggests omitting stitches to form apertures. The Board and the Federal Circuit have already rejected this argument. (Paper 69, at 17.) adidas’ expert testimony regarding Nishida is irrelevant. The expert did not offer testimony regarding how Nishida’s “net-like woven or knitted structure” is formed. (Ex. 1001, at 56-57.) He merely opined that the structure has apertures for air permeability. (*Id.*)

IV. ADIDAS BEARS THE BURDEN OF PERSUASION

adidas argued neither party bears the burden, thus implicitly arguing the Board bears the burden. (Paper 75, at 8-10.) The USPTO raised, and the Federal Circuit rejected, that argument in *Bosch*. There, the Federal Circuit explained the Board may “justify any finding of unpatentability by reference to the evidence of record in the IPR.” *Bosch Auto. Serv. Sols., LLC v. Matal*, 878 F.3d 1027, 1040 (Fed. Cir. 2017), *as amended* (Mar. 15, 2018). The USPTO argued, as a result, that the “petitioner or agency” bears the burden of persuasion. (Ex. 2024, at 5-6.) The Federal Circuit

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.