

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 11

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ALVIN D. WILBANKS

Appeal No. 2001-0226
Application 09/009,122

ON BRIEF

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

MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Alvin D. Wilbanks appeals from the final rejection of claims 1 through 6, 11 and 16. Claims 7 through 10, 12 through 15 and 18 through 20, the only other claims pending in the application, stand objected to as depending from rejected parent claims.

THE INVENTION

The invention relates to "a portable insect killing apparatus which emulates certain characteristics of a mammal to attract insects to the apparatus where they are electrocuted" (specification, page 1). A copy of the appealed claims appears in the appendix to the appellant's brief (Paper No. 9).

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THE PRIOR ART

The references relied on by the examiner to support the final rejection are:

Craig	1,085,023	Jan. 20, 1914
Gagliano	3,041,773	Jul. 3, 1962

THE REJECTIONS

Claims 1, 4 through 6 and 16 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Gagliano.

Claims 2 and 3 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gagliano.

Claim 11 stands rejected under 35 U.S.C. § 102(b) as being anticipated by Craig.

Attention is directed to the appellant's brief (Paper No. 9) and to the examiner's final rejection and answer (Paper Nos. 5 and 10) for the respective positions of the appellant and the examiner with regard to the merits of these rejections.

DISCUSSION

I. The 35 U.S.C. § 102(b) rejection of claims 1, 4 through 6 and 16 as being anticipated by Gagliano

Gagliano discloses an insect attracting and killing apparatus comprising a top wall 11, side walls 12 and 13, a front wall 14 having a circular opening 15, a rear wall 17 having an

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opening 17a, a screen 18 covering the rear wall opening, an electrocution grid 20-23 mounted just inside the screen, a cylindrical conduit 24 mounted to the inside of the front wall, an electric motor 28 and a fan disposed within the conduit, a fluorescent lamp 34 fixed to the outside of the front wall, a transformer 39 fixed to the underside of the top wall, an electrical light bulb 43 mounted to the inside of side wall 13, and a bottom tray 48-50. Figures 1 through 4 illustrate the structural relationships between these elements.

Anticipation is established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984).

Independent claim 1 recites an insect killing apparatus comprising, inter alia, contiguous outer and inner walls forming an air space therebetween, an interior chamber enclosed by the inner and outer walls, a source of heat for heating the air space and an electrocution grid located within the interior chamber. According to the examiner (see page 2 in the final rejection and pages 3 and 4 in the answer), Gagliano's top wall 11, conduit 24 and the space therebetween meet the claim limitations relating to

the inner and outer walls and the air space, the interior of Gagliano's conduit 24 and/or the area defined, from the perspective of Figure 3, on the left by the conduit 24 and on the right by top wall 11 and tray wall 48 meet the claim limitations relating to the interior chamber, Gagliano's light bulb 43, transformer 39 and motor 28 meet the claim limitations relating to the source of heat for heating the air space, and Gagliano's electrocution grid 20-23 meets the claim limitations relating to the location of the electrocution grid within the interior chamber.

To the extent that Gagliano's top wall 11 and conduit 24 constitute contiguous outer and inner walls forming an air space therebetween, the reference does not provide any factual support for the examiner's determination that the light bulb 43, transformer 39 and motor 28 constitute a source of heat for heating the air space. To the contrary, and as pointed out by the appellant (see page 6 in the brief), it is likely that the airstream generated by Gagliano's fan effectively insulates the air space from any heat generated by these components. Moreover, Gagliano's electrocution grid 20-23 is not located within the interior chamber enclosed by Gagliano's topwall 11 and conduit 24. The actual location of Gagliano's electrocution grid 20-23

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cannot reasonably be described as being within an interior chamber of the sort required by the claim.

Independent claim 16 recites an insect killing apparatus comprising, inter alia, a main body and "means for imparting periodic motion to said main body to simulate a living creature, whereby said main body moves from a first position to a second position different from said first position." The Gagliano apparatus includes no such means. The examiner's determination that "a user picking up and setting the [Gagliano] device down in another location acts as means for imparting periodic motion" (final rejection, page 2) is untenable. The limitation at issue is in means-plus-function format which under 35 U.S.C. § 112, sixth paragraph, covers the corresponding structure in the specification and equivalents thereof. There is no authority for finding that a human being could ever be the equivalent of a machine disclosed in a patent application. See In re Bernhart, 417 F.2d 1395, 1399, 163 USPQ 611, 615 (CCPA 1969).

In light of the foregoing, the examiner's determination that the subject matter recited in claims 1 and 16 is anticipated by Gagliano is not well founded. Therefore, we shall not sustain the standing 35 U.S.C. § 102(b) rejection of claims 1 and 16, or

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of claims 4 through 6 which depend from claim 1, as being anticipated by Gagliano.

II. The 35 U.S.C. § 103(a) of claims 2 and 3 as being unpatentable over Gagliano

Claims 2 and 3 depend from claim 1. In addition to not disclosing the subject matter recited in the parent claim, Gagliano would not have suggested such to one of ordinary skill in the art. It follows that the same is true with regard to the subject matter recited in dependent claims 2 and 3.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) of claims 2 and 3 as being unpatentable over Gagliano.

III. The 35 U.S.C. § 102(b) rejection of claim 11 as being anticipated by Craig

Craig discloses an electric insect trap comprising a drum, a motor 20 for constantly rotating the drum, electric wires 13 and 14 spirally wound on the drum, a pan 23 beneath the drum, and a brush 25 arranged to sweep insects from the drum into the pan.

Independent claim 11 recites an insect killing apparatus comprising, inter alia, a main body and "means for imparting periodic motion to said main body to simulate a living creature, whereby said main body moves from a first position to a second position different from said first position." In the examiner's

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view (see page 3 in the final rejection), Craig's drum meets the claim limitations relating to the main body and Craig's drum-rotating motor meets the claim limitations relating to the means for imparting periodic motion to the main body. As persuasively argued by the appellant, however, "[c]ontinuous and constant rotation around an axis is clearly not periodic motion between a first position and a second position different from said first position" (brief, pages 7 and 8).

Thus, Craig does not disclose each and every element of the invention recited in claim 11. Hence, we shall not sustain the standing 35 U.S.C. § 102(b) rejection of claim 11 as being anticipated by Craig.

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SUMMARY

The decision of the examiner to reject claims 1 through 6,
11 and 16 is reversed.

REVERSED

IAN A. CALVERT)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
)	
)	APPEALS AND
CHARLES E. FRANKFORT)	
Administrative Patent Judge)	INTERFERENCES
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JOHN P. MCQUADE)	
Administrative Patent Judge)	

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