

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARTSANA USA, INC.,
Petitioner,

v.

KOLCRAFT ENTERPRISES, INC.,
Patent Owner.

Case IPR2014-01053
Patent 8,388,501 B2

Before JAMES T. MOORE, HYUN J. JUNG, and
BARRY L. GROSSMAN, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

DECISION
Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

A. Background

Artsana USA, Inc. (“Petitioner”) filed a Corrected Petition (Paper 5, “Pet.”) seeking to institute an *inter partes* review of claims 1–20 of U.S. Patent No. 8,388,501 B2 (“the ’501 patent”) pursuant to 35 U.S.C. §§ 311–

319. Kolcraft Enterprises, Inc. (“Patent Owner”) filed a Preliminary Response (Paper 11, “Prelim. Resp.”). We have jurisdiction under 35 U.S.C. § 314, which provides that an *inter partes* review may not be instituted “unless . . . there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”

Petitioner contends the challenged claims are unpatentable under 35 U.S.C. § 102 or 35 U.S.C. § 103 on the following specific grounds (Pet. 20–59):

References	Basis	Claims challenged
Dole ¹	§ 102	14, 19, and 20
Rupert ²	§ 102	14 and 19
Dole and Graco ³	§ 103	1–13, 15, 16, and 18
Tyco ⁴ and Graco	§ 103	1, 6, 7, 9, 12, and 13
Tyco, Graco, and Dole	§ 103	2–5, 8, and 11
Tyco and Rupert	§ 103	14, 19, and 20
Tyco, Rupert, and Century ⁵	§ 103	15–18

Our factual findings and conclusions at this stage of the proceeding are based on the evidentiary record developed thus far (prior to Patent Owner’s Response). This is not a final decision as to patentability of claims

¹ U.S. Patent No. 3,223,098, Dec. 14, 1965 (Ex. 1003).

² U.S. Patent No. 2,948,287, Aug. 9, 1960 (Ex. 1006).

³ Graco Pack ’N Play Product Brochure, copyright 2001 (“Graco”) (Ex. 1004).

⁴ Tyco’s Sesame Street Cozy Quilt Gym (“Tyco”) (Ex. 1009).

⁵ Century Fold -n- Go Care Center Manual (“Century”) (Ex. 1005).

for which *inter partes* review is instituted. Our final decision will be based on the record as fully developed during trial.

For reasons discussed below, we institute *inter partes* review of the '501 patent as to claims 1–5 and 8 based on the authorized grounds, as discussed herein, and we do not institute *inter partes* review of claims 6–7 and 9–20.

B. Related Proceedings

Petitioner informs us that the '501 patent is at issue in *Kolcraft Enterprises, Inc. v. Artsana USA, Inc.*, No. 1:13-cv-04863 (N.D. Ill.). Pet. 1.

C. The '501 Patent

The '501 patent relates to a play gym which suspends an object over a mat within a play yard. Ex. 1001, Abstract. Figure 2 is illustrative and is reproduced below.

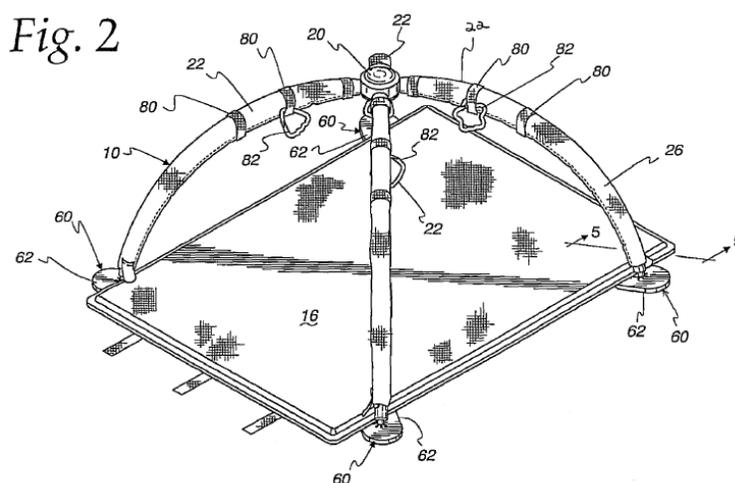


Figure 2 is a perspective view of a play gym and mat

D. Illustrative Claim

As noted above, Petitioner challenges claims 1–20 of the '501 patent, of which claims 1, 9, and 14 are independent. Claim 1 is illustrative of the challenged claims and is reproduced below:

1. An apparatus comprising:
 - at least one of a play yard or a bassinet;
 - a floor mat dimensioned to substantially cover a floor of the play yard or the bassinet, the floor mat having a connector positioned in proximity to a perimeter edge of the floor mat, and the floor mat to couple to at least one of the play yard or the bassinet when the floor mat is located within the play yard or the bassinet; and
 - a play gym to suspend an object above the floor mat, the play gym having a fastener to engage the connector of the floor mat to couple the play gym to the floor mat, the floor mat to couple the play gym to the play yard or the bassinet when the play gym is positioned in one of the play yard or the bassinet.

II. DISCUSSION

A. Claim Construction

In an *inter partes* review, claim terms in an unexpired patent are interpreted according to their broadest reasonable construction in light of the Specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *see also* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012). Claim terms are given their ordinary and customary meaning as would be understood by one of ordinary skill in the art in the context of the entire disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Any special definition for a claim term must be set forth in the Specification with reasonable clarity, deliberateness, and precision. *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

Petitioner does not assert a particular meaning for the term “play yard” or the term “play gym,” although the terms occur singularly, and occasionally together, in all of the challenged claims. There seems to be little doubt that play yards were well known in the art. Pet. 10 (citing Ex. 1001, 2:60–62). There also seems to be little doubt that play gyms were known in the art. Ex. 1001, 1:60–66.

The proper construction for these terms is necessary in order to properly address the Patent Owner’s contention concerning the sufficiency of the description in the cited prior art. *See* Prelim. Resp. 25.

Patent Owner asserts that the term “play gym” should be construed as “an apparatus that is specifically designed: (1) to be used by small children – namely babies and infants; and (2) to suspend an object — namely a toy — above a mat or other structure to which the play gym is coupled.” Prelim. Resp. 9.

There are no size limitations in the claims, and no requirement in the claims that the apparatus only be used in combination with babies and infants (although an alternative embodiment includes a bassinet). Indeed, Patent Owner’s statement that it is “to be used” makes the point that the interpretation the Patent Owner desires is a statement of intended use, rather than a definition of a structure. It is not unreasonable to imagine the claim covering, for example, a device suspended over an adult in rehabilitation in a confined area.

Petitioner’s expert witness, Mr. Drobinski, testifies that the ’501 patent describes a known prior art play gym “having two flexible arches for suspending objects such as toys or the like is coupled to the corners of a rectangular mat via snaps or the like. The arches cross and are snapped to

one another roughly above the middle of the mat.” Ex. 1010, 7 ¶ 26 (citing Ex. 1001, 1:61–66.)

Accordingly, we conclude that based upon the evidence presently of record, the broadest reasonable interpretation of “play gym” is a structure or apparatus which is capable of suspending an object over a defined area.

Likewise, a “play yard” is an area delineated by a frame, an enclosure supported by the frame, and a floor. Ex. 1001, 1:26–29.

Petitioner asserts that the terms “couple,” “coupled,” and “couplable” are to be given their plain and ordinary meanings. Pet. 13–14. The definition given is to (or be able to) link together, connect, fasten, or associate together in a pair or pairs. Pet. 14 (citing Ex. 1013,⁶ 318 and Ex. 1014,⁷ 334). Patent Owner asserts that “associate together in a pair or pairs” is vague and overbroad. Prelim. Resp. 7–8. We agree with Patent Owner on this point, and adopt the Patent Owner’s interpretation “to [(or able to)] link, connect, or fasten together.” *Id.* at 8.

Petitioner does not propose a construction for the claim term “connector.” Patent Owner asserts that a connector must be a structure attached to the underside of a floor mat. Prelim. Resp. 16. We agree with the Patent Owner that the connector must comprise some structure and be associated as claimed with the floor mat. Otherwise, the language “the bottom surface having a first connector” would be meaningless.

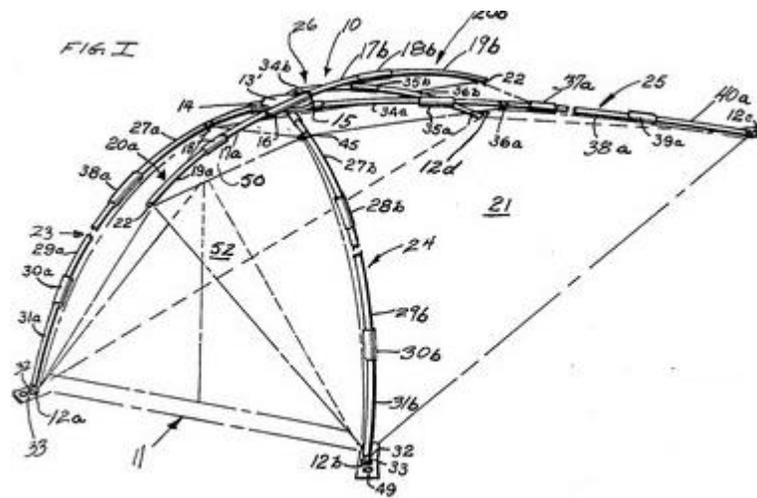
B. The Cited Art

1. U.S. Patent No. 3,223,098 to Dole (“Dole”) (Ex. 1003)

⁶ THE AMERICAN HERITAGE COLLEGE DICTIONARY 318 (1993).

⁷ WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 334 (1994).

Dole describes a “Collapsible Shelter Construction” and issued on December 14, 1965. According to the Dole Specification, it provides a shelter construction which is quickly set up and collapsed. Ex. 1003, 1:35–36. The shelter has a sectioned exterior framework, with individual sections which remain interconnected in any of the set-up, collapsed, or folded conditions. The shelter is said to be foldable into a very small package to facilitate the transportation thereof. *Id.* at 1:22–47. Dole Figure 1 is reproduced below:



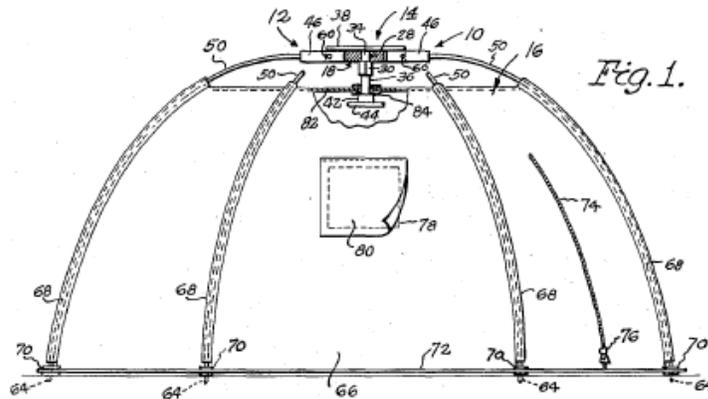
Dole Figure 1 is a perspective view of a shelter. *Id.* at 2:5–7.

2. U.S. Patent No. 2,948,287 to Rupert (“Rupert”) (Ex. 1006)

Rupert describes a folding portable shelter, and issued August 9, 1960. Rupert describes folding portable shelters that are quickly erected. The folding portable tent includes a tent-supporting structure having ribs of flexible material, the upper ends of which are pivoted to a quick-action locking device. A person may bow the ribs into approximately spherical form while the rib ends are pressed close to one another and firmly against the ground. A hemispherically-shaped cover is distended by a snap action

into this shape when the operator pulls upward on the locking device to release the lower ends of the flexible ribs from restraining engagement with the ground, and thereby free them to spring outward to distend the cover.

Ex. 1006, 1:20–35. Rupert Figure 1 is reproduced below:

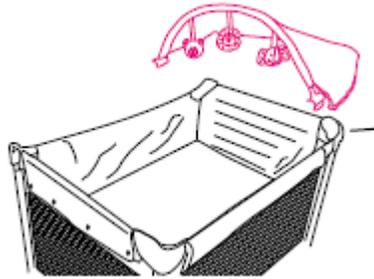


Rupert Figure 1 is a side view of a shelter with collapsible ribs. *Id.* at 1:61–68.

3. The Graco Pack 'N Play Model No. 386-11-01 Owner's Manual (© 2001) ("Graco") (Ex. 1004)

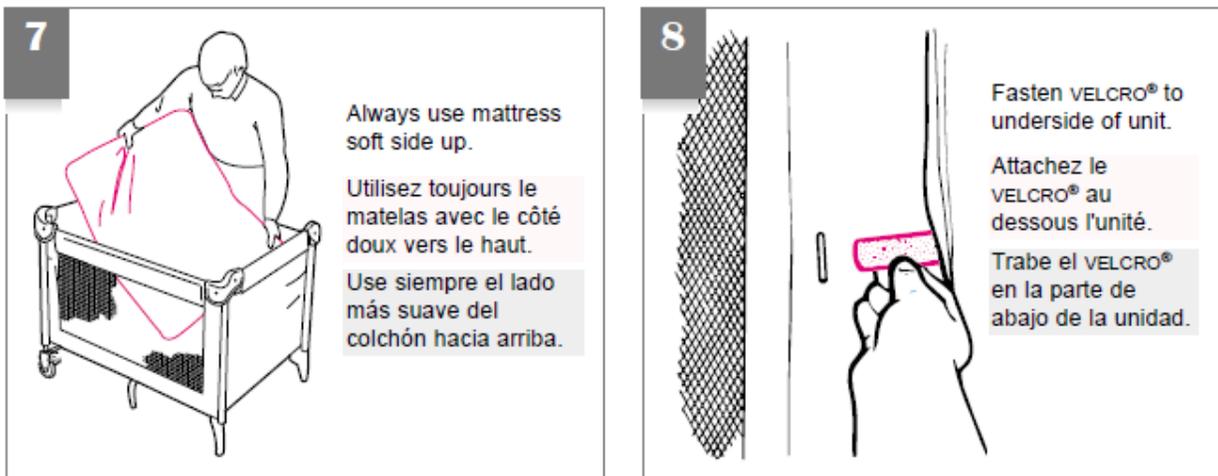
This is an owner's manual detailing the operation of a portable folding crib, with a copyright date of 2001, which was distributed with the Pack 'N Play. Patent Owner does not challenge the prior art status of this document at this time.

Graco illustrates, among other things, a play gym connected to the crib in Figure 37.



Graco Figure 37 is a perspective view of a crib and play gym.

Graco Figures 7 and 8 describe a mattress pad with Velcro attachment, as illustrated below.



Graco Figures 7 and 8 are perspective views of a crib and mattress pad.

4. The Century Fold-n-Go Care Center Manual (January 1998) (“Century”) (Ex. 1005)

Century is a user manual for the Century Fold-n-Go Care Center, distributed with the product, bearing the date “1/98.” Ex. 1005, 1. Patent Owner does not challenge the prior art status of this document at this time.

Among other description, Century illustrates setting up a crib with a floor mat and securing the floor mat to the crib. *Id.* at 4–5. Figures 7 and 8 are reproduced below.

7 Place floorboard in playard with padded side facing up.

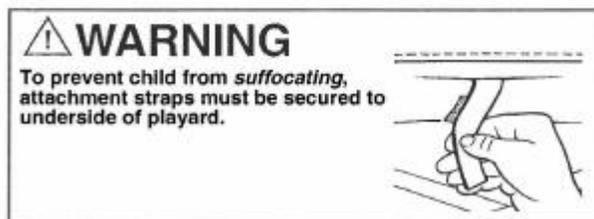


NOTE: *If* using playard with bassinet, **DO NOT** install floorboard.

8 Secure floorboard to playard by passing attachment strap through hole in bottom of playard floor and securing attachment strap to underside of playard.



Repeat for other end of floorboard.



Figures 7 and 8 are perspective views of installation of a play yard floor.

5. Certified copy of Tyco’s Sesame Street Cozy Quilt Gym (“Tyco”) (Ex. 1009)

Patent Owner has asserted that this art does not qualify as a patent or printed publication. As we agree (discussed further below) that the Petitioner has not shown that this set of documents has been adequately

published to qualify as a printed publication, we need not describe this art here.

C. Asserted Anticipation of Claims 14, 19, and 20 by Dole

Petitioner argues that Dole anticipates each of claims 14, 19, and 20. Pet. 20–24. Claims 19 and 20 depend from claim 14, which is somewhat different than claim 1. As a consequence, we reproduce these three claims below as follows.

14. An apparatus comprising:

a play gym having a leg coupled to a hub, the hub having a cavity and the leg having a first end and a second end;

a first fastener coupled to the first end of the leg to attach the leg to the hub and a second fastener extending from the second end of the leg, the first fastener to enable the first end of the leg to be positionable relative to the cavity of the hub; and

a floor mat removably couplable to the play gym, the floor mat defining an upper surface and a bottom surface, *the bottom surface having a first connector that includes an opening to receive the fastener of the leg when the play gym is coupled to the floor mat.*

19. The apparatus of claim 14, the first connector of the floor mat is positioned adjacent a perimeter edge of the floor mat.

20. The apparatus of claim 14, wherein the first connector is pivotally coupled to the floor mat.

Ex. 1001, 8:52–64, 10:1–6 (emphasis added).

We first focus in on a contested element of claim 14, which we have highlighted by italicizing above.

Claim 14 recites “a floor mat removably couplable to the play gym, the floor mat defining an upper surface and a bottom surface, the bottom surface having a first connector that includes an opening to receive the fastener of the leg when the play gym is coupled to the floor mat.” Ex. 1001, 8:60–64.

According to Petitioner, Dole describes a device including all the claim elements, including the first connector. Pet. 21–23.

With more specificity, Petitioner asserts that the floor mat and connector are described in Dole as “floor portion (11) has an upper surface and a bottom surface having a first connector (e.g., tab (12a)) that includes an opening (42) to receive the fastener (foot section (32)) of the leg (23) when the leg (23) is coupled to the floor portion (11).” Pet. 22.

We are directed by Petitioner to Dole at Figures 1, 2, and column 5, lines 27–44.

Dole Figures 1 and 2 are reproduced below.

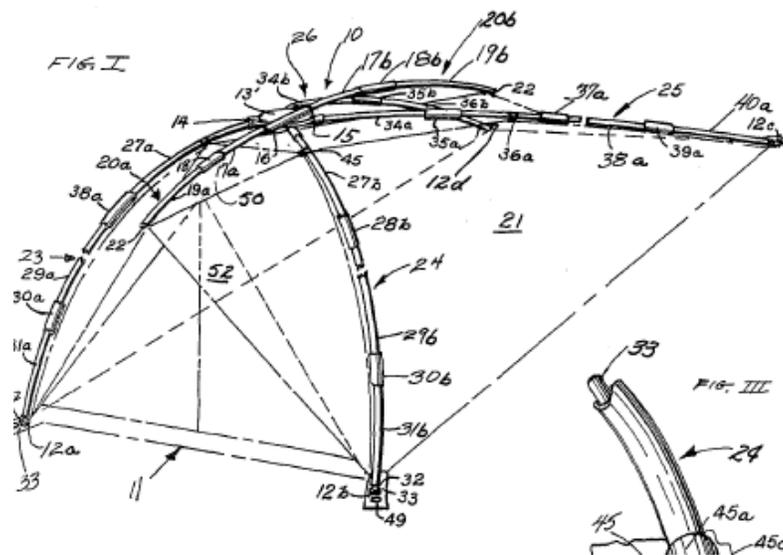


Figure 1 is a perspective view of a frame hub and legs. Ex. 1003, 2:5–7.

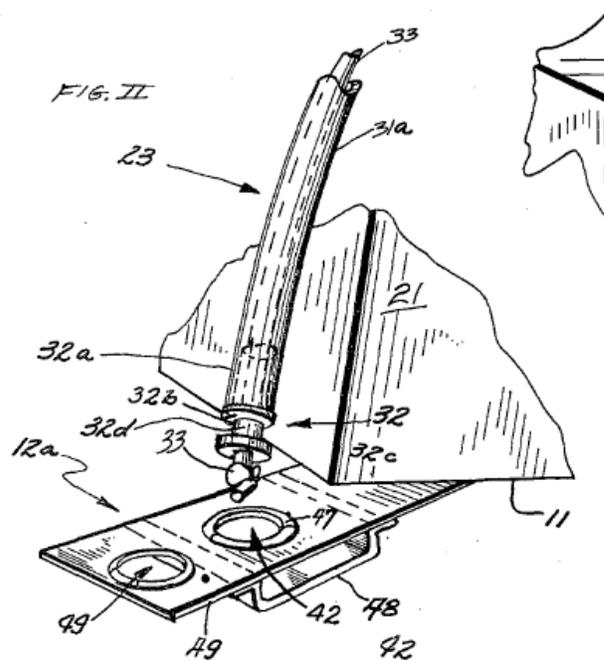


Figure 2 is an enlarged fragmentary perspective view of a frame leg. *Id.* at 2:8–9.

We focus on one element of claim 14.

Patent Owner points out that Dole does not disclose that tab 12 connector is attached to bottom surface 11. Prelim. Resp. 28. Dole is said to describe only that the tabs extend from the corners of a floor component. *Id.* (citing Ex. 1003, 1:62–66, 2:44–47, 5:32–37).

To anticipate a claim, a prior art reference must disclose every limitation of the claimed invention, either explicitly or inherently. *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997).

Although an initial glance at Figure 2 of Dole might lead one to think that the tab is under the floor of the tent, it is only definitive that the tab is under wall 21 of the tent. Reference numeral 11 indicates that the floor is under the wall. This figure gives us no evidence as to the relationship of the tab to the floor. It might be affixed to the top, the bottom, or simply sewn to the edges of the floor. Petitioner's Declaration does not provide further evidence regarding the relationship of tab 12a and floor 11. Ex. 1010, 16–19. Furthermore, in connection with claim 19, Petitioner's witness only points out that tab 12 is positioned “adjacent” to a perimeter edge of mat 11(*id.* at 20 ¶ 52), which gives us no convincing indication as to its anchoring position vertically. We have no way of knowing with a reasonable degree of certainty.

Accordingly, we conclude that Petitioner has not established a reasonable likelihood that Petitioner would prevail on this ground, and decline to initiate a review as regards claims 14, 19, and 20, on this ground.

D. Asserted Anticipation of Claims 14 and 19 by Rupert

Rupert is similar to Dole in its disclosure. We again focus our attention on the contested element of the floor mat “defining an upper surface and a bottom surface, the bottom surface having a first connector that includes an opening to receive the fastener of the leg when the play gym is coupled to the floor mat.” Ex. 1001, 8:60–64.

Petitioner asserts that Rupert describes “floor (72) having an upper surface and a bottom surface, the bottom surface having connectors that include openings (i.e., grommets (70)) for receiving the fasteners of the legs when the frame (12) is coupled to the floor (72).” Pet. 26 (citing Ex. 1006, fig. 1, 3:20–24).

Patent Owner again asserts that Rupert fails to describe this element. Prelim. Resp. 33. Patent Owner asserts that the grommets of Rupert are not the claimed first connectors. According to Patent Owner, the grommets are openings that pass completely through Rupert's floor 72, and through which Rupert's ribs 50 can freely pass. We are pointed to Ex. 1006, 3:20–24, which recites:

The lower end portions of the ribs 50, after passing through the rib tunnels 68, pass through grommets 70 in a tent floor 72 of flexible material such as fabric and preferable sewed or otherwise secured to the lower ends of the gussets 66.

We agree with Patent Owner that Rupert's grommets and floor do not disclose the claimed bottom surface "having connectors." The grommets are above the floor. As a consequence, Rupert does not describe the invention as claimed.

Accordingly, we conclude that Petitioner has not established a likelihood of prevailing on this ground, and decline to initiate a review as regards claims 14 and 19, on this ground.

E. Asserted Obviousness of Claims 1–13, 15, 16, and 18 over Dole and Graco

i. The References

Petitioner asserts that one of ordinary skill in the art would recognize the Dole assembly as a suitable play gym frame, and that it would have been obvious to one of ordinary skill in the art to couple the floor mat of Dole to the play yard or bassinet of Graco to arrive at the claimed invention. Pet. 29.

Petitioner further asserts that one of ordinary skill in the art would understand that Dole and Graco would combine easily to result in placing

the Dole hub and leg framework and floor mat inside the Graco play yard or bassinet. *Id.* Additionally, it is urged, that one of ordinary skill in the art would understand that the floor mat of the play gym could be coupled to the play yard or bassinet. *Id.* According to the Petitioner, Graco suggests attaching a toy bar capable of suspending an object above the floor of the bassinet or play yard. *Id.*

Petitioner concludes that these references provide one of ordinary skill in the art with a motivation to combine the teachings of Graco and Dole to arrive at a play yard or bassinet as claimed in claim 1. Pet 29 (citing Ex. 1010 ¶ 35, 59–60).

ii. Procedural Issue

Preliminarily, Patent Owner asserts that both Dole and Graco were before the United States Patent and Trademark Office during prosecution of the '501 patent. The Patent Owner then asserts that the Board should deny this ground solely on this basis. Prelim. Resp. 35–36.

We observe that 35 U.S.C. § 325 (d) provides the Director with discretion to take into account the fact that the same or substantially the same prior art was before the Office. We decline to exercise that discretion in this case. Patent Owner has pointed to no substantial prosecution concerning this reference, which would indicate that the Examiner or the Office focused specific attention to Dole, or its relationship with Graco and the issued claims, such that this review would be duplicative, superfluous, or unnecessary.

iii. Whether Dole is Analogous

Patent Owner also asserts that the Dole patent is non-analogous art, as it is directed to collapsible shelters. Prelim. Resp. 36. More specifically,

Patent Owner argues that “[t]he ’501 patent ‘relates generally to child care products, and, more particularly, to play gyms and methods of operating the same.’” Prelim. Resp. 37–38 (citing Ex. 1001, 1:20–22.)

The test for analogous art, as set forth by our reviewing court, is a two-part consideration. A reference is considered analogous prior art: (1) if the reference is from the same field of endeavor as the claimed subject matter, regardless of the problem addressed, or (2) if “the reference still is reasonably pertinent to the particular problem with which the inventor is involved,” even though the reference is not within the field of the inventor’s endeavor. *See In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

The field of endeavor test asks if the structure and function of the prior art is such that it would be considered by a person of ordinary skill in the art, because of the similarity to the structure and function of the claimed invention as disclosed in the application. It is necessary to apply common sense in deciding in which fields a person of ordinary skill would reasonably be expected to look for a solution to the problem facing the inventor. *See Bigio*, 381 F.3d at 1325–27.

A reference is reasonably pertinent if, even though it may be in a different field from that of the inventor’s endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor’s attention in considering his problem. Thus, the purposes of both the invention and the prior art are important in determining whether the reference is reasonably pertinent to the problem the invention attempts to solve. If a reference disclosure has the same purpose as the claimed invention, the reference relates to the same problem, and that fact supports use of that reference in an obviousness rejection. An inventor may well have been motivated to consider the reference when making his invention. If it is directed to a different purpose, the inventor would accordingly have had less motivation or occasion to consider it.

In re Clay, 966 F.2d 656, 659 (Fed. Cir. 1992).

According to Patent Owner, the '501 patent's field of endeavor is an infant play gym, play yard, and bassinet, while Dole relates to the construction of shelters and more particularly to the construction of improved collapsible shelters. Prelim. Resp. 37–38 (citing Ex. 1003 1:8–10).

Dole is said to claim and describe a collapsible tent construction having a pliable shelter member, collapsible legs, and a resilient, extensible element connected to and extending through all sections of a leg. The '501 patent play gym is said to include no shelter or tent member, or shock cords running through leg sections. Prelim. Resp. at 38.

Dole's function is also urged to differ such that it would not be considered by a person of ordinary skill in the art of the '501 patent. Specifically, the provision of a shelter construction that is quickly set up and collapsed is said to differ from a children's play gym, which functions to suspend an object such as a toy over the play yard. *Id.* at 38–39.

Dole's purpose is also urged to differ in that Dole is said to be directed at providing a collapsible shelter without problems of prior art shelters, including: a multitude of individual parts; severed parts susceptible to being mislaid; fitting together being tedious and difficult; the shelter enclosure not being an integral component; structural parts being unwieldly in shape and size; and fabrication being costly. *Id.* at 39.

Patent Owner contrasts the purpose of the '501 patent as providing a play gym structured to suspend an object such as a toy above a mat in two modes—a first mode when the mat is positioned in either a bassinet or play

yard, and a second mode when the mat is removed from the bassinet or play yard and positioned on another surface such as the floor of a house. Prelim. Resp. 39. Patent Owner concludes that these differences in purpose preclude a finding that Dole is reasonably pertinent to the particular problem faced by the '501 patent's inventors.

Although we have carefully considered all of these factors outlined by Patent Owner, several facts come to the forefront. First, the similarities of the two structures, that is, the structure of Dole and the cited structure of a play gym in the Specification of the '501 patent, are remarkable. Utilizing the four legs attached to a mat to perform a suspending function is virtually identical in both instances, regardless of how the legs are constructed. We, thus, find that this evidence tends to support that both the Dole patent and the patent at issue are in the same field of endeavor.

Second, the Patent Owner's stated field of endeavor and that of the Dole patent are not as distant as Patent Owner asserts. Common sense dictates that a shelter enclosure for camping such as Dole can be put to use as an infant or child play area, and both collapsible play yards and collapsible tents are made to be portable devices for housing individuals. The claims at issue presently are not limited by size, and intended use does not provide sufficient structure to differentiate them, on this record, On this record, we think this tends to support a finding that Dole would logically commend itself to one presented with the '501 patent's solution to the problem of suspending an object in a play yard.

In sum, we think the fields of endeavor are somewhat broader than laid out by the Patent Owner, and the structure closely related. Accordingly,

we are of the view, informed by the standards as set forth by the Supreme Court, that Dole is analogous art.⁸

iv. Claim 1

“An apparatus comprising: at least one of a play yard or a bassinet”

Petitioner asserts that Graco teaches at least one of a play yard or bassinet, citing pages 1 and 19 and Figure 1. Pet. 27. The Pack ’N Play is said to be for “playing or sleeping.” Ex. 1004, 2.

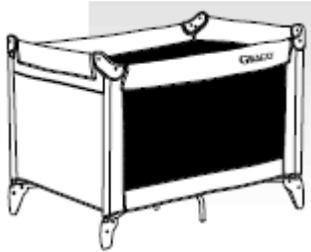


Figure 1 is a perspective view of a Pack ’N Play

“a floor mat dimensioned to substantially cover a floor of the play yard or bassinet”

⁸ “When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. *Sakraida* and *Anderson’s-Black Rock* are illustrative—a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007).

Petitioner asserts that Graco describes a floor mat that substantially covers a floor of the play yard or the bassinet. Pet. 27 (citing Ex. 1004, figs. 7, 44).

Graco Figure 7, illustrating a floor mat, is reproduced below.

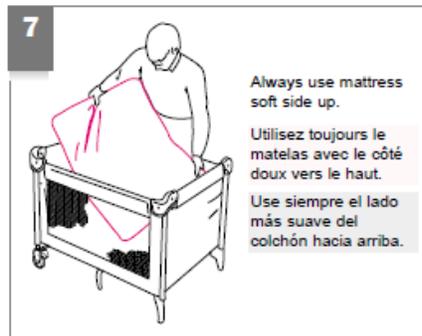
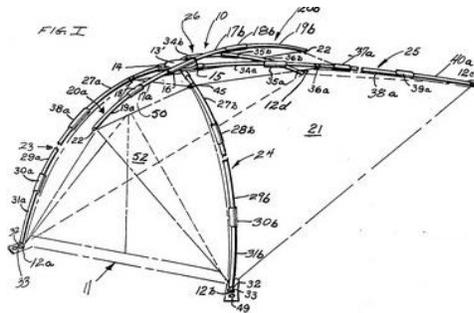
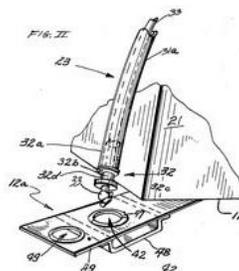


Figure 7 is a perspective view of a play yard and floor mat
“the floor mat having a connector positioned in proximity to a perimeter edge of the floor mat”

Petitioner asserts that Dole describes a connector that is positioned in proximity to a perimeter edge of the floor mat. Pet. 27. We are directed to Dole Figures 1 and 2, which are reproduced below.



Dole Figure 1 is a perspective view of a shelter



Dole Figure 2 is a fragmentary perspective view of a connector

“the floor mat to couple to at least one of the play yard or the bassinnet when the floor mat is located within the play yard or the bassinnet”

Petitioner alleges that Graco teaches a floor mat that “couples” to the play yard or the bassinnet when the floor mat is located within the play yard or the bassinnet. Pet. 28 (citing Ex. 1004, figs. 7, 8, 44).

Graco Figure 8 is the most illustrative and reproduced below.

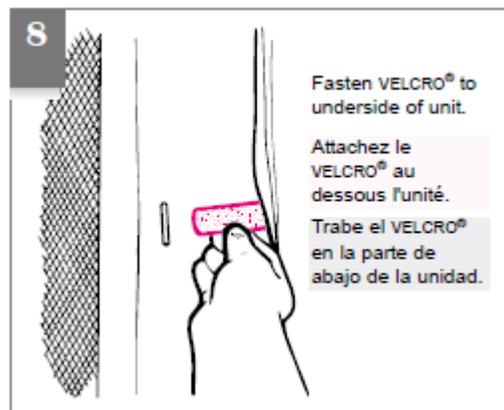


Figure 8 is a perspective view of a mat connector

“a play gym to suspend an object above the floor mat”

Petitioner states that Dole teaches a hub and leg framework that suspends a tent above the floor mat. Pet. 28 (citing Ex. 1003, fig. 1, 5:27–50). Petitioner does not discuss how this equates to a “play gym.”

Patent Owner is of the view that equating a play gym to this hub and leg frame work is an “unreasonably broad interpretation” of the term “play gym” and we should disregard this interpretation. Prelim. Resp. 12.

Citing a reexamination proceeding of the parent application, Patent Owner urges that the Office's previous holding that a prior art reference to a cabana⁹ would not be a "play gym." Prelim. Resp. 13–15. We note that the *inter partes* reexamination in question turned on a different issue, as to whether a structure was collapsible by pulling a leg out of the hub.¹⁰ As a consequence, although the finding that the specific structure in Custer was not a play gym in a reexamination proceeding is instructive, it is not in any way binding upon the Board in this trial proceeding.

Dole has a structure with two flexible arches coupled to a rectangular mat. Compare, as noted above, the description of the arched structure in Ex. 1001, 1:61–66. We are pointed to no structure that makes Dole unsuited for suspending an object or that physically differentiates it from the prior art play gym.

“the play gym having a fastener to engage the connector of the floor mat to couple the play gym to the floor mat”

Petitioner asserts that Dole describes a frame with a fastener to engage the connector of the floor to couple the frame to the floor mat. Pet. 28 (citing Ex. 1003, fig. 2). According to Petitioner, Figure 2, reproduced above, illustrates a connector.

“the floor mat to couple the play gym to the play yard or the bassinet when the play gym is positioned in one of the play yard or the bassinet.”

Finally, Petitioner asserts that Graco teaches the floor mat couples to the play yard when located in the play yard. Pet. 28 (citing Ex. 1004, figs. 7, 8, 44). We are not pointed to contrary evidence by Patent Owner.

⁹ Custer, U.S. Patent No. 6,109,280.

¹⁰ Reexamination Proceeding 95/000,514, Official Action February 12, 2010, page 17, ll. 2–5.

Conclusion

Each of the citations made by Petitioner above appear to be to persuasive evidence presently of record.

Accordingly, we conclude that Petitioner has established a reasonable likelihood that the Petitioner would prevail on this ground and will institute a review as regards claim 1.

v. Claim 2, Dependent From Claim 1

“a plurality of legs, each of the legs having a first end coupled to a hub and a second end having the fastener”

Petitioner asserts that Dole describes a plurality of legs each having a first end coupled to a hub and a second end having a fastener. Pet. 30 (citing Ex. 1003, figs. 1, 2, 5, 3:62–68).

This evidence tends to support Petitioner, and Patent Owner has not provided any independent persuasive argument otherwise as regards claim 2. Accordingly, we conclude that Petitioner has established a reasonable likelihood that the Petitioner would prevail on this ground and will institute a review as regards claim 2.

vi. Claim 3, Dependent From Claim 2

“the plurality of legs form crossing arches coupled to each other via the hub when the play gym is coupled to the floor mat”

Petitioner asserts that Dole describes the legs form crossing arches coupled to each other via the hub when the frame is coupled to the floor. Pet. 31 (citing Ex. 1003, fig. 1, 1:61–66). Figure 1 is reproduced above.

This evidence tends to support Petitioner, and Patent Owner has not provided any independent persuasive argument otherwise as regards claim 3. Accordingly, we conclude that Petitioner has established a reasonable

likelihood that the Petitioner would prevail on this ground and will institute a review as regards claim 3.

vii. Claim 4, Dependent From Claim 2

“the legs of the play gym are movable between a stored position at which the legs are positioned generally parallel to each other and an extended position at which the legs extend generally radially outward”

Petitioner asserts that Dole teaches the legs are movable between a stored position, at which the legs are positioned generally parallel to each other, and an extended position, at which the legs extend generally radially outward from the hub. Pet. 31 (citing Ex. 1003, figs. 1, 4, 5).

Figure 4 is most illustrative, and reproduced below:

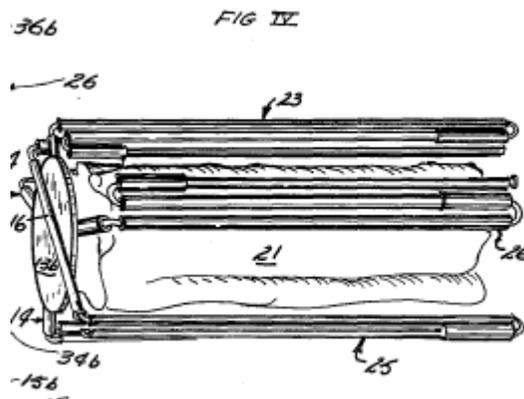


Figure 4 is a perspective view of the collapsed legs of a shelter

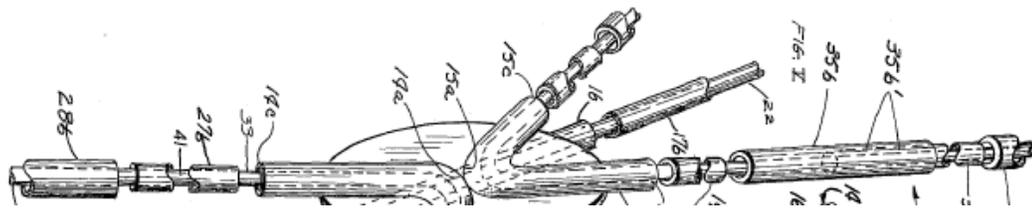
As such, Dole Figures 1 and 4 tend to support the position of Petitioner. Patent Owner has not provided any independent persuasive argument otherwise as regards claim 4. Accordingly, we conclude that Petitioner has established a reasonable likelihood that the Petitioner would prevail on this ground and will institute a review as regards claim 4.

vii. Claim 5, Dependent From Claim 2

“the hub defines a plurality of cavities, the cavities to receive a respective one of the legs when the play gym is in the extended position.”

Petitioner asserts that Dole describes a hub having a plurality of cavities that receive a respective leg when the frame work is in the extended position. Pet. 32 (citing Ex. 1003, figs. 1, 5).

Dole Figure 5 is most revealing, and reproduced in part below sideways.



As such, Dole Figure 5 tends to support the position of Petitioner. Patent Owner has not provided any independent persuasive argument otherwise as regards claim 5. Accordingly, we conclude that Petitioner has established a reasonable likelihood that the Petitioner would prevail on this ground and will institute a review as regards claim 5.

vii. Claim 6, Dependent From Claim 1, and Claim 7, Dependent From Claim 6

“the connector of the floor mat is positioned on an underside of the floor mat.”

According to Petitioner, Dole teaches the connector is positioned on an underside of the fabric floor. Pet 32 (citing Ex. 1003, fig. 2). However, as discussed above, we have not been pointed to, or found, description in

Dole which supports that placement of the connector. Rather, it could be either above or on the periphery. Moreover, we are not presented with declaration evidence that such a modification of Dole would have been obvious.¹¹

Accordingly, we conclude that Petitioner has not established a reasonable likelihood of Petitioner prevailing on this ground and will not institute a review as regards claim 6. The same applies for claim 7, dependent from claim 6.

viii. Claim 8, Dependent From Claim 1

“the connector comprises a plate”

According to Petitioner, Dole describes that the connector (12a) comprises a plate. Pet. 33 (citing Ex. 1003, fig. 2).

Dole Figure 2, illustrated above, shows a plate which receives the distal end of the leg. Accordingly, the evidence of record tends to support Petitioner’s position. In the absence of persuasive rebuttal, we conclude that Petitioner has established a reasonable likelihood that the Petitioner would prevail on this ground and will institute a review as regards claim 8.

ix. Independent Claim 9

Claim 9 has many of the features of claim 1, with a slightly different application of art to those claims. However, two features are dispositive of this claim.

“a first plurality of connectors provided on the second surface of the floor mat, the first plurality of connectors to couple the floor mat to the play yard when the floor mat is positioned in the play yard”

¹¹ See, e.g., Ex. 1010 ¶ 37. Graco (Ex. 1004) is not applied and accompanied by testimony in such a manner for this ground, however.

According to Petitioner, Graco teaches a second surface with connectors to couple the floor mat to the play yard when the floor mat is positioned in the play yard. Pet. 36 (citing Ex. 1004, figs. 2, 7, 8).

Figure 2 is particularly relevant:

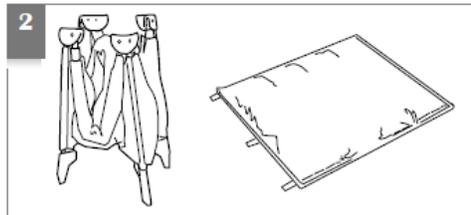


Figure 2 is a perspective view of a collapsed play yard and a mat

The tabs of Graco's mat appear to protrude from underneath the mat in this instance and, on the present record, meet this element.

“a second plurality of connectors provided on the second surface of the floor mat adjacent the first plurality of connectors”

Petitioner asserts that Dole describes a plurality of connectors on the second surface of the floor mat positioned in proximity to a perimeter edge of the floor. *Id.* (citing Ex. 1003, figs. 1, 2).

According to Petitioner's declarant:

[I]t would have been obvious to one of ordinary skill in the art to combine the Graco play yard with the Dole assembly to arrive at the claimed subject matter. One of ordinary skill in the art would understand that the Dole floor mat connectors for connecting the floor mat to the hub and leg framework and the Graco floor mat connectors for connecting the floor mat to the play yard or bassinet would be easily combinable to arrive at a floor mat with multiple connectors that attach the floor mat to both the play yard and the play gym. One of ordinary skill in the art would know to secure the play yard floor mat to the play yard structure, such as taught by Graco. In addition, one of ordinary skill in the art would know that in order for a play gym structure to be retained in an extended position above a floor

mat, the play gym would need to be secured, which can be achieved by coupling to the floor mat as taught by Dole.

Ex. 1010 ¶ 63.

While Graco does describe a set of connectors under the floor mat as noted above, we remain unpersuaded that Dole teaches a second plurality of connectors underneath the mat. Nor are we provided with testimony as to why such connectors would have been obvious. The testimony of the declarant assumes that the connectors of Dole are on the underside, when no persuasive evidence of record establishes this fact sufficiently.

Accordingly, we conclude that Petitioner has not established a reasonable likelihood that the Petitioner would prevail on this ground and will not institute a review as regards claim 9. The same applies for claims 10–13, 15, 16, and 18, which depend from claim 9.

F. Asserted Obviousness of Claims 1, 6, 7, 9, 12, and 13 over Tyco and Graco

Petitioner asserts the obviousness of claims 1, 6, 7, 9, 12, and 13 over the combination of Tyco and Graco. Pet. 42–49. Each of the claims asserted to have been obvious on this ground depends exclusively on Tyco for at least one of the claim elements, either directly or by virtue of claim dependence.

Patent Owner asserts that Tyco is not a prior art printed publication against the '501 patent. Patent Owner raises multiple challenges against the Tyco reference, including: (1) Petitioner has not established that Tyco was published or publicly accessible prior to May 7, 2003, the priority date of the '501 patent; (2) the Tyco reference includes “an amalgam of litigation

documents including a Declaration (Ex. 1009), an Answer to a Complaint (Ex. 1007) and an Affidavit, each of which in turn includes unauthenticated photos, catalog pages and magazine articles”; and (3) these materials appear to be asserting a public use or on-sale bar, which is not a legitimate basis to request *inter partes* review. Prelim. Resp. 43–44.

It appears to us that Patent Owner has a convincing point. Petitioner begins the analysis in the Petition at page 18 with “[t]he Product at issue in the Tyco litigation was Tyco’s Sesame Street Cozy Quilt Gym (‘Tyco’).” Pet. 18. The Petition then goes on to describe documents from the litigation.

Petitioner’s witness, Mr. Drobinski, states in his Declaration that:

44. I understand that Exs. 1007, 1008, and 1009 are certified copies of publication available to the public at least as early as their filing dates (May 9, 1995, June 16, 1995, and July 18, 1995, respectively) in a litigation styled as *Tyco Industries, Inc. v. Tiny Love, LTD and The Maya Group, Inc.*, in the United States District Court for the District of New Jersey, Civil Action No. 95-1135 (“Tyco Litigation”).

Ex. 1010, 13–14 ¶ 44. A footnote goes on to note that the decision was published in the Federal Supplement.

We observe that 35 U.S.C. § 311(b) provides that “[a] petitioner in an *inter partes* review may request to cancel as unpatentable 1 or more claims of a patent . . . only on the basis of prior art consisting of patents or printed publications.” Tyco is not a patent, so the question is whether it is a printed publication.

A printed publication “bar [under 35 U.S.C. § 102(b)] is grounded on the principle that once an invention is in the public domain, it is no longer patentable by anyone.” *In re Hall*, 781 F.2d 897, 898 (Fed. Cir. 1986). “The statutory phrase ‘printed publication’ has been interpreted to give

effect to ongoing advances in the technologies of data storage, retrieval, and dissemination.” *Id.* “Because there are many ways in which a reference may be disseminated to the interested public, ‘public accessibility’ has been called the touchstone in determining whether a reference constitutes a ‘printed publication’ bar under 35 U.S.C. § 102(b).” *Id.* at 898–99.

“The determination of whether a reference is a ‘printed publication’ under 35 U.S.C. § 102(b) involves a case-by-case inquiry into the facts and circumstances surrounding the reference’s disclosure to members of the public.” *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004).

Our reviewing court has explained that a reference is “publicly accessible” upon a satisfactory showing that: (1) the “document has been disseminated”; or (2) “otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it and recognize and comprehend therefrom the essentials of the claimed invention without need of further research or experimentation.” *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006) (quoting *In re Wyer*, 655 F.2d 221, 226 (CCPA 1981)).

The Petition establishes neither of these touchstone requirements with sufficient persuasive evidence. We have not been provided with persuasive evidence of adequate dissemination of the exhibits, nor with persuasive evidence that a person of ordinary skill exercising reasonable diligence would have located this collection of documents. The publication of a decision in the Federal Supplement, without more, in this instance does not equate to the sufficient publication of the underlying declarations in the litigation, along with their exhibits.

We cannot reasonably conclude on this record that a person of ordinary skill in the art routinely would haunt courthouses and look for depositions and exhibits in related litigations.

Accordingly, we conclude that Petitioner has not established a reasonable likelihood that Petitioner would prevail on this ground, and decline to initiate a review as regards claims 1, 6, 7, 9, 12, and 13.

G. Asserted Obviousness of Claims 2–5, 8, and 11 over Tyco, Graco, and Dole

Each of these claims depends from Claim 1. Claim 1 has elements which are asserted that Tyco solely in combination with Graco render the claims obvious. However, as noted above, Tyco has not been established to be a patent or printed publication.

Accordingly, we conclude that Petitioner has not established a reasonable likelihood that Petitioner would prevail on this ground, and decline to initiate a review as regards claims 2–5, 8, and 11.

H. Asserted Obviousness of Claims 14, 19, and 20 over Tyco and Rupert

Each of these claims depends from claim 14, which contains two elements for which Tyco is the sole applied reference.

However, as noted above, Tyco has not been established to be a patent or printed publication.

Accordingly, we conclude that Petitioner has not established a reasonable likelihood that Petitioner would prevail on this ground, and decline to initiate a review as regards claims 14, 19, and 20.

I. Asserted Obviousness of Claims 15–18 over Tyco and Rupert, and Century

Each of these claims depends from claim 14, which contains two elements for which Tyco is the solely applied reference.

However, as noted above, Tyco has not been established to be a patent or printed publication.

Accordingly, we conclude that Petitioner has not established a reasonable likelihood that Petitioner would prevail on this ground, and decline to initiate a review as regards claims 15–18.

III. CONCLUSION

For the foregoing reasons, we determine Petitioner has demonstrated there is a reasonable likelihood it would prevail in establishing the unpatentability of claims 1–5 and 8 of the '501 patent as obvious over the combination of Graco and Dole. At this stage of the proceeding, the Board has not made a final determination as to the patentability of any challenged claim or any underlying factual and legal issues.

IV. ORDER

For the reasons given, it is

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review is hereby instituted as to claims 1–5 and 8 of the '501 patent on the ground that the claims are unpatentable under 35 U.S.C. § 103(a) as being rendered obvious over Graco and Dole;

FURTHER ORDERED that pursuant to 35 U.S.C. § 314(c) and

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37 C.F.R. § 42.4, *inter partes* review of the '501 patent shall commence on the entry date of this Order, and notice is hereby given of the institution of a trial; and

FURTHER ORDERED that no ground other than that specifically provided above is authorized.

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