

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ERIC F. JUNKEL
and LINDA M. USHER

Appeal No. 2001-1360
Application 09/290,056

ON BRIEF

Before CALVERT, STAAB, and MCQUADE, Administrative Patent Judges.

MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Eric F. Junkel et al. appeal from the final rejection (Paper No. 7) of claims 1 through 12 and 15 through 22, all of the claims pending in the application.

THE INVENTION

The invention relates to a portable spray misting device which is defined in representative claim 1 as follows:

1. A portable spray misting device comprising:
an internally hollowed body capable of holding a volume of a fluid to be dispensed, said body having a substantially

flattened base and a contoured upper body, said body terminating in an upwardly extending and interiorly open neck which defines a first port having a first diameter;

a spray applicating head for issuing a mist spray of said fluid and securing means for attaching said applicating head to said open neck, said securing means further comprising an annular collar defining a first half and a second half, said halves being assembled around said open neck so as to sandwich an annular and downwardly facing flange portion of said spray head;

an interiorly open and annular rim extending from a specified location of said contoured upper body and defining a second port, said second port having a second diameter which is greater than said first diameter;

a cap and resecuring means for securing said cap in a fluid-tight manner over said second port; and

a portable fan unit including a plurality of blades rotatably connected to said unit, said fan unit being releasably secured atop said spray applicating head so that said mist spray is directed into a path of said rotating blades and, upon contact with said blades, is cooled and distributed.

THE PRIOR ART

The references relied on by the examiner as evidence of obviousness are:

Baeuerle	705,013	Jul. 22, 1902
Cunning	4,700,892	Oct. 20, 1987
Itzel et al. (Itzel)	4,705,191	Nov. 10, 1987
Lurkis et al. (Lurkis)	5,022,562	Jun. 11, 1991
Julinot	5,310,086	May 10, 1994
Siegel	5,529,217	Jun. 25, 1996
Junkel et al. (Junkel)	5,667,731	Sep. 16, 1997
Groess	5,675,873	Oct. 14, 1997
Saaski et al. (Saaski)	5,697,153	Dec. 16, 1997
Chu et al. (Chu)	5,740,948	Apr. 21, 1998

THE REJECTIONS

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Claims 1, 8, 9 and 15 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Groess and Junkel.

Claims 2 through 4, 6 and 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Groess, Junkel and Lurkis.

Claim 5 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Groess, Junkel and Baeuerle.

Claims 10 through 12 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Groess, Junkel and Saaski.

Claim 16 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Groess, Junkel and Cunning.

Claims 17 and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Groess, Junkel and Siegel.

Claim 18 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Groess, Junkel and Julinot.

Claim 19 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Groess, Junkel and Chu.

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Claims 21 and 22 rejected under 35 U.S.C. § 103(a) as being unpatentable over Itzel in view of Junkel.

Attention is directed to the appellants' brief (Paper No. 9) and to the examiner's answer (Paper No. 14) for the respective

positions of the appellants and the examiner with regard to the merits of these rejections.

DISCUSSION

Itzel, the examiner's primary reference, discloses "a device in which concentrates, particularly concentrated plant protecting agents, can be safely diluted with a suitable liquid to the concentration suitable for use, without any errors of dosage, and from which the resulting solution can be disseminated by spraying or atomizing" (column 1, lines 4 through 9). The illustrative embodiment depicted in Figures 1, 3 and 4 includes a container 1 having an upper opening 6 and a lower fill opening 3, a hand pump 2 secured to the upper opening, and a sealing cap 5 threaded to the fill opening. The sealing cap 5 comprises a cup 10 containing a concentrate 17. Screwing the cap down on the rim of the fill opening ruptures

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the cup to release the concentrate (see column 3, line 25 et seq.). In operation,

[t]he user first introduces the diluent (4), usually water, through the fill opening (3) into the container (1) having hand pump (2) mounted thereon, and then a sealing cap (5) containing the concentrate (17) is screwed onto fill opening (3). As it is screwed on, the cup (10) is ruptured and the concentrate (17) can be mixed with the diluent by shaking the container (1) without the need for the user to come into contact with the concentrate (17) [column 4, lines 19 through 27].

As tacitly acknowledged by the examiner (see pages 4 and 9 in the answer), Itzel does not respond to the limitation in independent claim 1 requiring the securing means for attaching the spray head to the open neck of the internally hollowed body to be in the form of an annular collar defining first and second halves assembled around the open neck so as to sandwich an annular and downwardly facing flange portion of the spray head.

The examiner's reliance on Groess to cure this shortcoming is not well taken.

Groess discloses a clamping ring for securely joining the flanged ends of structural components such as pipes, housings, gear boxes and engine blocks (see column 1, lines 7 through

12). The clamping ring 1, 8 comprises two ring sections 11A and 11B for encircling opposing flanges 4A and 4B and threaded bolts 13 for holding the ring sections together in clamping engagement with the flanges.

Contrary to the conclusion reached by the examiner (see pages 4 and 9 in the answer), there is nothing in Groess' disclosure of an annular collar for joining structural components such as pipes, housings, gear boxes and engine blocks which would have suggested utilizing such a heavy-duty collar to secure the spray head (hand pump 2) and internally hollowed body (container

1) of Itzel's handheld spraying device. Neither Junkel nor any of the other applied references overcomes this fundamental flaw in the examiner's evidentiary showing.

Therefore, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claim 1 or of claims 2 through 12 and 15 through 20 which depend therefrom.

We shall sustain, however, the standing 35 U.S.C. § 103(a) rejection of independent claims 21 and 22 as being unpatentable over Itzel in view of Junkel.

Claims 21 and 22 are similar in scope to claim 1 except that they do not limit the securing means to the annular collar specified in claim 1. Implicit in the examiner's explanation of the rejection (see pages 7 and 8 in the answer) is that Itzel responds to all of the limitations in claims 21 and 22 except for (1) those requiring the diameter of the second port to be larger than the diameter of the first port and (2) those relating to the portable fan unit.

Junkel discloses a portable fan device used in combination with a spray misting bottle to enhance the spray atomizing effect of the bottle by equally and uniformly distributing the atomized

spray (see column 1, lines 6 through 11, and column 4, lines 45 through 51). As described in the reference,

[t]he spray misting bottle is of an atomizing spray variety as is conventionally known in the art and includes a fluid carrying base and a spray applying head portion which is secured atop the base by a connector. The fan device includes a body which is attachable to the spray applying head portion and a fan blade unit made up of a plurality of blades which are connected to the body by a shaft and extend forwardly from the body. The body forms a self-contained unit which houses a small electric

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motor for driving the shaft and an electrical power means such as a battery for operating the motor [column 1, lines 47 through 57].

In rejecting claims 21 and 22, the examiner concludes that it would have been obvious to one of ordinary skill in the art "to make [Itzel's] second port diameter greater than the first port to accommodate a larger fill spout" (answer, page 8) and "to incorporate the fan of Junkel et al. to the device of Itzel et al. to cool and atomize the mist spray" (answer, page 8). As so modified, Itzel's spray misting device would meet all of the limitations in claims 21 and 22.

The appellants do not dispute the obviousness of the first modification, but do argue that the rejection is nonetheless unsound because

Junkel does not teach or suggest the construction of a spray misting device including first and second fill ports and, conversely, neither does Itzel teach or suggest a separable fan attachment unit. It is again respectfully submitted that the mere statement that it would be obvious to combine the references together to reconstruct the claimed device, and absent some suggestion or teaching in the respective references in support of the combination, is insufficient to show obviousness of the claimed device [brief, page 12].

The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the

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structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.

In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

The appellants' well founded observation that Itzel lacks a fan unit and Junkel a second port is not dispositive inasmuch as non-obviousness cannot be established by attacking references individually where, as here, the rejection is based upon the teachings of a combination of references. In re Merck & Co., Inc., 800 F.2d 1091, 1097, 231 USPQ 375, 380 (Fed. Cir. 1986). Junkel's teaching that the fan unit disclosed therein enhances the spray atomizing effect of the associated spray bottle by equally and uniformly distributing the atomized spray would have provided the artisan with ample suggestion or motivation to

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furnish Itzel's spray device with such a fan unit.¹ Thus, the appellant's position that the 35 U.S.C. § 103(a) rejection of claims 21 and 22 as being unpatentable over Itzel in view of Junkel is unsound due to a lack of suggestion to combine these references is not persuasive.

NEW GROUNDS OF REJECTION

The following new grounds of rejection are entered pursuant to 37 CFR § 1.196(b).

Claims 8 through 12 and 16 are rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter the appellants regard as the invention.

Claims 8 through 12 and 16 depend, either directly or indirectly, from claim 1 which, as indicated above, recites the securing means for attaching the spray head to the open neck of

¹ It seems to us that the combined teachings of the references also would have suggested providing Junkel's spray misting device with a second port of the type recited in the claims in view of Itzel to facilitate filling the device. In this regard, where a rejection is predicated on two references each containing pertinent disclosure which has been pointed out to the applicant, it is of no significance, but merely a matter of exposition, that the rejection is stated to be on A in view of B instead of on B in view of A, or to term one reference primary and the other secondary. In re Bush, 296 F.2d 491, 496, 131 USPQ 263, 267 (CCPA 1961).

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the internally hollowed body as an annular collar defining first and second halves assembled around the open neck so as to sandwich an annular and downwardly facing flange portion of the spray head. Claims 8 through 12 and 16, however, define other collar/securing means embodiments which, as disclosed, are mutually exclusive with respect to the embodiment recited in claim 1. This inconsistency, which appears to stem from the incorporation into claim 1 of the subject matter originally recited in now canceled claim 13, renders the scope of claims 8 through 12 and 16 unclear.

Claims 8 through 12 and 16 also are rejected under 35 U.S.C. § 112, first paragraph, as being based on a specification which fails to comply with the written description requirement of this section of the statute.

The test for compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language. In re Kaslow, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir.

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1983). The content of the drawings may also be considered in determining compliance with the written description requirement. Id.

In short, the disclosure of the application as originally filed would not reasonably convey to the artisan that the appellants had possession at that time of the mixed collar/securing means structure now recited in claims 8 through 12 and 16 via their dependency from claim 1.

SUMMARY

The decision of the examiner to reject claims 1 through 12 and 15 through 22 is affirmed with respect to claims 21 and 22 and reversed with respect to claims 1 through 12 and 15 through 20; and new rejections of claims 8 through 12 and 16 are entered pursuant to 37 CFR § 1.196(b).

In addition to affirming the examiner's rejection of one or more claims, this decision contains new grounds of rejection pursuant to 37 CFR § 1.196(b)(amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131, 53,197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21,

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1997)). 37 CFR § 1.196(b) provides, "A new ground of rejection shall not be considered final for purposes of judicial review."

Regarding any affirmed rejection, 37 CFR § 1.197(b) provides:

(b) Appellants may file a single request for rehearing within two months from the date of the original decision

37 CFR § 1.196(b) also provides that the appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (37 CFR § 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. . . .

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

Should the appellants elect to prosecute further before the Primary Examiner pursuant to 37 CFR § 1.196(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the

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prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If the appellants elect prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for reconsideration thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART; 37 CFR § 1.196(b)

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Administrative Patent Judge)	
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)	BOARD OF PATENT
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)	APPEALS AND
LAWRENCE J. STAAB)	
Administrative Patent Judge)	INTERFERENCES
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