

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES M. KELLER

Appeal No. 97-1471
Application 08/229,951¹

HEARD: AUGUST 2, 1999

Before COHEN, ABRAMS and FRANKFORT, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 20, which are all of the claims pending in the application.

¹ Application for patent filed April 19, 1994.

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Appellant's invention relates to a foam or liquid dispensing bottle brush for use in cleaning dirty food preparation and serving ware. Independent claims 1, 6, 11 and 15 are representative of the subject matter on appeal and a copy of those claims may be found in the Appendix to appellant's brief.

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

Samuel	2,924,360	Feb. 9, 1960
Chennell	3,485,563	Dec. 23, 1969
Fulwell (British patent)	2812	July 30, 1914
Alby (French patent) ²	1,243,684	Sept. 5, 1960
Smith (British patent)	815,644	July 1, 1959

Claims 1 through 20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Alby in

² Our understanding of this foreign language document is based upon a translation prepared by the U.S. Patent and Trademark Office. A copy of that translation accompanies this decision.

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view of Fulwell, Chennell, Smith and Samuel.

Rather than reiterate the examiner's full statement of the above-noted rejection and the conflicting viewpoints advanced by the examiner and appellant regarding the rejection, we make reference to the examiner's answer (Paper No. 14, mailed December 18, 1996) for the reasoning in support of the rejection, and to appellant's brief (Paper No. 13, filed September 5, 1996) and reply brief (Paper No. 15, filed February 24, 1997) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we have made the determination that the examiner's above-noted rejection will not be sustained. Our reasons follow.

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Like appellant, after having reviewed the teachings of the applied prior art references, we are of the opinion that there is no teaching, suggestion or incentive in the applied references, or otherwise specified by the examiner, which would have led one of ordinary skill in the art to modify the cleaning device of Alby in the manner urged by the examiner. The examiner's assertion (answer, page 4) that the motivation for modification of the device of Alby "is provided by the secondary patents," is ambiguous and fails to set forth any adequate factual basis to support the conclusion of obviousness asserted by the examiner. Given the teachings in Alby (translation, page 4) concerning the importance of the diaphragm (7) and the slit (8) therein for selectively controlling the dispensing of cleaning liquid from the bottle (1), we see no way that one of ordinary skill in the art would have eliminated the diaphragm and slit of Alby in favor of a feed tube like that of Fulwell or as in any of the other references applied by the examiner. Like appellant, we consider that the modification of Alby urged by the examiner is merely a hindsight reconstruction based on impermissible hindsight derived from appellant's own teachings. Thus, we will not sustain the examiner's rejection of claims 1 through 20 under 35 U.S.C. § 103.

Accordingly, the decision of the examiner is reversed.

In addition to the foregoing, we find it necessary to REMAND this application to the examiner

for a decision on the record as to whether or not a rejection of one or more of the claims on appeal in this case would be appropriate based on the Fulwell reference alone, wherein the device seen in Figure 1 of Fulwell appears, for example, to be fully responsive to the selectively orientable liquid receivable device set forth in appellant's claim 1 on appeal, particularly should the device of Fulwell Figure 1 be provided with a dilute liquid cleaning agent of a lesser volume than the container (a) therein (e.g., less than half the volume of the container) so that in a generally horizontal orientation the liquid cleaning agent would be below the level of the supply end of the feed tube (f), while in a more upright position the level of the liquid cleaning agent would be above the supply end of the feed tube. In this regard, we note that while Fulwell describes the brush device therein as a shaving brush which carries a liquid soap or the like therein, it is nonetheless fully capable of use as a cleaning device for dirty food preparation and serving ware, and more specifically appears to be fully capable of the particular use set forth in appellant's claims on appeal. With reference to claim 15 on appeal, we note that the device of Fulwell Figure 1 has a feed tube assembly (e, f, g) that appears to be fully responsive to that set forth in the claim. As for those claims which recite a bent feed tube (e.g., claims 5, 8, 11 and 16 on appeal), we urge the examiner to consider the combined teachings of Fulwell and Smith to determine if it would have been obvious to one of ordinary skill in the art to provide the device of Fulwell Figure 1 with a curved or bent feed tube as seen in Smith so as to ensure that

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substantially all of the liquid cleaning agent in the device of Fulwell can be dispensed. Note particular Figure 2 and the teaching at page 2, lines 29-37, of Smith regarding the bent lower end (7) of the feed tube (4).

REVERSED AND REMANDED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
NEAL E. ABRAMS)	
Administrative Patent Judge)	APPEALS AND
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)	INTERFERENCES
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CHARLES E. FRANKFORT)	
Administrative Patent Judge)	

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