

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD W. BROWN

Appeal No. 95-3684
Application 08/110,273¹

ON BRIEF

Before JERRY SMITH, BARRETT and FLEMING, **Administrative Patent Judges**.

FLEMING, **Administrative Patent Judge**.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of
claims 1 through 23, all of the claims pending in the
application.

¹Application for patent filed August 23, 1993.

Appeal No. 95-3684
Application 08/110,273

The invention relates to a method and apparatus for custom-izing a cosmetic product at the point of sale to the customer.

Independent claim 1 is reproduced as follows:

1. A machine for custom blending of a color cosmetic product comprising:

(i) a means for receiving operating instructions about a customer's optimal formula;

(ii) a plurality of dispensers each containing a cosmetic composition of a different color selected from the group consisting of white, yellow, red and black;

(iii) a means for activating dosing to a common dosing chamber of certain selected ones of the cosmetic compositions and at certain concentrations as determined by the operating instructions; and

(iv) a means for delivering the dosed formula into a container to the customer as a color cosmetic product.

The references relied on by the Examiner are as follows:

Cedrone et al. (Cedrone) 23, 1988	4,766,548	Aug.
Krauss et al. (Krauss) 1989	4,871,262	Oct. 03,

Claim 1 stands rejected under 35 U.S.C. § 102 as being

Appeal No. 95-3684
Application 08/110,273

anticipated by Krauss. Claims 2 through 14 and 18 through 23 stand rejected under 35 U.S.C. § 103 as being unpatentable over Krauss. Claims 15 through 17 stand rejected under 35 U.S.C. § 103 as being unpatentable over Krauss in view of Cedrone.

Rather than repeat the arguments of Appellant or the Examiner, we make reference to the brief and the answer for the details thereof.

OPINION

After a careful review of the evidence before us, we do not agree with the Examiner that claim 1 is anticipated by Krauss.

It is axiomatic that anticipation of a claim under § 102 can be found only if the prior art reference discloses every element of the claim. **See *In re King***, 801 F.2d 1324, 1326, 231 USPQ 136, 138 (Fed. Cir. 1986) and ***Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.***, 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984).

Appeal No. 95-3684
Application 08/110,273

Appellant argues on page 6 of the brief that Krauss fails to teach the Appellant's claimed limitations as required under 35 U.S.C. § 102. In particular, Appellant argues that Krauss does not disclose a dispensing system which delivers color ingredients to provide an optimal color formula.

We note that Appellant's claim 1 recites "a machine for customer blending of a color cosmetic product comprising ... a plurality of dispensers each containing a cosmetic composition of a different color selected from the group consisting of white, yellow, red and black and a means for activating dosing to a common dosing chamber of certain selected ones of the cosmetic compositions and at certain concentrations as determined by the operation instructions."

On page 4 of the answer, the Examiner states that Krauss does not explicitly teach the cosmetic additives are different colors. The Examiner points out that Krauss teaches blending cosmetic additives for makeup formulations in column 1, line 10. The Examiner argues that makeup formulations are notoriously well known to be color dependent and therefore Krauss anticipates Appellant's claim 1.

Appeal No. 95-3684
Application 08/110,273

Upon a careful review of Krauss, we fail to find that Krauss teaches a machine for blending color as recited in Appellant's claim 1. We agree that makeup formulations have a color. However, Krauss is not concerned with color blending, only blending additives into a cosmetic base for providing suitability to the type of skin condition (e.g. normal skin, oily skin or dry skin). See column 1, lines 1-31. Therefore, we find that Krauss fails to teach all of the limitations of claim 1, and thereby the claim is not anticipated by Krauss.

In regard to the 35 U.S.C. § 103 rejection, the Examiner has failed to set forth a *prima facie* case. It is the burden of the Examiner to establish why one having ordinary skill in the art would have been led to the claimed invention by the express teachings or suggestions found in the prior art, or by implications contained in such teachings or suggestions. *In re*

Sernaker, 702 F.2d 989, 995, 217 USPQ 1, 6 (Fed. Cir. 1983).

"Additionally, when determining obviousness, the claimed

Appeal No. 95-3684
Application 08/110,273

invention should be considered as a whole; there is no legally recognizable 'heart' of the invention." ***Para-Ordnance Mfg. v. SGS Importers Int'l, Inc.***, 73 F.3d 1085, 1087, 37 USPQ2d 1237, 1239 (Fed. Cir. 1995), ***cert. denied***, 117 S.Ct. 80 (1996) ***citing W. L. Gore & Assocs., Inc. v. Garlock, Inc.***, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983), ***cert. denied***, 469 U.S. 851 (1984).

In regard to the other independent claim, claim 20, the Examiner notes on page 4 of the answer that Krauss fails to teach the means for regulating the temperature within the machine to maintain the cosmetic compositions at a constant viscosity thereby improving accuracy of dosing as set forth in Appellant's claim 20. On the same page of the answer, the Examiner states that this concept is not new or unobvious and that it would have been obvious to one of ordinary skill in the art to regulate the temperature. We note that the Examiner did not provide any evidence in prior art to support the Examiner's conclusion.

With regard to the only other independent claim, claim 22, Examiner notes on page 5 of the answer that Krauss fails

Appeal No. 95-3684
Application 08/110,273

to teach a means for delivering the dosed formula into a container to the

customer as a cosmetic product, said delivery means including a first and second pump of different pumping capacity as recited in Appellant's claim 22. On the same page of the answer, the Examiner states it would have been obvious to one of ordinary skill in the art to design pumping systems to have different pumping capacities. We note that the Examiner did not provide any evidence in prior art to support the Examiner's conclusion.

The Federal Circuit states that "[t]he mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." ***In re Fritch***, 972 F.2d 1260, 1266 n.14, 23 USPQ2d 1780, 1783-84 n.14 (Fed. Cir. 1992), ***citing In re Gordon***, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984).

After a careful review of Krauss, we fail to find that

Appeal No. 95-3684
Application 08/110,273

Krauss teaches or suggests a means for regulating temperature or a delivery means including a first and second pump of different pumping capacity. Thus, the Examiner has failed to show that the prior art suggested the desirability of the Examiner's proposed modification. We are not inclined to dispense with proof by evidence when the proposition at issue is not supported by a

teaching in a prior art reference or shown to be common knowledge of unquestionable demonstration. Our reviewing court requires this evidence in order to establish a ***prima facie*** case. ***In re Knapp-Monarch Co.***, 296 F.2d 230, 232, 132 USPQ 6, 8 (CCPA 1961); ***In re Cofer***, 354 F.2d 664, 668, 148 USPQ 268, 271-72 (CCPA 1966). We have not sustained the rejection of claim 1 under U.S.C. § 102 or the rejection of claims 2 through 23 under 35 U.S.C. § 103. Accordingly, the Examiner's decision is reversed.

REVERSED

Appeal No. 95-3684
Application 08/110,273

JERRY SMITH)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
LEE E. BARRETT)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
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Appeal No. 95-3684
Application 08/110,273

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