

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

Paper No. 39

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KWANG HYUN YUN

Appeal No. 1999-0157
Application 08/113,310

HEARD: March 15, 2001

Before BARRETT, FLEMING, and LALL, Administrative Patent Judges.

FLEMING , Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 2, 3, 11 through 16, 18 and 23 through 27.

Claims 1, 5 through 10, 19, 20 and 22 have been withdrawn from consideration as directed to a non-elected invention.

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Claims 4, 17 and 21 have been canceled.

The invention relates to a method for controlling fermentation and ensilagation of food. In particular, the invention is directed to a method for controlling fermentation and ensilagation for use with a container for fermenting and ensilaging food. The device can control the fermenting stage of food by changing the fermenting time.

Independent claim 2 is reproduced as follows:

2. A method for controlling an apparatus for anaerobic fermenting and ensilaging of a food material, said method comprising the steps of:

selecting a ripeness setting;

maintaining a constant fermenting temperature inside an anaerobic fermenting and ensilaging container for a predetermined fermenting time corresponding to a selected said ripeness setting;

determining whether said predetermined fermenting time corresponding to the selected ripeness setting has lapsed; and

executing an ensilaging mode when said predetermined fermenting time has lapsed, wherein the ripeness of the food material is controlled by varying only fermentation time at predetermined temperatures.

The Examiner relies on the following references:

Wilson	3,926,738	Dec. 16, 1975
Christ et al. (Christ)	4,293,655	Oct. 6, 1981
Moo-Young et al. (Moo-Young)	4,938,972	Jul. 3, 1990

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Claims 2, 3, 11 through 16, 18 and 24 through 27 stand rejected under 35 U.S.C. § 103 as being unpatentable over Moo-Young in view of Christ.

Claim 23 stands rejected under 35 U.S.C. § 103 as being unpatentable over Moo-Young in view of Christ and Wilson.

Rather than reiterate the arguments of Appellant and Examiner, reference is made to the briefs¹ and answer with the respective details thereof.

OPINION

We will not sustain the rejection of claims 2, 3, 11 through 16, 18 and 23 through 27 under 35 U.S.C. § 103.

The Examiner has failed to set forth a *prima facie* case. It is the burden of the Examiner to establish why one having ordinary skill in the art would have been led to the claimed invention by the express teachings or suggestions found in the prior art, or by implications contained in such teachings or suggestions. *In re Sernaker*, 702 F.2d 989, 995, 217 USPQ 1, 6

¹Appellant filed an appeal brief on August 21, 1997. Appellant filed a reply brief on December 10, 1997. The Examiner mailed an office communication on March 10, 1998 stating that the reply brief had been entered and considered but no further response by the Examiner is deemed necessary.

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(Fed. Cir. 1983). "Additionally, when determining obviousness, the claimed invention should be considered as a whole; there is no legally recognizable 'heart' of the invention." *Para-Ordnance Mfg. v. SGS Importers Int'l, Inc.*, 73 F.3d 1085, 1087, 37 USPQ2d 1237, 1239 (Fed. Cir. 1995), *citing W. L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983).

Appellant argues on pages 7 and 8 of the brief that even if the proposed combination of Moo-Young and Christ was proper, the combination fails to make a *prima facie* showing of obviousness under 35 U.S.C. § 103. Appellant argues that the proposed combination of Moo-Young and Christ is completely devoid of any teaching of the Appellant's specific relation between the ripeness setting selected by the user and "maintaining a constant fermenting temperature inside an anaerobic fermenting and ensilaging container" for a constant period of fermentation. Appellant argues that the specific relations defined between user selection of a ripeness setting, predetermined fermentation time and constant temperature defined by independent claims 2, 11 and 12 state

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that the context of the constant temperature fermenting wherein the length of the fermenting time is determined in response to the selected ripeness setting, is a concept neither suggested nor taught by the proposed combination.

We note that Appellant's independent claim 2 recites "wherein the ripeness of the food material is controlled by varying only fermentation time at predetermined temperatures." We also note that Appellant's independent claims 11 and 12 recite "the ripeness of the food material being controlled by varying only fermentation time at constant temperatures."

We find that neither Moo-Young nor Christ teaches the above limitations. In column 6, lines 18 through 41, Moo-Young teaches that the fermentation process is controlled by varying the conditions of oxygen, agitation, temperature, pH and time. Furthermore, we note that Christ is not concerned with the fermentation process but is directed to the ensilaging process. Thus, Christ does not teach selecting a ripeness setting, maintaining a constant fermenting temperature, determining whether the predetermined time corresponds to the selected ripeness setting, wherein the ripeness of the food material is controlled by varying only

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the fermenting time at the predetermined temperatures as recited in Appellant's claims.

Appellant further argues on pages 5 through 7 of the brief that the modification of Moo-Young with Christ, as proposed by the Examiner, would impermissibly destroy the intended mode of practicing the process of the Moo-Young process. Appellant points out that the Moo-Young process employs an aerobically fermenting process while Christ employs an anaerobic fermenting process. Appellant points out that the modification of employing an anaerobic fermenting process to the Moo-Young process would destroy the Moo-Young fermenting process.

The Federal Circuit states that "[t]he mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." ***In re Fritch***, 972 F.2d 1260, 1266 n.14, 23 USPQ2d 1780, 1783-84 n.14 (Fed. Cir. 1992), ***citing In re Gordon***, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984). It is further established that "[s]uch a suggestion may come from the nature

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of the problem to be solved, leading inventors to look to references relating to possible solutions to that problem." ***Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc.***, 75 F.3d 1568, 1573, 37 USPQ2d 1626, 1630 (Fed. Cir. 1996), ***citing In re Rinehart***, 531 F.2d 1048, 1054 189 USPQ 143, 149 (CCPA 1976) (considering the problem to be solved in a determination of obviousness). The Federal Circuit reasons in ***Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.***, 73 F.3d 1085, 1088-89, 37 USPQ2d 1237, 1239-40 (Fed. Cir. 1995), that for the determination of obviousness, the court must answer whether one of ordinary skill in the art who sets out to solve the problem and who had before him in his workshop the prior art, would have been reasonably expected to use the solution that is established using hindsight or in view of the teachings or suggestions of the invention." ***Para-Ordnance Mfg. Inc. v. SGS Importers Int'l Inc.***, 73 F.3d at 1087, 37 USPQ2d at 1239, ***citing W. L. Gore & Assocs., Inc. v. Garlock, Inc.***, 721 F.2d 1551, 1553, 220 USPQ 311, 312-13. In addition, our reviewing court requires the PTO to make specific findings on a suggestion to combine prior art references. ***In re Dembiczak***,

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175 F.3d 994, 1000-01, 50 USPQ2d 1614, 1617-19 (Fed. Cir. 1999).

We note that the Moo-Young process, aerobic fermentation, employs the use of oxygen to grow a culture of fungus. In contrast, the Christ fermenting process, anaerobic fermentation, requires the absence of oxygen. The modification of Moo-Young to become an anaerobic fermentation process would destroy the culture of fungus. Therefore, we find that there would be no suggestion to those skilled in the art to use the solution of the Christ reference employing a completely different process in the Moo-Young aerobic fermentation process.

Turning to the rejection of claim 23 under 35 U.S.C. § 103 over the combination of Moo-Young, Christ and Wilson, we find that Wilson also fails to teach the above limitations that we have discussed. In particular, Wilson is directed to controlling a plurality of process variables. These variables include temperature, pressure, agitation speed, flow rate of additional gases, rate of addition of ingredients from additional vessels, and pH. See column 2, lines 64 through 67. In addition, we fail to find that Wilson provides any

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suggestion to support the Examiner's proposed combination of
modifying Moo-Young with Christ.

In view of the foregoing, we have not sustained the
rejection of claims 2, 3, 11 through 16, 18 and 23 through 27.
Accordingly, the Examiner's decision is reversed.

REVERSED

LEE E. BARRETT)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
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