

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JAMES HEREBERT KEMP and AL SPROSTA

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Appeal 2007-3192  
Application 11/085,615  
Technology Center 1700

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Decided: November 20, 2007

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Before CHARLES F. WARREN, THOMAS A. WALTZ, and  
CATHERINE Q. TIMM, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1-18. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

## I. BACKGROUND

The invention relates to a toothbrush and method of generating power in a toothbrush. Claim 1 is illustrative of the subject matter on appeal:

1. A powered toothbrush comprising a handle, a head with at least one cleaning element, a powered element and a power generator, wherein power is generated from the power generator by movement of the toothbrush.

The Examiner rejects the claims under 35 U.S.C. § 103(a) as follows:

1. Claims 1-5, 7, 10-14, and 16 over Giuliani et al. (US 5,784,742 issued Jul. 28, 1998) in view of Konotchick (US 5,347,186 issued Sep. 13, 1994);
2. Claims 1-5, 9-14, and 18 over Bauer (US 4,788,734 issued Dec. 6, 1988) in view of Konotchick; and
3. Claims 1-6, 8, 10-15, and 17 over Massholder (US 6,343,400 B1 issued Feb. 5, 2002) in view of Konotchick.

Appellants request review of all the above rejections.

## II. DISCUSSION

The primary references, Giuliani, Bauer, and Massholder, each describe a battery powered toothbrush. The Examiner concludes that it would have been obvious to replace the battery of each toothbrush with the battery replacement module described by Konotchick.

For each rejection, Appellants contend that there is no teaching or suggestion within the prior art for modifying the toothbrushes of the primary references with the power generator of Konotchick.

The claims are not argued separately. We select claim 1 as representative for deciding the issue on appeal.

The issue on appeal arising from the contentions of Appellants and the Examiner is: Have Appellants overcome any of the rejections by showing that the evidence does not support the Examiner's finding of a reason to combine?

A preponderance of the evidence of record supports the following Findings of Facts (FF):

1. Each of the primary references, Giuliani, Bauers, and Massholder, describes or suggests powered toothbrushes including batteries for supplying power to powered elements within the toothbrush (Giuliani, Fig. 1 showing a toothbrush with rechargeable battery 30; Bauer, Figs. 1-2 showing a toothbrush with battery 4; Massholder, Fig. 1 showing a toothbrush with batteries 12, 13).
2. Konotchick describes a linear motion electric power generator (Title) which can be used in a variety of devices including exercise radios, battery replacement modules, and battery charger embodiments (Konotchick, cols. 9 and 10).
3. The "battery replacement module" of Konotchick is intended to replace batteries as a source of power in a device (Konotchick, col. 5, ll. 1-5; col. 9, ll. 58-65; col. 10, ll. 40-43).
4. For long time power needs, the battery replacement module "would provide a smaller, lighter, longer lifetime power source than batteries, when mechanical energy is available." (Konotchick, col. 10, ll. 40-43).

"On appeal to the Board, an applicant can overcome a rejection by showing insufficient evidence of *prima facie* obviousness or by rebutting the

prima facie case with evidence of secondary indicia of nonobviousness.” *In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (emphasis omitted).

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18. See also *KSR*, 127 S. Ct. at 1734 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”).

Applying the preceding legal principles to the Factual Findings, we determine that the Examiner has established a prima facie case of obviousness which Appellants have not rebutted.

In the present case, the prior art shows that battery powered toothbrushes were known in the art (FF 1) as were power generating modules intended to replace batteries (FF 3). Konotchick further suggests a range of applications including application in light consumer products such as exercise radios (FF 2). Moreover, the module is said to provide a smaller, longer lifetime power source (FF 4). Here, the use of the known battery replacement module for the batteries of the primary references would have been obvious to obtain the predictable result of a lighter, longer lasting

power source, one of ordinary skill in the art recognizing that the movement of brushing would provide the needed linear motion for generating electrical power. *KSR*, 127 S. Ct. at 1739 (2007) (“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.”).

While Appellants argue that the Examiner is applying a *per se* rule of obviousness, we do not agree. The Examiner has not merely found two elements in the prior art and substituted one for the other without a rational reason supporting the combination; rather, the Examiner has taken into account the knowledge of those of ordinary skill in the art as evidenced by the references to determine that it would have been obvious to use the Konotchick power generator in powered toothbrushes. Recently, in *KSR*, the Supreme Court set aside any “rigid” application of the teaching, suggestion, motivation (“TSM”) test, advising that: “A person of ordinary skill is also a person of ordinary creativity, not an automaton.” 127 S. Ct. at 1742 (2007). The evidence supports the position of the Examiner; particularly given the range of products suggested by Konotchick (FF 2), and the advantages Konotchick provides for using the battery replacement module instead of a battery alone (FF 4).

Appellants further argue that Giuliani teaches away from utilizing the teachings of Konotchick because the combination would render Giuliani’s toothbrush unsatisfactory for its intended purpose (Br. 6; Reply Br. 5). In view of the advantages cited by Konotchick (FF 4), we cannot agree with Appellants that Konotchick teaches away from using the module to replace batteries in toothbrushes. Certainly, a powered toothbrush with a smaller, lighter, longer lifetime power source is suitable for brushing teeth.

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Nor can we agree that the Examiner is taking Official Notice of any fact without citing a prior art reference. Konotchick supports the Examiner's finding that “[p]ower generators which generate electricity by shaking are well known.” That is exactly how the battery replacement module generates electricity.

### III. CONCLUSION

The evidence supports the Examiner's finding of a reason to combine the toothbrushes of each of the primary references with the battery replacement module of Konotchick.

### IV. DECISION

The decision of the Examiner is affirmed.

### V. TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal maybe extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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