

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte ROBERT GLASER

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Appeal No. 98-0674  
Application 08/533,287<sup>1</sup>

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HEARD: May 6, 1999

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Before MEISTER, PATE and GONZALES, Administrative Patent Judges.

GONZALES, Administrative Patent Judge.

**DECISION ON APPEAL**

This is a decision on appeal from the examiner's final rejection of claims 1 through 3, 5 and 7 under 35 U.S.C. § 103. No other claim is pending in the application.

Appellant's invention relates to a toothbrush toy having

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<sup>1</sup> Application for patent filed September 25, 1995.

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a toothbrush portion detachably secured to a handle in the  
form of

an animate character. An understanding of the invention can  
be derived from a reading of exemplary claim 1, which has been  
reproduced in the "Appendix" to appellant's Brief (Paper No.  
9).<sup>2</sup>

**THE REFERENCES**

The prior art references of record relied upon by the examiner  
in rejecting the appealed claims are:

Guest et al. (Guest)	5,306,019	Apr. 26, 1994
Zandberg et al. (Zandberg)	Des. 209,574	Dec. 19, 1967
Schleich (British Patent)	656,087	Aug. 08, 1951

**THE REJECTION**

Claims 1 through 3, 5 and 7 stand rejected under  
35 U.S.C. § 103 as being unpatentable over Zandberg in view of  
Schleich and Guest.<sup>3</sup>

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<sup>2</sup> We note the following error in claim 1 as reproduced in the  
"Appendix": line 6, "i" should read --in--.

<sup>3</sup> Strict antecedent basis is lacking for the recitation of "said  
toothbrush" in lines 8 and 9 of claim 1. It appears that the language should  
read --said toothbrush toy--. Correction of this informality is in order upon  
return of this application to the jurisdiction of the examiner.

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The rejection is explained in the Examiner's Answer (Paper No. 10).

The opposing viewpoints of the appellant are set forth in the Brief.

#### **OPINION**

To begin with, we note the examiner's references at pages 4 and 5 of the Answer and to appellant's references at pages 4-6 of the Brief to certain patents which were cited during prosecution of the present application, but not applied in the final rejection. We also note that the examiner has stated that no new prior art has been relied on in the rejection (Answer, page 3). Accordingly, we will limit our consideration of the standing rejection to the prior art relied on in the final rejection.

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it

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is our conclusion that the evidence adduced by the examiner is not sufficient to establish a prima facie case of obviousness with respect to claims 1 through 3, 5 and 7. Accordingly, we will not sustain the examiner's rejection of claims 1 through 3, 5 and 7 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the references before him to make the proposed combination or other modification. See In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972). Furthermore, the conclusion that the claimed subject matter is prima facie obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual

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to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Rejections based on

§ 103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. The examiner may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. See In re Warner, 379 F.2d

1011, 1017, 154 USPQ 173, 178 (CCPA 1967), cert. denied, 389 U.S. 1057 (1968). Our reviewing court has repeatedly cautioned against employing hindsight by using the appellant's disclosure as a blueprint to reconstruct the claimed invention from the isolated teachings of the prior art. See, e.g., Grain Processing Corp. v. American Maize-Products Co., 840 F.2d 902, 907, 5 USPQ2d 1788, 1792 (Fed. Cir. 1988).

With this as background, we turn to the rejection of the

claims on appeal.

Claim 1 recites a "bendable and posable"<sup>4</sup> toothbrush toy comprising a toothbrush portion detachably secured to a handle portion by means of a twist-and-lock connector. The handle portion is in the form of an animate character having limbs which are posable relative to remaining portions of the handle. The twist-and-lock connector includes a male connector 6 formed integrally with the toothbrush portion and having at least one radially extending projection 9 and a cylindrical socket 5 disposed in the handle having at least one axial groove 11 for

receiving the radially extending projection, an inclined surface 12 defined by a cut-out portion which cooperates with the projection on the toothbrush portion to retain the toothbrush portion in the handle portion and an abutment 14 restricting the toothbrush portion to rotate only in one

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<sup>4</sup> As defined in the specification, an object is "bendable" if the object may be bent, but automatically returns to its original pose after it is released and an object is "posable" if the object will maintain a pose to which it is bent (pages 3 and 4).

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direction upon being inserted into the cylindrical socket.

Zandberg is a design patent showing an ornamental design for a toothbrush in the form of an animate character. The character appears to be of human form and is depicted as standing on two feet with folded arms and has a number of toothbrush bristles extending out the back of the character's head.

Schleich discloses a toy figure, e.g., a doll, puppet or animal, comprising a bendable wire skeleton having a thin covering of flexible material adapted to permit the parts of the figure to be bent and retained in any adjusted position (lines 8, 9 and 18-22).

Guest discloses an arrow with a nock assembly including an adapter 50 mounted within a bore 36 of the arrow shaft 30. A nock 40 is removably mounted to the adapter 50 so that the head end 42 of the nock 40 is located within the socket 52 of the adapter 50, and the bifurcated tail end 44 of the nock 40 is

located outside of the socket 52. With the nock 40 mounted to

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the adapter 50 in the locked position, the adapter 50 is fixed to the shaft 30, typically with an appropriate glue, so that the adapter 50 is in a predetermined angular position about the shaft axis 34, relative to the vanes or feathers 25 on the arrow shaft. In order to lock the nock in place, the nock is provided with a pair of locking pins 48 which extend radially outward from the head end 42 of the nock 40. The adapter includes a wall 56 having an aperture 60 which consists of a central circular portion 66 and a pair of radially extending slots 67. A plurality of cam surfaces 62 are located on the forward surface 58 of the wall 56. Each cam surface 62 tapers gradually forward from the forward surface 58 to a forward most point 64 adjacent a depression 65. The depressions 65 as well as the wall 56 with its forward surface 58, the aperture 60 with its central circular portion 66 and radially extending slots 67, the cam surface 62 with its forward most point 64 and the arcuate slits 68 in the wall 56 function as detent means 72 for the pins 48 when the nock 40 is combined with the adapter 50 in the locking mode as shown in FIGS. 1 and 2. See, col. 4, lines 27-58. In an alternative embodiment shown in Figures 15-18, the detent is replaced by

threading 148 on the nock and complimentary threading 157 on the adapter. See, col. 7, lines 3-7.

It is the examiner's position (Answer, page 4) that it would have been obvious to make the arms of the Zandberg character posable as taught by Schleich in order to render the toy element more versatile and add play value. Appellant, on the other hand, argues (Brief, pages 3 and 4) that there is no teaching, suggestion or motivation in the prior art of record to confer bend-ability and posability to the handle portion of the toothbrush taught by Zandberg.

We have carefully reviewed the collective teachings of Zandberg, Schleich and Guest and find ourselves in agreement with the appellant. The examiner's reference to "added play value" sounds to us as though the examiner is assuming that the article shown by Zandberg is a toy and has concluded that the addition of posable arms to the Zandberg device would simply add to the existing play value of the Zandberg "toy." While we recognize that a child could use a toothbrush as a play object, that does not make Zandberg's disclosed toothbrush a toy. We see Zandberg's design not as a toy, but

simply as an attempt to make the prospect of using the article for its intended purpose, i.e.,

dental hygiene, more enticing to a child. That being the case, we find the motivation put forth by the examiner to be unpersuasive.<sup>5</sup>

Zandberg suggests a one piece toothbrush. Neither Schleich nor Guest provide any teaching, suggestion or motivation for making the toothbrush shown by Zandberg in two parts or for combining Zandberg's toothbrush with a separate handle portion in the form of an animate character. That being the case, we find no motivation in the applied references for applying the specific twist and lock connector disclosed by Guest to the toothbrush disclosed by Zandberg.

Accordingly, we will not sustain the rejection of claim 1 under 35 U.S.C. § 103 as being unpatentable over Zandberg in

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<sup>5</sup> The mere fact that the prior art structure could be modified does not make such a modification obvious unless the prior art suggests the desirability of doing so. In re Gordon, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984). A suggestion arising from appellant's disclosure is impermissible as the basis for a rejection. In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992)

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view of Schleich and Guest.

Claims 2, 3, 5 and 7 are dependent on claim 1 and, therefore, contain all of the limitations of claim 1.

Accordingly, the examiner's respective rejections of claims 2, 3, 5 and 7 under 35 U.S.C. § 103 will not be sustained.

**SUMMARY**

The decision of the examiner to reject claims 1 through 3, 5 and 7 under 35 U.S.C. § 103 is reversed.

**REVERSED**

JAMES M. MEISTER	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
WILLIAM F. PATE, III	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
	)	
	)	
JOHN F. GONZALES	)	

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