

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte REINHARD MUELLER,
KURT SEIDEL,
DETLEF HOLLENBERG and
ANJA PATTEN

Appeal No. 1997-0327
Application No. 08/204,150

ON BRIEF

Before PAK, WALTZ, and KRATZ, Administrative Patent Judges.
KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 6 through 11, which are all of the claims pending in this application.

BACKGROUND

Appellants' invention relates to an aqueous cleaning composition useful for hair washing or rinsing while improving

". . . the fullness and stylability of hair . . ."
(specification, page 3). According to appellants, the composition is directed to the problem of providing an aqueous cleaning composition that would "combine high foaming power with a minimal effect on the skin" while diminishing ". . . the smoothness of dry hair without making the hair tacky and without any adverse effect on its wet combability[sic, compatability]" (specification, pages 2 and 3). The claimed composition comprises four components in the following weight percent amounts:

- (A) about 1-50% of a specified class of anionic surfactant(s);
- (B) about 0.5-10% of one or more alkyl glycosides of a specified formula;
- (C) about 0.1-5% of an anionic polymer; and
- (D) about 35-98.4% water;

with the additional proviso that the sum (in respective weight percents) of components B and C is no greater than component A.

Claim 6, the only independent claim on appeal, is reproduced below.

6. An aqueous cleaning composition comprising: (A) from about 1 to about 50% by weight of one or more anionic surfactants having 1 or 2 lipophilic groups each of which has from 1 to 22 carbon atoms and a polar group selected from the group consisting of a carboxylate, a sulfate, and a sulfonate group; (B) from about 0.5 to about 10% by weight of one or more alkyl glycosides of the formula



wherein R is a linear, saturated C₈₋₂₂ alkyl group, (G) is a glycoside or oligoglycoside moiety, and x is a number from 1 to 4; (C) from about 0.1 to about 5% by weight of an anionic polymer; (D) from about 35 to about 98.4% by weight of water; wherein the sum total of components (B) and (C) is no greater than the amount of component (A).

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

Hoeffkes et al. (Hoeffkes) 4,898,725

Feb. 06,

1990

Claims 6-11¹ stand rejected under 35 U.S.C. § 103 as being unpatentable over Hoeffkes.

OPINION

Upon careful review of the record presented on appeal, we find ourselves in agreement with appellants' view that the examiner has failed to carry the burden of establishing a prima facie case of obviousness. In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992); In re

¹ The examiner's statement that claims 6 and 8 through 11 are being rejected at the bottom of page 2 of the answer involves an obvious error in the omission of claim 7. This is so since the examiner indicates that the status of the claims, the statement of the issues, and the grouping of claims section presented in the brief, and the copy of the appealed claims in the appendix to the brief are correct (answer, pages 1 and 2). Those items all refer to claims 6 through 11. We further note that the final rejection (page 2) includes an interlineation, in ink, that changes the rejected claims from claims 6 and 8 through 11 to claims 6 through 11, which corresponds to the cover page of the final rejection. Also, we did not uncover an express withdrawal of the rejection of claim 7 in our review of the answers. In light of the above together with appellants' briefs having been directed to the rejection of all of claims 6 through 11, we further consider the error of omitting claim 7 from the stated rejection in the answer as harmless. Accordingly, we determine that the examiner's stated rejection pertains to all of appealed claims 6 through 11.

Piasecki, 745 F.2d 1468, 1471-72, 223 USPQ 785, 787-88 (Fed. Cir. 1984).

As correctly pointed out by appellants (brief, pages 5 and 6), the examiner has not convincingly explained where the applied Hoeffkes reference teaches both an anionic surfactant and an alkyl glycoside used together in their composition, let alone in the relative amounts claimed herein together with the other components as required by all of the claims on appeal. On the matter of the composition of Example 3, we agree with appellants' position and explanations offered in the reply brief (page 3) and the main brief (page 5).

Having realized the futility of maintaining the unsupported position that Example 3 of Hoeffkes discloses both of the aforementioned anionic surfactant and alkyl glycoside components being used together in a composition as claimed herein (supplemental answer, page 3)², the examiner, nevertheless, maintains the stated rejection. In this regard,

² We note that the examiner inexplicably maintained this position in the stated rejection in the answer (page 4) while at page 5 of the same answer expressing agreement with appellants' position that Hoeffkes' Example 3 did not disclose an anionic surfactant, a component of the herein claimed composition.

the examiner refers to various sections of Hoeffkes at page 3 of the answer including portions of the patent wherein alternative surfactants are discussed.

However, the examiner does not explain where Hoeffkes discloses or suggests the selection of **both** a glycoside (component B) and an anionic surfactant (component A) to be used **together** in a composition within the scope of the present claims.

While the examiner acknowledges that Hoeffkes does not teach the relative amounts of the components A, B and C, as claimed herein, it is the examiner's position that selection of the claimed proportions of the components would have been obvious as a matter of optimization of the composition of Hoeffkes. (answer, pages 4 and 5 and supplemental answer, page 2). Faced with appellants' cogent arguments concerning the lack of any reasonable teaching or suggestion in Hoeffkes of the claimed composition including both of components A and B together with the other components in the claimed amounts (brief, pages 5-7), the examiner responds, "[o]ne cannot rely

merely on the Examples in a reference as art to read upon a claimed invention" (answer, page 5).

Manifestly, on this record, we cannot sustain the stated rejection. Here, the examiner has not even articulated a reason, much less a convincing one, explaining why a skilled artisan would have been led to use both surfactant components A and B as claimed herein in their composition from the diverse alternative surfactants listed in the patent. As urged by appellants (brief, page 6), ". . . Hoeffkes only discloses the presence of one or the other in his compositions. . . ."

In addition, we are not convinced by the examiner's logic that the claimed component amounts herein would have been arrived at from the teachings of Hoeffkes via optimization since the examiner has not shown that Hoeffkes even teaches using the components in combination as claimed. From our perspective, there is no guidance or direction given in Hoeffkes that the examiner has pointed out which would have led a skilled artisan to the particularly claimed composition.

In summary, the only motivation and factual basis we can locate in support of the examiner's stated rejection is the description of appellants' invention in their specification. Hence, on this record, it is our view that the examiner used impermissible hindsight when rejecting the claims. Accordingly, we will not sustain the examiner's rejection.

CONCLUSION

To summarize, the decision of the examiner to reject claims 6-11 under 35 U.S.C. § 103 as being unpatentable over Hoeffkes is reversed.

REVERSED

CHUNG K. PAK)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
THOMAS A. WALTZ)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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