

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte FREDERICK M. ABBAS  
and  
GREG ALLEN ABBAS

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Appeal No. 2005-0944  
Application No. 09/941,377

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ON BRIEF

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Before OWENS, WALTZ, and DELMENDO, Administrative Patent Judges.  
DELMENDO, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 (2004) from the examiner's final rejection of claims 1 through 14 and 16 through 20 in the above-identified application. Claims 15 and 21 through 25, the only other pending claims, appear to have been allowed.<sup>1</sup>

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<sup>1</sup> Claims 21-25 were first submitted for examination as part of a 37 CFR § 1.116 (2004)(effective Feb. 5, 2001) amendment filed on Jun. 7, 2004. It appears that the examiner has entered

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The subject matter on appeal relates to a method for distributing a scented chemical composition for hunting animals (claims 1 and 2) and to an apparatus for distributing a scented chemical composition for hunting animals (claims 3-14 and 16-20). Further details of this appealed subject matter are recited in representative claims 1 through 3, and 9 reproduced below:

1. A method for distributing a scented chemical composition for hunting animals, the method comprising:
  - providing a pressurized dispenser for pressure based dispensing of a foam string from a distance away from a target, the distance being sufficient to avoid an ambient environment being contaminated by human scent, the foam string including the scented chemical composition to attract animals or mask human scent or both; and
  - discharging the foam string toward the target.
  
2. A method for a hunter to hunt animals by dispensing a chemical composition that emits a scent from a dispenser, the method comprising:
  - configuring a can to dispense a liquid-gas foam string of encapsulated plastic resin, the string including the chemical composition;
  - providing the chemical composition so as to emit the scent for a selected period of time after being dispensed, wherein the scent attracts animals or masks human scent; and
  - dispensing the string from the can toward a target, the string being dispensed far enough away from the can that the hunter does not substantially

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this amendment. (Examiner's answer mailed on Jul. 20, 2004 at 2, "Grouping of Claims.")

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contaminate an area around the target.

3. An apparatus for distributing a scented chemical composition for hunting animals, the apparatus comprising:

a pressurized dispenser for pressure based dispensing; and

a foam string dispensed by the dispenser, the foam string including the scented chemical composition for hunting.

9. The apparatus of claim 3, wherein the chemical composition comprises a chemical composition that masks human scent.

The examiner relies on the following prior art references as evidence of unpatentability:

Cox et al. (Cox)	3,705,669	Dec. 12, 1972
Easley	4,771,563	Sep. 20, 1988
Konietzki	4,788,787	Dec. 6, 1988

Claims 1 through 6, 11 through 14, and 16 through 20 on appeal stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cox in view of Konietzki. (Answer at 3-4.)

Correspondingly, dependent claims 7 through 10 on appeal stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cox in view of Konietzki, as applied to claim 1, and further in view of Easley. (Id. at 4.)

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We reverse as to claims 1 and 2 but affirm as to claims 3 through 14 and 16 through 20.<sup>2</sup>

Cox, the principal prior art reference, describes a pressurized dispensing container containing a composition comprising a resin for forming a cohesive body of plastic foam, a surfactant for providing a surface of controlled tackiness on the foam, and a propellant in which the resin and the surfactant are soluble for propelling the composition from the container and for subsequent expansion to form the foam. (Column 1, lines 19-27.) Cox further teaches that "[a]s the composition is expelled, it remains in the form of a thin string..." (Column 2, lines 48-53.) Cox also teaches that "if desired perfumes"<sup>[3]</sup>

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<sup>2</sup> With respect to the rejection based on Cox and Konietzki, the appellants state that the claims should be considered separately in two groups as follows: (I) claims 1, 2, and 11; and (II) claims 3-6, 12-14, and 16-20. (Appeal brief filed on Jun. 7, 2004 at 4.) For reasons discussed more fully below, we will consider claims 1, 2, and 11 individually. As to Group II, we select claim 3 as representative and confine our discussion to this representative claim. 37 CFR § 1.192(c)(7)(2003) (effective Apr. 21, 1995). With respect to the rejection based on Cox, Konietzki, and Easley, the appellants state that claims 7-10 stand or fall together. (Appeal brief at 4.) We select claim 9 as representative and confine our discussion to this representative claim.

<sup>[3]</sup> With respect to the definition of the term "perfume," Merriam-Webster's Collegiate Dictionary 863 (10<sup>th</sup> ed., 1996), copy attached, includes the following: "a substance that emits a pleasant odor; esp: a fluid preparation of natural essences (as

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or other odors may be incorporated in the composition." Column 7, lines 12-14.) According to Cox, the container may be used as a toy or play article. (Column 1, lines 7-15.) Nothing in Cox suggests the use of the disclosed container for hunting animals.

Konietzki, the other reference on which the examiner relies to reject appealed claims 1 and 2, discloses a scent propagation device having a leak-proof container and a line contained in a housing that is saturated with liquid concentrate of a scent indigenous to the environment of the game that is hunted.

(Column 1, lines 51-55.) According to Konietzki, the line may be drawn out from within the housing as a means of dispersing the scent. (Column 1, lines 55-57.)

The examiner states that "Cox et al. do not disclose a scent for a hunter to lure animals" but that one of ordinary skill in the art would have been led to combine the teachings of Cox and Konietzki to arrive at the subject matter of appealed claims 1 and 2. (Answer at 3-4.) We disagree.

As a preliminary matter, we note that appealed claim 1 recites "scented chemical composition to attract animals or mask human scent." (Emphasis added.) Thus, contrary to the

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from plants or animals) or synthetics and a fixative used for scenting."

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examiner's finding, Cox discloses the use of a "scented chemical composition" in the form of perfumes. Similarly, appealed claim 2 recites "scented chemical composition for hunting." The subject specification informs one skilled in the relevant art that the term "chemical composition" includes "a composition that masks human scent." (Specification at 3.) Accordingly, one skilled in the relevant art would understand that the recitation "scented chemical composition for hunting" encompasses Cox's perfumes, which would serve to mask human scent.

Nevertheless, we find no motivation, suggestion, or teaching in either Cox or Konietzki to make the examiner's proposed combination. While Cox suggests a method for applying the foam on "inert surfaces such as windows, walls, and the like" for play purposes (column 2, lines 63-68), such a purpose has no relation to hunting. Nothing in the applied prior art references would have led one of ordinary skill in the art to modify Cox's play method into a method for distributing [in a hunting ground] a scented chemical composition. In re Dembiczak, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999) ("The best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous

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application of the requirement for a showing of the teaching or motivation to combine prior art references.”)

For these reasons, we cannot uphold the examiner’s 35 U.S.C. § 103(a) rejection of appealed claims 1 and 2 as unpatentable over Cox in view of Konietzki.

The examiner’s rejection of appealed claims 3, which is directed to an apparatus, is another matter. As we discussed above, Cox discloses an apparatus including a pressurized container capable of dispensing a foam composition in the form of a string, which may include perfumes (i.e., a scented chemical composition). While Cox does not disclose the use of the prior art apparatus for hunting, this does not defeat the examiner’s rejection because the prior art apparatus and the claimed apparatus are structurally identical. Cf. In re Bigio, 381 F.3d 1320, 1326, 72 USPQ2d 1209, 1212 (Fed. Cir. 2004); In re Schreiber, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997); In re Sinex, 309 F.2d 488, 492, 135 USPQ 302, 305 (CCPA 1962); In re Wolfe, 251 F.2d 854, 855, 116 USPQ 443, 444 (CCPA 1958); In re Hack, 245 F.2d 246, 248, 114 USPQ 161, 162 (CCPA 1957).

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It is our judgment, therefore, that Cox describes, either expressly or inherently, each and every limitation of appealed claim 3.

With respect to appealed claim 11, Cox teaches that the foam string may be propelled 6 inches or more from the nozzle of the container, which can provide more than 0.5 mile of string. (Column 2, lines 25-39.) Thus, it would reasonably appear that Cox's apparatus would have the same characteristic recited in appealed claim 11.

With respect to appealed claim 9, we have already pointed out that Cox teaches the use of perfumes. Thus, the limitation recited in appealed claim 9 is of no help to the appellants.<sup>4</sup>

We have considered all of the arguments set forth in the appeal brief and reply brief filed on Sep. 23, 2004 but do not find any of them germane to the apparatus claims.

In summary, we reverse the examiner's rejection under 35 U.S.C. § 103(a) of appealed claims 1 and 2 as unpatentable over Cox in view of Konietzki. We affirm, however, the rejections under 35 U.S.C. § 103(a) of: (i) appealed claims 3 through 6, 11 through 14, and 16 through 20 as unpatentable over Cox in view

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<sup>4</sup> We need not discuss the teachings of Easley because they are unnecessary to support the rejection of appealed claim 9.

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of Konietzki; and (ii) appealed claims 7 through 10 as unpatentable over Cox in view of Konietzki and further in view of Easley.

Accordingly, the decision of the examiner is affirmed in part.

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

Terry J. Owens	)	
Administrative Patent Judge	)	
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	)	
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	)	BOARD OF PATENT
Thomas A. Waltz	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
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Romulo H. Delmendo	)	
Administrative Patent Judge	)	

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