

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ELISE TOMSIK EDELMAN,
MARY ELLEN RALEIGH, SUSAN TYLER EDE,
MARTY ALLEN VANDERSTELT,
THOMAS JACKSON KIRK,
and GAYLE MARIE FRANKENBACH

Appeal 2008-0324
Application 11/059,099
Technology Center 1700

Decided: February 27, 2008

Before EDWARD C. KIMLIN, THOMAS A. WALTZ, and
LINDA M. GAUDETTE, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-18, the only claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

The invention relates to “a fabric care composition with an improved scent experience.” (Spec. 1, ll. 8-9). Claim 1 is illustrative of the invention. Claim 1, as presented in Appellants’ Brief, is reproduced below:

1. An article comprising:
 - a) a rinse-added fabric conditioning composition comprising a perfume;
 - b) a container releasably containing the composition;
 - c) at least one label attached to the container; and
 - d) one or two natural scent identifiers located on the label;

The Examiner relies on the following prior art references to show unpatentability:

Bacon	5,652,206	Jul. 29, 1997
Wang	2002/0083534 A1	Jul. 4, 2002
Cooper	6,492,322 B1	Dec. 10, 2002

The Examiner made the following rejections:

1. Claims 1-10, 17, and 18 under 35 U.S.C. § 103 as unpatentable over Wang.
2. Claims 11 and 12 under 35 U.S.C. § 103 as unpatentable over Wang in view of Cooper.
3. Claims 13-16 under 35 U.S.C. § 103 as unpatentable over Wang in view of Cooper, and further in view of Bacon.

The Examiner also provisionally rejected claims 1-18 under the judicially created doctrine of obviousness-type double patenting. Appellants

do not appeal this ground of rejection, but indicate that they are prepared to submit a terminal disclaimer pending the identification of patentable claims. (Br. 3). Accordingly, we summarily affirm this ground of rejection.

Appellants maintain that the appealed claims are patentable over the applied prior art because none of the references, alone or in combination, disclose or suggest “one or two scent identifiers located on the label” as required by independent claim 1. (Br. 8-10). Appellants contend that the Examiner erred in failing to accord patentable weight to this claim limitation. (Br. 7). Appellants maintain that “the written contents on the label of claim 1 are entitled to patentable weight because there exists a new and unobvious functional relationship with the substrate article.” (Br. 6). More specifically, Appellants argue that “[t]he written content of the label and substrate article are functionally interrelated because each requires the presence of the another [sic] to properly educate the consumers regarding the scent experience.” (Br. 7).

The Examiner argues that the claimed scent identifiers do not bear a functional relationship to the claimed fabric conditioning composition. (Ans. 6). The Examiner thus maintains that claim 1 is unpatentable over Wang because Wang discloses “all of the ingredients recited by applicants are suitable for inclusion in a surfactant composition.” (Ans. 4).

Based on the contentions of the Examiner and the Appellants, the issues presented are: Has the Examiner made sufficient factual findings to support a prima facie showing of obviousness as to appealed claim 1? And, if so, have Appellants demonstrated that a new and unobvious functional relationship exists between the claimed rinse-added fabric conditioning composition and the scent identifiers appearing on the container label? We

answer the first question in the affirmative and the second question in the negative.

Appellants argue that the Examiner has not established a prima facie showing of obviousness because Wang does not teach or suggest the claim 1 elements of “at least one label attached to the container; [and] one or more natural scent identifiers located on the label.” (Br. 8). In our view, the Examiner’s finding of obviousness was reasonably based on a determination that a label containing instructions is the functional equivalent of the claimed label listing scent identifiers. *See* Ans. 6; Wang [0069] (“the composition is preferably packaged in association with instructions for use to ensure that the consumer knows what benefits can be achieved”). Accordingly, we find that the burden was properly shifted to Appellants to present sufficient arguments or evidence to overcome the Examiner’s prima facie showing of obviousness.

“The bare presence or absence of a specific functional relationship, without further analysis, is not dispositive of obviousness. Rather, the critical question is whether there exists any new and unobvious functional relationship between the printed matter and the substrate.” *In re Gulack*, 703 F.2d 1381, 1386 (Fed. Cir. 1983) (holding that a new and unobvious functional relationship existed between a circular band and printed matter because the printed matter would not achieve its educational purposes without the band and the band would not produce the desired results without the printed matter). Appellants contend that the article of claim 1 is patentable because the scent identifiers and fabric conditioning composition bear the same type of new and unobvious functional relationship as the band and printed matter in *Gulack*.

We are not persuaded by Appellants' arguments. Rather, we are in agreement with the Examiner that such new and unobvious functional relationship does not exist between Appellants' scent identifiers and rinse-added fabric conditioning composition because the "written matter does not provide the composition with a utility which it does not otherwise possess. . . . [T]he cleaning composition can clean without the written matter" (Ans. 6). As pointed out by the Examiner, Appellants' own Specification suggests that the function of the scent identifiers is to influence selection, or purchase, of Appellants' article. (Answer 5, citing Spec. 1); *see* Spec. 1, ll. 29-31 (knowledge of the scent of a fabric care composition "would improve the likelihood that the consumer would find the right scent experience and make a positive purchase decision"). Thus, the scent identifiers appear to serve as marketing media rather than performing an educational function.

Therefore, we conclude that a preponderance of evidence favors the Examiner's determination that claims 1-10, 17, and 18 are unpatentable over Wang.

Appellants do not raise additional substantive arguments in response to the rejections of the remaining claims. (Br. 9-10). Absent arguments or evidence to refute the Examiner's findings with respect to claims 11-12 and 13-16, we conclude that the Examiner properly established a *prima facie* showing of unpatentability as to claims 11 and 12 over Wang in view of Cooper and as to claims 13-16 over Wang in view of Cooper, and further in view of Bacon.

The decision of the Examiner is affirmed.

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

AFFIRMED

tf/lr

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