

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PIERRE VANRAES

Appeal No. 96-3480
Application No. 08/142,381¹

ON BRIEF

Before McCANDLISH, Senior Administrative Patent Judge, and
NASE and CRAWFORD, Administrative Patent Judges.

NASE, Administrative Patent Judge.

¹ Application for patent filed November 29, 1993.
According to the appellant, the application is the national
stage application of PCT/FR92/00456, filed May 21, 1992.

Appeal No. 96-3480
Application No. 08/142,381

DECISION ON APPEAL

This is a decision on appeal from the examiner's rejection of claims 1 through 6, which are all of the claims pending in this application.²

We AFFIRM-IN-PART.

² The examiner withdrew all the rejections made in the final rejection and rendered a new ground of rejection under 35 U.S.C. § 103 against claims 1 through 6 in the examiner's answer.

BACKGROUND

The appellant's invention relates to a device, particularly intended for the hygiene of human auditory canals. Claims 1 through 3 are representative of the subject matter on appeal and a copy of those claims, as they appear in the appendix to the appellant's brief, is attached to this decision.

The prior art references of record relied upon by the examiner as evidence of obviousness under 35 U.S.C. § 103 are:

Tolman 1908	896,338	Aug. 18,
Hartman 1963	3,110,304	Nov. 12,
Choppy	2,277,557 ³ (France)	Feb. 6, 1976

Claims 1 through 6 stand rejected under 35 U.S.C. § 103 as being unpatentable over Tolman in view of Hartman and Choppy.

³ In determining the teachings of Choppy, we will rely on the translation provided by the FLS, Inc. A copy of the translation is attached for the appellant's convenience.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the § 103 rejection, we make reference to the examiner's answer (Paper No. 15, mailed December 14, 1995) and the supplemental examiner's answer (Paper No. 19, mailed January 15, 1997) for the examiner's complete reasoning in support of the rejection, and to the appellant's brief (Paper No. 14, filed October 30, 1995) and reply brief (Paper No. 16, filed January 29, 1996) 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.

Claim 1

We sustain the rejection of claim 1.

Claim 1 recites an auricular hygiene device comprising, inter alia, a cylindrical body having a longitudinal axis and two opposed extremities and an active portion on one of the extremities. The active portion includes, inter alia, a substantially circular active edge and a depression or cavity, having a hemispherical outer surface shape with a predetermined radius.

Tolman discloses an implement having a shank 2 and an ear wax spoon 3 shaped as shown in Figures 1 and 2.

Hartman discloses a conventional otoscope speculum having a base 11, a conical portion 10 and a projection 12. Hartman teaches at the paragraph beginning at column 1, line 63, that

[p]rojection 12 may assume a wide variety of shapes. In general, any shape which is adapted to engage and remove wax in the ear canal may be used. Such shapes include spoons, loops, and the like. A particularly suitable shape, because of its efficiency for the purpose, comprises a substantially cylindrical extension 13 from a portion of the distal end of the speculum 10 having a hood-like tip 14 on the end thereof. Tip 14, may have a substantially hemispherical shape.

Choppy discloses an ear swab. The ear swab includes a stick 5 and a small spoon 4 at one end of the stick. Additionally, the examiner determined that the stick 5 was cylindrical.⁴

The examiner, in applying the test for obviousness,⁵ determined (answer, p. 4) that it would have been obvious to one of ordinary skill in the art at the time of the invention to

(1) make the active portion of Tolman in hemispherical shape in order to make a larger receptacle for accommodating more ear wax, and (2) make the body (i.e., shank 2) of Tolman cylindrical as taught by Choppy. We agree.

The arguments advanced by the appellant (reply brief, p. 2 and brief, pp. 7-11) are unpersuasive for the following

⁴ Apparently from shading of the stick 5 in Figure 1.

⁵ The test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. See In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

reasons. First, we agree with the examiner that Hartman's hemispherically shaped tip does have an outer surface with a predetermined radius. Second, it is our opinion that Hartman's teaching that the shape of his projection 12 is particularly suitable, because of its efficiency for removing wax provides the artisan with ample motivation to modify the shape of Tolman's spoon.

Claim 2

We sustain the rejection of claim 2.

Dependent claim 2 adds to claim 1 the limitation that the substantially circular edge of the active portion is located in a plane approximately at a tangent to one of the external generatrices defining the cylindrical body.

The appellant argues (brief, p. 11) that this limitation is "neither disclosed nor suggestion by the prior art." We do not agree. It is our opinion that the combined teachings of the applied prior art would maintain the relationship of Tolman's shank 2 to the substantially circular edge of the

spoon as shown in Figure 2. That is, when Tolman's shank 2 is modified to be cylindrical as suggested by both Hartman and Choppy, the substantially circular edge of the spoon would have still been located in a plane approximately at a tangent to one of the external generatrices defining the cylindrical body.

Claim 3

We do not sustain the rejection of claim 3.

Dependent claim 3 adds to claim 1 or claim 2 the limitation that the point of origin of any radius of the active portion is located approximately in a plane that contains the longitudinal axis of the cylindrical body.

The appellant argues (brief, pp. 11-12) that this limitation is not disclosed or suggestion by the prior art. We agree. This limitation requires that the center of curvature of the hemispherical outer surface be located approximately in the plane that contains the longitudinal axis of the cylindrical body. The applied prior art does not teach

or suggest this limitation and the examiner has not given any reasoning as to why this limitation would have been obvious to one of ordinary skill in the art at the time of the appellant's invention. Accordingly, we will not sustain the rejection of claim 3.

Claims 4 through 6

We do not sustain the rejection of dependent claims 4 through 6 which depend directly or indirectly from claim 3 for the reasons express supra with respect to claim 3.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1 and 2 under 35 U.S.C. § 103 is affirmed and the decision of the examiner to reject claims 3 through 6 under 35 U.S.C. § 103 is reversed.

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

HARRISON E. McCANDLISH, SENIOR)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JEFFREY V. NASE)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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MURRIEL E. CRAWFORD)	
Administrative Patent Judge)	

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APPENDIX

1. An auricular hygiene device comprising external generatrices defining a cylindrical body having a longitudinal axis and two opposed extremities, at least one of which has an active portion that includes a substantially circular active edge intended for detaching a material from a predetermined surface and a depression or cavity intended for collecting said material,

wherein said active portion has a hemispherical outer surface shape with a predetermined radius.

2. The device of claim 1, wherein the substantially circular edge of the active portion is located in a plane approximately at a tangent to one of the external generatrices defining the cylindrical body that carries said active portion.

3. The device of claim 1 or 2, wherein the point of origin of any radius of the active portion is located approximately in a plane that contains the longitudinal axis of the cylindrical body.

APPEAL NO. 96-3480 - JUDGE NASE
APPLICATION NO. 08/142,381

APJ NASE

APJ CRAWFORD

APJ McCANDLISH

DECISION: **AFFIRMED-IN-PART**

Prepared By: Delores A. Lowe

DRAFT TYPED: 19 Dec 97

FINAL TYPED: