

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC.
and LULULEMON USA INC.,
Petitioner,

v.

NIKE, INC.,
Patent Owner.

IPR2023-00424
Patent 10,923,225 B2

Before JOSIAH C. COCKS, GEORGE R. HOSKINS, and
STEPHEN E. BELISLE, *Administrative Patent Judges*.

COCKS, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Petitioner, lululemon athletica canada inc. and lululemon usa inc. (“Petitioner” or “lululemon”), filed a Petition (Paper 2, “Pet.”) requesting *inter partes* review of claims 1–10 and 12–19 (“the challenged claims”) of U.S. Patent No. 10,923,225 B2 (Ex. 1001, “the ’225 patent”). Patent Owner, Nike, Inc. (“Patent Owner” or “Nike”), filed a Preliminary Response (Paper 10, “Prelim. Resp.”) We have authority under 35 U.S.C. § 314, which provides that *inter partes* review may not be instituted unless the information presented in the Petition shows that “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a); *see also* 37 C.F.R. § 42.4(a) (“The Board institutes the trial on behalf of the Director.”).

A decision to institute under § 314 may not institute on fewer than all claims challenged in the petition. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359–60 (2018). In addition, if the Board institutes trial, it will “institute on all grounds in the petition.” PTAB Consolidated Trial Practice Guide, 5–6 (Nov. 2019)¹; 37 C.F.R. § 42.108(a); *see also* *PGS Geophysical AS v. Iancu*, 891 F.3d 1354, 1360 (Fed. Cir. 2018) (interpreting the statute to require “a simple yes-or-no institution choice respecting a petition, embracing all challenges included in the petition”).

Having considered the arguments and evidence presented in the Petition, for the reasons described below, we institute *inter partes* review.

¹ Available at <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf?MURL=Tri alPracticeGuideConsolidated>.

A. Real Parties-In-Interest

Petitioner identifies the following as its real parties-in-interest: lululemon athletica inc., lululemon athletica canada inc., lululemon usa inc., and Curiouser Products, Inc. Pet. 46. Patent Owner identifies Nike, Inc. (i.e., itself) as the only real party-in-interest. Paper 4, 2.

B. Related Matters

The parties identify *Nike, Inc. v. lululemon athletica inc. et al.*, No. 1:22-cv-00082-AJN (S.D.N.Y) as a related matter. Pet. 47; Paper 4, 2.

C. The '225 Patent

The '225 patent is titled “Athletic Performance Sensing And/Or Tracking Systems and Methods.” Ex. 1001, code (54). The Abstract of the '225 patent reads as follows:

Athletic performance sensing and/or tracking systems include components for measuring or sensing athletic performance data and/or for storing and/or displaying desired information associated with the athletic performance to the user (or others). Such systems can allow users a wide variety of options in creating workouts, selecting and presenting media content during the athletic performance, etc., e.g., to help keep users entertained and motivated. In some instances, user feedback may be used, optionally in combination with objective data relating to a workout, to control features of the workout routine, to control the music or other media content selected and/or presented, and/or to control features of future workout routines and/or the presented media content.

Id. at code (57).

Figure 6 of the '225 patent is reproduced below:

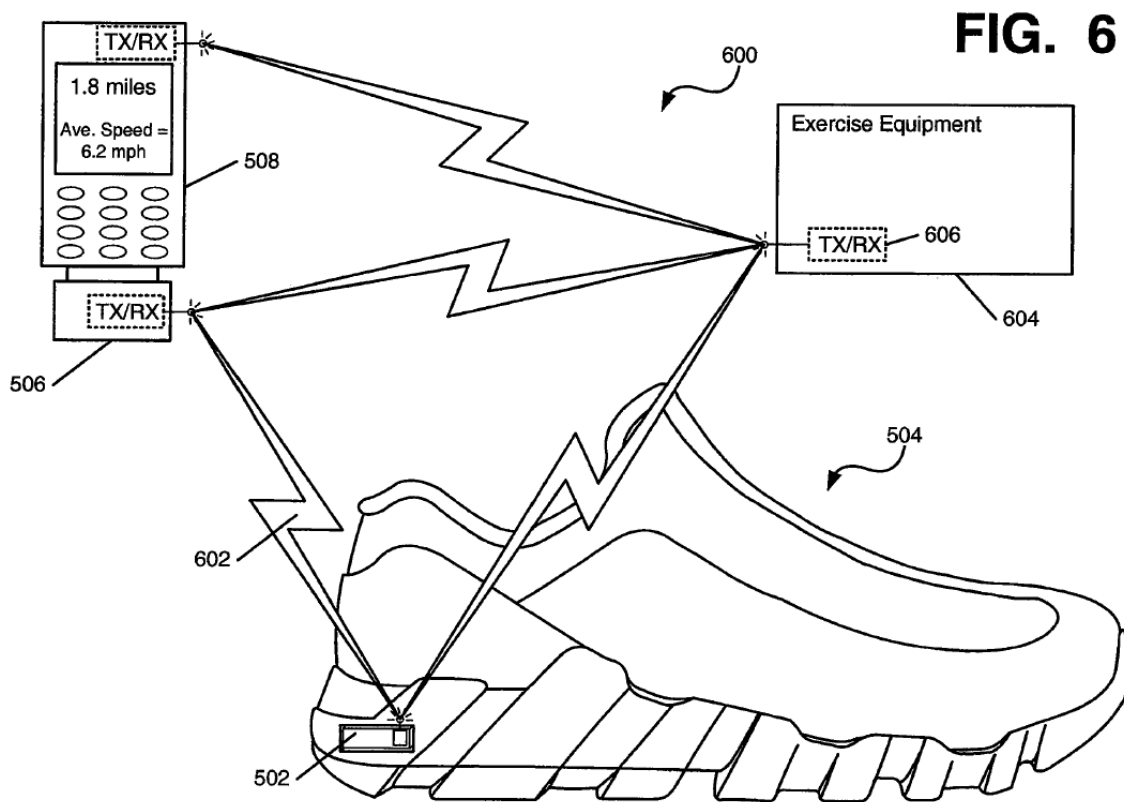


Figure 6 above “illustrates an example of electronic communications between athletic performance sensing systems in accordance with at least some examples of this invention and external equipment.” *Id.* at 3:44–47. As shown in Figure 6, article of footwear 504 includes athletic performance module 502, which, although not shown in Figure 6, contains, *inter alia*, athletic performance data sensors, a data transfer system, processing capabilities and a power supply. *Id.* at 16:52–58. Module 502 can electrically communicate with portable electronic device 508, and also with one or more pieces of athletic equipment 604, such as a treadmill, spinning machines, or weight lifting machines. *Id.* at 17:44–66. That electronic communication may include transmitting data, such as “user ID information,” or sensed data associated with a user’s workout. *Id.* at 19:34–

40. Such data may be stored or used to control parameters of the athletic equipment (e.g., vary treadmill speed and incline settings, or change intensity or resistance levels). *Id.* at 19:41–65.

D. The Challenged Claims

Petitioner challenges claims 1–10 and 12–19 of the '225 patent. Of those, claims 1 and 12 are independent. Claim 1 is representative and is reproduced below:

1. [1PRE] A method comprising:
 - [1A] establishing, by a sensor device, data communication with a piece of workout equipment;
 - [1B] transmitting, by the sensor device and to the piece of workout equipment, a first set of data for operating a first function of the piece of workout equipment; and
 - [1C] transmitting, by the sensor device and to the piece of workout equipment, a first set of activity data corresponding to an activity performed by a user during a first time period, wherein the piece of workout equipment is configured to display the first set of activity data.

Ex. 1001, 45:8–20.^{2,3}

E. Proposed Grounds of Unpatentability

Petitioner asserts the following grounds of unpatentability:

² We reproduce claim 1 with similar feature identification numbering used in both the Petition and the Preliminary Response (i.e., “[1PRE]” through “[1C]”).

³ Independent claim 12 is drawn to an “athletic activity tracking system” and includes features corresponding to those set forth in the method of claim 1. *See* Ex. 1001, 46:9–24.

Claims Challenged	35 U.S.C. §	Reference(s)/Basis
1–8, 10, 12–17, 19	102 ⁴	Acres ⁵
1–8, 10, 12–17, 19	103	Acres
9, 18	103	Acres, Pyles ⁶
1–5, 7, 10, 12–14, 16, 19	103	Abbondanza ⁷
9, 18	103	Abbondanza, Pyles

Pet. 7.

F. Testimonial Evidence

In support of its proposed grounds of unpatentability, Petitioner relies on the Declaration of Dr. Henry H. Houh, Ph.D. (Ex. 1005).

II. ANALYSIS

A. Principles of Law

A patent claim is unpatentable as anticipated under 35 U.S.C. § 102 “if each and every limitation is found either expressly or inherently in a single prior art reference.” *WhitServe, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 21 (Fed. Cir. 2012) (quoting *Celeritas Techs., Ltd. v. Rockwell*

⁴ The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284, 287–88 (2011), amended 35 U.S.C. §§ 102 and 103 effective on March 16, 2013. Neither party argues, at least at this stage of the proceeding, that the outcome of this case would differ based on applying the pre-AIA or post-AIA versions of these laws.

⁵ US Patent Application Publication No. 2005/0070809 A1 published Mar. 31, 2005 (Ex. 1002, “Acres”).

⁶ US Patent Application Publication No. 2005/0272564 A1 published Dec. 8, 2005 (Ex. 1004, “Pyles”).

⁷ US Patent No. 5,527,239 issued June 18, 1996 (Ex. 1003, “Abbondanza”).

Int'l Corp., 150 F.3d 1354, 1361 (Fed. Cir. 1998)). A claim is unpatentable under § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations, including (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of skill in the art; and (4) when in evidence, objective indicia of non-obviousness (i.e., secondary considerations). *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).⁸

At this preliminary stage, we determine whether the information presented shows a reasonable likelihood that Petitioner would prevail in establishing that at least one of the challenged claims would have been unpatentable over the proposed prior art. We analyze the asserted grounds with the above-noted principles in mind.

B. Level of Ordinary Skill in the Art

In determining the level of skill in the art, we consider the type of problems encountered in the art, the prior art solutions to those problems, the rapidity with which innovations are made, the sophistication of the technology, and the educational level of active workers in the field. *Custom Accessories, Inc. v. Jeffrey-Allan Indus. Inc.*, 807 F.2d 955, 962 (Fed. Cir. 1986); *Orthopedic Equip. Co. v. U.S.*, 702 F.2d 1005, 1011 (Fed. Cir. 1983).

⁸ At this stage, neither party presents any objective indicia of non-obviousness.

Petitioner presents the following assessment as to the level of skill in the art:

A POSITA^[9] for the technology of the '225 patent would have had (1) a bachelor's degree in engineering, computer science, industrial design, biomechanics, or a related field, and (2) at least two years of experience researching, developing, designing, and/or testing fitness or physiological sensors, wearable devices, physiological or biomechanical devices, remotely-controlled systems or interfaces, network-based applications and/or equipment, or the equivalent experience or education.

Pet. 5 (citing Ex. 1005, ¶¶ 43–44).

Patent Owner indicates that “[f]or purposes of this Preliminary Response only, Nike applies lululemon’s proposed level of skill in the art.” Prelim. Resp. 12.

For purposes of this Decision, we adopt Petitioner’s proposal of the level of ordinary skill in the art as reasonable and consistent with the prior art. *See also Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (the prior art may reflect an appropriate level of skill in the art).

C. Claim Construction

We construe claims “using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. 282(b), including construing the claim in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” 37 C.F.R. § 42.100(b) (2020); *see also Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

⁹ Person of ordinary skill in the art.

Petitioner does not propose claim construction for any term. *See* Pet. 6. Patent Owner also indicates that no claim construction is necessary at this time. Prelim. Resp. 13.

In reviewing the parties' briefings at this stage, we determine that it is necessary to address the meaning of the term "data" that appears in each of independent claims 1 and 12. Although Patent Owner represents in the "Claim Construction" section of its Preliminary Response that it is not necessary to construe any claim terms at this time (*see* Prelim. Resp. 13), Patent Owner does present a construction of the term "data" within the body of its Response. *See id.* at 17. In that respect, Patent Owner points to a dictionary definition of "data" as constituting "[f]actual information, such as that derived from observation, experimentation, or calculation, especially that which is used for processing and/or further analysis." *Id.* (citing Ex. 2002, 4). Based on that definition, Patent Owner contends that "the ordinary and customary meaning of 'data' is factual information, from which decisions and subsequent actions can be made." *Id.* at 18. Patent Owner offers that meaning in an attempt to distinguish over a "command" action performed in the prior art. *Id.* at 17 (citing Ex. 2002, 3 ("defining 'command' as '[o]ne or more signals which actuate a device' or '[a]n instruction that causes a computer action"))).

For the proposed meaning of "data," Patent Owner also directs our attention to content of the '225 patent describing exemplary types of "data" as being "user ID information" and "workout performance information" collected from sensors during a user's workout. *Id.* at 18 (citing Ex. 1001, 19:38–40, 19:61). Based on that disclosure, Patent Owner expresses that a

skilled artisan would have understood that “data” is “factual information.”
Id.

On the current record before us, it is difficult to objectively conclude, as Patent Owner urges, that the ordinary meaning of “data” is so restrictive in its meaning that it necessarily excludes, for instance, the content of a transmitted command or signal to an exercise machine that includes content used to adjust parameters of that machine. Although those commands or signals may not incorporate the two types of example data discussed by Patent Owner from the ’225 patent, i.e., “user ID information” or “workout performance information,” it is not apparent that “data” excludes other types of information. In other words, even assuming that the term “data” designates some types of “factual information,” at this time, it is not immediately clear that such a command or signal is entirely devoid of content recognized as “factual information” so as to be beyond the contours of what a skilled artisan would regard as “data.” For the purposes of evaluating whether to institute *inter partes* review, we proceed with that understanding as to the meaning of “data.”

We conclude that, for purposes of deciding whether to institute an *inter partes* review, it is unnecessary to make explicit the meaning of any other claim term. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. v. Matal*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (“we need only construe terms ‘that are in controversy, and only to the extent necessary to resolve the controversy’” (quoting *Vivid Techs, Inc. v. Am. Sci & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

D. Assessment of Proposed Grounds of Unpatentability Based on Acres

Petitioner contends that each of claims 1–8, 10, 12–17, and 19 is either anticipated by Acres or would have been obvious over Acres. Petitioner also contends that claims 9 and 18 would have been obvious over Acres and Pyles.

1. Overview of Acres

Acres is titled “System for Regulating Exercise and Exercise Network.” Ex. 1002, code (54). Acre’s Abstract is reproduced below:

Disclosed is an automatic system for configuration, direction and recording of exercise program for an individual, based upon the attained heart rate of that person during an exercise period. Configuration data can be stored on an account accessible over a network. Configuration data can also be stored in an electronic device. The electronic device can provide information feedback to the user indicating the user’s progress in a workout. In some embodiments the device can also send configuration commands to compatible exercise equipment according to heart rate or other exercise parameter.

Id. at code (57).

Acres's Figure 12 is reproduced below:

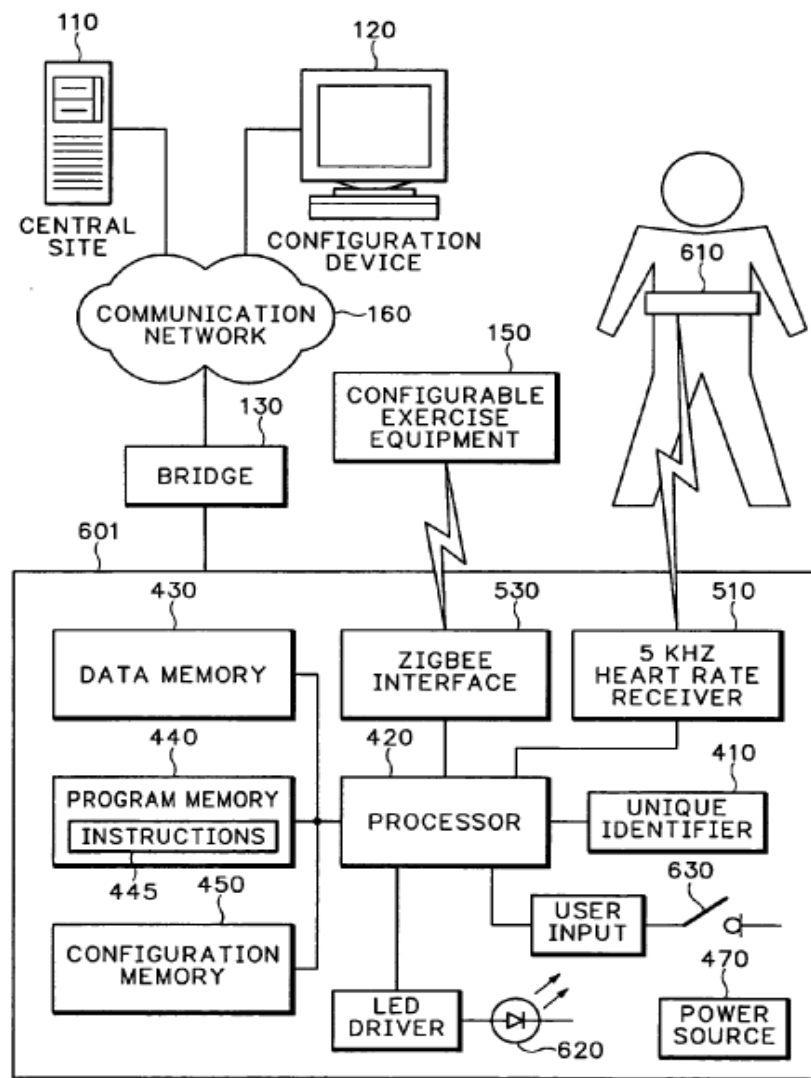


FIG.12

Figure 12 above shows a functional block diagram of an example exercise network according to an embodiment of Acres. *Id.* ¶ 20. The system includes, *inter alia*, heart rate monitor 610, “Bug” 601, and configurable exercise machine or equipment 150. *Id.* ¶ 69. A “Bug” is a portable electronic circuit that may be worn on clothing or held in a pocket of an exerciser (*id.* ¶ 47) and that “transmits signals to the exercise machine to increase or decrease the workload in accordance with the dictates of the

exercise program it carries and the current heart rate of the exerciser” (*id.* ¶ 29). For instance, where the exercise equipment is a treadmill, based on a user’s sensed heart rate, Bug 601 may send “a command to the treadmill 150 telling it to increase speed by a specific amount.” *Id.* ¶ 89.

2. Overview of Pyles

Pyles is titled “Exercise Apparatus and Method for Tracking Number of Steps.” Ex. 1004, code (54). A portion of Pyles’s Abstract reads “[d]isclosed is an exercise apparatus for use in accurately and automatically tracking number of steps taken by a user both on and off of an exercise machine.”

Pyles’s Figure 2 is reproduced below:

Fig. 2

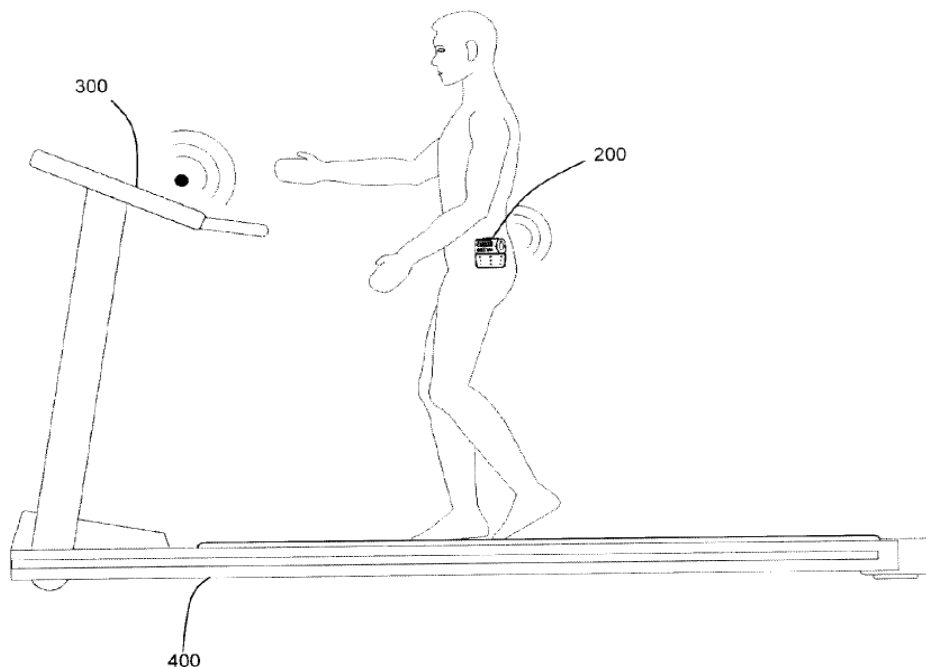


Figure 2 above “shows a version of the exercise apparatus in use with a treadmill [400] and where communication between the console [300] and step counter [200] is wireless.” *Id.* ¶¶ 17, 29.

3. Petitioner’s Arguments

Petitioner lays out in detail where it believes all the features of claims 1–10 and 12–19 are accounted for by Acres and Pyles. Pet. 7–31. For instance, with respect to claim 1, Petitioner explains how Acres discloses a method in which Acres’s Bug and its associated sensors operate in establishing data communication with a piece of workout equipment. *Id.* at 9–10. Petitioner also contends that Acres discloses a step of transmitting by the sensor device a first set of data for operating a first function of the workout equipment. *Id.* at 11–12. In that respect, Petitioner points to Acres’s disclosure of Bug 601 as sending commands to an exercise machine, e.g., a treadmill, to control parameters of the machine including speed and incline based on a user’s heart rate. *Id.* Lastly, Petitioner contends that Acres discloses a step of transmitting, by a sensor device, a set of activity data to a piece of workout equipment and displaying that activity data. *Id.* at 12–13. Specifically, Petitioner relies on Acres’s disclosure that its Bug transmits heart rate data to the treadmill and provides for the display of that heart rate data. *Id.* (citing Ex. 1005 ¶¶ 49–51).

Petitioner provides further assessment: (1) as to how Acres discloses the features set forth in claims 2–8, 10, 12–17, and 19 (*id.* at 13–23); (2) that claims 5, 10, 14, and 19 alternatively would have been obvious in view of Acres’s teachings (*id.* at 24–27); and (3) that claims 9 and 18 would have

been obvious in view of the combined teachings of Acres and Pyles (*id.* at 28–31).

4. *Patent Owner’s Arguments*

Patent Owner disputes that Acres discloses aspects of feature 1B (and also the corresponding feature of claim 12) pertaining to the “first set of data.” Prelim. Resp. 16–20. Patent Owner also argues that Petitioner’s grounds involving Acres are deficient in accounting for the “first set of activity data” required by feature 1C (and the corresponding feature of claim 12). *Id.* at 20–22. We consider Patent Owner’s arguments below.

5. *Discussion*

As noted by Petitioner (Pet. 11), Acres describes the following in connection with the operation of its system:

At the most elementary level, the Bug 601 takes control of compatible exercise machine parameters that determine exertion level. When the Bug 601 is used with a compatible treadmill 150, the treadmill speed is controlled by the Bug’s own processor 420. If the Bug 601 senses, based upon the exerciser’s heart rate, that exertion level should increase because the exerciser’s heart rate is below the target, the Bug 601 sends a command to the treadmill 150 telling it to increase speed by a specific amount.

Alternatively, the Bug 601 can control both speed and incline to match the fitness goals of the exerciser. The Bug 601 can be configured to control any number of machine parameters.

Ex. 1002 ¶¶ 89, 96.

Thus, Acres discloses that based upon an exerciser’s heart rate, Bug 601 operates to send commands to treadmill 150 to control operational parameters of the treadmill, such as its speed and incline. Patent Owner is of

the view that such commands do not constitute the required “first set of data” in claims 1 and 12 because those commands allegedly do not constitute “data.” *See* Prelim. Resp. 17–20. Patent Owner bases that view on its construction of the term “data” as being “factual information” that does not include Acres’s commands. *See id.* As discussed above in our Claim Construction section (§ II.C), however, on the record before us, it is not apparent why commands sent by Acres’s Bug that include information for controlling various operational parameters of a treadmill do not constitute data, even if data is something that is “factual information.” In other words, at this time, we question why the skilled artisan would have regarded the informational content of those commands being something other than “factual information” so as to be excluded from being “data.”

With respect to limitation [1C], Patent Owner contends that even if Acres’s commands are regarded as disclosing the “first set of data” required by limitation 1B, Petitioner has not accounted for the “first set of activity data” of limitation 1C under a theory that Petitioner has impermissibly used a single element in the prior art to account for two different claim limitations. *See* Prelim. Resp. 21–22. To wit, Patent Owner proposes that to the extent those commands are a “first set of data” (limitation [1B]) then that data is based on a user’s heart rate, yet the recited “first set of activity data” (limitation [1C]) also is based on a user’s heart rate, so Petitioner is said to improperly rely on the same heart rate data to satisfy both of the data limitations. Patent Owner’s proposal, however, is misplaced. There is no dispute that Acres’s heart rate data is activity data per limitation [1C]. The informational content of Acres’s commands as satisfying limitation [1B] is reasonably understood to be something different than heart rate data. As

something different than heart rate data, those commands are not the same prior art element. Thus, this premise under which Patent Owner challenges Petitioner's ground based on Acres is inapt. Even if there were some prohibition in some situations in which a prior art element cannot constitute multiple limitations of a claim, that is not the circumstance present here.

Patent Owner does not present any further challenges to the grounds proposed by Petitioner based on Acres, including the ground involving both Acres and Pyles. We have considered Petitioner's proposed grounds based on Acres alongside Patent Owner's challenges to those grounds. On the record before us, we conclude that Petitioner has established adequately a reasonable likelihood of success in prevailing in its challenges to claims 1–10 and 12–19 based on those grounds.

E. Assessment of Proposed Grounds of Unpatentability Based on Abbondanza

Petitioner contends that claims 1–5, 7, 10, 12–14, 16, and 19 would have been obvious in view of Abbondanza. Petitioner also contends that claims 9 and 18 would have been obvious over Abbondanza and Pyles.

1. Overview of Abbondanza

Abbondanza is titled “Pulse Rate Controlled Exercise System.” Ex. 1003, code [54]. Abbondanza's Abstract reads in-part as follows:

A pulse controlled exercise system is disclosed which incorporates an exercise device, a monitor capable of displaying images formed from television signals, a pulse rate sensor for sensing the pulse rate of a user of the pulse controlled exercise system, and a controller. The controller is coupled to the pulse rate sensor, to the exercise device, and to the monitor. The controller is used to control the exercise device's speed and other states and to cause the pulse rate of the user to be displayed on the monitor as the user progresses through his or her exercise regimen.

Id. at code [57].

Abbondanza's Figure 3 is reproduced below:

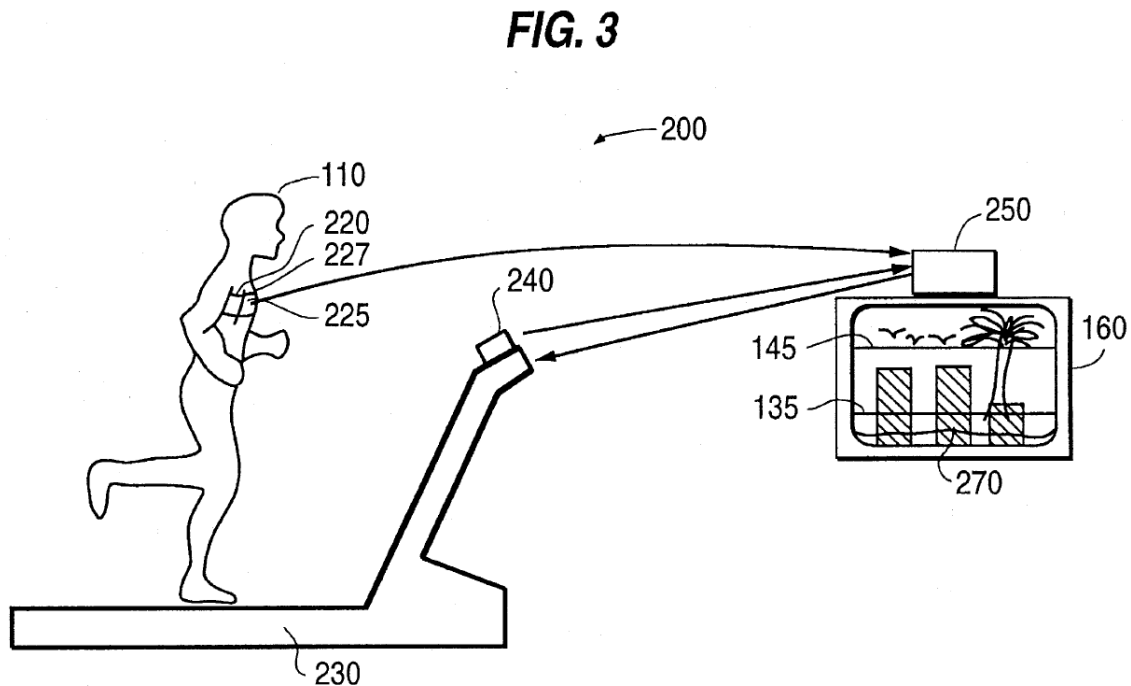


Figure 3 above is a system diagram of an embodiment of the invention in which a user strides on a treadmill which is controlled according to the user's pulse rate. *Id.* at 6:8–11. System 200 includes, *inter alia*, treadmill device 230, pulse rate sensor device 225 attached to user 110, transmitter 227, control center 240, base unit 250, and monitor 160. *Id.* at 10:56–11:10. Abbondanza further sets forth the following as to the operation of its system:

Base unit 250 is shown resting on monitor 160 and is equipped with a transmitter (not shown), a receive (not shown), a controller (not shown), and a video interface (not shown). The controller that resides in base unit 250 processes the machine states received from controller center 240 and the user's pulse rate received via infrared pulse rate transmitter 227. Base unit 250's controller is equipped in such a way that it determines if the user's pulse rate is within that user's target heart rate range and instructs treadmill device 230 to either speed-up or slow-down ultimately to cause the user to either work harder (i.e. run faster on treadmill device 230) or work softer (e.g. run slower on treadmill device 230) respectively. Additionally, base unit 250's controller will cause the user's pulse rate to be displayed on monitor 160.

Id. at 11:16–24.

2. *Petitioner's Arguments*

Petitioner explains in detail where it believes all the features of claims 1–10 and 12–18 are accounted for by Abbondanza and Pyles. Pet. 32–46. In particular, with respect to claim 1, for example, Petitioner contends that Abbondanza discloses a method involving a sensor said to be formed from Abbondanza's base unit 250 and pulse rate sensor 225 taken together. *Id.* at 34. The base unit is said to establish data communication with treadmill device 230 to “instruct[]” the treadmill, based on a user's heart rate, to either

speed-up or slow down. *Id.* at 34–35 (citing Ex. 1003, 11:16–23, 10:65–11:10). Petitioner contends that those instructions constitute a “set of data.” *Id.* at 35 (citing Ex. 1005 ¶ 57). Petitioner also contends that Abbondanza’s sensor device transmits the user’s pulse rate, as a “first set of activity data,” to the treadmill and that the pulse rate can be displayed on monitor 160. *Id.* at 36–37. To the extent that claim 1 requires that monitor 160 be “within” the exercise equipment, i.e., the treadmill, Petitioner reasons that it would have been obvious to a skilled artisan to incorporate Abbondanza’s monitor 160 within treadmill 230. *Id.* at 37 (citing Ex. 1005 ¶¶ 75–76).

Petitioner provides further assessment (1) as to how Abbondanza discloses the features set forth in claims 2–5, 7, 10, 12–14, 16, and 19 (*id.* at 37–44), and (2) that claims 9 and 18 would have been obvious in view of the combined teachings of Abbondanza and Pyles (*id.* at 45–46).

3. *Patent Owner’s Arguments*

Patent Owner presents arguments similar in nature to those advanced in connection with the grounds based on Acres. In particular, Patent Owner disputes that Abbondanza discloses aspects of feature [1B] (and also the corresponding feature of claim 12) pertaining to the “first set of data.” Prelim. Resp. 27–30. Patent Owner also argues that Petitioner’s grounds involving Abbondanza are deficient in accounting for the “first set of activity data” required by feature [1C] (and the corresponding feature of claim 12). *Id.* at 30–31. Patent Owner additionally argues that Abbondanza’s base unit 250 and pulse rate sensor 225 cannot collectively be considered a sensor device, such that the required limitations concerning the “sensor device” of the claims (e.g., the “sensor device” introduced in feature

1A) has not been met. *Id.* at 23–27. We consider Patent Owner’s arguments below.

4. Discussion

In a similar vein to our discussion above, we are not satisfied that Patent Owner has shown deficiency in Petitioner’s accounting for the required “first set of data” in Abbondanza. To that end, in our view, Abbondanza’s “instructions” transmitted by its base unit 250 to treadmill 230 for controlling the treadmill are analogous to Acres’s “commands” sent for controlling a treadmill. At this time, it is not apparent to us why one of ordinary skill in the art would not have regarded the informational content of those instructions to be something other than “factual information” so as to be excluded from being “data.” *See* Prelim. Resp. 28–29.

Similarly, we also are not satisfied that Abbondanza’s pulse rate data that is ultimately displayed on monitor 160, does not adequately meet the “first set of activity data” required by the claims. In that respect, on this record, we find credible that Abbondanza’s pulse rate data from pulse rate sensor 225 reasonably constitutes a first set of activity data that is ultimately displayed on monitor 160. We find misplaced Patent Owner’s argument that Petitioner has relied on a single element of the prior art to satisfy two different limitations (i.e., “first set of data” and “first set of activity data”). *See* Prelim. Resp. 29. At this time, we are persuaded that Abbondanza’s transmitted instructions, even if prompted based on heart rate data, constitute “data” that is distinct from the heart rate data itself that Petitioner likens to the claimed first set of activity data.

With respect to Patent Owner’s arguments pertaining to the “sensor device” required by the claims, we find some merit in them. Claim 1, for

instance, requires that a sensor device communicates with workout equipment and that it is the sensor device that transmits information to the workout equipment. *See, e.g.*, Ex. 1001, 45:9–20. Thus, it is the sensor device *itself* that transmits data to the workout equipment. In Abbondanza, base unit 250 receives signals from pulse rate sensor 225, and then it is the base unit that transmits those signals to treadmill device 230. Petitioner simply states that “Abbondanza’s base unit and pulse rate sensor are together a sensor device.” Pet. 34. Petitioner provides no further explanation as to why that is the case, or citation to evidence to support the contention. A reasonable question arises as to why base unit 250, which is not described as performing any sensing operation, nevertheless is viewed as forming part of a “sensor device.”

As discussed above, we conclude that Petitioner has presented grounds based on Acres that warrant institution of *inter partes* review. Although Patent Owner has identified a potential deficiency in the grounds based on Abbondanza, we also institute based on those grounds. *See* PTAB Consolidated Trial Practice Guide, 5–6 (Nov. 2019); 37 C.F.R. § 42.108(a); *see also PGS Geophysical AS v. Iancu*, 891 F.3d at 1360 (interpreting the statute to require “a simple yes-or-no institution choice respecting a petition, embracing all challenges included in the petition”).

III. CONCLUSION

Petitioner has shown a reasonable likelihood that it would prevail with respect to at least one of the challenged claims.

At this stage of the proceeding, the Board has not made a final determination on the construction of any claim term or the patentability of any challenged claim

IV. ORDER

It is

ORDERED that, pursuant to 35 U.S.C. § 314(a), *inter partes* review of claims 1–10 and 12–19 of the '225 patent is instituted with respect to all grounds set forth in the Petition; and

FURTHER ORDERED that, pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4(b), *inter partes* review of the '225 patent shall commence on the entry date of this Order, and notice is hereby given of the institution of a trial.

IPR2023-00424
Patent 10,923,225 B2

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