

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 40

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte FRANZ HAUSLER, JOACHIM MAASZ  
and THOMAS VALERI

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Appeal No. 95-1373  
Application No. 08/011,074<sup>1</sup>

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HEARD: November 6, 1998

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Before KIMLIN, JOHN D. SMITH and WEIFFENBACH, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

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<sup>1</sup> Application for patent filed January 29, 1993. According to appellants, this application is a continuation of Application No. 07/824,425, filed January 23, 1992, now abandoned.

Appeal No. 95-1373  
Application No. 08/011,074

This is an appeal from the final rejection of claims 2, 4, 5, 7 and 9, all the claims remaining in the present application. Claim 7 is illustrative:

Claim 7. An acetylsalicylic acid-salt releasing chewing gum comprising acetylsalicylic acid, and a basic substance capable of reacting with said acetylsalicylic acid to form an acetylsalicylic acid salt, said gum containing not more than about 2% of water and said acetylsalicylic acid and said basic substance being bound in said chewing gum apart from each other sufficiently to prevent them from reacting with each other until said chewing gum is chewed, which gum when chewed in the presence of saliva brings said acetylsalicylic acid into contact with said basic substance so that they react to form said acetylsalicylic acid salt which is then rapidly released to the saliva, said basic substance being selected from the group consisting of an alkaline earth metal carbonate, calcium hydroxide, magnesium hydroxide, light magnesium carbonate, heavy magnesium carbonate or magnesium oxide, tris-(hydroxymethyl)-aminomethane, alkali metal phosphates or alkaline earth metal phosphates and basic amino acids, the amount of basic substance being such that together with the amount of acetylsalicylic acid employed there results a buffer capacity of between 5 and 15 mEq.

The examiner relies upon the following reference as evidence of obviousness:

Kehoe	4,975,270	Dec. 4, 1990
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Appellants' claimed invention is directed to a chewing gum that releases a salt of acetylsalicylic acid. The gum comprises acetylsalicylic acid and a basic substance, such as an alkaline earth metal carbonate, that is capable of reacting with the acid to form the salt. The acid and basic substance

Appeal No. 95-1373  
Application No. 08/011,074

are sufficiently bound apart from each other in the gum matrix to prevent them from reacting until the gum is chewed. Saliva generated by the chewing process effects reaction between the acid and basic substance.

Appealed claims 2, 4, 5, 7 and 9 stand rejected under 35 U.S.C. § 103 as being unpatentable over Kehoe.

Upon careful consideration of the opposing arguments presented on appeal, we concur with appellants that the disclosure of Kehoe fails to establish a prima facie case of obviousness for the claimed invention. Accordingly, we will not sustain the examiner's rejection.

Kehoe discloses a wide variety of chewable articles that may, in turn, contain a wide variety of active ingredients. At column 2, lines 38-50, Kehoe lists chewing gum as one of 14 chewable articles, and at column 2, lines 62 et seq., aspirin (acetylsalicylic acid) is specified in an extensive list of active ingredients. Based on these disclosures, we find, as acknowledged by appellants, that it would have been obvious for one of ordinary skill in the art to incorporate aspirin as an active ingredient in chewing gum.

Appeal No. 95-1373  
Application No. 08/011,074

To meet the claim requirement for a basic substance in the chewing gum, the examiner relies upon Kehoe's disclosure that calcium carbonate can be used as a filler in the chewable article (column 8, line 27). The examiner points out that although Kehoe does not expressly teach the combination of aspirin and calcium carbonate in chewing gum, and that such substances react in the presence of saliva to form a salt, "the prior art need not teach Appellant's reason for adding a material and a mere difference in reason does not provide patentable distinction" (page 6 of Answer).

The flaw in the examiner's reasoning is that Kehoe, considered in its entirety, does not teach or suggest the addition of calcium carbonate as a filler to a chewing gum containing aspirin. At column 4, lines 37 et seq., Kehoe discloses that a dusting agent may be added to the chewable article which is chemically inert to the active ingredient. Consequently, when selecting a dusting agent for a chewable article containing aspirin, we agree with appellants that one of ordinary skill in the art would not have chosen calcium carbonate, a material that is hardly inert to aspirin. Although Kehoe teaches a combination of citric acid and

Appeal No. 95-1373  
Application No. 08/011,074

calcium carbonate in a chewable product, we concur with appellants that Kehoe does not provide one of ordinary skill in the art "any reason to believe that a combination of aspirin and calcium carbonate could be advantageous" (page 12 of main brief). In our view, one must resort to impermissible hindsight to derive from the Kehoe disclosure a chewing gum comprising both aspirin and calcium carbonate.

In conclusion, based on the foregoing, the examiner's decision rejecting the appealed claims is reversed.

REVERSED

EDWARD C. KIMLIN	)	
Administrative Patent Judge	)	
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	)	
JOHN D. SMITH	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
	)	
CAMERON WEIFFENBACH	)	
Administrative Patent Judge	)	

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Appeal No. 95-1373  
Application No. 08/011,074

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