

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 12

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DANIEL E. KELLY

Appeal No. 97-0374
Application 08/310,493¹

ON BRIEF

Before McCANDLISH, Senior Administrative Patent Judge and
FRANKFORT and CRAWFORD, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 6 and 7. Claim 1, the only other claim remaining in the application, stands allowed. Claims 2 through 5 have been canceled.

¹Application for patent filed September 22, 1994.

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Appellant's invention relates to a display rack for bottles and the like. Claim 6 is representative of the subject matter on appeal and a copy of that claim, as it appears in the appendix to appellant's brief, is attached to this decision.

The single prior art reference of record relied upon by the examiner as evidence of obviousness of the claimed subject matter is:

Murphy	3,964,810	Jun. 22, 1976
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Claims 6 and 7 stand rejected under 35 U.S.C. § 103 as being unpatentable over Murphy. As indicated on page 2 of the final rejection, it is the examiner's position that

Murphy shows all of the claimed invention except for the shape of the pillars 45 and posts C. To merely modify the shape is generally considered to be obvious to one with ordinary skill in the art, as it would be here, to make the pillars and posts of Murphy triang-ular in shape. Note, lines 4-6 in column 7 which indicate stackability.

Reference is made to the final rejection (Paper no. 4, mailed February 23, 1996) and to the examiner's answer (Paper

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No. 9, mailed August 5, 1996) for the examiner's reasoning in support of the above-noted rejection and to appellant's brief (Paper No. 8, filed May 8, 1996) for appellant's arguments thereagainst.

OPINION

Our evaluation of the obviousness issues raised in this appeal has included a careful assessment of appellant's specification and claims, the applied prior art reference, and the respective positions advanced by appellant and the examiner. As a consequence of our review, we will sustain the examiner's rejection of the appealed claims under 35 U.S.C. § 103. Our reasoning follows.

Appellant's arguments herein center on the fact that the examiner has taken the position that it would have been an obvious matter of design choice to alter the shape of the

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recesses/sockets (50) and the spacer columns or posts (25-27) of Murphy to be of a triangular configuration, without any express reason or motivation in the cited Murphy reference for such a modification. In appellant's view, the examiner has not

provided the factual predicate necessary to establish a prima facie case of obviousness. We do not agree.

In considering the limitation regarding the triangular shape of the recesses in the lower end of the pillars and of the posts in appellant's claim 6, the examiner has noted that appellant's specification merely describes these elements of the invention as "triangular" without any reason given for this particular shape or any indication that such a shape solves a particular problem associated with the display rack therein. Given the lack in appellant's own disclosure of any criticality concerning this specific shape of the recesses and the posts, the examiner has concluded that making the shape of the recess in the lower end of the pillars and of the posts in

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Murphy triangular would have been an obvious matter of design choice to one of ordinary skill in the art. In this regard, we must agree with the examiner.

The triangular shape of the recesses and the posts in appellant's invention is apparently merely a preferred shape used instead of the square shape of those same items in Murphy, but, like the examiner, it is our opinion that a triangular shape

would have been an obvious matter of design choice to one of ordinary skill in the art given the fact that appellant's specification provides no indication that the shape in question

solves any stated problem or provides any unexpected result.

Thus, we consider that the recitations regarding the shape of the

recesses in the ends of the pillars and of the posts in the claims on appeal do not serve to patentably distinguish the

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claimed invention over the display rack structure suggested by the applied prior art. See In re Kuhle, 526 F.2d 553, 555, 188 USPQ 7, 9 (CCPA 1975). We further consider that this position is bolstered by the disclosure in Murphy (column 3, lines 18-30) wherein it is expressly noted that neither the specific shape nor the specific dimensions of the posts therein "are critical to the invention," thus suggesting to those of ordinary skill in the art that other configurations of the posts, and by inference, the recesses which receive those posts, would be acceptable and well within the skill of the art. The only restriction on the shape of the posts in Murphy is that they must be of uniform cross section throughout so as to facilitate their formation by a continuous extrusion process. A triangular shape, as well as a

square or a round shape would clearly permit such a formation process.

Based on the foregoing, the examiner's rejection of claims 6 and 7 under 35 U.S.C. § 103 relying on the teachings

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Murphy is sustained.

While we have fully considered the arguments advanced by appellant in the brief, we are not convinced thereby of any error in the examiner's position. Like the examiner, we note that appellant has not expressly indicated in the brief exactly why it would not have been obvious to the ordinarily skilled artisan to modify Murphy in the manner posited by the examiner in the rejection under 35 U.S.C. § 103. Instead, appellant has merely made the broad assertion that the examiner has not provided a factual basis to support a prima facie case of obviousness. As indicated above, we do not agree with this position.

For the reasons stated in the examiner's answer, as amplified above, the decision of the examiner rejecting appealed claims 6 and 7 under 35 U.S.C. § 103 is affirmed.

No time period for taking any subsequent action in

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connection with this appeal may be extended under 37 CFR
§ 1.136(a).

AFFIRMED

	HARRISON E. McCANDLISH)	
	Senior Administrative Patent Judge)	
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)	
)	BOARD OF
PATENT)	
	CHARLES E. FRANKFORT)	APPEALS
AND)	
	Administrative Patent Judge)	
INTERFERENCES)	
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)	
	MURRIEL E. CRAWFORD)	
	Administrative Patent Judge)	

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