

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PATRICK GRIFFITH

Appeal No. 97-1810
Application No. 08/321,262¹

ON BRIEF

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

NASE, Administrative Patent Judge.

¹ Application for patent filed October 11, 1994. According to the appellant, the application is a continuation-in-part of Application No. 08/144,060, filed October 27, 1993, now abandoned.

Appeal No. 97-1810
Application No. 08/321,262

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 21 through 30, which are all of the claims pending in this application.²

We AFFIRM-IN-PART.

² Claims 25 and 28 were amended subsequent to the final rejection.

BACKGROUND

The appellant's invention relates to a disposable toothbrush. An understanding of the invention can be derived from a reading of exemplary claim 21, which appears in the appendix to the appellant's brief.

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

Danek 1910	958,371		May 17,
Merrill 1927	1,642,620		Sep. 13,
Zagouris ³ 1981	2,457,378	(France)	Aug. 14,
Munoz Saiz ⁴ 1986	3,616,182	(Germany)	Dec. 4,

Claims 21, 24 and 25 stand rejected under 35 U.S.C. § 103 as being unpatentable over Merrill in view of Munoz Saiz.

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

⁴ In determining the teachings of Munoz Saiz, we will rely on the translation provided by the PTO. A copy of the translation is attached for the appellant's convenience.

Claims 22, 23 and 26 through 30 stand rejected under 35 U.S.C. § 103 as being unpatentable over Merrill in view of Munoz Saiz, Danek and Zagouris.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the examiner's answer (Paper No. 14, mailed December 11, 1996) for the examiner's complete reasoning in support of the rejections, and to the appellant's brief (Paper No. 12, filed September 9, 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.

The rejection of claims 21, 24 and 25 under 35 U.S.C. § 103

We sustain the rejection of claims 21 and 25, but not the rejection of claim 24.

Claim 21

Claim 21 recites a disposable tooth cleaning apparatus comprising, inter alia, an elongated brush portion having a segment at one end and a plurality of bristles at the other end, an elongated handle portion having a compartment for holding a supply of powdered dentifrice and an opening through which the dentifrice may be poured and through which the segment of the brush portion is received for connecting the brush portion and handle portion for use, and means for sealing the opening for subsequent manual unsealing.

Merrill discloses a pocket outfit for the care of teeth. As shown in Figures 1, the outfit includes a toothbrush 1 provided with a shank 2 whose tapered end fits exactly into a corresponding aperture 3 formed in the hollow handle 4.

Merrill teaches (page 1, lines 49-54) that

[b]y this arrangement the brush is well secured to its handle and at the same time the aperture 3 is closed, so that the chamber 5 in the interior of the handle will

serve to contain a dentifrice in the form of a liquid or a paste, or even a powder.

Applying the terms of claim 21 to these teachings we find that Merrill has an elongated brush portion having a segment at one end (i.e, shank 2) and a plurality of bristles at the other end (i.e, toothbrush 1) and an elongated handle portion (i.e, handle 4) having a compartment for holding a supply of powdered dentifrice (i.e, chamber 5) and an opening (i.e, aperture 3) through which the dentifrice may be poured and through which the segment of the brush portion is received for connecting the brush portion and handle portion for use.

Munoz Saiz discloses a toothbrush with an interchangeable handle. As shown in Figure 1, the toothbrush 1 consists of a brush head body 3 and a handle 2. The brush head body 3 has a passage 5 extending from slanted end 7 to the bristles. The handle 2 forms a container 11 for containing liquid or semi-liquid toothpaste. The container 11 is sealed by wall 12 which is pushed through or removed by the slanted end 7 of the brush head body 3 during connection (see page 6, third

paragraph and page 4, fourth and fifth paragraphs). Munoz Saiz teaches (see page 5, second paragraph) that

the removable wall of the container serves as a seal until connection with the brush head body is made, since this exchangeable part is purchased individually in stores.

After the scope and content of the prior art are determined, the differences between the prior art and the claims at issue are to be ascertained. Graham v. John Deere Co., 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966).

Based on our analysis and review of Merrill and claim 21, it is our opinion that the only difference is the limitation that the tooth cleaning apparatus includes "means for sealing the opening for subsequent manual unsealing."

In applying the test for obviousness⁵, we reach the conclusion that it would have been obvious to one of ordinary

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).

skill in the art at the time the invention was made to seal Merrill's chamber 5 in the handle 4 by a wall which would be pushed through or removed by Merrill's shank 2 as suggested by the teachings of Munoz Saiz. The motivation for this modification is to make Merrill's handle an exchangeable part which can be purchased in stores in the manner suggested and taught by the handle of Munoz Saiz.

The appellant's argue (brief, pp. 5-6) that the combination of Merrill and Munoz Saiz is improper since there is no motivation to combine their teachings. We do not agree. As set forth above, it is our opinion that Munoz Saiz's teaching of making his handle an exchangeable part which can be purchased in stores provides one skilled in the art the motivation to provide Merrill's chamber 5 in the handle 4 with a sealing wall.

The appellant's argue (brief, p. 4 and reply brief, p. 1) that the combination of Merrill and Munoz Saiz does not meet all the limitations of claim 21. Specifically, the appellant's argue that the claimed "means for sealing the

opening for subsequent manual unsealing" is not met since the seal 12 in Munoz Saiz does not appear to be manually removable. We find this argument to be unpersuasive for the following reasons. First, claim 21 does not require the sealing means to be manually removable. Claim 21 only requires the sealing means to be manually unsealed. Second, as pointed out above, Munoz Saiz specifically teaches that the wall 12 can be either pushed through or **removed** by pushing the slanted end 7 into the handle 2. Lastly, it is our opinion that the pushing of the brush head body into the handle to either push through or **remove** the wall is manually unsealing the opening to the chamber. In that regard, it quite apparent to us that the pushing of the brush head body into the handle is done manually (i.e., by the hands of a person) and the result is the unsealing of the chamber.

For the reasons set forth above, the decision of the examiner to reject claim 21 under 35 U.S.C. § 103 is affirmed.

Claim 25

The appellant has grouped claims 21 and 25 as standing or falling together.⁶ Thereby, in accordance with 37 CFR § 1.192(c)(7), claim 25 falls with claim 21. Thus, it follows that the decision of the examiner to reject claim 25 under 35 U.S.C. § 103 is also affirmed.

Claim 24

Dependent claim 24 adds to parent claim 21 the limitation that the means for sealing includes a flexible material extending across the opening and attached with an adhesive for one-time removal.

The appellant argues (brief, p. 4) that the combination plainly fails to meet or suggest this limitation. As pointed out in the reply brief (p. 1), the examiner has not responded to this argument.

⁶ See page 3 of appellants' brief.

We have reviewed the applied prior art but find nothing therein which would have suggested the subject matter of claim 24. Specifically, there is no teaching or suggestion of utilizing an adhesive for attaching the wall 12 of Munoz Saiz across the opening to his container 11. Since all the limitations of claim 24 are not suggested or taught by the applied prior art, the decision of the examiner to reject claim 24 under 35 U.S.C. § 103 is reversed.

The rejection of claims 22, 23 and 26 to 30 under 35 U.S.C. § 103

We sustain the rejection of claims 22, 23, 26 and 28 through 30, but not the rejection of claim 27.

Claim 22

Dependent claim 22 adds to parent claim 21 the limitation that the apparatus further includes a hermetic package enclosing the brush portion and the handle portion and that the package includes means for facilitating manually tearing open the package.

The appellant has not provided any argument with respect to claim 22. The appellant has grouped claim 22 (brief, p. 3) with claims 23, 26 and 28 to 30 and has provided arguments relative to those claims.

While the appellant has not argued claim 22, we have reviewed the applied prior art and find that the subject matter of claim 22 would have been obvious to one of ordinary skill in the art at the time the invention was made in view of Zagouris' teachings of a single-use toothbrush contained within a package having a pull-tab to separate the package into two sections.

For the reasons set forth above, the decision of the examiner to reject claim 22 under 35 U.S.C. § 103 is affirmed.

Claim 23

Dependent claim 23 adds to parent claim 21 the limitation that the distal end of the handle portion is curved upwardly such that a thumb fits within the curve and a middle finger of

a hand fits under the curved distal end, opposite the thumb, when the handle is manually grasped and oriented for brushing.

Danek discloses a toothbrush. As shown in Figure 1, the toothbrush includes a handle 1 having an enlarged curved portion 3 shaped to conform to the contour of the palm of the hand, and a cavity 4 to receive the ball of the thumb.

Zagouris discloses a single-use toothbrush. As shown in the figure, the handle 6 of the toothbrush is curved upwardly.

In applying the above-noted test for obviousness, we reach the conclusion that it would have been obvious to one of ordinary skill in the art at the time the invention was made to curve Merrill's handle upwardly as suggested and taught by Danek and Zagouris. The self-evident motivation for this modification is to permit better gripping of Merrill's handle.

The argument presented by the appellant (brief, p. 6 and reply brief, p. 2) is unpersuasive for the following reason. While the upwardly curved handles of Danek and Zagouris fit

the contour of the palm, they are capable of being gripped in the manner recited in claim 23. That is, a thumb is capable of fitting within the curve and a middle finger of a hand is capable of fitting under the curved distal end, opposite the thumb, when the handle is manually grasped and oriented for brushing. In this regard, it should be remembered that claim 23 is directed to a tooth cleaning apparatus, per se, not to a method of using wherein this particular tooth cleaning apparatus is used. It seems the appellant is endeavoring to predicate patentability upon the method of using the tooth cleaning apparatus. This method is not determinative of the patentability of claim 23. The manner or method in which a machine is to be utilized is not germane to the issue of patentability of the machine itself. See In re Casey, 370 F.2d 576, 580, 152 USPQ 235, 238 (CCPA 1967); In re Yanush, 477 F.2d, 958, 959, 177 USPQ 705, 706 (CCPA 1973).

For the reasons set forth above, the decision of the examiner to reject claim 23 under 35 U.S.C. § 103 is affirmed.

Claims 26 and 28 through 30

The appellant has grouped claims 23, 26 and 28 through 30 as standing or falling together.⁷ Thereby, in accordance with 37 CFR § 1.192(c)(7), claims 26 and 28 through 30 fall with claim 23. Thus, it follows that the decision of the examiner to reject claims 26 and 28 through 30 under 35 U.S.C. § 103 is also affirmed.

Claim 27

Dependent claim 24 adds to parent claim 26 the limitation that the means for sealing includes a flexible material extending across the opening and attached with an adhesive for one-time removal.

The appellant argues (brief, pp. 4 and 6) that the combination plainly fails to meet or suggest this limitation. As pointed out in the reply brief (p. 1), the examiner has not responded to this argument.

⁷ See page 3 of appellants' brief.

We have reviewed the applied prior art but find nothing therein which would have suggested the subject matter of claim 27 for the same reasons as pointed out above with respect to claim 24. Since all the limitations of claim 27 are not suggested or taught by the applied prior art, the decision of the examiner to reject claim 27 under 35 U.S.C. § 103 is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 21 through 30 under 35 U.S.C. § 103 is affirmed with respect to claims 21 through 23, 25, 26 and 28 through 30 but is reversed with respect to claims 24 and 27.

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)	
)	
)	
)	
)	BOARD OF PATENT
JAMES M. MEISTER)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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APPEAL NO. 97-1810 - JUDGE NASE
APPLICATION NO. 08/321,262

APJ NASE

SAPJ McCANDLISH

APJ MEISTER

DECISION: **AFFIRMED-IN-PART**

Prepared By: Gloria Henderson

DRAFT TYPED: 04 Sep 98

FINAL TYPED: