

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MPL BRANDS NV, INC.,
Petitioner

v.

BUZZBALLZ, LLC,
Patent Owner

PGR2024-00035
U.S. Patent No. 11,932,441

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW
37 C.F.R. § 42.75

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I. Introduction

BuzzBallz is a quintessential example of the American dream and the story of its founder, Ms. Merrilee Kick, is remarkable. Ms. Kick, a Texas high school teacher at the time, conceived of the inventive container that is the heart of BuzzBallz while sitting by the pool grading papers. Ms. Kick undertook significant financial risks to bring her invention to market, including investing heavily to protect her intellectual property. For more than 15 years, Ms. Kick has partnered with and relied on America's Innovation Agency—the USPTO—as a critical part of her journey. That Agency failed her by instituting and deciding a post-grant review (“PGR”) where the patent in question should never have been eligible for such a review. The PGR process—implemented well after the filing of Ms. Kick's initial patent application—should not be used to deprive her of the benefits of her inventions.

In the Final Written Decision, the Board found Ms. Kick's '441 patent eligible for PGR despite the claims having priority to before enactment of the AIA. To reach this conclusion, the Board misapprehended or overlooked what is required for a Petitioner to meet its burden of demonstrating a challenged patent is eligible for PGR. The Board misapplied controlling Federal Circuit precedent and ignored large swaths of expert testimony from both parties. As a result, the Final Written Decision is based on multiple legal errors and cannot be allowed to stand.

Patent Owner respectfully asks the Director to vacate the Final Written Decision, determine Petitioner has not met its burden of establishing the '441 patent is eligible for PGR under the correct legal standard, vacate the Institution Decision on this basis, and terminate the proceeding.

II. The Board allowed Petitioner to challenge the pre-AIA '441 patent without requiring Petitioner to meet its burden of establishing the '441 patent is eligible for PGR.

Pre-AIA patents are not eligible for PGR. *See* AIA § 3(n)(1). The '441 patent is a pre-AIA patent, claiming priority to April 19, 2010. *See* EX1001 ('441 Patent), (63). Nevertheless, the Petitioner argued, and the Board agreed, that a difference between two figures in the prosecution history of the '441 patent deprived the '441 patent of its pre-AIA status.

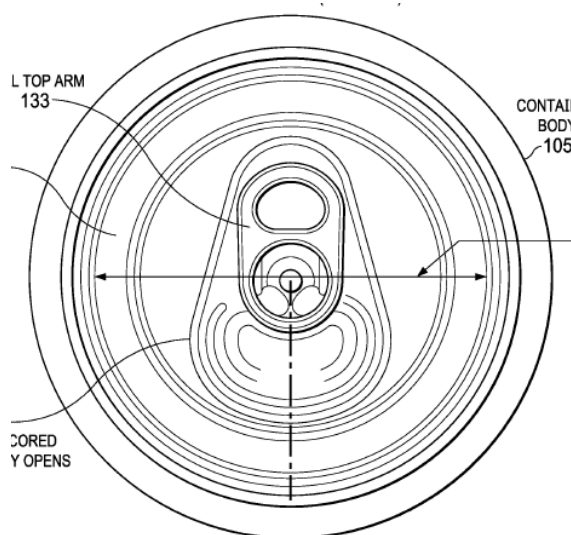


Figure 4

**EX2002, 106
('195 Application)**

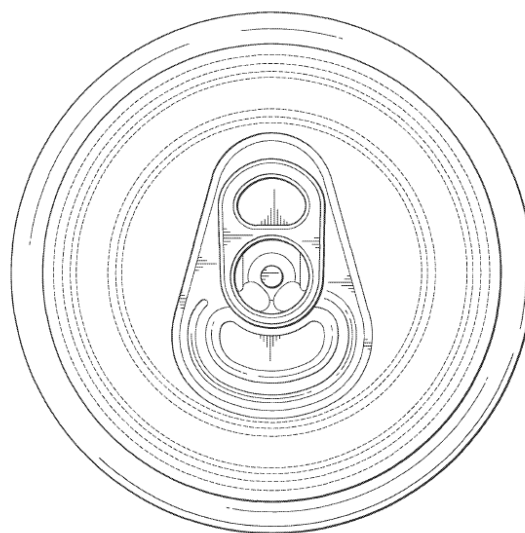


FIG. 2

**EX1003, 187
('813 Application)**

More specifically, the Board concluded that the figure on the left did not provide written description support for the figure on the right. FWD, 17-32. But, contrary to the Board's decision, the test for written description of design patent applications is not a simple "spot-a-difference" exercise that can be performed by anyone. Instead, the Federal Circuit's controlling caselaw explains that "the test for sufficiency of the written description...*is the same for either a design or a utility patent.*" *In re Owens*, 710 F.3d 1362, 1366 (Fed. Cir. 2013). That standard is "whether the disclosure of the application relied upon reasonably conveys *to those skilled in the art* that the inventor *had possession of the claimed subject matter* as of the filing date." *Id.* (quoting *Ariad*, 598 F.3d at 1351). Put simply, the test for written description requires presenting and evaluating evidence regarding **the understanding of a POSITA**. An examiner's opinion, a PTAB judge's opinion, and, of course, an attorney's opinion cannot be a substitute for the perspective of a POSITA.

In finding the '441 patent PGR-eligible, the Board made multiple, fundamental legal errors. First, the Board improperly excused the Petition's failure to address the proper written description standard set forth by the Federal Circuit or present *any evidence* regarding the understanding of a POSITA on this issue. Second, the Board improperly replaced the perspective of a POSITA with its own perspective and the perspective of a patent examiner. And third, the Board

improperly excused all Petitioner's errors by finding, contrary to the opinions of both parties' experts, that "no expert testimony is needed." FWD, 25. These errors, alone and collectively, require overturning the Final Written Decision.

A. The Board improperly excused Petitioner's failure to provide any evidence relevant to the proper test for written description support as established by the Federal Circuit.

Petitioner bears "the ultimate burden" to show the '441 patent is PGR-eligible. *Mylan Pharms. Inc. v. Yeda Res. & Dev. Co.*, PGR2016-00010, Paper 9 at 10 (Aug. 15, 2016); *One World Tech., Inc. v. Chervon (HK) Ltd.*, PGR2020-00061, Paper 19 at 3-4 (Feb. 23, 2021); *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015) (burden of showing of unpatentability "never shifts to the patentee").

For the '441 patent to be PGR-eligible based on lack of written description support, the Petitioner was required to provide evidence establishing that Figure 4 of the '195 Application would not **reasonably convey to a POSITA** that the inventor had possession of the design shown in Figure 2 of the '813 Application. POR, 4, citing *In re Owens*, 710 F.3d 1362, 1366 (Fed. Cir. 2013) ("The test for sufficiency of the written description, which is the same for either a design or a utility patent, has been expressed as 'whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.'"). Yet, the Petition

entirely fails to address the relevant legal standard or provide *any evidence* regarding the understanding of a POSITA.

The Petition's analysis cites only the prosecution history of the '813 application, relying on the examiner's statement during prosecution that the drawings in question were different. *See* Pet., 5-7 (citing EX1003, 107). The fact that there are differences in the drawings ignores the fundamental question: "whether the disclosure of the" '195 Application "reasonably conveys *to those skilled in the art* that the inventor *had possession of*" the design in Figure 2 of the '813 application. *Owens*, 710 F.3d at 1366.

From the beginning and throughout this proceeding, Patent Owner has repeatedly identified this failure in Petitioner's evidentiary burden. *See* POPR, 6, 13-29; Pre-Institution Sur-Reply, 1-4; POR, 3-9; Sur-Reply, 3-9. The trial record makes clear that this omission by Petitioner was not an oversight, but a calculated and intentional decision. When asked what the disclosure of the '195 Application would have conveyed to a POSITA, Petitioner's expert, Dr. Delson, would not address the issue, testifying that "**I was *not asked to give an opinion on whether a POSITA would understand if there was undisclosed new matter***" and that "[i]n regard to the priority date, I have *relied on advice from counsel*." EX2015, 24:5-21; *see also*, POR, 5; Sur-Reply, 7. In other words, Petitioner simply chose not to provide evidence on this point, in complete derogation of the applicable

legal standard.

Despite Patent Owner directly raising the issue, in his Reply Declaration Dr. Delson still did not address whether the disclosure of the '195 Application reasonably conveys to a POSITA that the inventor had possession of the design in Figure 2 of the '813 application. *See* Sur-Reply, 8-9; EX1019, generally. Instead, Dr. Delson simply testified that there are “differences” between the figures, but never explained whether those “differences” would have conveyed to a POSITA that the inventor was not in possession of the claimed subject matter. *Id.* Because Dr. Delson continually chose not to address the issue, the only evidence of record regarding the understanding of a POSITA establishes that the inventor was in possession of the subject matter. POPR, 13-29; POR, 5-9; Sur-Reply, 8-9; EX2028, ¶¶40-54; EX2001, ¶¶10-32.

Incredibly, the Board excused the Petitioner's failure to provide any relevant evidence regarding the understanding of a POSITA and rejected the expert testimony presented by Patent Owner directly on point. FWD, 31. In doing so, the Board improperly shifted the burden to Patent Owner to establish the '441 patent was not PGR-eligible despite Petitioner always having “the ultimate burden” to show the '441 patent is PGR-eligible. *Mylan Pharms. Inc.* and *One World Tech., Inc.* This is legal error that requires vacating the Final Written Decision.

B. The Board improperly replaced the perspective of a POSITA with its own perspective and the perspective of a patent examiner.

Not only did the Board fail to require the Petitioner to meet its burden, but the Board also misapplied the test for written description support established by the Federal Circuit.

After correctly summarizing the standard, *see* FWD, 22 (citing *In re Owens*, 710 F.3d 1362, 1366 (Fed. Cir. 2013) (“The test for sufficiency of the written description, which is the same for either a design or a utility patent, has been expressed as ‘whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.’”), the Board “reproduce[d] the Examiner’s side-by-side comparison” of the drawings, and, like the Petitioner, conducted its own spot-the-difference exercise. FWD, 23. The Board recognized that “[t]he lines under the pop-op tab plainly differ in the figures” and described the connecting lines of the ’813 Application as “form[ing] a kidney-bean shape that is absent from Figure 4 of the ’195 Application.” FWD, 23-24. But the Board’s comparison of the figures does nothing to inform **what a POSITA would have understood** when evaluating the figures. The Board itself recognized that “there is no dispute that there are differences in the figures.” FWD, 31. But the mere existence of differences does not resolve the issue. Instead, the key inquiry is what those

differences convey to a POSITA.

In the context of the present case, the test set forth by the Federal Circuit requires evaluating the evidence regarding “whether the disclosure of the” ’195 Application “reasonably conveys *to those skilled in the art* that the inventor *had possession of*” the design in Figure 2 of the ’813 application. *Owens*, 710 F.3d at 1366. Any analysis—including the analysis in the Final Written Decision—that merely recognizes differences in figures without addressing what those differences mean or convey to a POSITA in terms of possession of the invention misapplies the Federal Circuit’s controlling test for written description support.

The Board next found that the Petitioner provided adequate evidence by “rel[ying] on the prosecution history of the ’813 Design Application” where “the Examiner found a lack of adequate written description.” FWD, 24. The examiner designated the ’813 Application as a continuation-in-part due to the differences in the figures. *See* Pet. 5-7 (citing EX1003, 107). But the examiner’s opinion of the differences between the figures provides no more relevant information regarding the perspective of a POSITA than the Board’s comparison of the figures.

As explained in the Sur-Reply, an examiner’s “designation given to a derivative application,” i.e., whether it is a continuation or continuation-in-part, “does not determine its legal status.” *Anascape, Ltd. v. Nintendo of Am. Inc.*, 601 F.3d 1333, 1338 (Fed. Cir. 2010). And here, like the Petitioner and the Board, the

examiner never acknowledged, addressed, or utilized the controlling standard for determining written description support for design drawings. Instead, the examiner said the '813 design “*could not have been recognizable*.” EX1003, 107. The examiner’s “could not have been recognizable” standard is inconsistent with the standard set forth by the Federal Circuit. And the examiner’s application of this incorrect standard cannot supplant a POSITA’s perspective required to inform the decision.¹

Because the Final Written Decision merely recognizes differences in the figures—whether identified by the Board or the examiner—without addressing what those differences mean or convey to a POSITA in terms of possession of the invention, the Final Written Decision misapplies the Federal Circuit’s controlling test for written description support that is fundamentally based on the understanding of a POSITA. This is legal error that requires vacating the Final Written Decision.

¹ The Final Written Decision asserts this argument as “insufficiently developed” because the Board did not understand “what ‘designation’ it refers to” or “how the Examiner allegedly ‘applied the wrong standard.’” FWD, 24. The case cited in the original briefing clearly explains that the “designation” is the designation of an application as a continuation or continuation-in-part. *See* Sur-reply, 6 (citing *Anascape*, 601 F.3d at 1338). Additionally, these arguments were not waived because they were clearly responsive to the Petitioner’s arguments. *See* Reply, 1-3 (arguing that “[t]he Examiner recognized the new matter”).

C. The Board improperly found that no expert testimony is needed.

In the end, the Board attempted to excuse the Petitioner's lack of evidence and the Final Written Decision's efforts to replace the perspective of a POSITA with the perspective of the Board or an examiner by concluding that this case is so "simple" and "easily understandable" that "[e]xpert testimony is not required." FWD, 25 (citing *Intercontinental Great Brands LLC v. Kellogg N. Am.*, 869 F.3d 1336, 1348 (Fed. Cir. 2017)). However, the Board's conclusion is contradicted by both parties' experts, including the explicit testimony of Petitioner's expert, Dr. Delson.

In his Reply Declaration, Dr. Delson testified that:

The design of the pull tabs of the beverage cans described and depicted above ***require significant effort and optimization so that they function properly***. The lid of the can must have a weak point that is punctured, and the tab must have sufficient rigidity so that it creates a large enough opening as it is pushed downwards so that fluid can flow appropriately. **The location and continuity of the contour lines are *critical design elements* necessary to achieve proper function for a specific lid.**

EX1019, ¶17.²

² The Final Written Decision accuses Patent Owner of taking Dr. Delson's "testimony out of context." FWD, 25. Accordingly, Patent Owner is providing the

According to Dr. Delson, although the design of contour lines may seem a simple matter to the untrained, a POSITA would have recognized the design of the contour lines was actually very complex, “requiring significant effort and optimization.” EX1019, ¶17; Sur-Reply, 6. When asked about this issue during his supplemental deposition, Dr. Delson confirmed that “[t]he selection of the contour lines and the contour height involves a relatively sophisticated analysis.” EX2034, 42:1-6; Sur-Reply, 6.

The Final Written Decision cast this testimony aside, instead assuring the reader that, despite Dr. Delson's explanation and the testimony of Patent Owner's experts, the technology was simple, and the Board was knowledgeable enough to reach a conclusion without relying on the opinions of any expert witnesses regarding the understanding of a POSITA. FWD, 25. This approach improperly replaces the technological understanding and expertise of the expert witnesses retained by both parties with the Board's own understandings.

Further, the Final Written Decision's reliance on *In re Owens* and *In re Berkman* is misplaced. FWD, 25. The Final Written Decision asserts that these cases are examples where “no expert testimony [was] cited” in determining whether a design was supported in an earlier-filed application. *Id.* However, there

full paragraph to provide greater context to Dr. Delson's quoted statements.

are two fundamental distinctions in these cases relative to the present case.

First, neither *In re Owens* nor *In re Berkman* involved a PGR where the **Petitioner** bears “the ultimate burden” to establish PGR eligibility. Instead, in both cases, the **applicant** carried the burden of satisfying the written description requirement. *See, generally, In re Owens*, 710 F.3d 1362, 1366 (Fed. Cir. 2013); *In re Berkman*, 642 F.2d 427, 430 (CCPA 1981). Contrary to the Final Written Decision’s assertion, these cases simply do not support the premise that a Petitioner can satisfy its burden of establishing PGR eligibility based on a lack of written description support *without* providing actual evidence regarding the understanding of a POSITA. If anything, the Final Written Decision’s reliance on *In re Owens* and *In re Berkman* is further evidence that the Board improperly shifted the burden to Patent Owner to establish the ’441 patent was not PGR-eligible, instead of requiring Petitioner to meet its burden of showing the ’441 patent is PGR-eligible.

Second, contrary to the present case, ***there was no expert testimony*** regarding the understanding of a POSITA presented in either of these cases. *See, generally, In re Owens*, 710 F.3d 1362, 1366 (Fed. Cir. 2013); *In re Berkman*, 642 F.2d 427, 430 (CCPA 1981). In both cases, the Board—and ultimately the Fed. Cir. and CCPA—did not disregard testimony regarding the understanding of a POSITA or replace that testimony with its own understanding.

The Board's determination that the technology in the present case is "simple" and "easily understandable" such that "[e]xpert testimony is not required" contradicts the testimony of both parties' experts and was the foundation for the Board excusing Petitioner's failure to provide *any evidence* regarding the understanding of a POSITA in the Petition and, ultimately, replacing the testimony of the parties' experts with the understandings of the Board and the examiner. This is legal error that requires vacating the Final Written Decision.

III. Conclusion

For the above reasons, there are multiple legal errors that warrant vacating the Final Written Decision. Accordingly, Patent Owner respectfully requests that the Director vacate the Final Written Decision, determine Petitioner has not met its burden of establishing the '441 patent is eligible for PGR under the correct legal standard, vacate the Institution Decision on this basis, and terminate the proceeding.

Respectfully submitted,

Dated: December 17, 2025
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CERTIFICATE OF SERVICE

The undersigned certifies that, in accordance with 37 C.F.R. § 42.6(e),
service was made on Petitioner's counsel as detailed below.

Date of service December 17, 2025

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