

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SCOTT M. SHARP

Appeal No. 2003-0700
Application 09/547,578

ON BRIEF

Before ABRAMS, MCQUADE, and NASE, Administrative Patent Judges.
MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Scott M. Sharp originally took this appeal from the final rejection of claims 1 through 3, 6, 7 and 15 through 28. As the examiner has since withdrawn the rejection of claims 15 through 23, the appeal as to these claims is hereby dismissed, leaving for review the standing rejections of claims 1 through 3, 6, 7 and 24 through 28. Claims 15 through 23, along with claims 8 through 14 and 39 through 42, stand allowed. Claims 4 and 29 through 31, the only other claims pending in the application, stand objected to as depending from rejected base claims.

THE INVENTION

The subject matter on appeal relates to "an adjustable-depth crankbait fishing lure in which the traveling depth of the lure may be manually adjusted by the user, thereby allowing the user to catch fish located at certain water depths" (specification, page 1). Representative claims 1 and 24 read as follows:

1. An adjustable-depth fishing lure, of the type used with a fishing line, for use in catching fish at user-selected water depths, comprising in combination:

- a) a buoyant substantially rigid body comprising a first side, a second side, and two artificial eyes;
- b) a diving means, located adjacent said first side and said second side of said body, for assisting in forcing said body under the water's surface;
- c) an adjustable-depth means, coupled to said diving means, for adjustably setting the traveling depth of the fishing lure;
- d) a hooking means for hooking the fish;
- e) an attachment means for attaching the fishing lure to the fishing line; and
- f) a guard means for preventing accidental changing of said adjustable-depth means;
- g) wherein said guard means comprises an internal cavity within said body structured and arranged to substantially enclose said adjustable-depth means.

24. An adjustable-depth fishing lure, of the type used with a fishing line, for use in catching fish at user-selected water depths, comprising, in combination:

- a) a body comprising an exterior, an internal cavity, a first opening, and a second opening, wherein said body is structured and arranged to attach to a hook and to a fishing line;
- b) at least one fin attached to a first rotatable member wherein said fin is located adjacent said exterior of said body, and said first rotatable member is inside said first opening in said body; and

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c) a fin pitch control mechanism comprising a second rotatable member located in said second opening of said body;
d) wherein said pitch control mechanism is structured and arranged so that a selected amount of rotation of said second rotatable member selects the water depth.

THE PRIOR ART

The references relied on by the examiner as evidence of obviousness are:

Drake	1,870,559	Aug. 9, 1932
Golembeski	2,484,162	Oct. 11, 1949
Watts	3,858,344	Jan. 7, 1975

THE REJECTIONS

Claims 1 through 3, 6 and 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Drake.

Claims 24 through 27 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Drake in view of Watts.

Claim 28 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Drake in view of Watts and Golembeski.

Attention is directed to the appellant's main and reply briefs (Paper Nos. 13 and 15) and to the examiner's final rejection and answer (Paper Nos. 9 and 14) for the respective positions of the appellant and the examiner regarding the merits of these rejections.¹

¹ In the final rejection, claims 15 through 23 stood rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. As pointed out above, the examiner has since

DISCUSSION

I. The 35 U.S.C. § 103(a) rejection of claims 1 through 3, 6 and 7 as being unpatentable over Drake

Drake discloses a fishing lure which can be adjusted "to travel at any desired depth below the surface of the water" (page 1, lines 3 and 4). The lure comprises a body 10, gang hooks 11 and 12, a line attaching eye 13, a metal tube 15 extending transversely and rotatably through the body near its front end, vanes 17 fixedly attached to the ends of the tube projecting from the body, and a set screw 19 extending through the body so as to be movable into contact with the tube 15. Drake explains that

[i]n use, the vanes 17 may be set to any desired inclined position by turning the tube while the set screw is released and are then locked in that position by tightening the set screw. By this adjustment it is determined whether the lure will travel along the surface of the water as the line is reeled in or at some desired depth according to the speed of travel, the inclined vanes serving to pull downwardly the body which would otherwise float [page 1, lines 83 through 94].

As framed by the appellant (see pages 5 and 6 in the main brief and pages 2 and 3 in the reply brief), the dispositive issue with respect to the rejection of claims 1 through 3, 6 and

withdrawn this rejection (see page 4 in the answer). Also, the record indicates that the examiner's omission of Watts from the restatement of the rejection of claim 28 in the answer was inadvertent.

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7 is whether Drake teaches or would have suggested a fishing lure meeting the limitation in independent claim 1 requiring "a guard means for preventing accidental changing of said adjustable-depth means . . . wherein said guard means comprises an internal cavity within said body structured and arranged to substantially enclose said adjustable-depth means."

The appellant does not dispute that Drake's metal tube 15 and set screw 19 collectively constitute an adjustable-depth means as recited in claim 1. As clearly shown in Figure 3, this adjustable-depth means is substantially enclosed within an internal cavity defined within Drake's lure body 10 by a pair of intersecting passages. Ostensibly, this internal cavity would inherently function as a guard means for preventing accidental changing of the adjustable-depth means. Thus, notwithstanding the appellant's argument to the contrary, Drake does in fact disclose a guard means to the extent recited in claim 1.

Hence, the appellant's traverse of the standing 35 U.S.C. § 103(a) rejection of claims 1 through 3, 6 and 7 as being unpatentable over Drake is not persuasive. We shall therefore sustain this rejection.

II. The 35 U.S.C. § 103(a) rejection of claims 24 through 27 as being unpatentable over Drake in view of Watts

As implicitly conceded by the examiner (see pages 3 and 4 in the final rejection), Drake does not respond to the limitation in independent claim 24 requiring a fin pitch control mechanism structured and arranged so that a selected amount of rotation of the second rotatable member selects the water depth. Although the Drake lure includes a second rotatable member in the form of set screw 19, selected rotation of the set screw does not select the water depth of the lure. The examiner's reliance on Watts to overcome this deficiency is not well founded.

Watts pertains to a fishing lure "of the spinning type in which the direction of rotation of the lure can be changed at will, without untying the lure from a line and without dismantling the lure" (column 1, lines 49 through 52). The lure comprises a body 1 composed of relatively rotatable front and rear parts 7 and 8 having respective pairs of diametrically opposed apertures 11 and 12 in register with one another, and a pair of fins 2 mounted within registered apertures. Rotation of the lure body parts relative to one another disposes the fins in either of two inclinations which respectively foster right-handed and left-handed spinning of the lure as it moves through the water.

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In proposing to combine Drake and Watts to reject claim 24, the examiner concludes that it would have been obvious "to provide Drake with [the] concept shown by Watts so that rotation of one lure part effects a rotation of another lure part for the purpose of effecting a more direct relationship between cause and effect and since a step of manually rotating [Drake's] fins can be omitted" (final rejection, page 4). Suffice to say that the only suggestion for this proposed combination of widely disparate teachings stems from hindsight knowledge impermissibly derived from the appellant's disclosure.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of independent claim 24, and dependent claims 25 through 27, as being unpatentable over Drake in view of Watts.

III. The 35 U.S.C. § 103(a) rejection of claim 28 as being unpatentable over Drake in view of Watts and Golembeski

Since Golembeski does not cure the above noted shortcomings of the Drake-Watts combination relative to the subject matter recited in parent claim 24, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of dependent claim 28 as being unpatentable over Drake in view of Watts and Golembeski.

SUMMARY

The decision of the examiner to reject claims 1 through 3, 6, 7 and 24 through 28 is affirmed with respect to claims 1

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through 3, 6 and 7, and reversed with respect to claims 24 through 28.

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

NEAL E. ABRAMS)	
Administrative Patent Judge)	
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Administrative Patent Judge)	INTERFERENCES
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JEFFREY V. NASE)	
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