

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LARRY THOMAS BRUNNER and RAE JEAN BRUNNER

Appeal 2008-0009
Application 10/918,870
Technology Center 3600

Decided: February 28, 2008

Before TONI R. SCHEINER, DEMETRA J. MILLS, and RICHARD M. LEBOVITZ, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 1-20. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

STATEMENT OF THE CASE

The claims relate to a deer attracting apparatus which can be used to simulate tail wagging by a doe (Spec. 1). Claims 1-20 are appealed.

Appellants request review of the following rejections:

Claims 1, 2, 4, 8, and 18-20 as anticipated under 35 U.S.C. § 102(e) by Terrill (U.S. Pat. No. 5,335,438, Aug. 9, 1994);

Claims 5, 6, and 7 as obvious under 35 U.S.C. § 103(a) over Terrill; Claim 3 as obvious under 35 U.S.C. § 103(a) over Terrill in view of Marek (U.S. Pat. No. 4,773,178, Sep. 27, 1988);

Claims 9-12 as obvious under 35 U.S.C. § 103(a) over Terrill in view of Bitting (U.S. Pat. No. 5,826,364, Oct. 27, 1998); and

Claims 13-17 as obvious under 35 U.S.C. § 103(a) over Terrill in view of Bitting and Marek.

We select claims 1, 11, and 18 as representative. Claims 1, 11, and 18 read as follows:

1. A deer attracting apparatus comprising:
a mount;

a flexible flag including a tip, a mounting location, an outer side and an underside, the flexible flag being configured to resemble the shape of a deer's tail when viewed from the underside and being mounted at the mounting location to the mount;

an actuator coupled to the flexible flag adjacent the tip;
wherein the flag, mount and actuator are configured to induce the flag to hang from the mount with the tip downward so that the outer side is presented toward a desired direction when the actuator is not actuated and during actuation of the actuator, the tip of the flag moves upwardly in a curling fashion that induces the outer side of the flag adjacent a tip portion to face the outer side of portions of the remainder of the flag and the underside of the flag adjacent the tip portion to be presented toward the desired direction.

11. A deer attracting apparatus comprising:

a pole having a ground engaging end configured for insertion into soil, a top end displaced from the ground engaging end when the pole is in a use configuration by a length greater than the height of a deer's hind quarters and a stop disposed between the ground engaging end and the top end at a height

above the ground engaging end approximating the height of a deer's hind quarters when the ground engaging end is received in the soil;

a flexible flag including a tip, a mounting location, an outer side and an underside, the flexible flag being configured to resemble the shape of a deer's tail when viewed from the underside and being mounted at the mounting location to the pole adjacent the stop, the underside includes a material having a texture and color simulating the texture and color of a deer's tail;

an actuator comprising a guide mounted adjacent the top end of the pole and a line coupled at a first end adjacent the tip of the flag and a free end located remotely from the pole wherein between the free end and the first end, the line is guided by the guide; and

wherein the flag, pole and actuator are configured to induce the flag to hang from the pole with the tip downward so that the outer side is presented toward a desired direction when the actuator is not actuated and during actuation of the actuator, the tip of the flag moves upwardly in a curling fashion that induces the outer side of the flag adjacent a tip portion to face the outer side of portions of the remainder of the flag and the underside of the flag adjacent the tip portion to be presented toward the desired direction.

18. A game attracting apparatus comprising:

a pole having a lower end and a top end displaced from the lower end;

a flag including a tip, a mounting location, an outer side and an underside, the flag being configured to resemble the shape and color of a deer's tail when viewed from the underside and being mounted at the mounting location to the pole at a location above the lower end;

an actuator coupled to the flag adjacent the tip of the flag; and

wherein the flag, pole and actuator are configured to induce the flag to hang from the pole with the tip downward so that the outer side is presented toward a desired direction when the actuator is not actuated and during actuation of the actuator, the tip of the flag moves upwardly so that the underside of the flag is presented toward the desired direction.

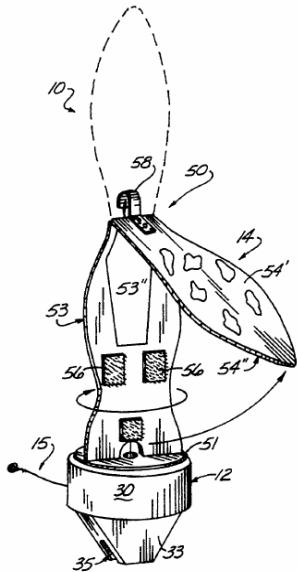
ANTICIPATION

Claims 1, 2, 4, 8, and 18-20 stand rejected under 35 U.S.C. § 102(e) as anticipated by Terrill.

Claims 1, 2, 4, and 8

Claim 1 is directed to a deer attracting apparatus comprising: 1) a mount, 2) a flexible flag which hangs from the mount, and 3) an actuator coupled to the flexible flag adjacent its tip. When actuated, “the tip of the flag moves upwardly in a curling fashion that induces the outer side of the flag adjacent a tip portion to face the outer side of portions of the remainder of the flag.” Thus, the actuator is used to curl or fold the flag upwards.

The Examiner finds that “Terrill shows a deer flagging apparatus having a mount 20, a flexible flag 14 including a tip, a mounting location, an outer side and an under side (all not labeled but see Fig. 1 [])” (Final Rejection 2). The mount 20 is a post member located within the housing 30 (Terrill, at col. 2, l. 55 to col. 3, l. 5). “Terrill shows an actuator 15 coupled to the flexible flag adjacent the tip” (Final Rejection 2). Terrill’s Fig. 1 is reproduced below.



The Examiner contends that Terrill’s apparatus as shown in Fig. 1, when actuated, folds the flag at the hinged region 58 – meeting the limitation of claim 1 that the actuator is used to fold the flag upwards (*id. at 2*).

We shall reverse this rejection. Claim 1 requires the flexible flag to hang from the mount. If the flag is considered to be elements 53 and 54 of Terrill's Fig. 1 – which would be necessary for the flag to meet the limitation of claim 1 that it folds when actuated – then we agree with Appellants that it does not ‘hang from the mount with the tip downward’ as recited in claim 1 (App. Br. 6). “One portion of the hinged flag member does ‘hang’, but it does not hang *from the mount*. Instead, the hanging portion 54 merely hangs from another portion of the hinged flag member” (*id.* at 7).

Flag member 54 alone of Fig. 1 could also be considered the flexible flag. In this case, while it hangs from the mount by the hinged portion 58, “during actuation of the actuator,” the flag does not curl or fold upward such that “the outer side of the flag adjacent a tip portion [is] to face the outer side of portions of the remainder of the flag” as recited in claim 1. As seen in Terrill's Fig. 1, actuation raises the entire flag member 54. “At no point does any portion of the outer side of the Terrill flag member [54] face any other portion of the outer side of the Terrill flag member [54]” (App. Br. 7).

For the foregoing reasons, we reverse the rejection of claim 1 and dependent claims 2, 4, and 8.

Claims 18-20

Claim 18 is directed to a game attracting apparatus comprising: 1) a pole; 2) a flag which is mounted to the pole such that the tip hangs downward; and 3) an actuator “coupled to the flag adjacent the tip of the flag.” Unlike claim 1, the flag in claim 18 is not required to be “flexible” and does not curl upwards when actuated so that “the outer side of the flag

adjacent a tip portion to face the outer side of portions of the remainder of the flag” as in claim 1.

The Examiner finds that

Figs. 1 and 2 of Terrill shows the . . . actuator 60 extending past the tip of the flag 54 due to the small semi-circular hole in the base of the vertical flag member 53. Hence the actuator not only passes close to the tip, but can be considered to be coupled to the flag adjacent the tip of the flag since no frame of reference is stated.

(Ans. 3-4).

We do not agree with the Examiner’s findings and thus reverse this rejection. Claim 18 requires the flag “to hang from the pole with the tip downward.” The actuator is “coupled to the flag adjacent the tip of the flag.” Fig. 1 of Terrill shows flag member 54 hanging from the hinged region with its tip downward. The actuator is not coupled to the tip, nor adjacent to it, but opposite to it at the hook 58 (Terrill, at col. 3, ll. 35-40; at col. 4, ll. 6-16). Thus, Terrill does not meet all the elements of claim 18. We reverse the rejection of claim 18 and dependent claims 19 and 20.

OBVIOUSNESS

Claims 5-7 stand rejected as obvious over Terrill; claim 3 stands rejected as obvious over Terrill in view of Marek; claims 9-12 stand rejected as obvious over Terrill in view of Bitting; and claims 13-17 stand rejected as obvious over Terrill in view of Bitting and Marek (Final Rejection 3-4; *see supra* at p. 2).

Claims 3, 5-7, 9, and 10 ultimately depend on claim 1. Claim 11 is an independent claim, but like claim 1, is directed to a deer attracting apparatus having a flag which is configured such that “during actuation of the actuator,

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the tip of the flag moves upwardly in a curling fashion that induces the outer side of the flag adjacent a tip portion to face the outer side of portions of the remainder of the flag.” Claims 12-17 depend on claim 11.

Terrill alone (claims 5-7), or in combination with Marek and/or Bitting (claims 3 and 9-17) does not address the deficiencies of Terrill as discussed above. Consequently, we reverse the rejections of claims 3, 5-7, and 9-17.

CONCLUSION

The rejections of (1) claims 1, 2, 4, 8, and 18-20 as anticipated by prior art and (2) claims 3, 5-7, and 9-17 as obvious over prior art are

REVERSED.

saj

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