

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. 40

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

Ex parte JEFF BAYLEY

---

Appeal No. 2003-0666  
Application No. 08/891,351

---

HEARD: June 10, 2003

---

Before ABRAMS, STAAB, and BAHR, Administrative Patent Judges.  
ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-8, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellant's invention relates to a universal drain adaptor kit. An understanding of the invention can be derived from a reading of exemplary claim 1, which has been reproduced below.

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

Wise	938,102	Oct. 26, 1909
Izzi, Sr. (Izzi)	4,423,526	Jan. 3, 1984
Alker	4,920,582	May, 1, 1990

The prior art admitted by the appellant as disclosed in the specification in the last paragraph of page 7. (AAPA)

Claims 1 and 4 stand rejected under 35 U.S.C. § 103 as being unpatentable over Wise in view of AAPA.

Claims 1-4 stand rejected under 35 U.S.C. § 103 as being unpatentable over Wise in view of AAPA and Alker.

Claims 5-8 stand rejected under 35 U.S.C. § 103 as being unpatentable over Wise in view of AAPA and Izzi.

Claims 5-8 stand rejected under 35 U.S.C. § 103 as being unpatentable over Wise in view of AAPA, Alker and Izzi.<sup>1</sup>

---

<sup>1</sup>The rejection of claims 5-8 was stated as "the art as applied to claim 1 above, and further in view of Alker." Since two rejections of claim 1 preceded the rejection of claims 5-8, we assume that the examiner intends that there also be two rejections of claims 5-8, and we have proceeded on this basis.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the Answer (Paper No. 34) for the examiner's complete reasoning in support of the rejections, and to the Brief (Paper No. 31) and Reply Brief (Paper No. 35) for the appellant's arguments thereagainst.

### OPINION

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. As a consequence of our review, we make the determinations which follow.

According to the appellant, depending upon the structure of the building in which it is installed, the main drain opening and the overflow drain opening of a bathtub are provided with either an indirect connection to the P-trap or a direct connection thereto. In an indirect connection, the vertical section of pipe from the overflow drain opening extends directly to the P-trap and is joined along the way to a horizontal section of pipe connecting the main drain opening. In a direct connection a vertical pipe extends from the main drain opening directly to the P-trap, and the vertical pipe from the overflow drain opening is connected by a horizontal pipe to the pipe from the main drain opening (see Figures 1 and 2). The appellant's invention is a kit that contains the fittings

needed to construct both the indirect and direct configurations, which allows the installer to manufacture whichever configuration is required on the scene.

Claim 1 recites the invention in the following manner:

A universal drain adaptor kit for use in association with a bath tub [sic] having a main drain opening and an overflow drain opening, the universal drain adaptor kit comprising:

a thermoplastic tee fitting having an attachment bell;

an overflow elbow;

a thermoplastic 90° elbow fitting having an attachment bell;

and an adaptor bushing, said adaptor bushing having:

internal interengaging means for receiving and securing a drain fitting therein,

an external surface sized and shaped to be secured to either of the attachment bells of said 90° elbow and said tee fitting, and

a rim sized and shaped to fit around said main drain opening in said bathtub,

wherein said kit when combined with drainage piping can be configured to form either a direct or an indirect drainage attachment for said bathtub.

All of the rejections are under 35 U.S.C. § 103. The test for obviousness is what the combined teachings of the prior art would have suggested to one of ordinary skill in the art. See, for example, In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In establishing a prima facie case of obviousness, it is incumbent upon the

examiner to provide a reason why one of ordinary skill in the art would have been led to modify a prior art reference or to combine reference teachings to arrive at the claimed invention. See Ex parte Clapp, 227 USPQ 972, 973 (Bd. Pat. App. & Int. 1985). To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the appellant's disclosure. See, for example, Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1052, 5 USPQ2d 1434, 1439 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988).

Claims 1 and 4 stand unpatentable over Wise in view of AAPA. As we understand this rejection, it is the examiner's view that Wise discloses all of the subject matter recited in claim 1 except for the "thermoplastic bell[s]," but it would have been obvious to replace the bells disclosed by Wise with thermoplastic bells in view of the AAPA, that is, the appellant's admission in his specification that such bells were known in the art at the time of the invention. According to the examiner, "[i]t would have been prima facie obvious to employ this modern day fitting scheme in the 1909 disclosure of Wise. The fittings set forth supra are capable of being used as set forth in the last two lines [of] claim 1" (Answer, page 2).

Wise is not concerned with providing fittings that will allow a bathtub drain system to be assembled in two different configurations. Wise discloses an indirect bathtub drainage system comprising a tee fitting 16 equipped with three compression

fittings 17 connected to a vertical pipe 19 from the overflow drain, a vertical pipe communicating with a P-fitting, and a horizontal pipe 15 communicating with the main drain. From the drawings, all three of the compression fittings on the tee fitting appear to be the same size, and the reference does not advise otherwise. The patent describes fittings 5 and 20, which are attached respectively to the main drain and the overflow drain, as having a “large expanded mouth 6 [22] and a contracted tubular neck 7 [21]” (page 1, lines 81 and 82; page 2, lines 11 and 12). Thus, while the proximal ends of fittings 5 and 20 appear to be the same size as the three fittings on the tee, it is clear from the specification and the drawings that the distal ends, which mate with the main drain fitting and the overflow drain fitting, are larger. The patentee describes the connection between the expanded mouth of each bell to the tub in the following manner: “To adapt the bell for attaching to the bottom of the tub, I provide a sheet metal bushing 9 [23] which has an annular flange 10 [24] formed substantially at right angles to the part 9 [23]” (page 1, lines 82-86). As shown in Figure 6, the inner surface of the expanded bell is threaded onto the outer surface of the bushing, and the outer surface of the flanged strainer is threaded into the inner surface of the bushing.

The arrangement of the adaptor bushings to the expanded bell of the ells and to the bathtub drain fittings recited in *Wise* is the same as is recited in the appellant’s claim 1. However, the reference does not disclose or teach that the adapter bushing has “an external surface sized and shaped to be secured to either of the attachment

bells of said 90° elbow and said tee fitting” (emphasis added), for the bushings disclosed therein fit only one end of each 90° elbow (the expanded end), and do not fit the other end of the elbow or any of the tee fittings.

The examiner’s theory seems to be that (1) modern thermoplastic fittings all have the same size attachment bells, (2) it would have been obvious to one of ordinary skill in the art to employ thermoplastic fittings in the Wise arrangement, (3) this would result in all of the bells of the tees and the elbows being the same size, and (4) the bushing used in Wise to connect the bells to the drain fittings then would fit all of the bells, rather than just to ones on the drain fittings. Implicit in this theory is that the expanded bell fittings in Wise would be replaced by bells of the same size as the other bells. From our perspective, however, even if suggestion were to exist for substituting thermoplastic fittings for the metal fittings disclosed by Wise, we fail to perceive any teaching, suggestion or incentive which would have led one of ordinary skill in the art to reduce the size of Wise’s expanded bells to the same size as those of the other bells on the ell and the tee. Support for this position is found in the fact that Wise does not recognize the problem solved by the appellant, and thus there would seem to be no reason to deviate from bell sizes disclosed in the reference.

This being the case, it is our conclusion that Wise and AAPA do not establish a prima facie case of obviousness with regard to the subject matter recited in

independent claim 1 or, it follows, in dependent claim 4, and therefore we will not sustain this rejection.

Claims 1-4 stand rejected as being unpatentable over Wise, AAPA and Alker. The deficiency discussed above in the combination of Wise and AAPA is not, in our view, alleviated by Alker. This additional reference discloses a system in which the same components can be arranged to form either a direct connection or an indirect connection from the two bathtub drains to a P-trap, which apparently is why the examiner applied it. However, while in Alker two 90° ells, a tee and an adaptor bushing are utilized, both ells and the tee have one attachment bell that is larger than the other bells in order to accommodate the larger openings in the bathtub drains. Therefore, in this regard Alker is no different than Wise and, as was the case in Wise, the adaptor bushing does not have an external surface sized and shaped to be secured to either of the attachment bells of the ells and the tee, as is required by claim 1. The rejection of independent claim 1 and dependent claims 2-4 is not sustained.

Izzi is added to either of the above combinations of references to reject claims 5-8. Izzi is applied for teaching providing a raised rib on the adaptor of a plumbing drain pipe to interface with a seal. Be that as it may, Izzi fails to overcome the problems explained above with regard to claim 1, and therefore neither of the rejections of claims 5-8 is sustained.

Since we have not sustained any of the rejections, there is no reason for us to consider the appellant's Rule 132 declarations directed to secondary considerations of nonobviousness (Papers No. 14 and 19), and we therefore shall not comment upon them.

CONCLUSION

None of the rejections are sustained.

The decision of the examiner is reversed..

REVERSED

NEAL E. ABRAMS  
Administrative Patent Judge

LAWRENCE J. STAAB  
Administrative Patent Judge

JENNIFER D. BAHR  
Administrative Patent Judge

)  
)  
)  
)  
)  
) BOARD OF PATENT  
) APPEALS AND  
) INTERFERENCES  
)  
)  
)  
)  
)

NEA/lbg

Appeal No. 2003-0666  
Application No. 08/891,351

Page 11

HOFFMAN & BARON, LLP  
6900 JERICHO TURNPIKE  
SYOSSET, NY 11791