

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. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte JAYSON A. JOHNSON, RONALD F. JOHNSON,  
and SUSAN S. JOHNSON

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Appeal No. 2002-1378  
Application No. 09/196,938

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ON BRIEF

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Before CAROFF, DELMENDO, and JEFFREY T. SMITH, Administrative Patent Judges.  
CAROFF, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's rejection of claims 1-6 and 9-31, all of the claims now pending in appellants' involved application.

The claims on appeal are directed to an artificial display representing a tree. It is instructive to highlight the differences in scope between the three independent claims before us. The most detailed of the three, claim 1, defines an artificial tree having a so-called "bubble trunk" as well as a plurality of rods extending outwardly from the trunk and spaced along substantially its entire height;

the artificial tree also including a garland representing foliage which extends from rod to rod and between the rods. Claim 16, like claim 1, defines an artificial tree having a “bubble trunk”, but does not require that the plurality of rods mounted on the trunk be spaced along “substantially the entire height” of the trunk as does claim 1. Claim 20, the broadest of the three independent claims, does not require that the tube which represents the trunk of the tree be constructed as a “bubble trunk” in the manner defined in claims 1 and 16.

With the understanding that the three independent claims are of significantly different scope, only claim 1 is reproduced below to highlight appellants’ invention in the most detail:

1. A display representing a tree and having a bubble trunk, comprising:

a hollow tube representing the trunk of the tree, said hollow tube configured to hold a liquid therein;

a base for holding the hollow tube in a substantially vertical position on a surface so that the hollow tube has a height;

an air supply means located in the hollow tube for supplying air to the hollow tube;

a plurality of rods mounted on the hollow tube and extending outwardly therefrom spaced along substantially the entire height of the tube to represent tree branches; and

a garland representing foliage secured to a selected plurality of rods to extend from rod to rod of the selected plurality of rods and between such rods in a manner to give the appearance of a tree having foliage.

Prior art references relied upon by the examiner on appeal are:

Hamlett	5,085,900	Feb. 4, 1992
Burnett	5,349,771	Sept. 27, 1994
Burnett	Des. 390, 157	Feb. 3, 1998



“substantially the entire height” of a “bubble trunk”, considering that this would tend to obstruct one’s view of the bubble display feature of the trunk. Claims 5-6, 9-15 and 27-31, being dependent on claim 1, stand with claim 1.

With the foregoing in mind, we do note that Dick et al. evidences that some artificial trees in the prior art do have artificial foliage which extends along substantially the entire height of the simulated trunk; yet the foliage is relatively sparse and, thus, does not substantially obstruct one’s view of the trunk. The examiner should consider the question of whether it would have been obvious under 35 U.S.C. § 103 to use a “bubble trunk” to enhance the aesthetic appearance of artificial trees of this genre, and whether it would have been further obvious to incorporate a plurality of rods in the superstructure in order to enhance its structural integrity.

As for claims 16-26, we note that neither claim 16 nor claim 20 embraces the combination of distinctive features associated with claim 1. For instance, claim 16 does not require that the recited rods be spaced along “substantially the entire height” of the bubble trunk. Claim 20 does not even require a “bubble trunk”. For these reasons, we agree with the examiner that independent claims 16 and 20, and those claims which depend from them, do not define a patentably distinct invention.

Appellants nevertheless argue that the use of a garland to create the impression of foliage would not have been obvious from the known use of garlands as a trimming to decorate a tree. We are not persuaded by this argument since the “comprising” language used in appellants’ claims is inclusive. In other words, appellants’ claims read on the use of a garland as a decorative trimming (which appellants acknowledge as a known use), creating the impression of foliage, even in a

situation where the branch-like elements of the tree already have some foliage on them. This is pointed out on page 5 of the examiner's Answer.

Finally, we address those arguments relating to the rod mounting characteristics defined in claims 24 and 26. In these claims, the rods are respectively referred to as being "rotatably mounted" and "moveably mounted". Aside from the speculation engaged in by both the appellants and the examiner as to the scope of the teachings in Hamlett, we find that the scope of the terminology employed in appellants' claims is so broad as to effectively read on the fronds mounting arrangement of Hamlett. In Hamlett, an artificial palm tree is formed by mounting frond elements at selected locations near the top of the simulated trunk (Figure 6). Each frond is constructed from a limb or branch-like rod and artificial palm leaves (col. 4, lines 59-62). Certainly, at some point during the mounting process described in Hamlett (col. 5, lines 17-50), the limb or rod component of each frond could be considered as being "rotably" or "moveably" mounted in the mounting fixture.

For the foregoing reasons, the decision of the examiner is affirmed as to claims 16-26, and reversed as to claims 1-6, 9-15 and 27-31.

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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

MARC L. CAROFF	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
ROMULO H. DELMENDO	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
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	)	
JEFFREY T. SMITH	)	
Administrative Patent Judge	)	

MLC/lp

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