IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent of:	Theodore L. Brann
U.S. Patent No.:	6,059,576
Issue Date:	May 9, 2000
Appl. Serial No.:	08/976,228
Filing Date:	November 21, 1997
Title:	TRAINING AND SAFETY DEVICE, SYSTEM AND METHOD TO AID IN PROPOER MOVEMENT DURING PHYSICAL ACTIVITY

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PETITIONER'S NOTICE RANKING AND EXPLAINING MATERIAL DIFFERENCES BETWEEN PETITIONS FOR *INTER PARTES* REVIEW OF U.S. PATENT NO. 6,059,576

Apple is concurrently filing two petitions (IPR2022-00037 and IPR2022-00040) challenging U.S. Patent No. 6,059,576 (the "'576 Patent"). Pursuant to the November 2019 Trial Practice Guide Update, this paper provides: "(1) a ranking of the petitions in the order in which [Petitioner] wishes the Board to consider the merits, if the Board uses its discretion to institute any of the petitions, and (2) a succinct explanation of the differences between the petitions, why the issues addressed by the differences are material, and why the Board should exercise its discretion to institute additional petitions." Trial Practice Guide, 59-61.

I. Ranking of Petitions

Although Apple believes that institution of both petitions would promote the AIA's goals of providing an effective and efficient alternative to district court litigation with respect to claims that Patent Owner has serially asserted, Apple respectfully requests that the Board consider the petitions in the following order:

Rank	Petition	Primary Reference(s)
1	IPR2022-00037	Ono
2	IPR2021-00040	Allum and Gesink

II. Material Differences Between the Two Petitions

Both petitions demonstrate the obviousness of claims of the '576 Patent, but they do so on the basis of different combinations of references that address the respectively challenged claims in materially different ways. At bottom, the petitions are non-redundant in their reliance on these different references.

IPR2022-00037 relies on Ono as its primary reference. Ono describes "an electronic wrist watch to which a pedometer is installed," which can be used to monitor and analyze physical activities including walking, jogging, and running. APPLE-1101, 1:5-10, 2:30-32, 3:10-11, FIG. 1. For example, an included processor calculates a number of steps, number of steps per minute, mean walking speed, and distance walked based on movement data and user-defined parameters; based on the data and parameters, the processor determines when the wearer reaches a user-defined target distance, and generates an alarm. APPLE-1101, 8:60-9:12, 12:17-35, 13:23-25, 14:44-45, 15:10-16:4, 17:26-34, FIG. 18.

In contrast, IPR2022-00040 relies on each of Allum and Gesink as primary references. Allum, for example, describes a body-worn device that measures the "body sway angle and body sway angular velocity" for "subjects who are prone to abnormal falling or who wish to improve their movement control." APPLE-1008, 3:59-62, 8:66-9:1, FIG. 2. An included microprocessor collects and interprets movement data from the device's sensors, and detects whether a subject's "body sway is approaching or has exceeded the limits of safety, *i.e.*, the subject's angular sway has approached within a certain percentage of the angular cone of stability." APPLE-1008, 14:7-11. If so, a "fall warning" is provided by visual, auditory, and/or tactile feedback systems. *Id.*, 15:48-50, 7:56-64.

As is apparent, Ono and Allum offer distinct disclosures that, in combination with various secondary references, demonstrate the obviousness of the '576 Patent in materially different ways. Additionally, the motivations to combine the distinct sets of references presented in the two Petitions materially differ. In at least these ways, Apple's two petitions offer non-redundant, non-duplicative, and substantially dissimilar challenges. In summary, each petition provides strong showings of obviousness, without repeating the same theories. As such, Apple respectfully requests that the Board institute trial on both petitions.

III. Additional Considerations Supporting Institution of Both Petitions

LoganTree asserts a large number of '576 Patent claims (33) against Apple. Apple attempted to fully address all 33 claims in a single petition, but word-count constraints necessitated the splitting of grounds into two petitions, both of which meritoriously address the asserted claims, but in materially different ways. Apple respectfully submits that Apple's filing of two IPR petitions resulted from LoganTree's choice to assert 33 claims, and that, for at least that reason, the Board would be justified in exercising its discretion to institute both petitions.[1]

[1] Notably, FitBit Inc. and Garmin Int'l Inc. each addressed similar numbers of '576 Patent claims in two petitions, and the Board instituted both of Garmin's petitions. *See* IPR2017-00256, IPR2017-00258, IPR2018-00564, IPR2018-00565.

Indeed, the institution of both petitions would promote the AIA's objectives of providing an effective and efficient alternative to district court litigation with respect to claims that LoganTree has serially asserted, and for at least that reason would be in the public interest. *See*, *e.g.*, Sen. Rep. No. 110-259 (2008)(Leahy, Judiciary Committee Report)("The legislation is designed to…improve patent quality and limit unnecessary and counterproductive litigation costs"), H.R. Rep. No. 112-98, pt. 1, pp. 39-40.

In more detail, LoganTree asserted the '576 Patent against a first defendant less than six months after the '576 Patent's emergence from a LoganTree-initiated reexamination that resulted in the addition of over 100 claims. APPLE-1007, 1, 470-473. Over the past six years, LoganTree has serially asserted the '576 Patent's broad claims against numerous defendants who have brought a variety of technologies to the market—Apple being just one of several companies targeted throughout the country. *See* APPLE-1004, APPLE-1004, APPLE-1031, APPLE-1032, APPLE-1033, APPLE-1034, APPLE-1035, APPLE-1036, APPLE-1037.

Indeed, the unreasonably broad scope of the '576 Patent's numerous asserted claims is evidenced by Apple's demonstration of the obviousness of those claims through the materially different combinations of prior art references leveraged in Apple's two petitions. For at least these additional reasons, Apple respectfully submits that the Board should exercise its discretion to institute both petitions.

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