

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte KAREN A. KREUTZ, LISA A. MacKAY, DONNA R. HILL
and THOMAS W. OSBORN III

Appeal No. 2006-0061
Application No. 09/653,012

HEARD: FEBRUARY 22, 2006

Before FRANKFORT, CRAWFORD and BAHR, 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 6 and 8 through 20, all of the claims remaining in the application. Claim 7 has been canceled.

Appellants' invention relates to feminine hygiene kits and, more particularly, to an improved tampon kit for females first learning to use tampons. In general each kit comprises an absorbent tampon and a backup feminine protection product, such as a panty liner, packaged in a common package. Since the target market for the kits is new or novice tampon users, appellants

express a preference (specification, page 9) for an absorbent tampon having an absorbent core with a "syngyna" absorbent capacity of less than 6 grams.¹ Such tampons are generally referred to as being of the "junior" absorbency type, and sometimes referred to as "lites" or "light absorbency." Independent claim 1 is representative of the subject matter on appeal and a copy of that claim may be found in the Appendix attached to appellants' brief.

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

Moder et al. (Moder '165)	5,986,165		Nov. 16, 1999
Morrow		5,988,386	Nov. 23, 1999
Stravitz		6,164,442	Dec. 26, 2000

¹ As noted on page 9 of the specification and on page 4 of the brief, the "syngyna" absorbent capacity is a well known industry standard test, and is required by the U.S. Food and Drug Administration (FDA) to be performed on samples of all tampons sold in the United States. The FDA also requires tampons to be labeled on the basis of the results of the "syngyna" test (see, 54 Fed. Reg. 43,766 (Oct. 26, 1989)).

Claims 1 through 5 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Moder '165.

Claim 1, 6, 8, 9 and 14 through 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Stravitz.²

Claims 10 through 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Stravitz in view of Morrow.

Rather than attempt to reiterate the examiner's commentary with regard to the above-noted rejections and the conflicting viewpoints advanced by appellants and the examiner regarding those rejections, we make reference to the answer (mailed December 16, 2003) for the examiner's reasoning in support of the rejections, and to

² Given the discussion in the body of this rejection on page 5 of the answer, we consider the rejection to be more correctly based on Stravitz in view of Moder '165, and have treated it accordingly in our deliberations on appeal. Appellants' counsel was informed of this action at the oral hearing held on February 22, 2006 and had no objection.

appellants' brief (filed August 27, 2003) and Reply Brief (filed January 7, 2004) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we have made the determinations which follow.

Concerning the examiner's rejection of claims 1 through 5 under 35 U.S.C. § 103(a) as being unpatentable over Moder '165, on page 4 of the brief appellants concede that Moder '165 discloses a feminine hygiene kit comprising 1) an absorbent tampon with an absorbent core and a withdrawal mechanism attached thereto, and 2) a backup feminine protection product in the form of a panty liner or sanitary napkin, wherein the tampon and panty liner or sanitary napkin are packaged in a common package. Note, for example, Figures 7-9, 10-12, 47 and 48 of Moder '165. Appellants then agree with the examiner that the only difference between the applied prior art reference and the

claimed invention is that Moder '165 does not disclose that the absorbent core of the tampon therein has a "syngyna" absorbent capacity of less than 6 grams.

For reasons set forth on pages 3, 4 and 8-10 of the answer, the examiner has concluded that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to modify the kit of Moder '165 by providing an absorbent tampon therein having an absorbent core with a "syngyna" absorbent capacity of less than 6 grams. We agree.

As noted in column 6, lines 13-17 of Moder '165, the invention therein addresses a novel feminine sanitary protection packaging and method which provides "full and complete sanitary protection,... ease in consumer handling, convenience, and discretion in packaging appearance." Lines 18-22 of column 6 further note that the novel feminine sanitary protection packaging provides a sanitary napkin or panty liner or shield combined around one or more vaginal inserts, or vaginal insert applicators containing absorbents or medical devices for easy handling and use and easy disposal. At column 6, lines 33-45, it is noted that

By vaginal insertion device, it is meant a vaginal insert or vaginal insert applicator. By vaginal insert, it is meant a tampon or vaginal medicine insert such as a vaginal suppository. By vaginal insert applicator, it is meant a tampon applicator or a vaginal medicine insert applicator such as a vaginal suppository applicator.

The novel sanitary protection package fills a woman's need to have an absorbent pad or panty liner or shield readily accessible when using absorbent substances such as tampons or vaginal suppositories, e.g., such as for yeast infections. At the same time, the sanitary protection package of the present invention minimizes the use of superfluous materials, e.g., such as peel strip, extra packaging pouch, and the like.

Advantages of the invention in Moder '165 are described in column 8, lines 16-31 as follows:

An advantage for such a packaging combination is that it conveniently contains all the products a women needs to feel fresh and completely protected, i.e., 100% protected, from stains on her undergarments or adjacent clothing. The novel sanitary protection package combination of the present invention provides women with an almost zero chance of experiencing staining on their undergarments when using these products together.

The product is more discreet and convenient than carrying two separate devices. A women does not need to go out and buy two separate products, thereby saving money and time. Nor does she need to carry them around separately, and make sure when it comes time to use them that both separate packages still are available.

The packaging keeps them both fresh and protected from contamination.

Notably absent from the disclosure in Moder '165 is any requirement or limitation on the type, size, or absorbency of tampons to be included in the kits described therein. The claims of the Moder patent are also silent as to any restriction on the type, size or absorbency of tampons to be included. Moreover, we observe that Moder '165 expressly notes that catamenial tampons are "available in a variety of sizes and shapes

so as to accommodate different sized vaginal cavities” (col. 19, lines 23-25). Further, at column 20, lines 2-4, after discussing the construction process of a typical tampon, it is indicated that “[d]epending upon the desired absorbency one desires in the finished tampon, the basis weight of the absorbent ribbon [making up the absorbent core] can vary.” Thus, it is clear to us that one of ordinary skill in the art would have recognized that Moder ‘165 was aware of and contemplated use of tampons in a variety of sizes, shapes and absorbencies available at the time of the invention therein.

As for the particular requirement in claim 1 that the absorbent tampon comprise an absorbent core having a “syngyna” absorbent capacity of less than 6 grams, we note that it is clear from the specification of the present application (e.g., page 9) and other evidence of record that tampons having that rated absorbent capacity were well known and available to the public at the time of the present application and even before the time of filing of Moder ‘165 (note, e.g., 54 Fed Reg. 43,766 issued October 26, 1989).

Given the broad disclosure in Moder ‘165 of the use of tampons in general in the kits therein, the fact that tampons in the particular claimed range of absorbency (i.e., less than 6 grams, known as “Junior” tampons) were well known before the filing of Moder ‘165, and the fact that Moder ‘165 clearly contemplated use of tampons in a variety of sizes, shapes and absorbencies, we conclude that it would have been obvious to one of

ordinary skill in the art at the time of the present invention to have provided kits of the type described in Moder '165 having tampons of various absorbency levels so that an individual user can choose the kit and level of absorbency necessary for a given anticipated menstrual flow. That is, we are of the opinion that kits of the type disclosed in Moder '165 having "Junior" tampons for light flow days, "regular" tampons for regular flow days, "super" tampons for heavier flow day, etc., would have been obvious to one of ordinary skill in the art at the time of the present invention. In that regard, we again point out that an objective of Moder '165 was to provide a feminine sanitary protection package "which provides full and complete sanitary protection" (col. 1, lines 16-18) and that the patent expressly notes that catamenial tampons useful therein come in a variety of sizes and with different absorbencies to accommodate different levels of menstrual flow.

Concerning the discussion of "the evidence" alluded to on pages 6-10 of the brief that the specification of the present application makes clear that low absorbency tampons like those of claim 1 are particularly suited for kits which are intended to be "learner's kits" for new or novice users of tampons, we note that it is not necessary that the prior art suggest modification of the kit of Moder '165 to achieve the same advantage or result discovered by appellants, it is sufficient that Moder '165 considered as a whole and from the perspective of one of ordinary skill in the art at the time of

appellants' invention would have suggested, or provided motivation for making a feminine hygiene kit like that broadly set forth in claim 1 on appeal to allow a woman to take advantage of a feminine sanitary protection kit like that of Moder '165 on light or low flow days, as well as on heavier flow days. Moreover, we note that the claims on appeal are in no way limited to a "learner's kit" for new or novice users as described in appellants' specification and urged in their briefs.

As for the mention in Moder '165 of FDA set absorbency standards for "regular," "super," and "super-plus" size tampons (col. 20, lines 5+), we do not find the mere recitation of those particular sizes to be in any way limiting on the size or absorbency of tampons to be used in the kits of the patent. In our view, that portion of Moder '165 is merely intended to be exemplary of tampons most commonly used and to provide a basic understanding of how such tampons would be formed to have a desired absorbency meeting FDA requirements by varying the basis weight of the absorbent ribbon used to make the core of the tampon. Nothing in Moder '165 limits the size or absorbency of the tampons to be used in the kits broadly described therein.

For the above reasons, we will sustain the examiner's rejection of claim 1 under 35 U.S.C. § 103(a). Given appellants' grouping of claims indicated on page 3 of the brief, it follows that the rejection of dependent claims 2 through 4 under

35 U.S.C. § 103(a) based on Moder '165 will likewise be sustained.

Dependent claim 5 specifically sets forth that the backup feminine protection product in the kit of claim 1 on appeal is "an absorbent interlabial device." The examiner contends (answer, pages 4 and 10) that the disclosure of Moder '165 at column 3, lines 5-9 regarding a backup feminine protection product in the form of "a shield configured to fit the pudendal region of a woman" would have been suggestive to one of ordinary skill in the art of an absorbent interlabial device. We agree. The pudendal region is that associated with the external genitals of the female and includes the labia majora. Thus, a shield configured to fit the pudendal region of a woman as referred to in Moder '165 would at least have been suggestive of an absorbent interlabial shield or device utilized as an alternative to the sanitary napkin or panty liner also discussed at column 3, lines 5-9. Thus, the rejection of claim 5 under 35 U.S.C. § 103(a) based on Moder '165 is also sustained.

The next rejection for our review is that of claims 1, 6, 8, 9 and 14 through 20 under 35 U.S.C. § 103(a) as being unpatentable over Stravitz in view of Moder '165. In this instance, the examiner points to the feminine hygiene kit shown in Figures 5-8 of Stravitz wherein absorbent tampons (113) and backup feminine protection products (115) are packaged in a common container or package (110). The examiner recognizes that the tampons of the feminine hygiene kit of Stravitz are not expressly disclosed as

including a withdrawal mechanism attached thereto and that the absorbency of the tampons is not specified. To account for these differences, the examiner looks to Moder '165 urging that it is suggestive of providing a tampon with a withdrawal mechanism in the form of a string (132) attached to the tampon and is also suggestive of tampons of different sizes and absorbencies for use in kits designed to provide full and complete sanitary protection. Based on the collective teachings of Stravitz and Moder '165 the examiner concludes that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to utilize a withdrawal mechanism on the tampons (113) of Stravitz and to provide the kit therein with tampons of different sizes and absorbencies, e.g., tampons for light flow days having a synergistic absorbent capacity of less than 6 grams, for regular flow days having a synergistic absorbent capacity of 6-9 grams, etc.

Concerning independent claim 1, appellants urge that all of the discussions with respect to the Moder '165 patent above are applicable to this rejection, and additionally that there is nothing in Stravitz, either taken alone or in combination with Moder '165, which suggests the desirability of providing a tampon having an absorbent capacity of less than 6 grams (brief, page 11). Given the broad disclosure of Stravitz regarding the feminine hygiene kit seen in Figures 5 through 8 thereof and our discussion above

regarding the teachings and suggestions of Moder '165, we conclude that the examiner has correctly determined that the feminine hygiene kit set forth in claim 1 on appeal would have been obvious to one of ordinary skill in the art at the time of appellants' invention.

Although neither Moder '165 nor Stravitz expressly mentions tampons having an absorbent capacity of less than 6 grams, we remain of the view that one of ordinary skill in the art at the time of appellants' invention would have found such a kit to have been obvious in light of the broad disclosure in both Moder '165 and Stravitz concerning the use of tampons generally without limitation on the size or absorbency thereof in their respective kits. Thus, looking to the collective teachings of Stravitz and Moder '165, we conclude that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to provide a kit like that of Stravitz (Figs. 5-8) containing tampons (113) having various absorbencies so that an individual user can choose a tampon with an appropriate level of absorbency necessary for a given anticipated menstrual flow. That is, we are of the opinion that a kit of the type disclosed in Stravitz having "Junior" tampons for light flow, "regular" tampons for regular flow, "super" tampons for heavier flow, etc., would have been obvious to one of ordinary skill in the art at the time of the present invention. In that regard, we note that claim 1 on appeal is drafted using an open-ended "comprising" format, and therefore is not limited to a kit containing only one

tampon or a tampon of only one absorbency. Thus, the tampons seen at (113) in Figure 6 and 7 of Stravitz may be of various absorbencies, one for each of the several different anticipated flow situations mentioned above.

In light of the foregoing, and in view of appellants' grouping of claims set forth on page 3 of the brief, we will sustain the examiner's rejection of claims 1, 6, 9, 19 and 20 under 35 U.S.C. § 103(a) as being unpatentable over Stravitz in view of Moder '165.

Regarding claim 8, appellants contend that the tampon insertion guide required therein is wholly missing from Stravitz. The examiner's position (answer, page 6) is that it is well known in the art to package a tampon with a tampon insertion guide, and that to modify the kit of Stravitz (Figs. 6-8) to include such a guide would have been obvious to one of ordinary skill in the art at the time of appellants' invention to provide assistance to users that are not familiar with tampon usage. Again, we note that with appellants' approval we have treated the rejection on appeal as being based on Stravitz in view of Moder '165. A review of Moder '165 bears out what the examiner has said concerning use of tampon applicators or insertion guides in conjunction with tampons in a feminine hygiene kit (see, e.g., Figure 48 and the discussion thereof at columns 20 and 21). Thus, based on the collective teachings of the applied references, we will sustain the rejection of claim 8 under 35 U.S.C. § 103(a).

Appellants next challenge the examiner's rejection of claims 14 through 18 under 35 U.S.C. § 103(a), urging that the positive re-enforcement offerings of those claims (i.e., a bonus product offering in the form of candy, a bath product, or a coupon) are not suggested by the applied prior art. The examiner's bare assertion (answer, pages 6-7) that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to modify the feminine hygiene kit of Stravitz "to employ any and/or all of the claimed limitations based on the targeted population because the purpose of the kit in general is to provide convenience to the user" is wholly unsupported by any evidence in the record. The examiner's reference to other embodiments of the carrying case of Stravitz and the type of items that may be carried in such other embodiments has no bearing on or applicability to the feminine hygiene kit seen in Figures 5-8 of the patent. Accordingly, since the examiner has failed to make out a *prima facie* case of obviousness, we will not sustain the rejection of claims 14 through 18 under 35 U.S.C. § 103(a).

Looking next to the examiner's rejection of claims 10 through 13 under 35 U.S.C. § 103(a) as being unpatentable over Stravitz in view of Moder '165 and Morrow, the examiner has determined that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to include a glove in the feminine hygiene kit of Stravitz because such a glove would allow a woman's hand to remain sanitary while inserting/removing a tampon as set forth in Morrow (col. 11, lines 33-58). In response, appellants have merely urged that the examiner's position regarding claims 10 through 13 adds nothing to overcome the deficiencies discussed above with respect to claim 1. Thus, given the lack of any separate argument regarding the patentability of claims 10 through 13 and since we have already sustained the examiner's rejection of claim 1 under 35 U.S.C.

§ 103(a) as being unpatentable over Stravitz in view of Moder '165, it follows that the rejection of claims 10 through 13 will likewise be sustained.

To summarize, we note that the examiner's rejection of claims 1 through 5 under 35 U.S.C. § 103(a) relying on Moder '165 and of claims 1, 6, 8, 9, 19 and 20 under 35 U.S.C. § 103(a) relying on Stravitz and Moder '165 have been sustained, while the rejection of claims 14 through 18 under 35 U.S.C. § 103(a) as being unpatentable over Stravitz in view of Moder '165 has not been sustained. In addition, the rejection of claims 10 through 13 under 35 U.S.C. § 103(a) as being unpatentable over Stravitz in

view of Moder '165 and Morrow has been sustained. Thus, 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)(1)(iv).

AFFIRMED-IN-PART

CHARLES E. FRANKFORT)	
Administrative Patent Judge)	
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