

# The Limited Monopoly<sup>®</sup>

## Non-Patentable Subject Matter - Obnoxiousness Not a Bar

by John Hammond, PE and Robert Gunderman, PE

### Patents and the Public Interest – Generally

As regular readers of this column may recall, our patent system was founded to serve both the interests of the inventor and the general public.<sup>1</sup> A patent is a grant by the government of a limited monopoly. The monopoly is the right to exclude others from making, using, selling, or importing the claimed invention in the U.S. during this 20 year period. Therefore it is a time-limited monopoly.

In consideration of the grant of this limited monopoly, the public gets a benefit in return. Federal statute 35 U.S.C. 112 sets forth that in order to be granted the patent, the inventor must provide a clear, concise written description that teaches one of "ordinary skill in the art" how to make and use the invention, including the best mode of doing so. At the end of the 20-year monopoly, the public is then free to practice the invention, and it has the complete and best "recipe" to do so as prescribed in the patent.

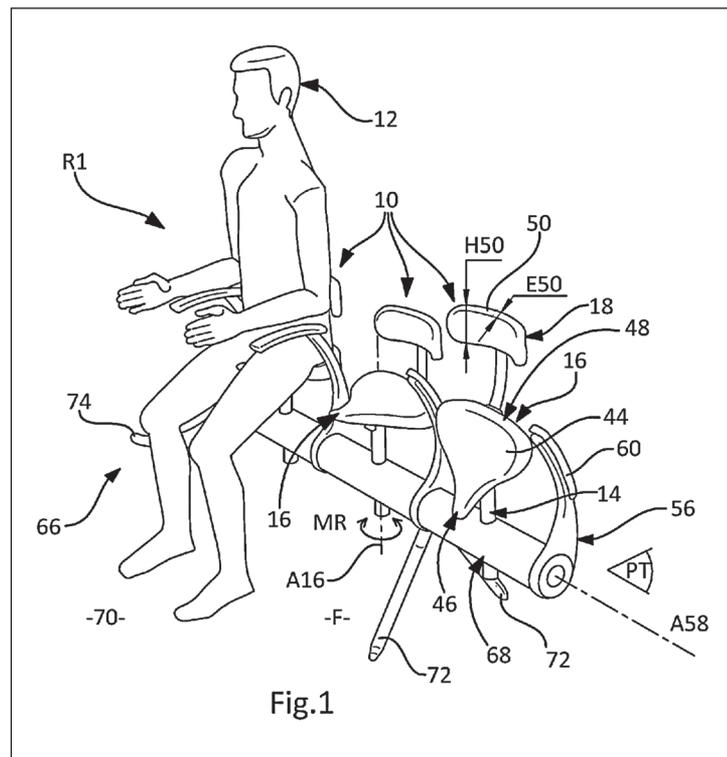
### The Public Interest – in What Not to Patent

The provisions of 35 U.S.C. 112 notwithstanding, as technology has evolved over the course of our history, Congress has found it to be in the public interest that when an invention, if patented (and therefore published) might present a risk to national security, that invention (and any patent application and/or issued patent that discloses it) must be kept secret. The governing statute, 35 U.S.C. 181, sets forth the responsibilities of the Commissioner of Patents and the Department of Defense to identify any such patent application, and take the necessary steps to maintain secrecy for as long as the risk is present.

In one special instance, rather than delegating the authority to maintain secrecy of an invention, patent application, and/or patent, Congress has legislated an outright ban on the issuance of a patent. 42 U.S.C. § 2181(a) states, "No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon. Any patent granted for any such invention or discovery is revoked, and just compensation shall be made therefor."

This statute is part of the Atomic Energy Act of 1954. The history of the statute, and the circumstances leading up to its enactment, are well documented by Alex Wellerstein in his article,<sup>2</sup> "Patenting the bomb: nuclear weapons, intellectual

*"No patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon."*



property, and technological control." Wellerstein explains that, "During the course of the Manhattan Project, the U.S. government secretly attempted to acquire a monopoly on the patent rights for inventions used in the production of nuclear weapons and nuclear energy. ... [A]t the time, when the bomb was a new and essentially unregulated technology, patents played an important role in the thinking of project administrators concerned with meaningful postwar control of the bomb."

Stepping back for a moment, and thinking about the requirement of 35 U.S.C. 112 to provide a clear, concise written description that teaches one of "ordinary skill in the art" how to make and use the invention, the notion of having a patent issue on an atomic weapon is horrifying, especially in our current state of world affairs.

As further described by Wellerstein, in a hearing before the U.S. Senate's Special Committee on Atomic Energy in February 1946, it was revealed by Captain Robert A. Lavender that the U.S. government had undertaken an extensive program to patent atomic weapons, and many patent applications had already been filed and were undergoing prosecution. That hearing, and further hearings and actions by Congress, led to the enactment of 42 U.S.C. § 2181, which remains in effect today.

### Obnoxious Inventions are Statutory

Ah, if only it were not so. Now that we've covered the serious subject matter, we turn to the unserious, and note that so long as an invention does not fall under a proscribed category, no matter how obnoxious, it may be considered as patentable subject matter (subject to meeting written description, novelty, and unobviousness requirements). We're sure that our readers could come up with their own, but here is a very short list of some of our least favorite inventions, and some editorial comments on them:

- Bass speakers that fill entire vehicle back seats and trunks. What's the utility? Annoying home dwellers 300 feet off the road through closed windows?
- Red light cameras. No doubt there are plenty of patents on these, and they all probably recite that they "enhance driver safety," blah, blah, blah. Probably none state the hidden truth: they are there to make money for the cities that use them.
- Self-service checkouts. Annoying because so often something goes wrong. You know you're near one when you come to a traffic jam of shopping carts full of abandoned merchandise.
- Automated call centers for customer service. There are patents for these, but none state forthrightly, "It is an object of this invention to frustrate a caller to the point of said caller hanging up and not calling back."
- Karaoke machines. Possible method claim: "A method of identifying a person who should not sing in public, the method comprising..."
- Google Glass. Annoying *and* creepy. That red light better not come on while you're talking to us, you \_\_\_\_\_.<sup>3</sup>
- Computer touch screens in cars. Taking distracted driving to a whole new level, but perfectly legal, unlike talking on your cell phone without a headset.

### ... and in Recent News...

Lastly, there is the "Knee Defender™." You have probably caught at least one of the recent stories in the news on the Knee Defender™, which is a device that can be secured to the back structure of a seat on a commercial jetliner, and prevent the occupant of that seat from reclining. On multiple occasions this past August, airline flights made unscheduled

landings due to physical conflicts that occurred between passengers when the device was put in use. According to the website gadgetduck.com,<sup>4</sup> the Knee Defender™ has been on the market since 2003. Frankly, we're surprised it took this long for it to cause a major fight, flight diversion, and related passenger ejections.

Also according to the website, the Knee Defender™ is patented. Sure enough, on October 30, 2007, U.S. Patent No. 7,287,817<sup>5</sup> to inventor Ira Goldman for "Methods and Devices for Enhancing Health, Safety, and Comfort on Conveyances in Relation to Reclining Seats." To say the least, the alleged benefit set forth in the title of the patent is debatable, or at least subject to one's point of view (or airline seat location), as is much of the content of the website where the Knee Defender™ is sold.

Rather than joining in the debate, we'll simply close with this observation: we wouldn't want to fly in the seat in front of Mr. Goldman, and he probably wouldn't want to fly in the seat behind us. However, that will probably become a moot point when the airlines, in their eternal quest to stuff ever enlarging passengers into even smaller spaces, decide to implement the seats disclosed in United States Patent Application Publication 2014/0159444 for a "seating device with reduced bulk, for example for an aircraft."<sup>6</sup> (Fig. 1 reproduced nearby.)

1. See *The Limited Monopoly*®, August 2009.
2. A.Wellerstein, Isis. 2008 Mar;99(1):57-87.
3. <http://www.urbandictionary.com/define.php?term=Glasshole>
4. <http://www.gadgetduck.com/goods/kneedefender.html>.
5. Expired 10/30/2011 for failure to pay maintenance fees.
6. Applicant: Airbus Operations (SAS), Toulouse (FR).

*Authors John M. Hammond P.E. (Patent Innovations, LLC [www.patent-innovations.com](http://www.patent-innovations.com)) and Robert D. Gunderman P.E. (Patent Technologies, LLC [www.patenttechnologies.com](http://www.patenttechnologies.com)) are both registered patent agents and licensed professional engineers. They offer several courses that qualify for PDH credits. More information can be found at [www.patenteducation.com](http://www.patenteducation.com). Copyright 2014 John Hammond and Robert Gunderman, Jr.*



*Note: This short article is intended only to provide cursory background information, and is not intended to be legal advice. No client relationship with the authors is in any way established by this article.*