

Commissioner's Decision #1464

Décision du commissaire #1464

TOPICS: J00 Meaning of Art
O00 Obviousness

SUJETS: J00 Signification de la technique
O00 Évidence

Application No: 2,616,332

Demande no: 2 616 332

IN THE CANADIAN PATENT OFFICE

DECISION OF THE COMMISSIONER OF PATENTS

Patent application number 2,616,332, having been rejected under subsection 30(3) of the *Patent Rules* (SOR/96-423), has consequently been reviewed in accordance with paragraph 30(6)(c) of the *Patent Rules*. The recommendation of the Board and the decision of the Commissioner are to refuse the application.

Agent for the Applicant

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INTRODUCTION

- [1] This recommendation concerns the review of rejected Canadian patent application number 2,616,332 (“the instant application”), which is entitled “CONTEXT-SENSITIVE HELP FOR DISPLAY DEVICE ASSOCIATED WITH POWER DRIVEN WHEELCHAIR” and is owned by INVACARE CORPORATION (“the Applicant”). A review of the rejected application has been conducted by the Patent Appeal Board (“the Board”) pursuant to paragraph 30(6)(c) of the *Patent Rules*. As explained in more detail below, our recommendation is that the Commissioner of Patents refuse the application.

BACKGROUND

The Application

- [2] The instant application, based on a previously filed Patent Cooperation Treaty application, is considered to have been filed in Canada on August 31, 2006 and was laid open to the public on March 8, 2007.
- [3] The instant application relates to an apparatus and method for providing context-related help information on a display device of a power driven wheelchair. Figures 7 and 12 of the instant application (shown below) illustrate an example of the system controller and the display device, respectively. Figure 12 shows an example of the operational parameters and the associated help information that may be displayed. With a display device of the wheelchair displaying information such as operational parameters (e.g., drive mode 209), context-related help information 211 may be provided on the display device by activation of an input device (e.g., a switch 124 of Figure 7). The help information displayed relates to the current operational parameters of the wheelchair.

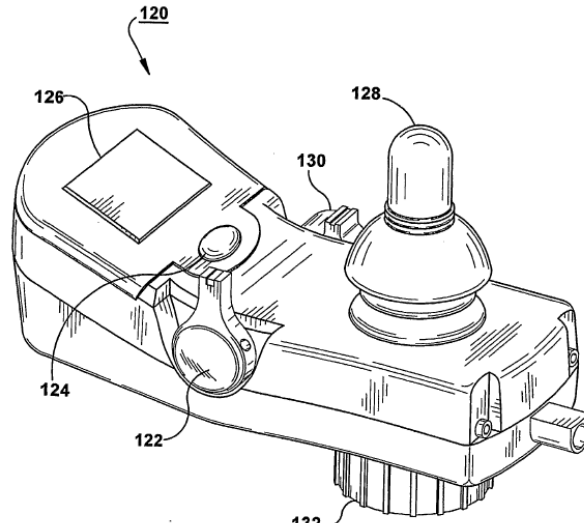


Fig. 7

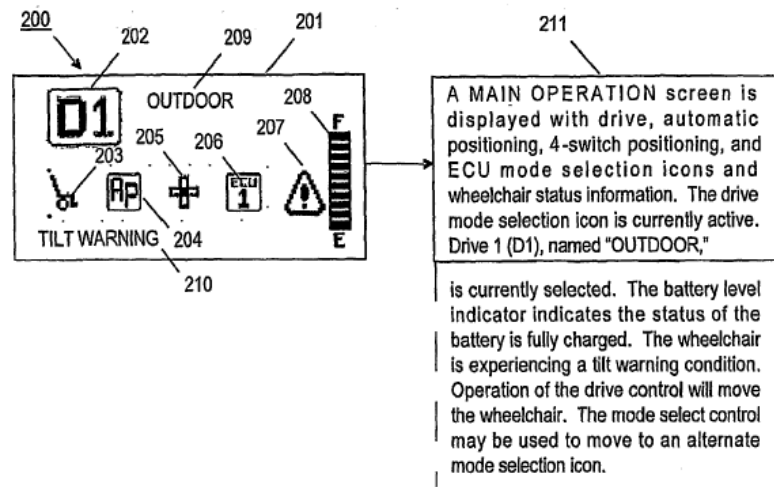


FIG. 12

Prosecution History

- [4] On September 14, 2015, a Final Action ("FA") was written pursuant to subsection 30(4) of the *Patent Rules*. The FA stated that the instant application is defective on the grounds that all of the claims on file at the time of the FA ("claims on file") encompass non-statutory subject-matter and therefore do not comply with section 2 of the *Patent Act* and that the claims on file would have been obvious and therefore do not comply with section 28.3 of the *Patent Act*.

- [5] In a March 11, 2016 response to the FA (“R-FA”), the Applicant proposed grammatical amendments to the claims on file and submitted arguments in favor of the statutory nature of the claims on file and their non-obviousness.
- [6] As the Examiner considered the application not to comply with the *Patent Act* and *Patent Rules*, pursuant to paragraph 30(6)(c) of the *Patent Rules*, the application was forwarded to the Patent Appeal Board (“the Board”) for review on June 1, 2016 along with an explanation outlined in a Summary of Reasons (“SOR”). The SOR set out the position that the claims on file were still considered to be defective due to non-statutory subject-matter and obviousness. The SOR further explained that the amendments proposed in the R-FA did not overcome these defects. The SOR also identified a defect that the description does not correctly describe the invention and is therefore non-compliant with subsection 27(3) of the *Patent Act* due to references in the instant application to the applicability of US legislative provisions (particularly 35 USC § 112).
- [7] In a letter dated June 21, 2016, the Board forwarded to the Applicant a copy of the SOR and offered the Applicant the opportunity to make further submissions and/or attend an oral hearing.
- [8] In a written communication dated September 16, 2016, the Applicant declined to participate in an oral hearing and requested that the review proceed based on the written record. The Applicant also indicated that written submissions would be provided prior to the Board’s review. However no such submissions were provided.
- [9] The present panel (“the Panel”) was formed to review the instant application under paragraph 30(6)(c) of the *Patent Rules*.
- [10] In a preliminary review letter (“PR letter”) dated November 30, 2017, the Panel set out its preliminary analysis of the statutory subject-matter and obviousness issues with respect to the claims on file as well as the proposed claims submitted with the R-FA.

[11] The Applicant provided written submissions in response to the PR letter (“R-PR”) on March 1, 2018. The submissions included a further set of proposed claims 1-20 (“proposed claims”) as well as arguments in favor of the statutory nature and non-obviousness of the claims on file and the proposed claims. The submissions also included a proposed amendment to page 33 of the application to address the defect identified in the SOR under subsection 27(3) of the *Patent Act*. However, in light of our conclusions as to the statutory subject-matter and obviousness issues, this issue is moot.

ISSUES

[12] The issues to be addressed by the present review are whether:

- claims 1-20 on file are directed to statutory subject-matter; and
- claims 1-20 on file would have been obvious.

[13] If the claims on file are considered defective, we may turn to the proposed claims 1-20 and consider whether they constitute amendments necessary for compliance with the Act and Rules.

LEGAL PRINCIPLES AND OFFICE PRACTICE

Claim Construction

[14] In accordance with *Free World Trust v Électro Santé Inc.*, 2000 SCC 66 [*Free World Trust*], essential elements are identified through a purposive construction of the claims done by considering the whole of the disclosure, including the specification and drawings (see also *Whirlpool Corp v Camco Inc.*, 2000 SCC 67 at paragraphs 49(f) and (g) and 52). In accordance with the *Manual of Patent Office Practice*, §13.05 (revised June 2015), the first step of purposive claim construction is to identify the person skilled in the art and their relevant common general knowledge (“CGK”). The next step is to identify the problem

addressed by the inventors and the solution put forth in the application. Essential elements can then be identified as those required to achieve the disclosed solution as claimed.

Statutory Subject-Matter

[15] The definition of invention is set out in section 2 of the *Patent Act*:

“invention” means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.

[16] The Office examination memo PN 2013-03 entitled “*Examination Practice Respecting Computer-Implemented Inventions*” (“PN 2013-03”) clarifies examination practice with respect to the Office’s approach to computer implemented inventions.

[17] As stated in *PN 2013-03*, Office practice considers that where a computer is found to be an essential element of a construed claim, the claimed subject-matter will generally be statutory. Where, on the other hand, it is determined that the essential elements of a construed claim are limited to matter excluded from the definition of invention (for example, fine arts, methods of medical treatment, features lacking in physicality, or claims where the subject-matter is a mere idea, scheme, rule or set of rules), the claim will not be compliant with section 2 of the *Patent Act*.

Obviousness

[18] The *Patent Act* requires that the subject-matter of a claim not be obvious to a person skilled in the art. Section 28.3 of the *Patent Act* provides:

28.3 The subject-matter defined by a claim in an application for a patent in Canada must be subject matter that would not have been obvious on the claim date to a person skilled in the art or science to which it pertains, having regard to

- (a) information disclosed more than one year before the filing date by the applicant, or by a person who obtained knowledge, directly or indirectly, from the applicant in such a manner that the information became available to the public in Canada or elsewhere; and
- (b) information disclosed before the claim date by a person not mentioned in paragraph (a) in such a manner that the information became available to the public in Canada or elsewhere.

[19] In *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61 at paragraph 67 [*Sanofi*], the Supreme Court of Canada stated that it is useful in an obviousness inquiry to use the following four-step approach:

- (1) (a) Identify the notional “person skilled in the art”;
- (b) Identify the relevant common general knowledge of that person;
- (2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;
- (3) Identify what, if any, differences exist between the matter cited as forming part of the “state of the art” and the inventive concept of the claim or the claim as construed;
- (4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

ANALYSIS

Claim Construction

The person skilled in the art

[20] In the R-PR, the Applicant contends that contrary to the position taken in the PR letter, the first step of claim construction is to construe the claims in order to give them meaning and determine their scope, rather than identifying the person skilled in the art. However, in

accordance with the principles of claim construction as set out in *Free World Trust* and cited in the R-PR, the “claims are to be read in an informed and purposive way with a mind willing to understand, viewed through the eyes of the person skilled in the art as of the date of publication having regard to common general knowledge.” Therefore, before reading the claims, one must be aware of who the person skilled in the art is and their common general knowledge.

[21] In the PR letter, the person skilled in the art was characterized as a:

person skilled in the art of power driven wheelchair design, including the associated mechanical and electrical control systems.

[22] The above characterization was not disputed by the Applicant in the R-PR. We therefore apply it in our analysis.

The relevant common general knowledge

[23] In the PR letter, the relevant CGK was set out as including:

- typical triggers for displaying help information content;
- a display device;
- an input device;
- a microcontroller;
- right and left drive mechanisms with right and left motors;
- actuators and motors controlling user support systems such as seats, leg rests, etc.;
- user interfaces that include input devices to control the various actuators and motors such as joysticks, pushbuttons, switches, etc.;
- input devices for special needs users such as proportional head control, sip n’ puff systems, fiber optic tray arrays, proximity head arrays and proximity switch arrays;
- the use of separate remote programmers used to set or modify the parameters associated with operation of a given wheelchair;
- the necessity to navigate through a large number of menus in a wheelchair control system to effect input commands;

- the conventional use of a “Help” function in association with computer display systems, such as a function activated by, e.g., a “Help” command or key. This function generally provides a synopsis of the description of a particular computer command found in a written manual; and
- the use of a Help button on a keyboard such as with respect to the “Xerox 8010 Star” information system, introduced in April 1981. Activation of the Help button displayed a screen containing the Help table of contents. The system further included use of a “?” command associated with every command menu in every window, as well as a “?” command at various message areas of a screen. Invoking the “?” command produced context-dependent help information. For a particular window, invoking the “?” command displayed help information describing the window, its contents and its functions. Invoking the “?” command at various message areas of the screen resulted in the display of help information relevant to that topic.

[24] Although the Applicant in the R-PR, with respect to the assessment of obviousness, questioned whether the extent of the CGK was sufficient to make the subject-matter of the claim on file obvious, the relevant points identified above were not disputed. We therefore apply them in our analysis.

The problem to be solved

[25] In the PR letter, the problem to be solved was characterized by the Panel as:

the lack of sufficient contextually-related information provided by the display system of a power driven wheelchair. In our preliminary view, there were no problems present related to the systems to produce such information.

[26] In the R-PR, the Applicant contends that contrary to the position taken by the Panel, there were particular issues that were required to be addressed in relation to the wheelchair systems and points to passages from pages 7-9 of the instant application in support of this contention. However, upon review of the passages cited by the Applicant, we are of the view that these issues are not related to the subject-matter of the claims on file. In

particular, issues such as providing modularization of actuators, motors and other output devices in order to simplify the addition or removal of optional output devices and streamline upgrades and retrofits are not addressed by the claimed subject-matter, which is directed to the provision of contextually-related help information.

[27] The Applicant also points to issues related to the stabilization of power-driven wheelchairs in relation to their input and output in real-time during the operation or support of such wheelchairs. Again, this is not a problem addressed by the claimed subject-matter.

[28] In light of the above, in our view the problem to be solved is that set out by the Panel in the PR letter.

The solution

[29] In the PR letter, the solution provided by the instant application was characterized as the provision of:

specific contextually-related help information related to multiple display screen objects simultaneously in response to input to a power driven wheelchair during its operation or support.

[30] In the R-PR, the Applicant contends that the prior art does not present a solution to the problem identified in the instant application:

The prior art ... does not provide a solution to the problem identified in the present application, that is they do not provide specific and textually-related help information provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power driven wheelchair as claimed. [Emphasis in original]

[31] In our view, this does not significantly differ from the solution as identified by the Panel. We therefore adopt the solution as set out in the PR letter.

Essential Elements

[32] Claims 1 and 8 on file, taken in the PR letter as representative of the claims on file, are reproduced below for ease of reference:

1. An apparatus associated with a power driven wheelchair, including:
 - a display device to selectively display screen content during operation or support of the power driven wheelchair;
 - a first input device for selective activation; and
 - a microcontroller in operative communication with the display device and the first input device;
 wherein the microcontroller controls the content displayed on the display device during the operation or support and detects activation of the first input device; and
 - wherein, in response to detection of the first input device activation, the microcontroller selects help information content from a collection of help information, the selected help information content being contextually related to multiple screen objects simultaneously displayed on the display device, and simultaneously displays the contextually-related help information content for the multiple screen objects on the display device.

8. A method for providing help information on a display device associated with a power driven wheelchair, including:
 - a) displaying content on the display device during operation or support of the power driven wheelchair;
 - b) detecting selective activation of a first input device;
 - c) in response to detection of the first input device activation, selecting help information content from a collection of help information, the selected help information content being contextually related to multiple screen objects simultaneously displayed on the display device and associated with the operation or support of the power driven wheelchair; and
 - d) simultaneously displaying the contextually-related help information content for the multiple screen objects on the display device.

[33] We stated in the PR letter that in light of the similarities in the subject-matter of independent claims 1 and 8 on file, it was our preliminary view that the only essential element of these claims was “the specific contextually-related help information provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power driven wheelchair.”

[34] We also addressed the Applicant’s contention in the R-FA that there were other essential features of the claims:

In the R-FA at page 4, the Applicant asserts that the features of:

- supplying help information for multiple screen objects simultaneously as claimed; and
- displaying help information content being contextually related to multiple screen objects simultaneously displayed

are essential to the invention and pertain to the “technical arrangement and combination of means necessary in order to operate the claimed apparatus associated with a power driven wheelchair and the method as per each independent claim. These features are providing the solution to the invention, and are therefore material to its operation and ability to achieve that solution.”

In our view, in light of the relevant CGK above, there were no problems present regarding “supplying information” or “displaying help information” since the “technical arrangement and combination of means necessary” to perform such functions was already well known. Therefore, all that remains is the specific content of the supplied and displayed information as the essential element to provide the identified solution.

[35] With respect to independent claim 15 on file, we indicated in the PR letter that it was our preliminary view that this claim contained the same essential feature of claims 1 and 8 on file.

[36] We also indicated in the PR letter that with respect to the dependent claims:

the additional features of these claims relate to the particular context to which the “contextually-related help information” relates and the particular medium from [which] the information is retrieved, none of which relate to the problem to be solved or the solution identified above. These claims therefore add no essential elements beyond that of the independent claims.

[37] In the R-PR, the Applicant did not directly address the essential elements identified above, other than to suggest that the invention as claimed addresses the problem and solution. However, in light of our assessment of the problem and solution above, the essential element of the claims on file is restricted to “the specific contextually-related help information provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power driven wheelchair.”

[38] We therefore assess the essential element of the claims on file as identified in the PR letter below to determine whether it is directed to statutory subject-matter and whether it would have been obvious.

Statutory Subject-Matter

[39] In the PR letter, we expressed our preliminary view that the subject-matter of the claims on file, as construed in accordance with office practice, is directed to subject-matter that lies outside of the definition of invention in section 2 of the *Patent Act*:

We have identified the essential element of the claims on file in accordance with the Office Practice set out in *MOPOP §13.05*. The essential element is the specific contextually-related help information provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power driven wheelchair. By its nature, such information is abstract and is akin to a mere idea and therefore lacking in physicality. It is not “something with physical existence, or something that manifests a discernable effect or change” (*Canada (Attorney General) v Amazon.com Inc.*, 2011 FCA 328 at paragraph 66, cited in *PN 2013-03* at page 2).

In the R-FA at pages 3-4, the Applicant pointed to Commissioner’s Decision CD1349 and contended that the claims on file of the instant application were likewise directed to statutory subject-matter. We note however that in that case, as shown by the extracted portion cited by the Applicant in the R-FA at page 4, the essential features of the claims in that case were considered to include a physical “technical arrangement and combination of means”, rather than abstract information.

[40] In the R-PR, the Applicant contends that the Panel’s analysis is incorrect in that:

- If the position is that a business scheme *per se* is not patentable subject-matter, there is no support for such a conclusion in Canadian jurisprudence; and
- The claims on file are directed to a patentable apparatus and method that has physical existence or manifests a discernable effect or change, as was the case with the subject-matter of the claims at issue in *Canada (Attorney General) v Amazon.com Inc.*, 2011 FCA 328 [*Amazon.com*];

[41] With respect to the first point, the Panel has not indicated in the PR letter that the subject-matter of the claims is directed to a business scheme. Rather, after construing the claims on file, the Panel was of the preliminary view that the subject-matter of the claims is directed to specific information, which is abstract in nature and akin to a mere idea and therefore lacks physicality. The subject-matter of the claims on file would therefore not fall within the criteria set forth in *Amazon.com*, namely that what is required is “something with physical existence, or something that manifests a discernable effect or change” (*Amazon.com*, 2011 FCA 328 at paragraph 66, cited in *PN 2013-03* at page 2).

[42] With respect to the second point, as construed above, the claims on file are directed to “the specific contextually-related help information provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power driven wheelchair.” Given the abstract nature of such information, the essential element of the claims has no physical existence and does not manifest a discernable effect or change. While the Applicant in the R-PR attempts to compare the claims granted in *Amazon.com* with those of the instant application, it is our view that each case must be judged on its own merits and the construction in each case will depend on the identification of the person skilled in the art, their relevant CGK and how such a person would construe the claims in light of the particular specification. The outcome of one case is not determinative of another.

Conclusion on Statutory Subject-matter

[43] In light of the above, it is our view that claims 1-20 on file are directed to non-statutory subject-matter and therefore non-compliant with section 2 of the *Patent Act*.

Obviousness

(1)(a) Identify the notional “person skilled in the art”

[44] The person skilled in the art has been set out above under Claim Construction at paragraph [21].

(1)(b) Identify the relevant common general knowledge of that person

[45] The relevant CGK has also been identified above under Claim Construction at paragraph [23].

(2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it

[46] In the PR letter, the Panel took the essential element of the claims identified under Claim Construction to be representative of the inventive concept of the claims as well:

In light of our identification of the essential elements of the claims above, we take this to be representative of the inventive concept of the claims as well.

To clarify, the inventive concept then becomes the specific contextually-related help information provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power driven wheelchair.

[47] In the R-PR, the Applicant did not directly dispute the inventive concept identified in the PR letter, or as noted above, the essential element from which it was drawn. The Panel therefore applies below the inventive concept as identified in the PR letter.

(3) Identify what, if any, differences exist between the matter cited as forming part of the “state of the art” and the inventive concept of the claim or the claim as construed

[48] In the PR letter, with respect to the state of the art, we stated that:

In the FA two pieces of prior art were applied, as set out below:

D1: US 20050076308	Mansell et al.	April 7, 2005
D2: US 5157768	Hoeber et al.	October 20, 1992

In the FA, the claims on file were considered to have been obvious having regard to prior art document D1 in view of prior art document D2 and the relevant CGK.

D1 discloses a control system for a personal mobility vehicle such as a power driven wheelchair. The control system uses a menu-driven structure that is accessed through a display device. In the case of D1, the menu structure of the control system may be customized to suit the needs of the user.

As asserted by the Applicant in the R-FA at page 6 and acknowledged in the FA at page 7, D1 does not disclose the provision of help information content whether contextually-related or not.

D2 discloses an apparatus and method for use in computer-controlled display systems wherein a computer cursor may be positioned over an area of a "window" image on a display screen, with the depression of a predetermined help key on a keyboard causing the display of context-related help information within a separate help window. Examples of the areas over which the cursor may be placed include an icon, window function or other window image. As noted at col. 2, lines 54-56, the help information retrieved "corresponds to the object or area over which the cursor has been placed" (see also col. 7, lines 24-29).

The invention described in D2 was disclosed as an improvement of the "Xerox 8010 Star information system", noted above in relation to the relevant CGK. This is evident from the text at col. 7, lines 29-34:

Unlike the prior art systems, the present invention does not require the placement or selection of a "?" command to invoke the help documentation. The present invention provides a help system which is sensitive to the context of the image over which cursor **36** has been placed.

As such, in our preliminary view, the person skilled in the art would view the reference to providing help information contextually-related to an area in D2 as being meant to refer to the equivalent functionality of the Xerox system, where invoking the "?" command for a window produced help documentation describing the window, its commands and its functions.

In the R-FA at pages 5-8, the Applicant contends that neither D1 nor D2 disclose:

1. Displaying help information for multiple screen objects simultaneously; or
2. Displaying help information content being contextually related to multiple screen objects simultaneously displayed.

While we agree that D1 does not disclose such features, in light of our assessment of D2 it is our preliminary view that such features are disclosed by D2, though not specifically as part of a power driven wheelchair display system.

Given the inventive concept identified above, namely the specific contextually-related help information provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power

driven wheelchair, which is not disclosed in either of D1 or D2, this becomes the difference between the state of the art and the inventive concept.

[49] In the R-PR, the Applicant asserted the presence of the same two differences between the prior art documents D1 and D2 and the claims on file that they did in the R-FA (discussed in the quotation from the PR letter above).

[50] As the Panel stated in the PR letter, we agree that D1 does not disclose such features as this document does not disclose the provision of help information.

[51] In regard to the first alleged difference with respect to D2, the Applicant again contends that prior art document D2 only provides help information for one screen object at a time. The Applicant contends that D2 teaches away from providing help information to multiple screen objects and that if D2 were modified to provide help information for multiple screen objects, the hovering cursor used therein to select screen objects would not be used for the purpose set out in D2.

[52] However as the Panel noted in the PR letter, D2 discloses the use of the cursor to select and obtain information related to “a particular object, area or function within window 80 in order to assist the user in operating the computer display system.” Further, the PR letter pointed to the passage in D2 that states “the present invention permits a user to place cursor 36 over any area, icon, or image within a window displayed on display 24 and obtain help information as a function of the location of the cursor 36.” It is our view that the selection of an area as opposed to, for example an icon, implies the selection of an area that would include more than one screen object or icon. The particular embodiment described in D2 where the user selects a push pin icon 130 is only one embodiment of the disclosed invention. Further, as noted in the PR letter, D2 is described as an improvement over the “Xerox 8010 Star information system” described therein in that a cursor may be used to select screen items or areas as opposed to the inclusion of multiple “?” commands on a screen. It is our view that the skilled person would interpret D2 as intending to provide the same type of help information as was the case in the Xerox system, namely “help documentation describing the window, its commands and its functions” (D2 at col. 2,

lines 5-6), which also suggests providing help information relating to multiple screen objects simultaneously.

- [53] In regard to the second alleged difference with respect to D2, namely that the help information is contextually related to multiple screen objects simultaneously, as set out in the PR letter, D2 discloses a “help system which is sensitive to the context of the image over which cursor 36 has been placed” (D2 at col. 7, lines 32-34). D2 further discloses a system “whereby context sensitive help information may be obtained by a user of a computer display system” (D2 at col. 7, lines 36-38).
- [54] In the R-PR, the Applicant seems to focus on the idea that the contextually-related information provided in the claims on file relates to the “status” of the displayed screen objects and contends that D2 did not provide contextually-related information related to the status of the push pin used in the exemplary embodiment. However, the claims on file are not limited to providing contextually-related help information related to the status of a displayed screen object. The Applicant acknowledges this in the R-PR when they state that the portions of the specification relating to status-related help information are being referred to for exemplary purposes, not to limit the claims. As such, it is our view that D2 does disclose “contextually-related help information” as set out in the claims on file.
- [55] The Applicant also pointed to features of claim 15 as not being shown by the prior art, namely the provision of help information content that is contextually-related to an “active screen object within the content of the multiple screen objects simultaneously displayed.” However, as noted in the PR letter and by the Applicant in the R-PR, the scope of this claim is similar to the others and in light of our claim construction above contains the same essential feature as the other claims on file and therefore no other difference.
- [56] In our view, in light of the above, as we stated in the PR letter, the features identified as differences with respect to D2 by the Applicant are only differences in as much as they are applied specifically to a power driven wheelchair display system. Such differences are in

our view reflected in the inventive concept itself, identified above, which then becomes the difference between the state of the art and the inventive concept.

[57] To restate, the difference between the state of the art and the inventive concept is “the specific contextually-related help information provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power driven wheelchair.”

(4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

[58] In the PR letter, we set out our preliminary view that given the difference identified at step 3 above, the claims on file would have been obvious:

It is our preliminary view that, given that it was part of the relevant CGK and disclosed by prior art document D2 to provide contextually-related help information related to multiple screen objects simultaneously on a display device, the information provided would logically vary depending on the particular context. The information provided would depend, for example, on whether the context related to the functions of a general purpose computer such as that of D2, or to the functions of a power driven wheelchair such as that of D1. By definition, the information is “contextually-related.”

[59] We also explained why, in our preliminary view, even if we had taken into account the other features of the claims on file that were considered non-essential, and therefore also not part of the inventive concept, we would have arrived at the same preliminary view that the claims on file would have been obvious:

We also note that had we considered the other elements of the claims that were considered to be non-essential, we would have arrived at the same preliminary view. In such an assessment, at step 3, above, we would have considered the difference between the state of the art and the independent claims to have been the use of a contextually-related help information system such as that of D2 in a power driven wheelchair control system display such as that of D1 (given that

D2 discloses the provision of contextually-related help information for multiple screen objects simultaneously, as discussed above at step 3).

It would also have been our preliminary view that such a difference would have been obvious. Given the general suggestion in D2 to provide contextually-related help information in a computer display system, it would have been obvious to improve such systems by providing such help information, whether the help information was retrieved by activating a “?” command, by activating a help button after selecting an area of a window by a cursor, or by activating a help button after using a known menu-driven system such as that of D1 to select a control function (as in the claims of the instant application). A power driven wheelchair control system display, such as that of D1, was one such computer display system. In our preliminary view, the examples of how the information may be retrieved would have represented obvious variations to the person skilled in the art based on the particular context in which the help information system is implemented.

With respect to the dependent claims, features such as varying kinds of objects on the screen for which contextually-related help information may be provided and varying triggers for retrieving it were already disclosed by D2. Further, the choice of medium from which the help information is to be retrieved would have in our preliminary view, depended on the particular implementation of the help system and the preference of the person skilled in the art in doing so.

[60] In the R-PR, the Applicant contended that the Panel’s preliminary analysis in the PR letter was based on an impermissible hindsight analysis and that, although the person skilled in the art may possess the relevant CGK as identified by the Panel, more would be required to arrive at the claimed invention than what was found in D1, D2 and the relevant CGK. The Applicant also contended that the claimed invention would not have been obvious to try and it would not have been more or less self-evident that it would work in light of the prior art and the relevant CGK (the issue of whether it would have been more or less self-evident that the claimed invention would work being one of the factors to consider in whether or not the claimed invention would have been obvious to try (*Sanofi* at paragraph [69])).

[61] With respect to the allegation of a hindsight analysis, other than generally pointing to the Panel’s assessment of the prior art, there was no other point made in this regard. The Panel has assessed above the claims on file, as construed, in light of the applicable prior art and relevant CGK at the relevant date of the claims and has come to the conclusion that the claims on file would have been obvious as of the relevant date.

[62] With respect to whether the claims on file were obvious to try or more or less self-evident, we note that in the PR letter, the Panel did not apply an “obvious to try” test. In our view, the subject-matter of the present claims is not that of “areas of endeavor where advances are often won by experimentation”, such as the pharmaceutical field (*Sanofi* at paragraph [68]). There is nothing on record that indicates that there was experimentation of the nature of the invention in *Sanofi* involved in arriving at the claimed invention. While there may have been adaptation of the prior art in order to implement the prior art principles in the context of a power driven wheelchair, this does not mean that an obvious to try test is necessary (*Wenzel Downhole Tools Ltd. v National-Oilwell Canada Ltd.*, 2012 FCA 333 at paragraphs 97-98). In our view, it is not necessary in this case. As a result of the four-step *Sanofi* approach, we have concluded that the claims on file would have been obvious.

Conclusion on Obviousness of Claims on File

[63] Having considered the record before us, including the Applicant’s submissions in the R-PR, we conclude that claims 1-20 on file would have been obvious and therefore non-compliant with section 28.3 of the *Patent Act*.

Proposed Claims

[64] In the R-PR, the Applicant submitted proposed claims 1-20, the only proposed modification being a change to claim 1 to include the limitation:

wherein the multiple screen objects comprise objects associated with an operation mode of a power driven wheelchair or a support mode of a power driven wheelchair to provide information about a specific operation mode or support mode of the power driven wheelchair in use.

[65] In our view, the proposed modification to claim 1 would not alter the conclusions in relation to the issues of statutory subject-matter or obviousness. The proposed modification merely sets out specific types of contextually related information, namely that relating to an operation or support mode of a power driven wheelchair. We have already concluded in relation to the claims on file that “the specific contextually-related help information

provided in relation to multiple display screen objects simultaneously in response to input during the operation or support of a power driven wheelchair” (the essential feature of the claims on file) does not represent statutory subject-matter and would have been obvious. Therefore, merely explicitly setting out a specific type of information, which would depend on the specific context, would not change that result.

[66] In light of the above, we conclude that proposed claims 1-20 do not overcome the statutory subject-matter and obviousness defects and therefore the introduction of these claims does not constitute a specific amendment that is “necessary” pursuant to subsection 30(6.3) of the *Patent Rules*.

CONCLUSIONS

[67] We have determined that claims 1-20 on file are directed to non-statutory subject matter and are therefore non-compliant with section 2 of the *Patent Act* and that claims 1-20 on file would have been obvious and therefore non-compliant with section 28.3 of the *Patent Act*. We have further determined that proposed claims 1-20 would not overcome the statutory subject-matter and obviousness defects and therefore the introduction of these claims does not constitute a specific amendment that is “necessary” pursuant to subsection 30(6.3) of the *Patent Rules*.

RECOMMENDATION OF THE BOARD

[68] In view of the above, the Panel recommends that the application be refused on the grounds that the claims on file are directed to non-statutory subject-matter and are therefore non-compliant with section 2 of the *Patent Act* and that the claims on file would have been obvious and are therefore non-compliant with section 28.3 of the *Patent Act*.

[69] Further, proposed claims 1-20 do not overcome the non-statutory subject-matter and obviousness defects and therefore the introduction of these claims does not constitute a specific amendment that is “necessary” pursuant to subsection 30(6.3) of the *Patent Rules*.

Stephen MacNeil
Member

Marcel Brisebois
Member

Lewis Robart
Member

DECISION

[70] I concur with the conclusions and recommendation of the Patent Appeal Board that the application be refused on the grounds that the claims on file are directed to non-statutory subject-matter and are therefore non-compliant with section 2 of the *Patent Act* and that the claims on file would have been obvious and therefore non-compliant with section 28.3 of the *Patent Act*.

[71] Therefore, in accordance with section 40 of the *Patent Act*, I refuse to grant a patent on this application. Under section 41 of the *Patent Act*, the Applicant has six months within which to appeal my decision to the Federal Court of Canada.

Johanne Bélisle
Commissioner of Patents

Dated at Gatineau, Quebec,
this 16th day of October, 2018