

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTHONY J. ROBERTSON
and CHARLES L. SCRIPPS

Appeal No. 96-3549
Application 08/171,484¹

HEARD: December 8, 1997

Before CALVERT, COHEN and STAAB, Administrative Patent Judges.
COHEN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 76 through 85. These claims constitute all of the claims remaining in the application.

¹ Application for patent filed December 21, 1993. According to appellants, the application is a division of Application 07/896,020, filed June 9, 1992, which is a division of Application 07/576,316, filed August 29, 1990, now abandoned, which is a division of Application 07/134,275, filed December 17, 1987, now Patent No. 4,963,140, granted October 16, 1990.

Appellants' disclosed invention pertains to a disposable absorbent article. An understanding of the invention can be derived from a reading of exemplary claim 76, a copy of which appears below.

76. A disposable absorbent article comprising:

a body portion comprising a backsheet, an absorbent core, and a topsheet, said body portion having a first end region, a second end region opposite of said first end region, an inside surface, an outside surface opposite of said inside surface, longitudinal edges, and end edges;

a mechanical fastening system for forming side closures such that said first end region and said second end region are in an overlapping configuration when worn, said mechanical fastening system comprising

a closure member disposed adjacent each longitudinal edge of said body portion in said first end region, each said closure member comprising a first mechanical fastening means for forming a closure, said first mechanical fastening means comprising a first fastening element;

a landing member disposed on said body portion in said second end region, said landing member comprising a second mechanical fastening means for forming a closure with said first mechanical fastening means, said second mechanical fastening means comprising a second fastening element mechanically engageable with said first fastening element; and

disposal means for allowing the absorbent article to be secured in a disposal configuration after use, said disposal means comprising a third mechanical fastening means for securing the absorbent article in the disposal configuration, said third mechanical fastening means comprising a third fastening element mechanically engageable with said first fastening element, said third fastening element being positioned on said body portion on said outside surface in said first end region.

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As evidence of anticipation and obviousness, the examiner has applied these references:

Hasslinger	4,569,348	Feb. 11, 1986
Toussant et al. (Toussant)	4,699,622	Oct. 13, 1987
Wilson et al. (Wilson)	4,895,569	Jan. 23, 1990 (filed Aug. 25, 1987)

The following rejections are before us for review.

Claim 76 stands rejected under 35 USC § 102(e) as being anticipated by Wilson, or in the alternative, under 35 USC § 103 as obvious over Wilson.

Claims 77 through 79 and 82 stand rejected under 35 USC § 103 as being unpatentable over Wilson in view of Toussant.

Claims 80, 81, and 83 through 85 stand rejected under 35 USC § 103 as being unpatentable over Wilson in view of Toussant and Hasslinger.

The full text of the examiner's rejections and response to the argument presented by appellants appears in the final

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rejection and answer (Paper Nos. 6 and 14), while the complete statement of appellants' argument can be found in the brief. (Paper No. 13).

OPINION

In reaching our conclusion on the anticipation and obviousness issues raised in this appeal, this panel of the board has carefully considered appellants' specification and claims, the applied teachings², and the respective viewpoints of appellants and the examiner. As a consequence of our review, we make the determinations which follow.

The rejection of claim 76 under 35 USC § 102(e)

We sustain the rejection of claim 76 under 35 USC § 102(e).

To support a rejection of a claim under 35 USC § 102, it must be shown that each element of the claim is found, either

² In our evaluation of the applied teachings, we have considered all of the disclosure of each teaching for what it would have fairly taught one of ordinary skill in the art. See In re Boe, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966). Additionally, this panel of the board has taken into account not only the specific teachings, but also the inferences which one skilled in the art would reasonably have been expected to draw from the disclosure. See In re Preda, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

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expressly described or under principles of inherency, in a single prior art reference. See Kalman v. Kimberly Clark Corp., 713 F.2d 760, 771, 218 USPQ 781, 789 (Fed. Cir. 1983).

A review of the Wilson patent as a whole, in particular Figures 1, 2, and 9, reveals to us that claim 76 is anticipated thereby.

As explained below, appellants' argument (brief, pages 3 through 9) fails to persuade us that claim 76 addresses a novel invention.

Contrary to the view advocated in the brief (brief, pages 4 through 7), we are of the opinion that an artisan would readily understand the disposable absorbent garment of Wilson (Figures 1 and 2) as being inherently capable of having a snap closure 62A or 62B (third fastening element) mechanically engageable with a respective snap element 50A or 50B (first fastening element).³ Of particular significance, is the circumstance that the outer stretchable cover material 12 of Wilson has a stretchability of "from about 20 percent to about 200 percent" (column 9, lines 47

³ Wilson indicates (column 6, lines 20 through 25) that disposal of a soiled garment is easily accomplished by folding the front panel 28 inwardly and fastening the rear pair of mating fastener members 42,44 to one another.

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through 50), assuring the certainty of the mechanical engageability of the aforementioned first and third elements. Other than argument, appellants have not come forward with any showing to the contrary to prove that the disposable absorbent garment of Wilson does not in fact possess the inherent characteristic relied upon. See In re Spada, 911 F.2d 705, 708-09, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). We note that appellants (brief, page 6) seem to implicitly acknowledge the capability of the aforementioned engagement of the snap closures and elements by referring simply to the difficulty (not the impossibility) of securing "the secondary load bearing closure means to the primary snaps". We also appreciate, again contrary to appellants' viewpoint (brief, pages 7 and 8), that snap closure 62A or 62B (third fastening element) would be positioned on the body portion of the outside surface of the garment of Wilson (column 7, line 65 to column 8, line 3), as claimed. We also recognize that the disclosed arrangement in Wilson (column 8, lines 1 through 3) of snaps applied directly to a stretchable outer cover material would effect the claimed overlapping configuration, again notwithstanding appellants' view to the contrary (brief, pages 8 and 9). As a concluding point we note that, while appellants indicate (brief, page 6) that the snap 62B is not necessarily the same size and configuration as the primary

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snaps 50A, Wilson (column 5, line 20) expressly sets forth at least two preferably "identical" male 50A or female 50B snap elements, which as disclosed can alternatively engage mating elements on the front and rear of the garment.

The rejection of claim 76 under 35 USC § 103

We sustain the rejection of claim 76 under 35 USC § 103.

Above, we found that claim 76 lacks novelty. Lack of novelty is the ultimate of obviousness. See In re Fracalossi, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982). Thus, claim 76 is appropriately rejected under 35 USC § 103 as being unpatentable.

The rejection of claims 77 through 79 and 82

We do not sustain the rejection of these claims under 35 USC § 103.

This panel of the board fully appreciates the examiner's point of view on this obviousness issue as articulated in the answer (Paper No. 14).

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However, the difficulty that we have with this rejection under 35 USC § 103 is that we do not perceive that it would have been obvious to one having ordinary skill in the art, from a combined consideration of the teachings applied by the examiner, to effect the claimed invention. We recognize, as focused upon by appellants, that Wilson (column 7, lines 51 through 65) explicitly instructs those versed in the art to rely upon stronger primary closures at the end points of each fastener member, specific examples being garment snaps and equivalent snap-like closures. On the other hand, the secondary load-bearing closure means 60 of Wilson (column 5, lines 42 through 63) between the primary snap closures may be a third snap element or, alternatively, a hook and loop arrangement. In our opinion, the clear instruction derived from the Wilson teaching is that a stronger, fixed position, snap or snap-like closure is required as a primary closure. Thus, notwithstanding the Toussant disclosure, it is our view that the teaching of Wilson, in particular, would have clearly militated against the examiner's proposed modification of the primary closures. For these reasons, the examiner's rejection under 35 USC § 103 cannot be sustained based upon the applied patents.

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The rejection of claims 80, 81, and 83 through 85

We do not sustain the rejection of these claims under 35 USC § 103.

This rejection, like the preceding rejection under 35 USC § 103, relies upon the basic combination of the Wilson and Toussant patents. However, for the reasons given above, which are incorporated herein, this panel of the board concludes that the proposed combination of the Wilson and Toussant documents is not sound. The additional Hasslinger reference does not overcome the stated deficiency of the applied Wilson and Toussant teachings.

In summary, this panel of the board has:

AFFIRMED the rejection of claim 76 under 35 USC § 102(e) as being anticipated by Wilson and under 35 USC § 103 as obvious over Wilson;

REVERSED the rejection of claims 77 through 79 and 82 under 35 USC § 103 as being unpatentable over Wilson in view of Toussant; and

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REVERSED the rejection of claims 80, 81, and 83 through 85 under 35 USC § 103 as being unpatentable over Wilson in view of Toussant and Hasslinger.

The decision of the examiner is affirmed-in-part.

AFFIRMED-IN-PART

IAN A. CALVERT)	
Administrative Patent Judge)	
)	
)	
IRWIN CHARLES COHEN)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
LAWRENCE J. STAAB)	
Administrative Patent Judge)	

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