

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALTRIA CLIENT SERVICES LLC
Petitioner,

v.

YIWU JINGANGKE TRADING CO., LTD.,
Patent Owner

Patent No. D. 1,081,032 S
Issue Date: June 24, 2025
Title: DOG TOY SET

Case No. PGR2026-00035

**PETITION FOR POST GRANT REVIEW
UNDER 35 U.S.C. §§ 321-322**

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EXHIBITS

Exhibit No.	Description
1001	U.S. Patent No. D 1,081,032 S (the “’032 Patent”)
1002	File History of U.S. Patent No. D 1,081,032 S
1003	Expert Declaration of Al Ball
1004	Life Magazine Marlboro® Advertisement dated March 30, 1959 (“1959 Marlboro® Ad”)
1005	U.S. Trademark Registration No. 1,039,413 (“the ’413 Registration”)
1006	TSDR Record for U.S. Trademark Registration No. 1,039,413
1007	U.S. Patent No. D 1,114,395 (“Pitman”)
1008	Frisco Plush Cigar Dog Toy Reviews
1009	U.S. Patent No. 2,610,851 (“Jones”)
1010	U.S. Patent No. D. 1,098,629 (“Ochoa”)
1011	Trademark Drawing Showing Product Configuration (Feb. 15, 2017)
1012	Trademark Specimen Showing Product Configuration (Oct. 19, 2016)
1013	Life Picture Collection About the Collection (captured from https://www.life.com/life-picture-collection/)
1014	LIFE Mar 30, 1959 Thumbnail View (annotated) (captured from https://books.google.com/books?id=EVIEAAAAMBAJ&lpg=PA7&pg=PA12#v=onepage&q&f=false)
1015	LIFE Mar 30, 1959 Page View Excerpt (captured from https://books.google.com/books?id=EVIEAAAAMBAJ&lpg=PA7&pg=PA12#v=onepage&q&f=false)

I. INTRODUCTION

Altria Client Services LLC (“Petitioner”) requests post-grant review of U.S. Patent No. D 1,081,032 S (Ex. 1001, the “’032 Patent”) and cancellation of its sole claim as invalid under 35 U.S.C. §§ 102 and 103.

The ’032 Patent claims a dog-toy design that imitates the well-known appearance of a Marlboro^{®1} cigarette pack and cigarette. The claimed design merely copies the well-known appearance of Marlboro[®] cigarette packaging, which had been publicly displayed for decades before the ’032 Patent’s filing date.

The prior art includes a 1959 Marlboro[®] advertisement and a 1976 trademark registration depicting the Marlboro[®] packaging design. These references disclose the same ornamental configuration shown in the challenged ’032 Patent. Designers of pet toys routinely adapt familiar consumer products into novelty toys, and dog toys shaped like tobacco products were already commercially available years before the filing of the ’032 Patent.

II. STANDING AND PROCEDURAL STATEMENTS

This Petition complies with all statutory requirements and 37 C.F.R. §§42.201 et seq. and should be accorded a filing date pursuant to 37 C.F.R. §42.206.

Petitioner certifies pursuant to 37 C.F.R. § 42.204(a) that the ’032 Patent is available for post-grant review and that Petitioner is not barred or estopped from

¹ U.S. Trademark Registration No. 5,379,044.

requesting post-grant review of the '032 Patent. Petitioner has not filed a civil action challenging the validity of any claim of the '032 Patent. This Petition is also filed within nine months of the June 24, 2025 issue date of the '032 Patent. 37 C.F.R. §42.202; 35 U.S.C. §321(c).

Petitioner files this Petition in accordance with 37 C.F.R. § 42.206(a) and concurrently files a Power of Attorney pursuant to 37 C.F.R. § 42.10(b). The required fee is paid via online Deposit Account payment.

The '032 Patent is eligible for post-grant review because it issued from a patent application filed on November 5, 2024, after enactment of the America Invents Act (“AIA”).

III. THE BOARD SHOULD INSTITUTE REVIEW

The Board should not exercise its discretion to deny review under 35 U.S.C. § 325(d) because the Office has not considered the prior art grounds forming the basis of this Petition. None of Petitioner’s references were cited by the Applicant in any information disclosure statements (IDSs) or considered during prosecution. *Unified Patents, Inc. v. Berman*, IPR2016-01571, Paper 10, 12–13 (P.T.A.B. Dec. 14, 2016) (informative) (instituting grounds relying on art not cited previously). Indeed, the challenged patent received only a cursory examination, receiving a notice of allowance after one Non-Final Office Action and Response. Ex. 1002 at 14. No basis exists for denying institution under 35 U.S.C. § 325(d).

IV. MANDATORY NOTICES

A. Real Party-in-Interest (37 C.F.R. § 42.8(b)(1))

Altria Client Services LLC is the only real party in interest. Altria Client Services LLC is a wholly owned subsidiary of Altria Group, Inc. No other party was involved in any aspect of this Petition.

B. Related Matters (37 C.F.R. § 42.8(b)(2))

Petitioner is not aware of any pending cases against third parties for alleged infringement of the '032 Patent. Petitioner is not aware of any other judicial or administrative matter that would affect, or be affected by, a decision in the proceeding.

C. Lead and Back-Up Counsel (37 C.F.R. § 42.8(b)(3))

Petitioner identifies the following lead and back-up counsel:

Lead Counsel	Back-Up Counsel
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D. Service Information (37 C.F.R. § 42.8(b)(4))

Please address all correspondence to the lead and back-up counsel at the addresses provided above. Petitioner hereby consents to electronic service by email to michael.sebba@arnoldporter.com, dina.hayes@arnoldporter.com, and kathleen.lichtenstein@arnoldporter.com.

V. STATEMENT OF PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. §§ 42.204(b) and 42.22(a), Petitioner respectfully requests the cancellation of the claim of the '032 Patent, which is unpatentable under 35 U.S.C. §§ 102 and/or 103 based on the prior art. Petitioner's full statement of the reasons for the relief requested is set forth in detail in Section X below and is supported by the Declaration of Al Ball (Ex. 1003). The specific prior art and statutory grounds for invalidity of claim 1 of '032 Patent are outlined in the following tables.

Exhibit	Prior Art	Publication Date
1004	Life Magazine Marlboro [®] Advertisement dated March 30, 1959 ("1959 Marlboro [®] Ad")	March 30, 1959
1005	U.S. Trademark Registration No. 1,039,413 ("the '413 Registration")	May 11, 1976
1007	U.S. D 1,114,395 ("Pitman")	September 28, 2023 (Filing Date)
1008	Frisco Plush Cigar Dog Toy Reviews	November 21, 2019
1009	U.S. Patent No. 2,610,851 ("Jones")	April 1, 1948

Ground	Statutory Basis	Prior Art
1	§ 102	1959 Marlboro® Ad
2	§ 103	1959 Marlboro® Ad in View of Knowledge in the Art
3	§ 103	1959 Marlboro® Ad in View of Pitman and Knowledge in the Art
4	§ 103	1959 Marlboro® Ad in View of Chewy Frisco Review and Knowledge in the Art
5	§ 103	1959 Marlboro® Ad in View of Jones and Knowledge in the Art
6	§ 102	'413 Registration
7	§ 103	'413 Registration in View of Knowledge in the Art
8	§ 103	'413 Registration in View of Pitman and Knowledge in the Art
9	§ 103	'413 Registration in View of Chewy Frisco Review and Knowledge in the Art
10	§ 103	'413 Registration in View of Jones and Knowledge in the Art

VI. OVERVIEW OF THE '032 PATENT AND THE PRIOR ART

A. The '032 Patent

The Patent Owner filed the '032 Patent on November 5, 2024 as application number 29/971,640 (the "'640 Application"). November 5, 2024 is the earliest priority date. The '640 Application issued on June 24, 2025 as D 1,081,032 S. Ex. 1001 at 1. The '032 Patent has a single claim for the "ornamental design for dog toy

set, as shown and described.” *Id.* The ’032 Patent claims a two-component dog-toy design that visually imitates a Marlboro® cigarette pack and a cigarette. Ex. 1003, ¶ 10. It includes seventeen figures, with FIG. 1 describing a “Fully Assembled Configuration”, FIGS. 2–9 describing the “First Element” and FIGS. 10–17 describing the “Second Element.” *Id.* The Fully Assembled Configuration consists of the First Element and the Second Element.

The Fully Assembled Configuration shows a dog toy set consisting of a cigarette pack dog toy and an accompanying cigarette dog toy (Ex. 1003, ¶ 10):

'032 Patent	
Fully Assembled Configuration	 <p>FIG. 1</p>

The “first element” of the dog toy set consists of a cigarette pack toy, as shown in FIGS. 2–9:

'032 Patent

First Element



FIG. 2

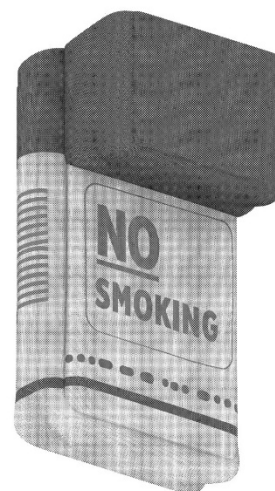


FIG. 3

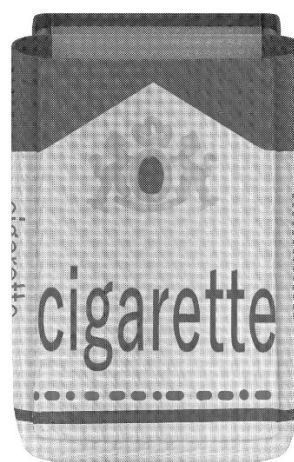


FIG. 4

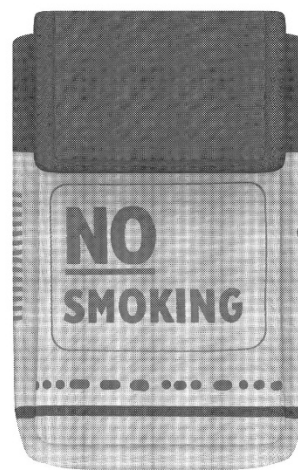
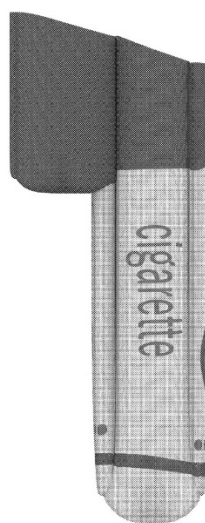
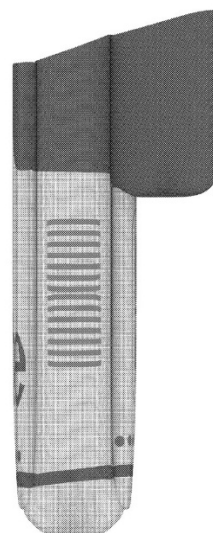
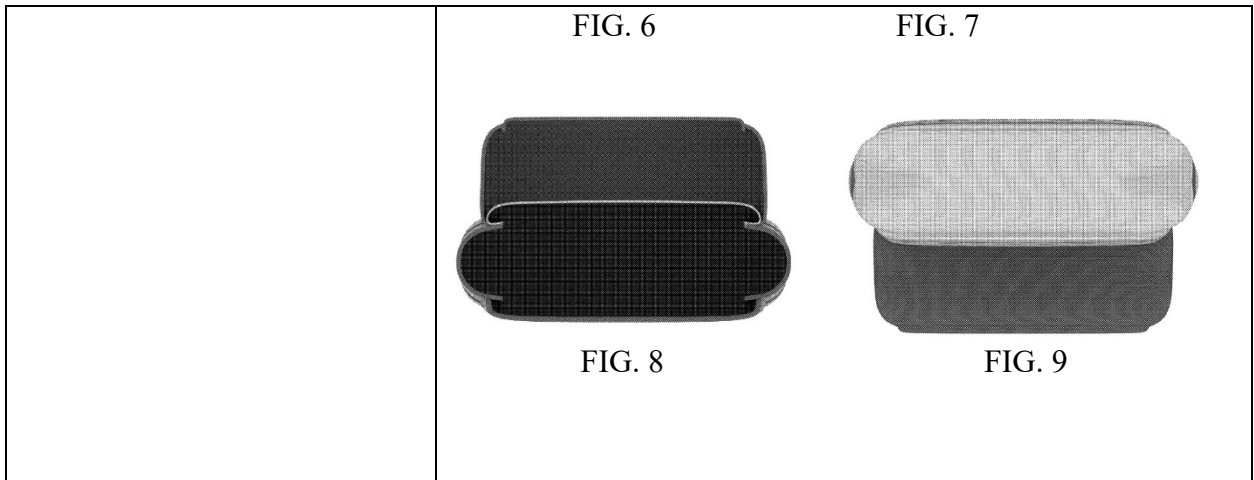
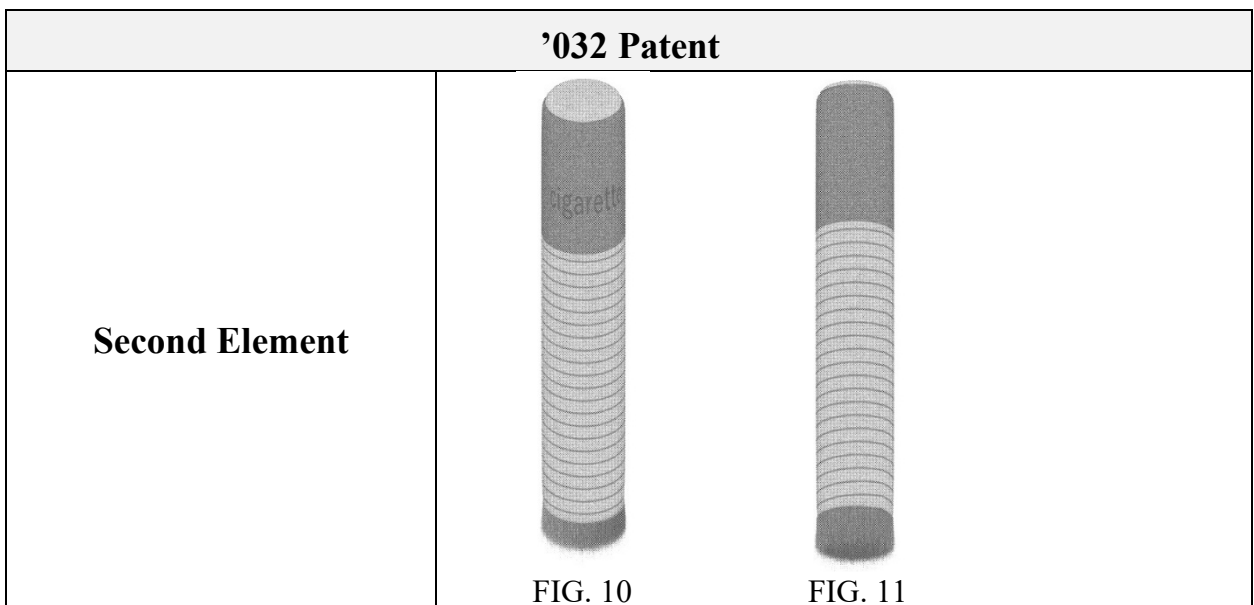


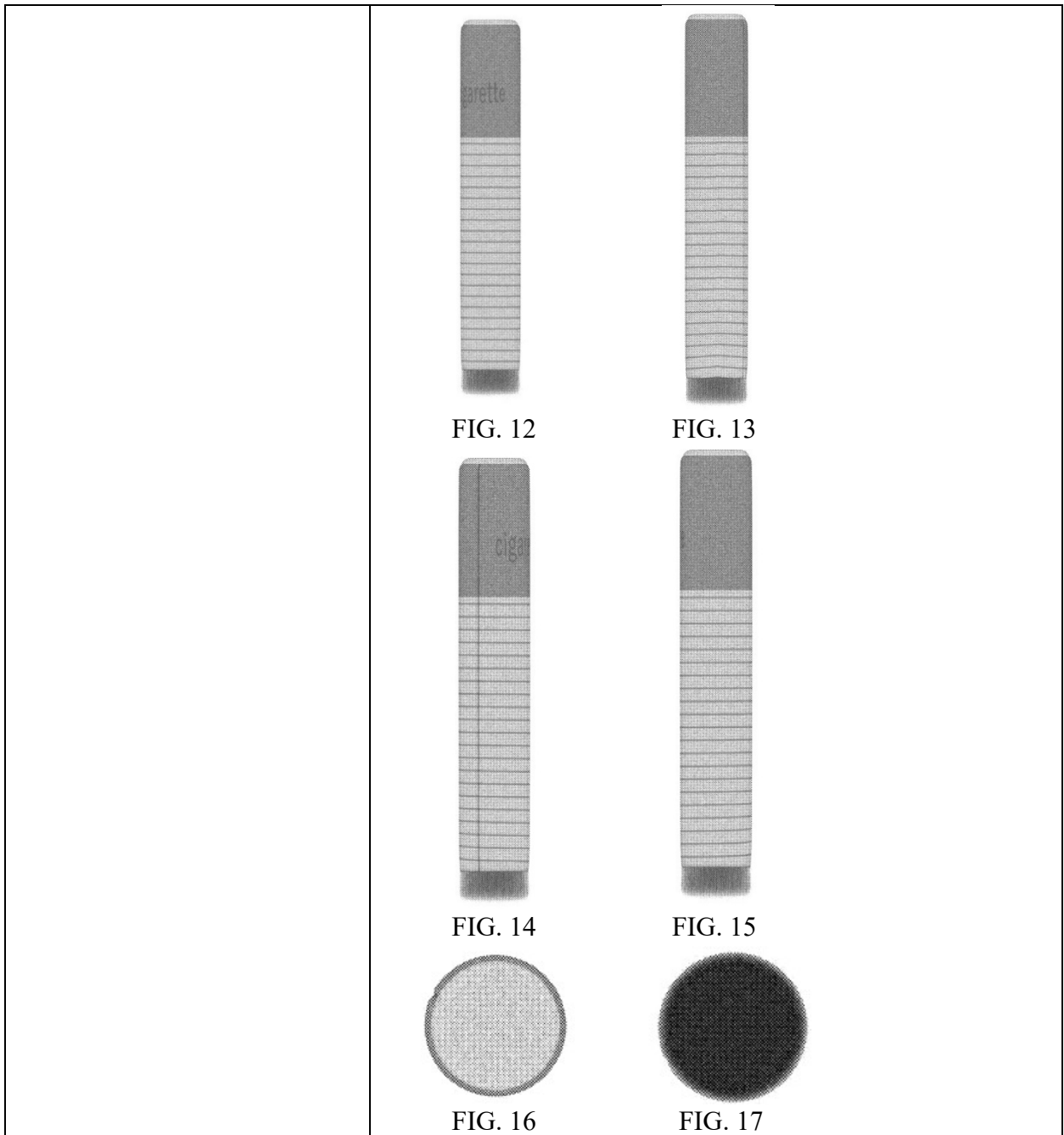
FIG. 5





The “second element” of the dog toy set consists of a cigarette toy, as shown in FIGS. 10–17:





As shown above, the '032 Patent depicts a two-component dog toy set. Ex. 1001. Figures 1 through 9 illustrate a rectangular box resembling a Marlboro® cigarette pack. Ex. 1003, ¶ 13. Key ornamental features of the cigarette pack toy include a rectangular carton-like body, a hinged flip-top lid, a cylindrical cigarette-

like element protruding from the top opening, a roof design at the top of the carton, a crest located directly under the middle of the roof design, and a horizontal solid line extending along the bottom of the carton. *Id.* Figures 10 through 17 illustrate a separate elongated cylindrical toy resembling a cigarette. *Id.* Key ornamental features of the cigarette toy include a long cylindrical body, a distinct filter-like segment near one end, and a two-toned appearance separating the filter portion from the body. *Id.* The drawings of the '032 Patent show the cigarette toy inserted into the cigarette pack toy and that it is removable from the pack toy. *Id.* The claimed design therefore encompasses the visual appearance of the toy set as a whole, consisting of both objects together. Ex. 1003, ¶ 16.

For purposes of evaluating the validity of a design patent, although a design patent is not directed to a design in the abstract, but rather to a design as applied to an article of manufacture, it is permissible to consider designs from different articles where the overall visual impression is substantially the same. Accordingly, a design that copies the same distinct ornamental appearance of the Marlboro® cigarette packaging would suggest the application of those features in a dog-toy design thereby anticipating or rendering obvious the claimed design.

B. Prosecution History of '640 Application

During prosecution of the '640 Application, the examiner issued a Non-Final Office Action rejecting the sole design claim under both 35 U.S.C. § 102 and § 103.

Ex. 1002, at 41–44 (Non-Final Office Action). The examiner determined that the claimed design was anticipated by a product identified as the “Nocciola Dog Toy,” which was listed in an Amazon.com product listing and was reportedly available on June 20, 2024, prior to the filing date of the design application. *Id.* at 42–43. The examiner concluded that the appearance of the dog toy shown in the Nocciola product listing was substantially the same as the claimed design. The examiner rejected the claim as anticipated under § 102 because the product listing constituted a printed publication or public disclosure before the effective filing date of the application. *See* Ex. 1002, at 42–43 (Non-Final Office Action).

The examiner also rejected the claim under 35 U.S.C. § 103, asserting that any differences between the claimed design and the Nocciola Dog Toy were minor and would have been obvious to a designer of ordinary skill in the art. In particular, the examiner noted that the Nocciola product appeared to include a toy cigarette pack with multiple cigarette toys, whereas the claimed design depicted a pack with a single cigarette element. *Id.* at 43. The examiner concluded that removing one or more cigarette elements from the prior design would have been an obvious modification and therefore did not impart patentable distinction over the cited product. *See id.* at 43–44 (“It would have been obvious to a designer of ordinary skill in the art to not include elements of Nocciola as the toy has segregable

parts...result[ing] in a design having an appearance that is visually the same as the claimed design.”).

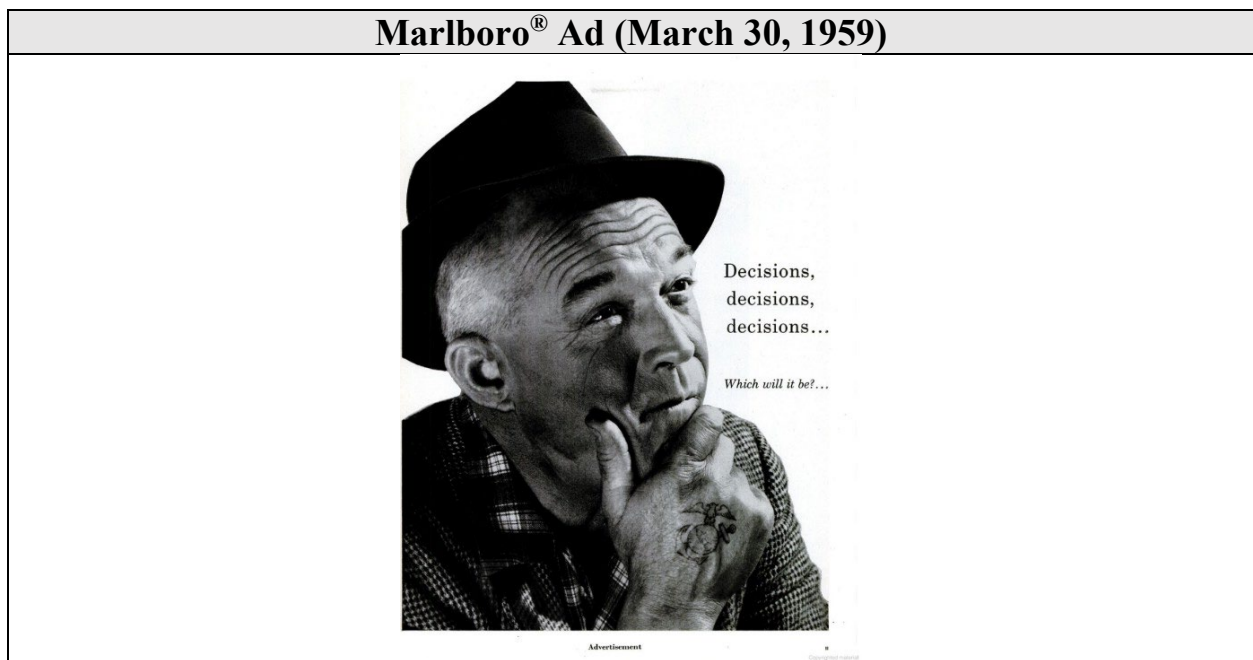
The applicant responded to the Office Action by amending the specification to claim a dog toy “set” as reflected in the drawings (Ex. 1002, at 33) and addressing the examiner’s rejections based on prior art. The applicant also submitted a declaration under 37 C.F.R. § 1.130(a) asserting that the Nocciola Dog Toy disclosure originated from the inventor or from an entity that obtained the design from the inventor. According to the declaration, the Nocciola-branded product available on Amazon was associated with Beijing Youyou Bear Technology Co., Ltd., which allegedly obtained the design from the inventor, Jufen Zheng. The applicant argued that because the disclosure originated from the inventor or from a party that obtained the subject matter from the inventor, and because the disclosure occurred within one year of the filing date of the application, the disclosure qualified for the grace-period exception under at least 35 U.S.C. § 102(b)(1). Ex. 1002, at 28–31.

The examiner subsequently withdrew the prior-art rejection and allowed the application. After the Notice of Allowance issued, the applicant paid the issue fee and the ’032 Patent issued on June 24, 2025.

C. Prior Art at Issue in this PGR

1. 1959 Life Magazine Marlboro[®] Advertisement (Ex. 1004)

A 1959 Marlboro® advertisement publicly disclosed the same cigarette-pack configuration reflected in the challenged design over sixty-five years before the '032 Patent's filing date. As shown below, the March 30, 1959 issue of Life Magazine featured a multipage Marlboro® cigarette advertisement prominently displaying Marlboro® cigarette packaging and individual cigarettes arranged to emphasize the distinctive design of the Marlboro® cigarette pack.





Ex. 1004 at 11–13.

The Marlboro[®] Ad depicts a standard Marlboro[®] cigarette pack with its characteristic rectangular pack shape and hinged top that opens to reveal multiple individual cigarettes inside the pack. The individual cigarettes are shown partially exposed and removable from the pack, visually demonstrating the functional and ornamental configuration of the cigarette packaging.

The Marlboro[®] Ad prominently presents the Marlboro[®] brand name and packaging graphics, including the well-known triangular roof design and associated branding elements on the front of the pack. The advertisement highlights the pack's hinged lid structure and the arrangement of cylindrical cigarettes contained within

the pack. By depicting both the pack and the individual cigarettes together, the Marlboro® Ad visually communicates the conventional configuration of a cigarette pack that opens via a hinged lid to hold multiple cylindrical cigarettes. The advertisement forms part of Marlboro®’s longstanding print advertising campaign that prominently featured the Marlboro® cigarette pack as a recognizable product design element and brand identifier.

The 1959 Marlboro® Ad is prior art to the ’032 Patent under at least 35 U.S.C. § 102(a)(1). The 1959 Marlboro® Ad was not prior art of record and was not considered during prosecution of the ’032 Patent. Ex. 1002 at 6, 45, 49; *see also* Ex. 1001 at 1.

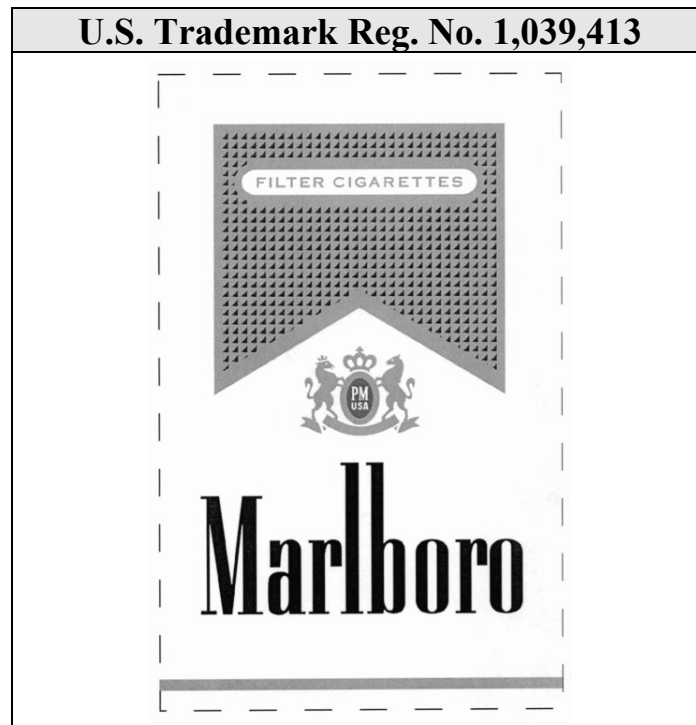
The March 30, 1959 Life Magazine is a periodical and so is self-authenticating prior art under F.R.E. 902(6). *See Microsoft Corp. v. FG SRC LLC*, IPR2018-01604, Paper 76 at 15–16 (P.T.A.B. April 30, 2020). It includes a date on the cover as well as a copyright symbol and ISBN. Ex. 1004 at Cover, 2. This authentication is further confirmed by Life Magazine’s public archive. “Every weekly issue of LIFE for its complete run from 1936-1972 is available” on Google. Ex. 1013 at 3. *See also* <https://www.life.com/life-picture-collection>. The Google Archive of the March 30, 1959 Issue also includes the 1959 Marlboro® Ad. Exs. 1014 (annotations added), 1015. *See also*

<https://books.google.com/books?id=EVIEAAAAMBAJ&lpg=PA7&pg=PA12#v=>

[onepage&q&f=false](#)]. A true and correct copy of the March 30, 1959 Issue is available for inspection at Arnold & Porter Kaye Scholer's Los Angeles Office.

2. U.S. Trademark Reg. No. 1,039,413 (Ex. 1005)

U.S. Trademark Registration No. 1,039,413 publicly discloses the distinctive Marlboro® cigarette-pack design long before the '032 Patent's priority date.



Philip Morris USA Inc. filed an application (Trademark App. No. 72/430,002) for the above-identified trademark on July 17, 1972. Ex. 1006. The description of the mark states that “the mark consists of a roof design with dark stippling located at the top of the design. Within the roof is an oval with the words FILTER CIGARETTES. A crest with an oval center with the words PM USA is located directly under the middle of the roof design. The word MARLBORO® is located in

the lower portion of the design. There is a line located at the bottom of the design. The broken lines outlining the packaging are intended to show the position of the mark and is not part of the mark.” *Id.* The first use date of this trademark is September 2, 1971. *Id.*

The ’413 Registration registered on May 11, 1976 and is prior art to the ’032 Patent under at least 35 U.S.C. § 102(a)(1). The ’413 Registration was not prior art of record and was not considered during prosecution of the ’032 Patent. Ex. 1002 at 6, 45, 49; *see also* Ex. 1001 at 1.

The ’413 Registration registered on May 11, 1976 and was published prior to that date in the Trademark Official Gazette. The ’413 Registration has been publicly accessible since it was first published.

3. U.S. D 1,114,395 (“Pitman”) (Ex. 1007)

Pitman claims the ornamental design for a plush dog toy. Ex. 1007. The patent application (App. No. 29/764,593) was filed on September 28, 2023 and issued February 17, 2026. *Id.* Pitman is prior art under 35 U.S.C. §102(a)(2). Pitman contains a single claim directed to “[t]he ornamental design for a plush dog toy, as shown and described.” *Id.* Pitman specifically illustrates a dog toy that resembles a reindeer. *Id.* The body is plush. *Id.* The claimed design is depicted in seven figures showing perspective, top, bottom, front, back, and side views of the toy. The figures of Pitman are shown below.

Pitman FIGS. 1-7



FIG. 1

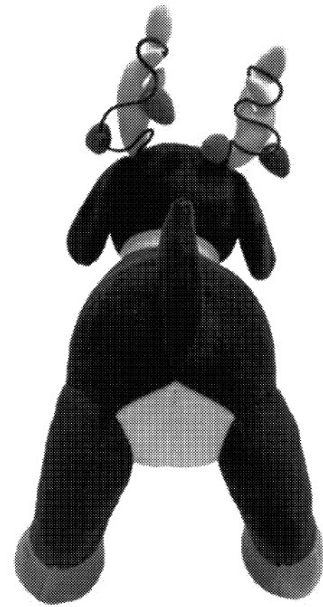


FIG. 2

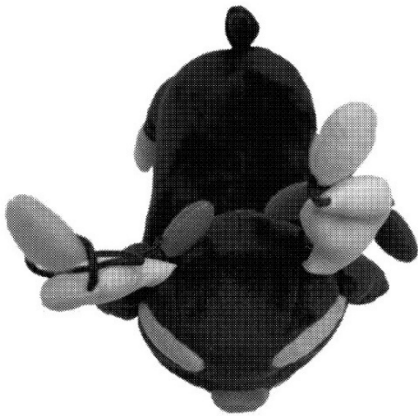


FIG. 3

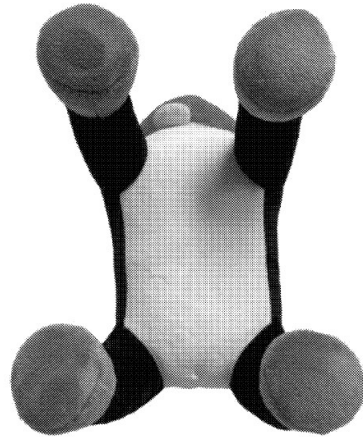
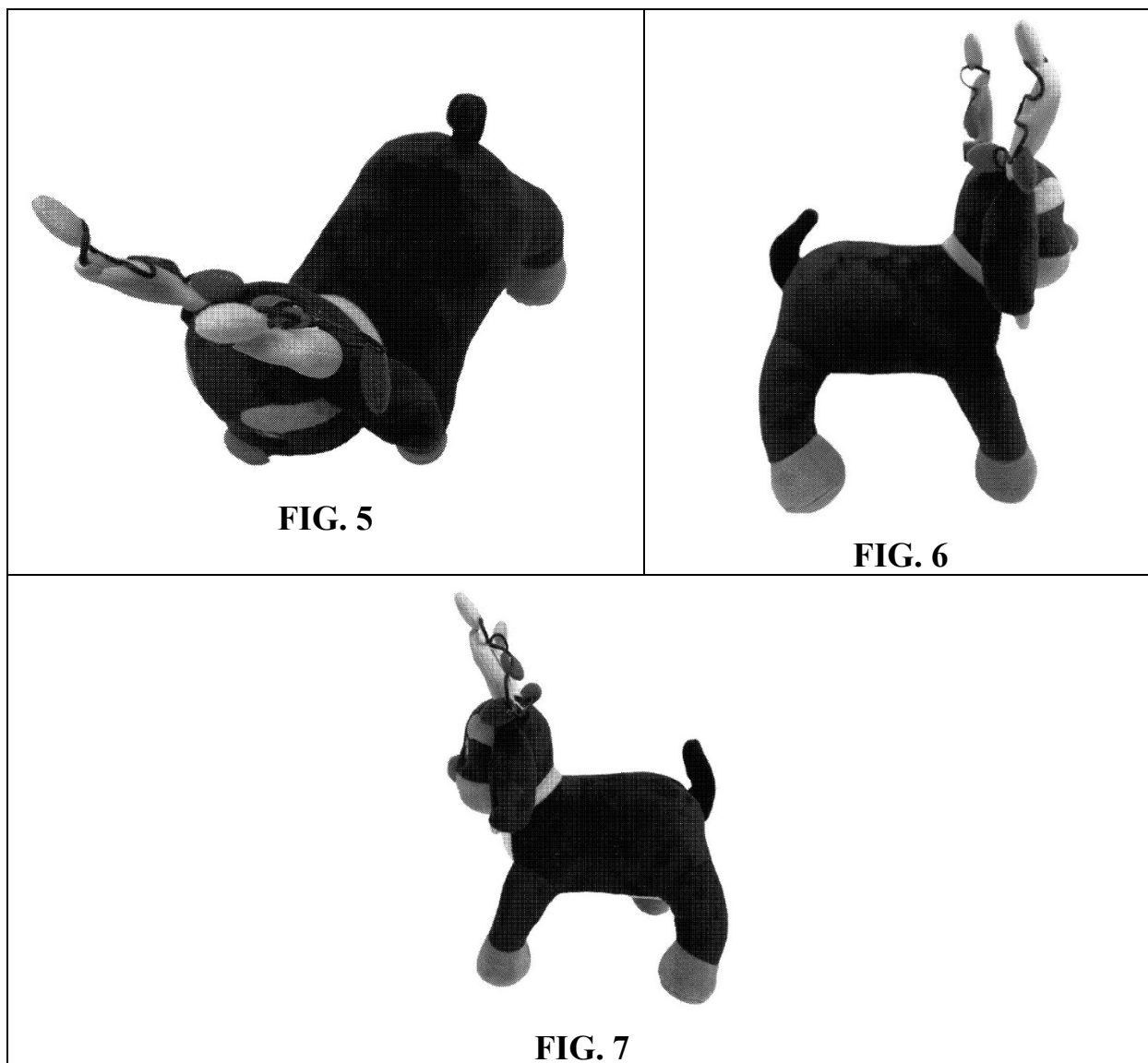


FIG. 4



Pitman was filed on September 28, 2023 and published on February 17, 2026 and is prior art to the '032 Patent under at least 35 U.S.C. § 102(a)(1). Pitman was not prior art of record and was not considered during prosecution of the '032 Patent. Ex. 1002 at 6, 45, 49; *see also* Ex. 1001 at 1.

4. Frisco Plush Cigar Dog Toy Reviews (Ex. 1008)

The Frisco Plush Cigar Dog was a novelty dog toy sold under the Frisco brand, a private-label line of pet products developed and sold by Chewy, Inc. Frisco

products include a variety of plush toys, chew toys, and novelty pet items designed to create entertaining play experiences for dogs. The Frisco Plush Cigar Dog Toy is a plush novelty toy designed to resemble a cigar. The toy is made of soft fabric and contains an internal squeaker intended to stimulate play when the dog bites or squeezes the toy. Plush toys of this type are typically used for interactive play activities such as fetch, tug-of-war, or general chewing, while also serving as a soft object dogs may carry or cuddle. From November 21, 2019 to January 22, 2020, ten customers reviewed the Frisco Plush Cigar Dog Toy, giving it an average rating of 3.8 out of 5 stars. This dog toy constitutes prior art demonstrating that a cigar-shaped dog toy was publicly available and being purchased and used by consumers back in at least 2019. The Frisco Plush Cigar Dog Toy was publicly available at least as early as November 21, 2019 and is prior art to the '032 Patent under at least 35 U.S.C. § 102(a)(1). The Frisco Plush Cigar Dog Toy was not prior art of record and was not considered during prosecution of the '032 Patent. Ex. 1002 at 6, 45, 49; *see also* Ex. 1001 at 1.

The Frisco Plush Cigar Dog Toy is shown below.

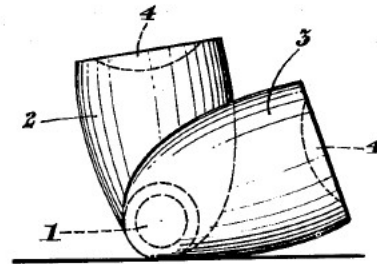
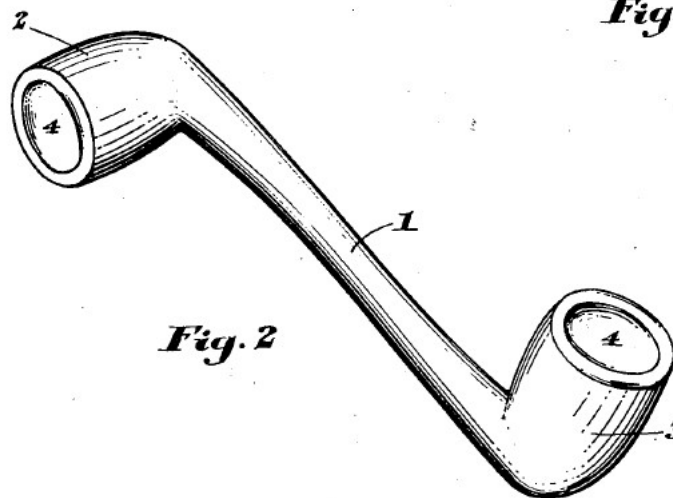


5. U.S. Patent No. 2,610,851 (“Jones”) (Ex. 1009)

Jones discloses a dog toy comprising an elongated stem with end portions configured to resemble pipe bowls. Ex. 1009. The toy is designed in a way such that one end may be inserted in a dog’s mouth, while the opposite end projects outward. Jones issued on April 1, 1948 and is prior art to the ’032 Patent under 35 U.S.C. § 102(a)(1). Jones was not considered during prosecution of the ’032 Patent. Ex. 1002 at 6, 45, 49; *see also* Ex. 1001 at 1.

As shown in the figures, the device includes a cylindrical stem and enlarged end portions, forming a pipe-like configuration. “The primary objects of the invention are to provide a dogs toy which, when held in the mouth of a dog or puppy, will produce a comical effect as though the animal were smoking a pipe.” Ex. 1009, 1:4–9. The patent also teaches that the toy is molded of rubber or similar material for chewing and durability making it suitable for canine use. *Id.*

Jones, FIGS. 1-3



6. Knowledge in the Art

Designers of pet toys frequently create novelty products that replicate the appearance of familiar consumer goods and household items. Ex. 1003, ¶ 40. These designs intentionally mimic recognizable products so that the toy produces a humorous or recognizable visual effect when carried or chewed by a dog. *Id.*

Because consumers readily recognize these objects, designers routinely adapt the appearance of well-known consumer products into dog-toy designs. *Id.*

This design practice was well established before the November 5, 2024 priority date of the '032 Patent. Designers of pet toys commonly created novelty toys that resembled everyday products such as beverage containers, food packaging, and other consumer goods. Ex. 1003, ¶ 41. Dog toys shaped like cigars, beer bottles, wine bottles, soda cans, and similar consumer items have long been sold through pet retailers and online marketplaces. *Id.* The goal of these designs is to produce a recognizable and humorous visual impression by adapting the appearance of familiar consumer products into dog toys. *Id.*

Courts and media have also recognized this longstanding design practice. Ex. 1003, ¶ 42. For example, the Supreme Court addressed a dispute involving a novelty dog toy called “Bad Spaniels,” which mimicked the appearance of a Jack Daniel’s whiskey bottle. *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140 (2023).² The toy replicated the distinctive bottle shape and label layout of the Jack Daniel’s product while replacing the wording with humorous phrases. *Id.* It is copied below.

² Both *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140 (2023) and *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007) (discussed below) address trademark issues. In both cases, the alleged trademark infringers did not obtain design patents copying the senior user’s mark as Patent Owner has done here.



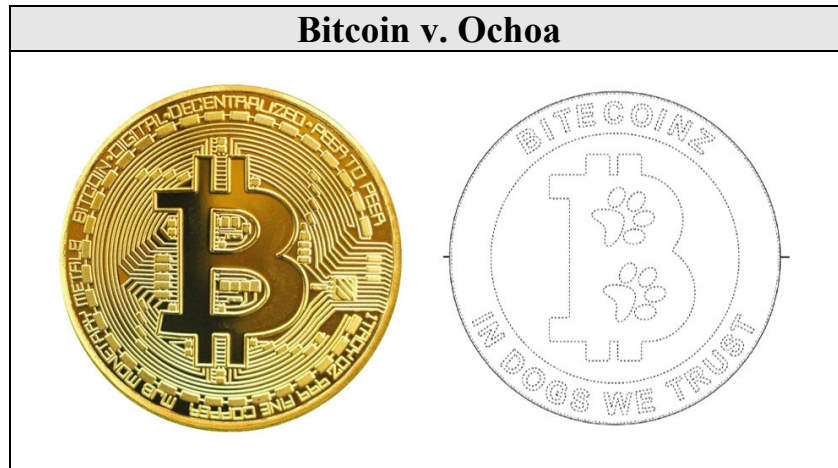
Similarly, the Fourth Circuit addressed a dispute involving plush dog toys called “Chewy Vuiton,” which intentionally imitated the appearance and branding of Louis Vuitton handbags. *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007). The products are copied below.

Louis Vuitton v. Chewy Vuiton



These cases illustrate that designers of pet toys have long adapted the appearance of well-known consumer products into novelty dog toys. Ex. 1003, ¶ 44.

U.S. Design Patent D. 1,098,629 to Richard Ochoa (“Ochoa”) is another novelty dog toy in the prior art. Ochoa has a single claim covering the design for a dog toy styled to resemble a bitcoin with dog paws shown in the letter “B” and the language “BITECOINZ” and “IN DOGS WE TRUST” surrounding the coin, as shown below.



The design elements that transform such objects into dog toys are largely functional and well known in the field. Ex. 1003, ¶ 46. For example, dog toys must generally be sized and shaped so that they can be gripped, chewed, and carried by a dog. *Id.* These functional requirements influence the scale and materials of the product but do not materially alter the ornamental appearance being replicated. *Id.* As a result, when designers adapt the appearance of familiar consumer products into dog toys, the primary ornamental features remain those of the original product being mimicked. *Id.*

Because novelty pet toys frequently replicate recognizable consumer products, an ordinary designer in the field would readily consider adapting the appearance of other well-known products into dog-toy designs. Ex. 1003, ¶ 47. Cigarette packaging is one such recognizable product. *Id.* Accordingly, the concept of creating a dog toy that mimics the appearance of a cigarette pack or cigarette

would have been well within the knowledge and creativity of a designer of ordinary skill in the field prior to the priority date of the '032 Patent.

VII. LEGAL STANDARDS FOR INVALIDITY

A. Section 102 Anticipation

The test for determining anticipation of a design patent under 35 U.S.C. § 102 is the “ordinary observer test.” *See Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1240 (Fed. Cir. 2009) (applying the same ordinary observer test used for the design patent infringement analysis in *Gorham Mfg. Co. v. White*, 81 U.S. 511, 528 (1871) to the design patent anticipation analysis). Under the ordinary observer test, a design patent is invalid if, “in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are ***substantially the same***, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other.” *Int’l Seaway*, 589 F.3d at 1239 (quoting *Gorham*, 81 U.S. at 528). *See also Door-Master Corp. v. Yorktowne*, 256 F.3d 1308, 1313 (Fed. Cir. 2001) (emphasis added).

Unlike the strict identity standard for anticipation in the utility patent context, the test for anticipation with design patents requires only “substantial” similarity—“minor differences cannot prevent a finding of anticipation.” *Int’l Seaway*, 589 F.3d at 1243; *see also Door-Master*, 256 F.3d at 1312–13. Thus, anticipation can be

avoided in a design patent analysis only by a showing of more than minor differences between the two designs.

B. Section 103 Obviousness

In determining obviousness for design patents, “the ultimate inquiry under section 103 is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.” *MRC Innovations, Inc. v. Hunter Mfg., LLP*, 747 F.3d 1326, 1331 (Fed. Cir. 2014) (citation omitted). The Federal Circuit recently concluded “that the Rosen-Durling test requirements—that (1) the primary reference be ‘basically the same’ as the challenged design claim; and (2) any secondary references be ‘so related’ to the primary reference that features in one would suggest application of those features to the other—are improperly rigid.” *LKQ Corp. v. GM Glob. Tech. Operations LLC*, 102 F.4th 1280, 1293 (Fed. Cir. 2024). Instead, the obviousness inquiry should apply a more flexible approach, like *KSR. Next Step Grp., Inc. v. Deckers Outdoor Corp.*, Case IPR2024-00525, Paper 11 at 3 (P.T.A.B. June 12, 2024) (“The Director has instructed that Board decisions addressing obviousness in the design patent context must follow the *LKQ* decision.”); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

The obviousness inquiry starts with a “primary reference” that is “something in existence” (*LKQ* factual inquiry one) and is “visually similar.” *LKQ*, 102 F.4th at 1293. Once a primary reference is found, differences between the primary reference

and the patented design are determined (*LKQ* factual inquiry two) by comparing the visual appearance from the perspective of an ordinary designer in the field of the article of manufacture (*LKQ* factual inquiry three). *Id.* at 1298. If the differences between the primary reference and the patented design are de minimis, then the design is invalid as obvious without the need to consider any secondary reference. *In re Nalbandian*, 661 F.2d 1214, 1217 (C.C.P.A. 1981); MPEP § 1504.03(II) (“Examiners are advised that differences between the claimed design and a primary reference may be held to be minor in nature and unrelated to the overall aesthetic appearance of the design with or without the support of secondary references.”). Secondary considerations should be taken into account if evidence is present (*LKQ* factual inquiry four).

A design patent is invalid for obviousness if an ordinary designer in the field would have been motivated to modify the prior art design to create the same overall visual appearance as the claimed design. *LKQ*, 102 F.4th at 1299–1300. The inquiry must focus on the visual impression of the claimed design as a whole and not on selected individual pieces. *Id.* at 1299. The “more visually similar the primary reference design is to the claimed design, the better positioned the patent challenger will be to prove its § 103 case.” *Id.* at 1298.

Under 35 U.S.C. § 103, the overall claimed design is what is important; small differences are inconsequential. *MRC Innovations*, 747 F.3d at 1335 (finding

insubstantial and obvious the addition of an ornamental surge stitching on top of a garment's existing seam even though no prior art had the same surge stitching in the same position as the claimed design); *In re Lamb*, 286 F.2d 610, 611–12 (C.C.P.A. 1961) (upholding the rejection of design claim as invalid because a slight change in some dimensions over the prior art was insignificant). “[T]he mere fact that there are differences over the prior art structures is not alone sufficient to justify a holding that the design is patentable.” *Id.* at 611.

In assessing obviousness, relevant factors include an “ordinary skilled designer’s experience, creativity,” “what market demands and industry customs exist in the relevant field,” and “which ornamental features are commonplace in the relevant field.” *LKQ*, 102 F.4th at 1299–1300 (internal quotation marks and citation omitted).

VIII. CLAIM CONSTRUCTION

The claim in a design patent is defined by the drawings. Unlike utility patents, claim construction for design patents does not require a detailed verbal description of the claimed design. As the Federal Circuit has recognized, for claim construction, “it may be ‘helpful to point out . . . various features of the claimed design as they relate to the accused design and the prior art.’” *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 680 (Fed. Cir. 2008).

The sole claim of the '032 Patent reads: “[t]he ornamental design for a dog toy set, as shown and described.” Ex. 1001. In accordance with 37 C.F.R. § 1.152, the scope of the '032 Patent is defined by the solid lines, not broken or dashed lines. *Door-Master Corp. v. Yorktowne, Inc.*, 256 F.3d 1308, 1313 (Fed. Cir. 2021). The figures of the '032 Patent include no broken or dashed lines. Accordingly, Petitioner considers the sole claim of the '032 Patent as based on the solid lines along with verbal descriptions of certain features relevant to the prior art. Here, the solid lines show that the '032 Patent design encompasses a rectangular box resembling a cigarette pack. Key ornamental features of the cigarette pack toy include a rectangular carton-like body, a hinged flip-top lid, a cylindrical cigarette-like element protruding from the top opening, a roof design at the top of the carton, a crest located directly under the middle of the roof design, and a horizontal solid line extending along the bottom of the carton. As a whole, the '032 Patent gives an ordinary designer an overall visual impression of a rectangular design for a cigarette box containing a cigarette. (Ex.1003, ¶ 62.)

IX. ORDINARY OBSERVER AND DESIGNER OF ORDINARY SKILL IN THE ART

A. The Ordinary Observer

The ordinary observer for purposes of the '032 Patent is a purchaser for dog toy sets. As one example, an ordinary observer could be a user of a dog toy set that

mimics a household item such as a dog owner, or a person purchasing a gift for a dog owner. Ex. 1003, ¶ 52.

B. The Designer of Ordinary Skill

The designer of ordinary skill would be someone with a degree in industrial or product design and two years of professional experience designing consumer products or pet products. In lieu of a degree, the designer of ordinary skill would need an additional one to two years of design experience. Ex. 1003, ¶ 61.

X. DETAILED EXPLANATION OF GROUNDS FOR UNPATENTABILITY

A. Ground 1: The '032 Patent Claim is Anticipated by the 1959 Life Magazine Marlboro® Ad

The 1959 Marlboro® Ad anticipates the claimed design because it discloses substantially the same overall cigarette-pack and cigarette-visual appearance shown in the '032 Patent. Any differences between the Marlboro® Ad and the claimed design are minor and would not be noticeable to an ordinary observer. Ex. 1003, ¶ 63. The overall visual impression of the designs is substantially the same. *Id.* The Marlboro® Ad discloses a cigarette packaging design with an overall appearance that is substantially the same as the elements of the '032 Patent. Ex. 1003, ¶ 64. The Marlboro® Ad discloses the same ornamental configuration depicted in the claimed design, including the cigarette-pack form and the protruding cylindrical cigarette element. *Id.*

As shown in the annotated figures below, both designs have the following features:

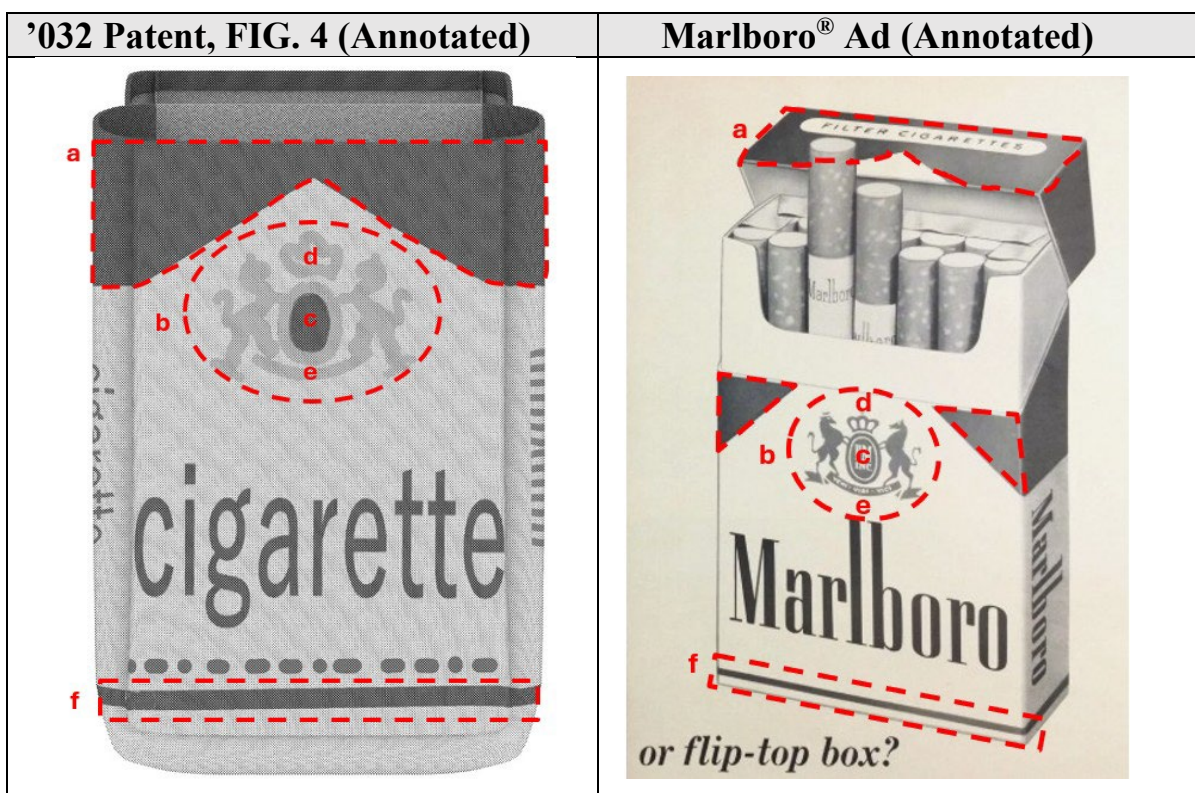
- a) A triangular roof element;
- b) A central crest;
- c) In the central crest, an outlined oval between two horse-like creatures;
- d) In the central crest, a crown above the outlined oval;
- e) In the central crest, a banner under the outlined oval connecting to the horse-like creatures;
- f) A solid line surrounding the base;
- g) Lower condensed text in the bottom portion of the box;
- h) Condensed text on the side of the box;
- i) A rectangular cigarette-pack silhouette;
- j) A “flip-top” or hinged aspect of the design at the top of the box;
- k) An individual cigarette protruding from the box; and
- l) The individual cigarette protruding having a two-toned appearance to show the cigarette filter.

Ex. 1003, ¶ 65.

These elements create the dominant ornamental impression of the design and would be immediately recognized by an ordinary observer. Ex. 1003, ¶ 66. Thus, the design of the '032 Patent is anticipated by the 1959 Marlboro® Ad.

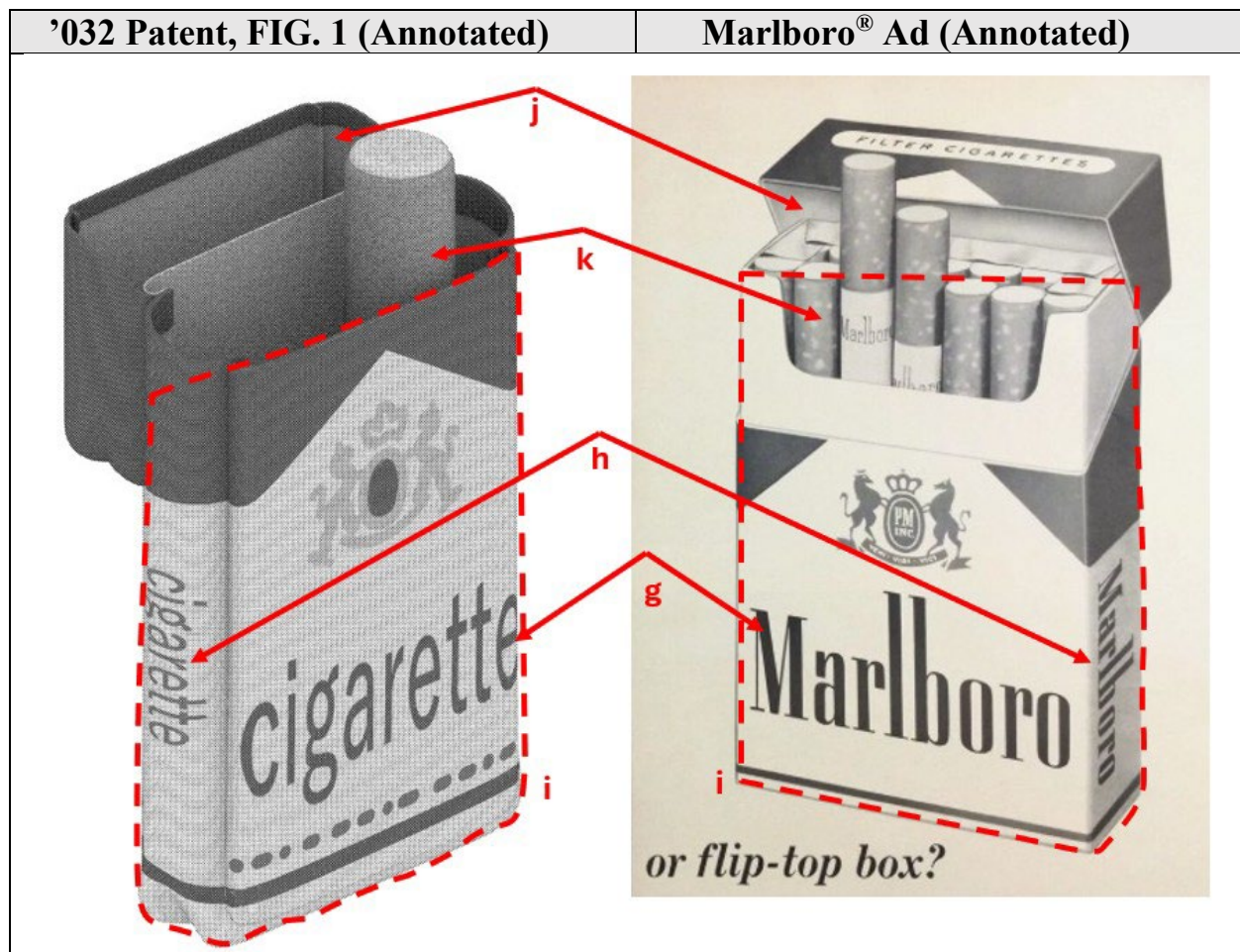
The annotated figures below highlight the substantially shared elements between the Fully Assembled and First Element of '032 Patent and the Marlboro®

cigarette box design disclosed in the Marlboro® Ad. Ex. 1003, ¶ 67. The annotations emphasize the **(a)** triangular roof element, **(b)** the central crest—with an **(c)** outlined oval between two horse-like creatures, **(d)** a crown above the oval, and **(e)** a banner under the oval connecting to the horse-like creatures—and **(f)** the solid line surrounding the base. *Id.*

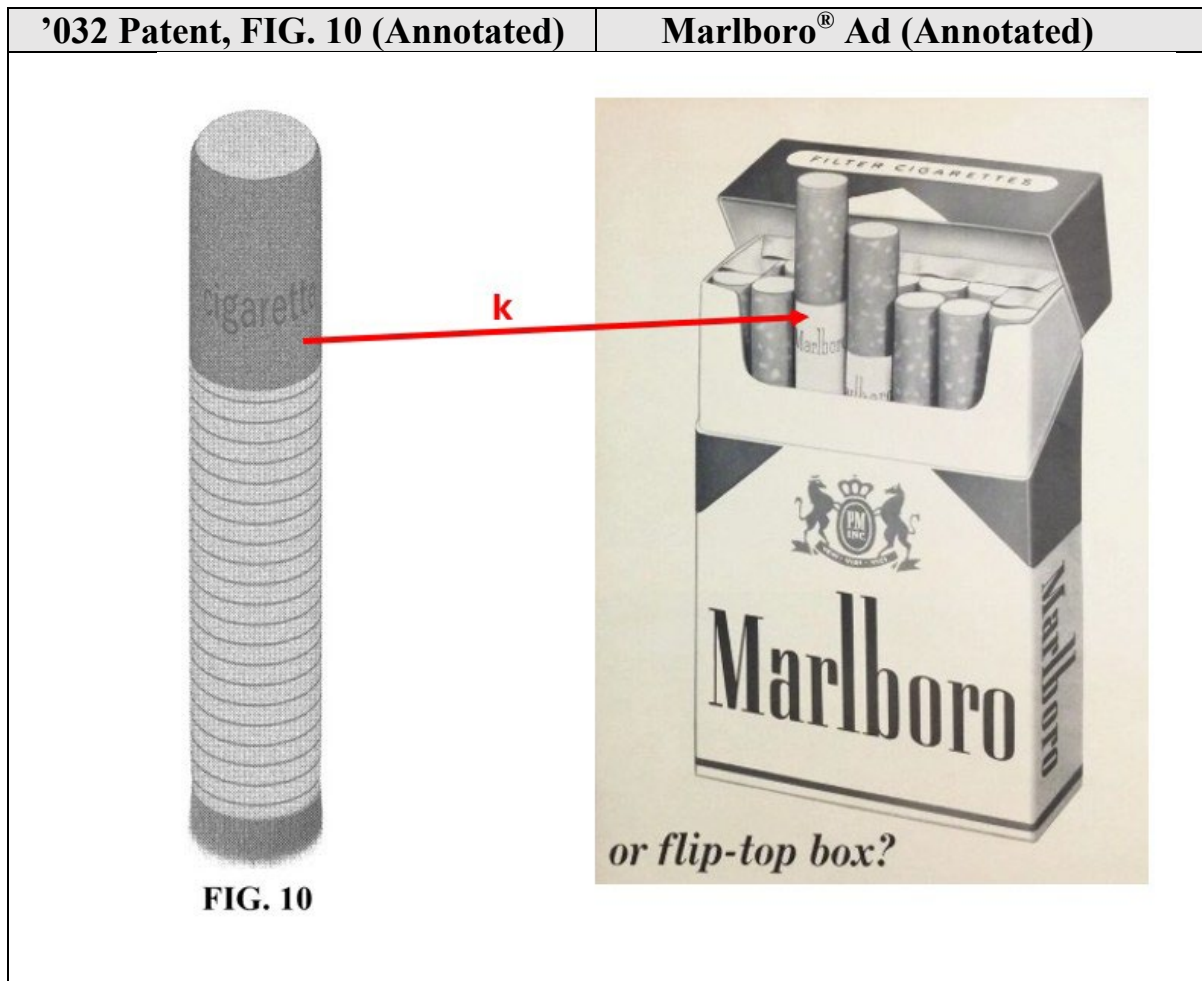


Other design similarities shown in the figures below include **(g)** the lower condensed text, **(h)** the condensed text on the side of the box, **(i)** the rectangular cigarette-pack silhouette, **(j)** the “flip-top” or hinged aspect of the design, and **(k)** an individual cigarette protruding from the box that is two-toned to show the cigarette filter, as shown below. *See* Ex. 1003, ¶ 68. The difference in text in the lower condensed text is not relevant to patentability. “Claim limitations directed to the

content of information and lacking a requisite functional relationship are not entitled to patentable weight because such information is not patent-eligible subject matter under 35 U.S.C. § 101.” *Praxair Distrib., Inc. v. Mallinckrodt Hosp. Prod. IP Ltd.*, 890 F.3d 1024, 1032 (Fed. Cir. 2018). Therefore, the text recited in the claim is not relevant, only that there is text.



The Marlboro® Ad also depicts the Second Element of the '032 Patent, which features an (k) individual cigarette that is two-toned to show the difference between the cigarette and the cigarette filter, as shown below. *See* Ex. 1003, ¶ 69.



These elements illustrate that the design of the '032 Patent created the dominant ornamental impression of the design and would be immediately recognized as substantially similar to the 1959 Marlboro® Ad by an ordinary observer. Ex. 1003, ¶ 70. Even if minor differences exist between the prior art and the claimed design, those differences would not alter the overall visual impression of the design and therefore cannot avoid anticipation under the ordinary observer test. Thus, the design of the '032 Patent is anticipated by the 1959 Marlboro® Ad.

B. Ground 2: The '032 Patent Claim is Rendered Obvious by the 1959 Life Magazine Marlboro® Ad in View of Knowledge in the Art

The 1959 Marlboro® Ad renders the claimed design obvious because it discloses the same dominant Marlboro® packaging appearance, and adapting that appearance to a dog toy was well within the knowledge of an ordinary designer. It is a primary reference for purposes of 35 U.S.C. § 103. The 1959 Marlboro® Ad is “something in existence,” and alone or in combination with the Knowledge in the Art is “visually similar” to the '032 Patent. *LKQ*, 102 F.4th at 1298; Ex. 1003, ¶ 59. *See also* Section X(A).

Developing dog toys that resemble everyday items was well known in the art. *See* Section VI(C)(5); Ex. 1003, ¶ 72. A designer of skill in the art would have known that dog toys were regularly designed to resemble consumer products. *Id.* For example, the Bad Spaniels and Chewy Vuiton products and the Ochoa art were known in the art. *Id.* The elements that convert these ornamental designs into dog toys are both functional and well known in the art. *Id.* For example, a dog toy must be a size that can fit in a dog’s mouth so it may be chewed by the dog. *Id.* As a result of that size, the dog toy has certain visual features. Ex. 1003, ¶ 72. But those features are not ornamental, they are functional because they enable the toy to be chewed by a dog. *Id.* A design patent cannot secure protection for functional elements. *See Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1293 (Fed. Cir. 2010). Only the

ornamental features are protected by the '032 Patent. *Id.* The ornamental features are those of the Marlboro® package shown in the 1959 Marlboro® Ad. Ex. 1003, ¶ 73. Therefore, the ornamental features of the '032 Patent are rendered obvious by the 1959 Marlboro® Ad in view of the Knowledge in the Art. *Id.*

C. Ground 3: The '032 Patent Claim is Obvious Over the 1959 Marlboro® Ad in View of Pitman and Knowledge in the Art

The 1959 Marlboro® Ad in view of Pitman and Knowledge in the Art renders the claimed design obvious because it discloses the same dominant Marlboro® packaging appearance, and adapting that appearance to a dog toy was well within the knowledge of an ordinary designer. The 1959 Marlboro® Ad is a proper primary reference under 35 U.S.C. § 103. The advertisement is “something in existence,” and its overall visual appearance is sufficiently similar to the claimed design such that it qualifies as a primary reference. *LKQ*, 102 F.4th at 1298; Ex. 1003, ¶ 59. *See also* Section X(A).

The 1959 Marlboro® Ad depicts the well-known Marlboro® cigarette package, which features a simple rectangular carton and a distinctive arrangement of cylindrical cigarette elements extending from the top of the package. Ex. 1003, ¶ 75. This configuration creates an overall visual appearance substantially similar to the design shown in Figures 1–17 of the '032 Patent. *Id.*

An ordinary designer would have been motivated to apply this recognizable cigarette-pack appearance to the dog-toy structure disclosed in Pitman. Ex. 1003, ¶

76. Designers in the pet-toy industry routinely create novelty toys that mimic familiar consumer products to produce humorous and visually distinctive products. *Id.* Such products include beverage containers, food packaging, and other everyday items. *Id.* The Marlboro[®] cigarette package shown in the 1959 Marlboro[®] Ad is a widely recognized consumer product with a distinctive appearance that would readily lend itself to such a novelty design. *Id.*

Pitman discloses a conventional dog-toy structure well known in the field of pet-toy design. Ex. 1003, ¶ 77. Pitman teaches an ornamental design of a plush dog toy that resembles a reindeer. *Id.* The patent depicts the toy from multiple perspectives, including perspective, top, side, and bottom views. *Id.*

Pitman specifically illustrates a dog toy that resembles a reindeer. Ex. 1003, ¶ 78. The body is plush. *Id.*



A designer of ordinary skill would have recognized the Marlboro[®] cigarette pack disclosed in the 1959 Marlboro[®] Ad as a well-known consumer product. The product has been used for over a century and has a distinctive and recognizable visual appearance. Ex. 1003, ¶ 79. Designers of pet toys frequently incorporate the visual appearance of such consumer products into novelty toy designs. *Id.*

Applying the Marlboro[®] cigarette-pack appearance to the dog-toy structure disclosed in Pitman would have been a straightforward and predictable design modification. Ex. 1003, ¶ 80. The Marlboro[®] advertisement provides the recognizable cigarette-pack configuration, including the rectangular carton and the

arrangement of cylindrical cigarette elements. *Id.* Pitman provides the underlying dog-toy structure. *Id.*

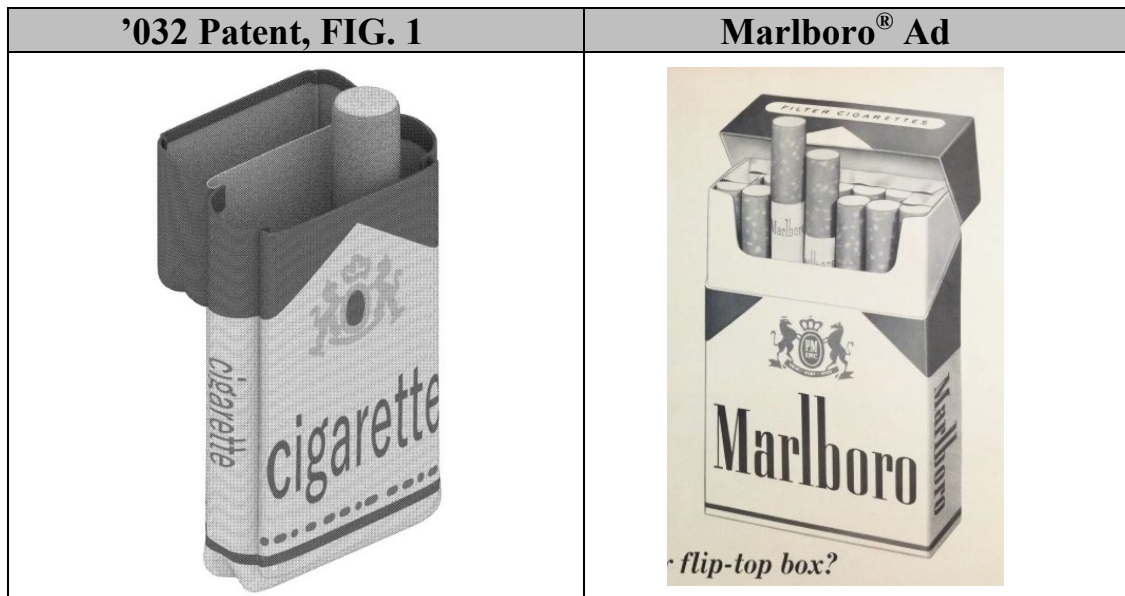
Combining these features would have yielded a dog toy resembling a cigarette pack containing multiple cylindrical elements, consistent with the overall visual appearance of the claimed design. Ex. 1003, ¶ 81. This modification reflects a predictable application of a familiar consumer-product appearance to an existing dog-toy form. Designers routinely use this approach in novelty pet-toy design. *Id.*

Because Pitman discloses the underlying plush dog-toy structure and the 1959 Marlboro[®] Ad discloses the distinctive cigarette-pack visual appearance incorporated into the claimed design, an ordinary designer would have been motivated to combine these references to achieve the claimed design. Ex. 1003, ¶ 82. Accordingly, the '032 Patent would have been obvious over the 1959 Marlboro[®] Ad in view of Pitman and Knowledge in the Art (as described above in Section X(B)).

D. Ground 4: The '032 Patent Claim is Obvious Over the 1959 Marlboro[®] Ad in View of the Chewy Frisco Review and Knowledge in the Art

The 1959 Marlboro[®] Ad in view of the Chewy Frisco Review and Knowledge in the Art renders the claimed design obvious because it discloses the same dominant Marlboro[®] packaging appearance, and adapting that appearance to a dog toy was well within the knowledge of an ordinary designer. The 1959 Marlboro[®] Ad

is a proper primary reference under 35 U.S.C. § 103. The advertisement is “something in existence,” and its overall visual appearance is sufficiently similar to the claimed design such that it qualifies as a primary reference. *LKQ*, 102 F.4th at 1298; Ex. 1003, ¶ 59. *See also* Section X(A).



The advertisement depicts the well-known Marlboro® cigarette package, which features a simple rectangular carton and a distinctive arrangement of cylindrical cigarette elements extending from the top of the package. Ex. 1003, ¶ 84. This configuration creates an overall visual appearance substantially similar to the design shown in Figures 1–17 of the '032 Patent. *Id.*

The Chewy.com product review page for the Frisco Plush Cigar Dog Toy (hereinafter “Chewy Frisco Review”) shows the Frisco toy, which is a plush dog toy shaped like a cigar, marketed as a novelty squeaky toy for dogs. Ex. 1003, ¶ 85. The Chewy Frisco Review includes multiple customer reviews from November 21, 2019

to January 22, 2020, describing the cigar-shaped toy and its use by dogs, as shown in the photo below attached to a review dated January 20, 2020. Ex. 1003, ¶ 86.



A designer of ordinary skill would have recognized the Marlboro[®] cigarette pack as a well-known consumer product. The product has been used for over a century and has a distinctive and recognizable visual appearance. Ex. 1003, ¶ 87. Designers of pet toys frequently incorporate the visual appearance of such consumer products into novelty toy designs. *Id.*

Applying the Marlboro[®] cigarette-pack appearance to the cigar-shaped, dog-toy structure disclosed in the Chewy Frisco Review would have been a straightforward and predictable design modification. Ex. 1003, ¶ 90. The Marlboro[®] advertisement provides the recognizable cigarette-pack configuration, including the rectangular carton and the arrangement of cylindrical cigarette elements. *Id.* The Chewy Frisco Review provides the underlying dog-toy structure in the form of the

cigarette that protrudes from the '032 design. *Id.* The Chewy Frisco Review also shows that tobacco-themed dog toys were known in the art. *Id.*

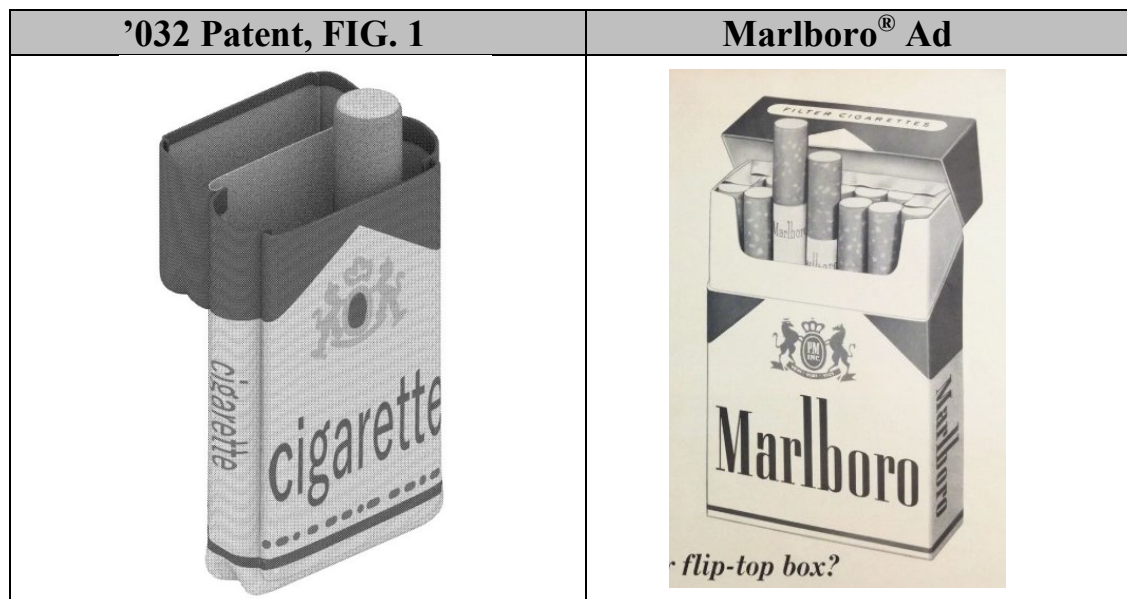
Combining these features would have yielded a dog toy resembling a cigarette pack containing multiple cylindrical elements, consistent with the overall visual appearance of the claimed design. Ex. 1003, ¶ 91. This modification reflects a predictable application of a familiar consumer-product appearance to an existing dog-toy form. Designers routinely use this approach in novelty pet-toy design. *Id.*

Because the Chewy Frisco Review discloses the underlying dog-toy structure in the form of a cigar and the 1959 Marlboro® Ad discloses the distinctive cigarette-pack visual appearance incorporated into the claimed design, an ordinary designer would have been motivated to combine these references to achieve the claimed design. Accordingly, the '032 Patent would have been obvious over the 1959 Marlboro® Ad in view of the Chewy Frisco Review and Knowledge in the Art (as described above in Section X(B)).

E. Ground 5: The '032 Patent Claim is Obvious Over the 1959 Marlboro® Ad in View of Jones and Knowledge in the Art

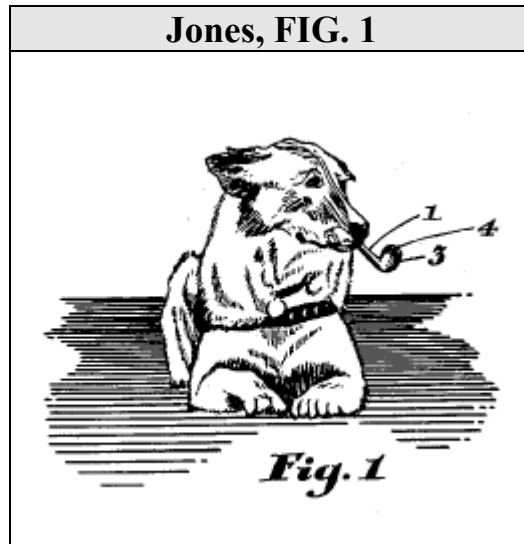
The 1959 Marlboro® Ad in view of Jones and Knowledge in the Art renders the claimed design obvious because it discloses the same dominant Marlboro® packaging appearance, and adapting that appearance to a dog toy was well within the knowledge of an ordinary designer. The 1959 Marlboro® Ad is a proper primary reference under 35 U.S.C. § 103. The advertisement is “something in existence,” and

its overall visual appearance is sufficiently similar to the claimed design such that it qualifies as a primary reference. *LKQ*, 102 F.4th at 1298; Ex. 1003, ¶ 59. *See also* Section X(A).



The advertisement depicts the well-known Marlboro® cigarette package, which features a simple rectangular carton and a distinctive arrangement of cylindrical cigarette elements extending from the top of the package. Ex. 1003, ¶ 96. This configuration creates an overall visual appearance substantially similar to the design shown in Figures 1–17 of the '032 Patent. *Id.*

Jones shows a “dog’s toy which, when held in the mouth of a dog or puppy, will produce a comical effect as though the animal were smoking a pipe”. Ex. 1009 at 1:4–9. The dog toy is a novelty tobacco pipe for a dog. Ex. 1003, ¶ 97.



A designer of ordinary skill would have recognized the Marlboro[®] cigarette pack as a well-known consumer product. The product has been used for over a century and has a distinctive and recognizable visual appearance. Ex. 1003, ¶ 98. Designers of pet toys frequently incorporate the visual appearance of such consumer products into novelty toy designs. *Id.*

Applying the Marlboro[®] cigarette-pack appearance to the pipe-shaped, dog-toy structure disclosed in Jones would have been a straightforward and predictable design modification. Ex. 1003, ¶ 99. The Marlboro[®] advertisement provides the recognizable cigarette-pack configuration, including the rectangular carton and the arrangement of cylindrical cigarette elements. *Id.* Jones provides the underlying dog-toy structure from the '032 design. *Id.* Jones also shows that tobacco-themed dog toys were known in the art. *Id.*

Combining these features would have yielded a dog toy resembling a cigarette pack containing multiple cylindrical elements, consistent with the overall visual appearance of the claimed design. Ex. 1003, ¶ 100. This modification reflects a predictable application of a familiar consumer-product appearance to an existing dog-toy form. Designers routinely use this approach in novelty pet-toy design. *Id.*

Because Jones discloses the underlying dog-toy structure in the form of a tobacco pipe and the 1959 Marlboro® Ad discloses the distinctive cigarette-pack visual appearance incorporated into the claimed design, an ordinary designer would have been motivated to combine these references to achieve the claimed design. Ex. 1003, ¶ 101. Accordingly, the '032 Patent would have been obvious over the 1959 Marlboro® Ad in view of the Jones and Knowledge in the Art (as described above in Section X(B)).

F. Ground 6: The '032 Patent Claim is Anticipated by the '413 Registration

The '413 Registration anticipates the claimed design because it discloses substantially the same overall cigarette-pack and cigarette-visual appearance shown in the '032 Patent. The '413 Registration anticipates the claimed design because it discloses the same cigarette-pack configuration shown in the '032 Patent. The '413 Registration discloses a cigarette packaging design with an overall appearance that is substantially the same as the elements of the '032 Patent, as explained below. Ex. 1003, ¶ 102. In the eye of an ordinary observer, giving such attention as a purchaser

usually gives, the '032 Patent's claimed design is substantially the same as the corresponding design in the '413 Registration such that the resemblance would deceive the observer. Ex. 1003, ¶ 103.

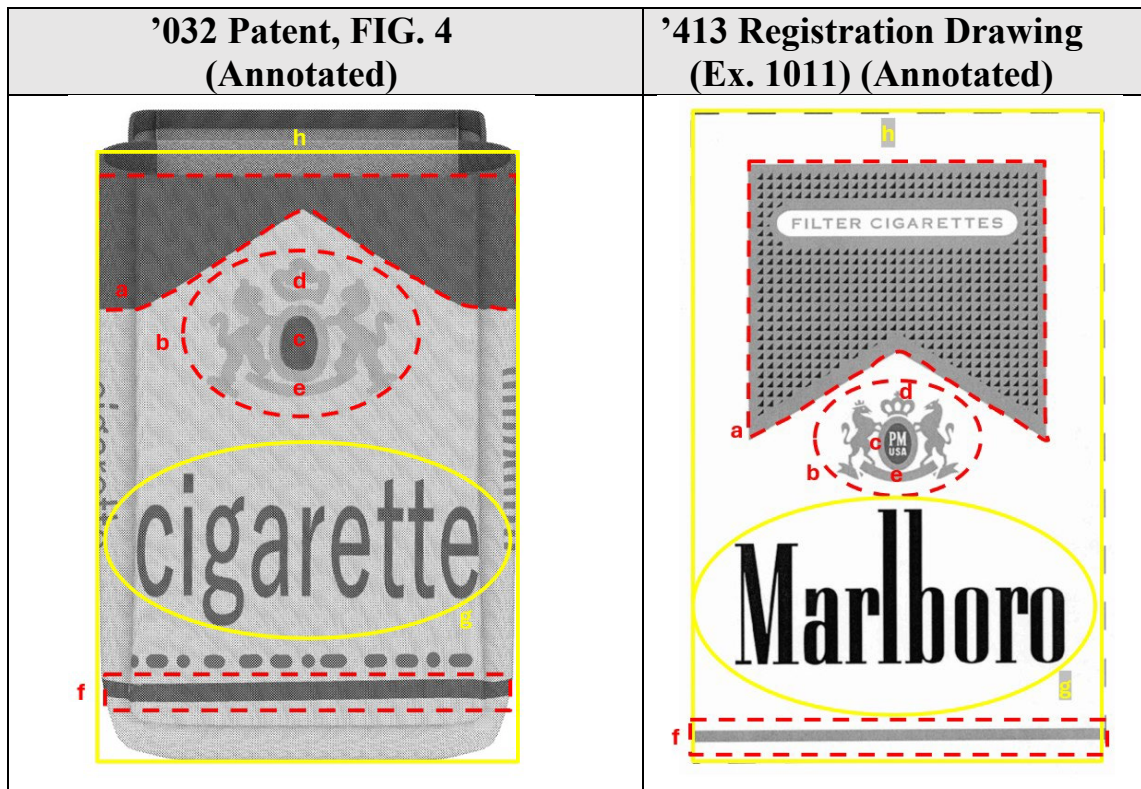
As shown in the annotated figures below, both designs have the following features:

- a) A triangular roof element;
- b) A central crest;
- c) In the central crest, an outlined oval between two horse-like creatures;
- d) In the central crest, a crown above the outlined oval;
- e) In the central crest, a banner under the outlined oval connecting to the horse-like creatures;
- f) A solid line surrounding the base;
- g) Lower condensed text in the bottom portion of the box;
- h) A rectangular cigarette-pack silhouette; and
- i) A “flip-top” or hinged aspect of the design at the top of the box.

These elements create the dominant ornamental impression of the design and would be immediately recognized by an ordinary observer. Ex. 1003, ¶ 104. Thus, the design of the '032 Patent is anticipated by the '413 Registration. Ex. 1003, ¶ 105.

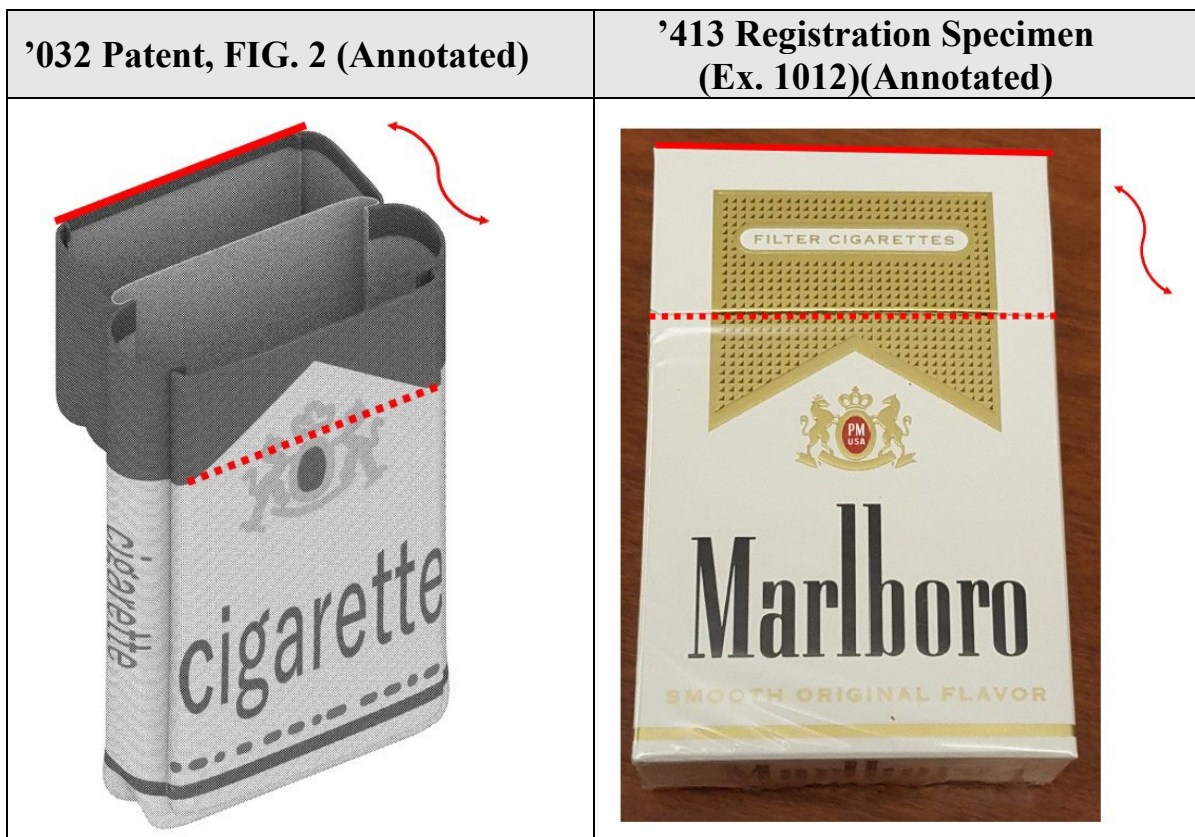
The annotated figures below highlight the substantially shared elements between the Fully Assembled and First Element of the '032 Patent and the Marlboro® cigarette box design disclosed in the '413 Registration. Ex. 1003, ¶106.

The annotations emphasize **(a)** the triangular roof element, **(b)** the central crest—with **(c)** an outlined oval between two horse-like creatures, **(d)** a crown above the oval, and **(e)** a banner under the oval connecting to the horse-like creatures—**(f)** the solid line surrounding the base, **(g)** lower condensed text in the bottom portion of the box, and **(h)** a rectangular cigarette-pack silhouette. Ex. 1003, ¶ 106. The difference in text in the lower condensed text is not relevant to patentability. “Claim limitations directed to the content of information and lacking a requisite functional relationship are not entitled to patentable weight because such information is not patent-eligible subject matter under 35 U.S.C. § 101.” *Praxair.*, 890 F.3d at 1032. Therefore, the text recited in the claim is not relevant, only that there is text.



These elements create the dominant ornamental impression of the design and would be immediately recognized by an ordinary observer. *See also*, Ex. 1003, ¶ 107. Figures 1 through 9 of the '032 Patent depict a hinge on the cigarette-pack toy that allows the top portion of the pack to swing open and closed. This hinging feature enables a user to open the cigarette-pack toy and insert the individual cigarette-shaped toys into the pack. Ex. 1003, ¶ 108. The owner of the '413 Registration has submitted multiple specimens demonstrating bona fide use of the registered mark on cigarette packaging that incorporates the same hinged pack-top structure. Ex. 1012; Ex. 1005 at 28, 42, 143. As shown in the side-by-side comparison below, the packaging depicted in those specimens includes a hinged top design that opens and

closes in the same manner as the hinging feature illustrated in the '032 Patent. Ex. 1003, ¶ 108.



The '032 Patent also includes a cylindrical toy element resembling an individual cigarette. However, this element does not materially alter the dominant visual impression of the design. Any alleged difference between the '413 Registration and the figures of the '032 Patent is immaterial to the invalidity of the '032 Patent's claimed design. Ex. 1003, ¶ 109.

First, the pack-shaped component dominates the overall design and immediately evokes the appearance of cigarette packaging. Second, the cylindrical element merely reinforces the cigarette theme already disclosed by the Marlboro®

reference. Third, the Board will consider the visual impressions created by the '032 Patent's claimed design as a whole and focuses on the dominant ornamental features of the claimed article. *MRC Innovations*, 747 F.3d at 1331. Accordingly, the addition of the cylindrical element does not meaningfully distinguish the claimed design from the prior art packaging design. Ex. 1003, ¶¶ 110, 113.

Because of the nature of a trademark registration that focuses on a subject mark, the '413 Registration does not depict the individual cigarettes inside the carton. *See* Ex. 1003, ¶ 110. But based on the specimens submitted in connection with the '413 Registration, it is understood that this trademark is being used on product packaging that contains individual cigarettes. Ex. 1003, ¶ 114. The fact that the '413 Registration and the '032 Patent design are slightly different from one another does not change that the ***overall visual effect*** of the claimed design in the '032 Patent and the design disclosed in the '413 Registration. The overall visual effect would be substantially the same to an ordinary observer. Ex. 1003, ¶ 116. This minimal difference is irrelevant because the law is clear that “minor differences cannot prevent a finding of anticipation.” *Int'l Seaway*, 589 F.3d at 1243. When focusing on just the claimed parts of the design, both designs have substantially the same overall appearance such as a triangular roof element; a central crest with an outlined oval between two horse-like creatures, a crown above the outlined oval, and a banner under the outlined oval connecting to the horse-like creatures; lower

condensed text in the bottom portion of the box; a rectangular cigarette pack silhouette; and a solid line surrounding the base. Such minor differences do not change the conclusion that the '413 Registration anticipates the '032 Patent. The overall visual effect of the claimed design in the '032 Patent and the design disclosed in the '413 Registration would be substantially the same to an ordinary observer. Ex. 1003, ¶ 116.

G. Ground 7: The '032 Patent Claim is Rendered Obvious by the '413 Registration in View of Knowledge in the Art

The '413 Registration renders the claimed design obvious because it discloses the same dominant Marlboro[®] packaging appearance, and adapting that appearance to a dog toy was well within the knowledge of an ordinary designer. The '413 Registration is a primary reference for purposes of 35 U.S.C. § 103. The '413 Registration is “something in existence,” and alone or in combination with the Knowledge in the Art is “visually similar” to the '032 Patent. *LKQ*, 102 F.4th at 1298; Ex. 1003, ¶ 59. *See also* Section X(E).

Developing dog toys that resemble everyday items was well known in the art. *See* Section VI(C)(5); Ex. 1003, ¶ 121. A designer of skill in the art would have known that dog toys were regularly designed to resemble consumer products. *Id.* For example, the Bad Spaniels and Chewy Vuiton products and the Ochoa art were known in the art. *See* Section VI(C)(5); Ex. 1003, ¶ 121. The elements that convert these ornamental designs into dog toys are both functional and well known in the

art. *Id.* For example, a dog toy must be a size that can fit in a dog's mouth so it can be chewed by the dog. *Id.* As a result of that size, the dog toy has certain visual features. *Id.* But those features are not ornamental, they are functional because they enable the toy to be chewed by a dog. *Id.* A design patent cannot secure protection for functional elements. *See Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1293 (Fed. Cir. 2010). Only the ornamental features are protected by the '032 Patent. *Id.* The ornamental features are those of the Marlboro® package shown in the '413 Registration. Ex. 1003, ¶ 122. Therefore, the ornamental features of the '032 Patent are rendered obvious by the '413 Registration in view of the Knowledge in the Art. *Id.*

H. Ground 8: The '032 Patent Claim is Obvious Over the '413 Registration in View of Pitman and Knowledge in the Art

The '413 Registration in view of Pitman and Knowledge in the Art renders the claimed design obvious because it discloses the same dominant Marlboro® packaging appearance, and adapting that appearance to a dog toy was well within the knowledge of an ordinary designer. The '413 Registration is a proper primary reference under 35 U.S.C. § 103. The registration is “something in existence,” and its overall visual appearance is sufficiently similar to the claimed design such that it qualifies as a primary reference. *LKQ*, 102 F.4th at 1298; Ex. 1003, ¶ 59. *See also* Section X(E).

The '413 Registration depicts the well-known Marlboro® cigarette package, which features a simple rectangular carton. Ex. 1003, ¶ 125. This configuration creates an overall visual appearance substantially similar to the design shown in Figures 1–17 of the '032 Patent. *Id.*

An ordinary designer would have been motivated to apply this recognizable cigarette-pack appearance to the dog-toy structure disclosed in Pitman. Ex. 1003, ¶ 125. Designers in the pet-toy industry routinely create novelty toys that mimic familiar consumer products to produce humorous and visually distinctive products. Ex. 1003, ¶ 126. Such products include beverage containers, food packaging, and other everyday items. *Id.* The Marlboro® cigarette package shown in the '413 Registration is a widely recognized consumer product with a distinctive appearance that would readily lend itself to such a novelty design. *Id.*

Pitman discloses a conventional dog-toy structure well known in the field of pet-toy design. Ex. 1003, ¶ 127. Pitman teaches an ornamental design of a plush dog toy that resembles a reindeer. *Id.* The patent depicts the toy from multiple perspectives, including perspective, top, side, and bottom views. *Id.*

Pitman specifically illustrates a dog toy that resembles a reindeer. Ex. 1003, ¶ 128. The body is plush. *Id.*



A designer of ordinary skill would have recognized the Marlboro[®] cigarette pack as a well-known consumer product. The product has been used for over a century and has a distinctive and recognizable visual appearance. Ex. 1003, ¶ 129. Designers of pet toys frequently incorporate the visual appearance of such consumer products into novelty toy designs. *Id.*

Applying the Marlboro[®] cigarette-pack appearance to the dog-toy structure disclosed in Pitman would have been a straightforward and predictable design modification. Ex. 1003, ¶ 130. The '413 Registration provides the recognizable cigarette-pack configuration, including the rectangular carton. *Id.* Pitman provides the underlying dog-toy structure. *Id.*

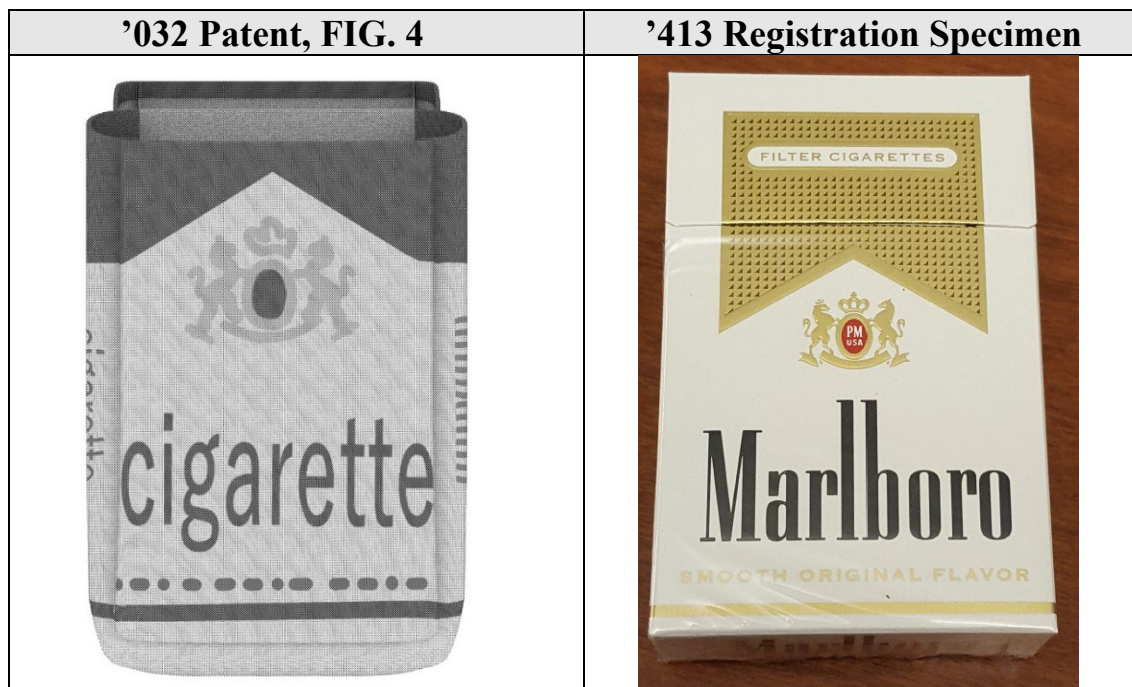
Combining these features would have yielded a dog toy resembling a cigarette pack, consistent with the overall visual appearance of the claimed design. Ex. 1003, ¶ 130. This modification reflects a predictable application of a familiar consumer-product appearance to an existing dog-toy form. Designers routinely use this approach in novelty pet-toy design. *Id.*

Because Pitman discloses the underlying plush dog-toy structure and the '413 Registration discloses the distinctive cigarette-pack visual appearance incorporated into the claimed design, an ordinary designer would have been motivated to combine these references to achieve the claimed design. Ex. 1003, ¶ 131. Accordingly, the '032 Patent would have been obvious over the '413 Registration in view of Pitman and Knowledge in the Art (as described above in Section X(G)).

I. Ground 9: The '032 Patent Claim is Obvious Over the '413 Registration in View of the Chewy Frisco Review and Knowledge in the Art

The '413 Registration in view of the Chewy Frisco Review and Knowledge in the Art renders the claimed design obvious because it discloses the same dominant Marlboro® packaging appearance, and adapting that appearance to a dog toy was well within the knowledge of an ordinary designer. The '413 Registration is a proper primary reference under 35 U.S.C. § 103. The registration is “something in existence,” and its overall visual appearance is sufficiently similar to the claimed

design such that it qualifies as a primary reference. *LKQ*, 102 F.4th at 1298; Ex. 1003, ¶ 59. *See also* Section X(E).



The '413 Registration depicts the well-known Marlboro® cigarette package, which features a simple rectangular carton. Ex. 1003, ¶ 134. This configuration creates an overall visual appearance substantially similar to the design shown in Figures 1–17 of the '032 Patent. *Id.*

As described in Section X(D) above, the Chewy Frisco Review shows the Frisco toy, which is a plush dog toy shaped like a cigar, marketed as a novelty squeaky toy for dogs. Ex. 1003, ¶ 135. The Chewy Frisco Review includes multiple customer reviews from November 21, 2019 to January 22, 2020, describing the cigar-shaped toy and its use by dogs, as shown in the photo below attached to a review dated January 20, 2020. *Id.*

Image From Chewy Frisco Review



A designer of ordinary skill would have recognized the Marlboro[®] cigarette pack as a well-known consumer product. The product has been used for over a century and has a distinctive and recognizable visual appearance. Ex. 1003, ¶ 136. Designers of pet toys frequently incorporate the visual appearance of such consumer products into novelty toy designs. *Id.* The Chewy Frisco Review also shows that tobacco-themed dog toys were known in the art. *Id.*

Applying the Marlboro[®] cigarette-pack appearance to the cigar-shaped, dog-toy structure disclosed in the Chewy Frisco Review would have been a straightforward and predictable design modification. Ex. 1003, ¶ 137. The '413 Registration provides the recognizable cigarette-pack configuration, i.e., the rectangular carton. *Id.* The Chewy Frisco Review provides the underlying dog-toy structure in the form of the cigarette that protrudes from the '032 design. *Id.*

Combining these features would have yielded a dog toy resembling a cigarette pack containing multiple cylindrical elements, consistent with the overall visual appearance of the claimed design. Ex. 1003, ¶ 137. This modification reflects a predictable application of a familiar consumer-product appearance to an existing dog-toy form. Designers routinely use this approach in novelty pet-toy design. *Id.*

Because the Chewy Frisco Review discloses the underlying cigar-shaped, dog-toy structure and the '413 Registration discloses the distinctive cigarette-pack visual appearance incorporated into the claimed design, an ordinary designer would have been motivated to combine these references to achieve the claimed design. Ex. 1003, ¶ 138. Accordingly, the '032 Patent would have been obvious over the '413 Registration in view of the Chewy Frisco Review and Knowledge in the Art (as described above in Section X(G)).

J. Ground 10: The '032 Patent Claim is Obvious Over the 413 Registration in View of Jones and Knowledge in the Art

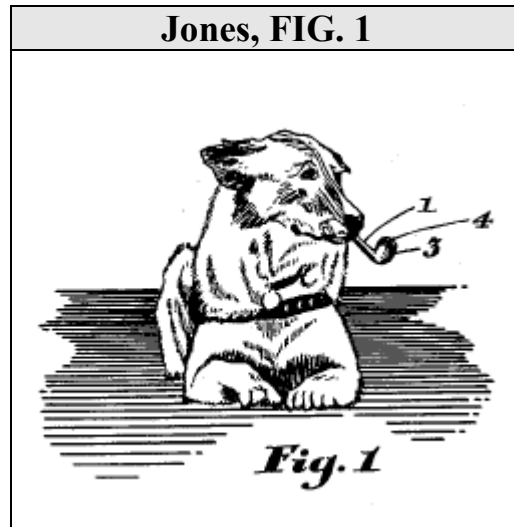
The '413 Registration in view of Jones and Knowledge in the Art renders the claimed design obvious because it discloses the same dominant Marlboro® packaging appearance, and adapting that appearance to a dog toy was well within the knowledge of an ordinary designer. The '413 Registration is a proper primary reference under 35 U.S.C. § 103. The registration is “something in existence,” and its overall visual appearance is sufficiently similar to the claimed design such that it

qualifies as a primary reference. *LKQ*, 102 F.4th at 1298; Ex. 1003, ¶ 59. *See also* Section X(E).

The '413 Registration depicts the well-known Marlboro® cigarette package, which features a simple rectangular carton. Ex. 1003, ¶ 141. This configuration creates an overall visual appearance substantially similar to the design shown in Figures 1–17 of the '032 Patent. *Id.*

An ordinary designer would have been motivated to apply this recognizable cigarette-pack appearance to the dog-toy structure disclosed in Jones. Ex. 1003, ¶ 142. Designers in the pet-toy industry routinely create novelty toys that mimic familiar consumer products to produce humorous and visually distinctive products. *Id.* Such products include beverage containers, food packaging, and other everyday items. *Id.* The Marlboro® cigarette package shown in the '413 Registration is a widely recognized consumer product with a distinctive appearance that would readily lend itself to such a novelty design. *Id.*

Jones shows a “dog’s toy which, when held in the mouth of a dog or puppy, will produce a comical effect as though the animal were Smoking a pipe”. Ex. 1009 at 1:4–9. The dog toy is a novelty tobacco pipe for a dog. Ex. 1003, ¶ 143.



A designer of ordinary skill would have recognized the Marlboro[®] cigarette pack as a well-known consumer product. The product has been used for over a century and has a distinctive and recognizable visual appearance. Ex. 1003, ¶ 144. Designers of pet toys frequently incorporate the visual appearance of such consumer products into novelty toy designs. *Id.*

Applying the Marlboro[®] cigarette-pack appearance to the pipe-shaped, dog-toy structure disclosed in Jones would have been a straightforward and predictable design modification. Ex. 1003, ¶ 145. The '413 Registration provides the recognizable cigarette-pack configuration, including the rectangular carton. *Id.* Jones provides the underlying dog-toy structure from the '032 design. *Id.* Jones also shows that tobacco-themed dog toys were known in the art. *Id.*

Combining these features would have yielded a dog toy resembling a cigarette pack consistent with the overall visual appearance of the claimed design. Ex. 1003, ¶ 146. This modification reflects a predictable application of a familiar consumer-

product appearance to an existing dog-toy form. Designers routinely use this approach in novelty pet-toy design. *Id.*

Because Jones discloses the underlying dog-toy structure in the form of a tobacco pipe and the '413 Registration discloses the distinctive cigarette-pack visual appearance incorporated into the claimed design, an ordinary designer would have been motivated to combine these references to achieve the claimed design. Ex. 1003, ¶ 147. Accordingly, the '032 Patent would have been obvious over the '413 Registration in view of the Jones and Knowledge in the Art (as described above in Section X(G)).

XI. CONCLUSION

Because the prior art discloses or renders obvious the claimed design, the Board should institute review and cancel the sole claim of the '032 Patent.

XII. FEES

Petitioner concurrently electronically submits the required fees for this Petition. The Board is authorized to charge Arnold & Porter Kaye Scholer LLP's deposit account, No. 50-2387, for any fee deficiency.

Dated: March 24, 2026

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Post-Grant Review of U.S. Patent No. D 1,081,032, as well as the accompanying Power of Attorney, and Exhibits 1001–1010 have been served in their entireties using Federal Express pursuant to 37 C.F.R. § 42.205 on March 24, 2026:

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Dated: March 24, 2026

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of 37 C.F.R. § 42.24(a)(1)(i). This brief (including figure labels and annotations) contains 11,971 words as calculated by the “Word Count” feature of Microsoft Word 2016, the word processing program used to create it, and manual counting of the annotations in the figures.

The undersigned further certifies that this brief complies with the typeface requirements of 37 C.F.R. § 42.6(a)(2)(ii) and typestyle requirements of 37 C.F.R. § 42.6(a)(2)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font.

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