

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(2) is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT W. CALVIN

Appeal No. 1997-0092
Application 08/215,015¹

ON BRIEF

Before JOHN D. SMITH, PAK, and LIEBERMAN, Administrative
Patent Judges.

LIEBERMAN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the
examiner's refusal to allow claims 7, 8, 10, 11, 14, and 15

¹Application for patent filed March 21, 1994. According
to appellant, this application is a continuation of
Application 07/963,420, filed October 19, 1992, now abandoned.

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which are all the claims remaining in the application. The rejections of claims 1 through 8 and 10 through 15 under 35 U.S.C. § 112, paragraphs 1 and 2, have been withdrawn. The rejection of claims 1 through 6, 12, and 13 under 35 U.S.C. § 103 has been withdrawn. See Answer, page 3. Claim 9 was canceled in an amendment received on February 24, 1995.

THE INVENTION

The invention is directed to a low alcohol wine having full body, aroma and character which are prepared by fermenting a mixture of a low sugar fraction separated from grape juice and additional grape juice added prior to fermentation to provide sugar for fermentation. The low sugar fraction contains organic compounds from the grape juice.

THE CLAIMS

Claims 11 is illustrative of appellant's invention and is reproduced below.

11. A low-alcohol wine formed from grape juice and having the full body, aroma and character of traditional wine, said low-alcohol wine comprising:

a fermented mixture including a low sugar fraction separated from the grape juice prior to fermentation together with organic compounds from the grape juice which provide the wine with full body, aroma and character, said low-sugar fraction having only a trace of sugar; and

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additional grape juice blended with the low-sugar fraction prior to fermentation, said additional grape juice providing sugar for fermentation.

THE REFERENCES OF RECORD

As evidence of obviousness, the examiner relies upon the following references:

Gogel	4,156,026	May 22, 1979
Lang et al. (Lang)	4,902,518	Feb. 20, 1990
Thumm	4,942,045	Jul. 17, 1990

THE REJECTION

Claims 7, 8, 10, 11, 14 and 15 stand rejected under 35 U.S.C. § 103 as unpatentable over Lang in view of Thumm, and Gogel.

OPINION

As an initial matter, appellant's Brief is devoid of any statement that the claims rejected under 35 U.S.C. § 103 do not stand or fall together. See Brief, page 3. Accordingly, we select claim 11, one of the independent product claims, as representative of appellant's invention and limit our consideration to said claim. 37 CFR § 1.192(c)(7) 1995.

We have carefully considered appellant's arguments for patentability. However, we are in complete agreement with the examiner that the claimed subject matter is unpatentable in

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view of the applied prior art. Accordingly, we will sustain the examiner's rejection for essentially those reasons expressed in the Answer, and we add the following primarily for emphasis.

The claimed subject matter before us is directed to product-by-process claims. Even though the product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of the product does not depend on its method of production. Claim 11 is a product-by-process claim wherein the determination of patentability is based on the product itself. See In re Thorpe, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985).

The claimed subject matter is directed to a low-alcohol wine having full body, aroma and character of traditional wine. Lang is likewise directed to a low-alcohol, wine prepared from a low sugar fraction typically containing from 5 to 15% by weight of sugar. See Lang, column 3, lines 31-32. Lang thereafter adds high boiling esters to the low sugar fraction, which components add wine flavors characteristic of the fruit and of the particular variety of the fruit from

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which it is stripped. See column 3, lines 34-41. Moreover, a third component derived from the pressed skins of the fruit and containing acid, flavor, tannin and color are added to the low sugar fraction. See column 3, lines 59-68. Finally, grape juice may be added to the wine after fermentation. See column 5, lines 46-53. We determine based upon the above findings that the low-alcohol wine of Lang contains each of the components present in the claimed subject matter. Based upon the above analysis, we conclude that the low alcohol wine prepared by Lang possesses the body, aroma and character of traditional wine. Hence, the teachings of Lang meet the requirements of the claimed subject matter. Stated otherwise, we conclude that the low alcohol wine product of the appellant produced by the process of the claimed subject matter is the same or obvious from the product of Lang and the claimed subject matter is unpatentable even though the product was made by a different process. Accordingly, we conclude that the examiner has established a prima facie case of obviousness over Lang. Therefore, the burden now shifts to the appellant to prove that the prior art products do not necessarily or inherently possess the characteristics of the claimed product.

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See In re Best 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977).

The appellant argues that the process of Lang may have a processed or cooked taste in the wine product. See Brief, pages 11 and 12. See specification, page 4. However, the appellant has offered no direct comparison between the low-alcohol wine of Lang and their own low-alcohol wine. The only data present in the specification compares full alcohol wines with appellants low-alcohol wines. No comparative data is present between low

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alcohol wines prepared by Lang's process and appellant's processes. Accordingly, on the record before us, appellant's arguments are unsupported by evidence and as such are entitled to little, if any weight.

Based on our consideration of the totality of the record before us, we have weighed the evidence of obviousness found in the teachings of Lang, Thumm and Gogel and appellants' countervailing evidence of and argument for nonobviousness and conclude that the claimed invention would have been obvious as a matter of law under 35 U.S.C. § 103.

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DECISION

The rejection of claims 7, 8, 10, 11, 14 and 15 under 35 U.S.C. § 103 as unpatentable over Lang in view of Thumm, and Gogel is affirmed.

The decision of the examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

	John D. Smith)	
	Administrative Patent Judge)	
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	Chung K. Pak)	BOARD OF
PATENT)	
	Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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)	
	Paul Lieberman)	
	Administrative Patent Judge)	

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