

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 28

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN E. SCHOMMER

Appeal No. 2003-0780
Application No. 08/642,962

ON BRIEF

Before STONER, Chief Administrative Patent Judge, FRANKFORT and NASE, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 11, which are all of the claims pending in this application.

Appellant's invention is directed to a method of checking for water leakage in a fixture, such as a flush toilet, and generally involves the steps of 1) applying or squirting a swath of dye having a color visually distinct from the color of the fixture surface onto the fixture surface just below the flush

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ports; 2) after applying the swath of dye to the surface and before flushing the fixture, observing the swath of dye; and 3) noting any streaks down through the swath of dye which reveal the fixture surface through the dye to determine whether water from the source for the fixture is leaking through one or more of the flush ports when the fixture is not being flushed. Independent claims 1 and 11 are representative of the subject matter on appeal and a copy of those claims may be found in Appendix A of appellant's brief (Paper No. 23).

The sole prior art reference of record relied upon by the examiner in rejecting the appealed claims is:

A product label from a container of LYSOL Fresh Scent Cling, Thick Liquid Toilet Bowl Cleaner, circa 1995 (hereinafter LYSOL).

Claims 1 through 11 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over LYSOL. The details of this rejection are set forth in a prior decision by the Board of Patent Appeals and Interferences mailed February 25, 2002 (Paper No. 18, pages 7-13), wherein the present rejection was entered as a new ground of rejection under 37 CFR § 1.196(b).

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OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied LYSOL product label, to the declarations under 37 CFR § 1.132 submitted on May 6, 2002 (Paper Nos. 20 and 21), and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we have made the determination that the rejection under 35 U.S.C. § 103(a) before us on appeal will not be sustained. Our reasons follow.

In refuting the position taken by the Board in the decision mailed February 25, 2002, and by the examiner in the final rejection (Paper No. 22), that the methods set forth in claims 1 through 11 on appeal would have been obvious to one of ordinary skill in the art at the time of appellant's invention based on LYSOL, appellant has urged that the Board and the examiner based their determination on a factual error. More specifically, appellant has pointed to the finding on page 11 of the prior Board decision that "the only source for the water entering the bowl [after the precleansing flush and scrubbing noted in LYSOL and the subsequent application of LYSOL's cleaner to the bowl

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surface] is a leak between the toilet tank and bowl," and the conclusion following therefrom that, because of this, "the practitioner would logically understand (determine) that water is leaking from the water source," as being factually incorrect.

In support of this contention, appellant has provided declarations under 37 CFR § 1.132 from Mr. Lloyd Luthringer and Mr. Kirk Brewer (Paper Nos. 20 and 21) urging that, in normal functioning and non-leaking toilets, it would have been expected that residual post-flush drainage from the precleansing flush required in LYSOL would continue for up to one to two minutes after the flush and thereby provide a source of water flow other than that coming from any leakage from the tank into the bowl. As a result of such residual post-flush drainage and the expectation that one cleaning the toilet would apply the LYSOL cleaner to the bowl surface immediately after the pre-cleaning flush and scrub as the instructions imply, both Mr. Luthringer and Mr. Brewer have opined that a person would be ill-advised to correlate any observed streaks in the swath of LYSOL cleaner on the bowl surface to leakage, since any such streaks would more like be the result of the residual post-flush drainage and

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thereby, in the majority of instances, result in false positive results.

In the brief (pages 4-5) appellant has also taken issue with the Board's assertion (decision, page 9) that the method in LYSOL "necessarily requires the user to 'observe' the toilet bowl and the cleaner (swath of dye) therein" during the subsequent brushing step, contending that it is entirely possible that at the end of the 10 minute waiting period a person would turn to the task at hand and immediately start brushing before noticing anything at all about the bowl. In this regard, appellant is of the view that the Board and the examiner imputes a rather high degree of alertness and curiosity to a person who is motivated only to undertake the menial task of scrubbing a toilet bowl. Appellant also questions where the prior art provides suggestion to use LYSOL not for cleaning but for leak detection, since LYSOL clearly does not remotely suggest leak testing.

The examiner has provided no cogent line of argument or reasoning in either the final rejection or the answer to refute the points of argument and the evidence presented by appellant.

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After a careful assessment of a) the teachings to be derived from LYSOL, b) the declarations submitted by Mr. Lloyd Luthringer and Mr. Kirk Brewer (Paper Nos. 20 and 21), and c) the arguments presented by appellant in the brief and reply brief (Paper Nos. 23 and 25), we find ourselves in agreement with appellant's position that the methods of claims 1 through 11 on appeal would not have been obvious to one of ordinary skill in the art at the time of appellant's invention based on the teachings of LYSOL, and, therefore, refuse to sustain the § 103 rejection on appeal.

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It follows that the decision of the examiner is reversed.

REVERSED

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| BRUCE H. STONER, JR. |) | |
| Chief Administrative Patent Judge |) | |
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| |) | BOARD OF PATENT |
| CHARLES E. FRANKFORT |) | APPEALS |
| Administrative Patent Judge |) | AND |
| |) | INTERFERENCES |
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| JEFFREY V. NASE |) | |
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