

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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

Appeal No. 98-1252
Application No. 08/642,184¹

ON BRIEF

Before MEISTER, ABRAMS and STAAB, ***Administrative Patent Judges.***

MEISTER, ***Administrative Patent Judge.***

DECISION ON APPEAL

Stephen M. Grussmark (the appellant) appeals from the final rejection of claims 1, 2, 12, 15-17 and 22-24. Claims 6-

¹ Application for patent filed May 6, 1996. According to appellant, this application is a continuation of Application No. 08/430,391 filed April 28, 1995, now abandoned; which is a continuation-in-part of Application No. 08/194,406 filed February 10, 1994, now abandoned.

11 and 14 stand allowed. Claim 13, the only other claim present in the application, has been indicated as being allowable subject to the requirement that it be rewritten to include all the subject matter of the claim from which it depends.

We AFFIRM-IN-PART.

The appellant's invention pertains to a combination of a dental floss dispenser and a stand-up toothpaste container. Independent claim 12 is further illustrative of the appealed subject matter and a copy thereof may be found in the APPENDIX to the brief.

The references relied on by the examiner are:

White 1937	2,084,568	Jun. 22,
Miles et al. (Miles) 1973	3,741,447	Jun. 26,
Cordero 1984	4,428,389	Jan. 31,
Paulson 1989	4,796,783	Jan. 10,
Grussmark 9, 1989	4,827,951	May

The claims on appeal stand rejected under 35 U.S.C. § 103 in the following manner:

(1) Claims 1, 2 and 23 as being unpatentable over Miles in view of Grussmark and Paulson;

(2) Claims 12, 15, 17 and 22 as being unpatentable over Cordero in view of White;

(3) Claim 15 as being unpatentable over Paulson in view of Grussmark;

(4) Claim 16 as being unpatentable over Paulson in view of Grussmark and White; and

(5) Claim 24 as being unpatentable over Miles in view of Grussmark.

The rejections are explained on pages 3-8 of the final rejection. The arguments of the appellant and examiner in support of their respective positions may be found on pages 7-25 of the brief, pages 1-5 of the reply brief and pages 5-15 of the answer.

OPINION

We have carefully reviewed the appellant's invention as described in the specification, the appealed claims, the prior art applied by the examiner and the respective positions advanced by the appellant in the brief and reply brief, and by the examiner in the answer. As a consequence of this review,

we will sustain Rejections (2), (3) and (5) and reverse Rejections (1) and (4). Our reasons for these determinations follow.

Rejection (1)

According to the examiner it would have been obvious to provide the cap of the toothpaste container of Miles with a dental floss dispenser in view of the teachings of Grussmark. The examiner is further of the opinion that it would have been obvious to form the vertically-inclined side walls of the housing of the dental floss dispenser of the toothpaste container of Miles, as modified by Grussmark, as a cylinder (thus resulting in the footprints of the housing's top and bottom walls being equal) in view of the teachings of Paulson.

We will not support the examiner's position. While we agree with the examiner that, as a broad proposition, it would have been obvious to provide the cap of the toothpaste container of Miles with a dental floss dispenser in view of the teachings of Grussmark, we cannot agree that it would have further been obvious to form the housing of the dispenser of the modified toothpaste container in such a manner that the footprints of the housing's top and bottom walls were equal.

The cap of Miles is of the two-part type wherein a second part 14 is pivotally mounted with respect to a first part 13, and the second part 14 of the cap of Miles and the dental floss dispenser 22 of Grussmark are both of a generally frusto-conical configuration. The outermost surface of Grussmark's cap 16 is provided with a recess or socket (defined by peripheral wall 18) for receiving the "top wall 20"² of the dental floss dispenser 22, but the housing of this dispenser has a cross-section that is octagonal in shape and has vertically inclined sidewalls, resulting in the housing's top wall 20 having a significantly larger footprint than the bottom wall 25. It is true that Paulson mounts dental floss dispenser "on" a cap 12 of a toothpaste container, and this cap has a cylindrical side wall 14. In Paulson, however, the dental floss dispenser has no separate housing that includes top, bottom and side walls. Instead, a coil of dental floss is

² Throughout the claims the appellant has referred to the top and bottom walls of the dental floss dispenser as though they were in the orientation depicted in Figs. 1, 2, 4-7, 9 and 10 of the drawings (i.e., wherein the toothpaste container is in an inverted position). Accordingly, we will refer to the "top" and "bottom" walls of the prior art dental floss dispensers as though they were in this same inverted orientation.

mounted **within** the cap by simply supporting the coil on a rotatable flat disc 30 that in turn is supported on the internally-threaded cylindrical member 24 which serves as the means to attach the cap to the externally-threaded outlet or nozzle 26 of the toothpaste container. In our view, the examiner has impermissibly relied on the appellant's own disclosure for a suggestion to single out the feature of a cylindrical side wall from the **cap** of Paulson and incorporate this feature into the side wall of the **separate housing** that forms the dental floss dispenser in the toothpaste container of Miles, as modified by Grussmark. This being the case, we will not sustain the rejection of 1, 2 and 23 under 35 U.S.C. § 103 based on the combined teachings of Miles, Grussmark and Paulson.

Rejection (2)

The examiner is of the opinion that it would have been obvious to configure or size the surface of the cap or bottom wall 7 of the dental floss dispenser 2 of Cordero in such a manner that it will stand upright on a planar surface in view

of the teachings of White. The appellant, however, argues that the bottom wall 7 has a protrusion 6 that precludes Cordero's combination of a dental dispenser 2 and a squeezable toothpaste container 1 from standing upright, and that "[r]emoving the protrusion will thereby completely change the intended function of Sanches Cordero which allows for replacement of the roll of dental floss" (brief, page 21). The appellant also contends that Cordero does not teach a means adjacent the top wall (as distinguished from bottom wall) of the housing of the dental floss dispenser that interfits with the cap means in such a manner that the dispenser is removably mounted on the cap means.

We are unpersuaded by such contentions. In our view, Cordero teaches all the subject matter defined by the claims under consideration with the exception that bottom wall 7 of the housing of Cordero's floss dispenser is provided with a protrusion 6 which would appear to prevent the dispenser from standing completely "upright" (claims 12 and 22) or "squarely" (claims 15 and 17) on a planar surface. That is, Cordero teaches a combination of a dental floss dispenser and a squeezable toothpaste container including a flexible tube means

1 for storing toothpaste having a nozzle means at one end thereof (see Fig. 2), a cap means 10 cooperating with the nozzle means for selectively opening and closing the nozzle means and a dental floss dispenser comprising a housing 2 for storing dental floss, a top wall (the wide-angled frusto-conical surface 9 depicted in Figs. 2 and 3), a removable bottom wall 7, a side wall (the cylindrical side wall depicted in Fig. 2) and means (the steeply angled frusto-conical surface or socket 9 depicted in Figs. 2 and 3) which is "adjacent" to the top wall for attaching the housing to the cap means 10 in a press-fit relation (see column 2 lines 41 and 42; column 3, lines 30-33). As we have noted above, the protrusion 6 (which serves as a handle for removing the removable bottom wall 7) would appear to prevent the dispenser from standing completely upright or squarely on a planar surface.

White, however, teaches a closure or cap for a flexible tube with a "bottom surface" which "will form a broad flat surface sufficiently large" (page 1, column 1, lines 52 and 53) for the purpose of providing

a broad base for the tube on which it will stand upright, permitting of more convenient disposal that

is possible with present tubes of the collapsible type. [Page 2, column 2, lines 9-13.]

Thus, White teaches that in order to achieve the advantage of standing a squeezable toothpaste container in an upright position, the end structure or bottom surface should be provided with a broad flat surface. In our view, a combined consideration of Cordero and White would have fairly suggested to one of ordinary skill in this art to provide the end structure 7 (i.e., the cap or bottom wall) of Cordero with a broad flat surface in order to achieve White's expressly stated advantage of providing a toothpaste container which will stand upright, thus permitting more convenient disposal. While the appellant makes much of the fact that Cordero has a protrusion 6 (which serves a handle for grasping and removing the bottom wall 7), we must point out that skill, rather than the converse, is presumed on the part of those practicing in the art. *In re Sovish*, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985). Therefore, we perceive that one of ordinary skill in this art when making the bottom wall 7 of Cordero broad and flat in accordance with the teachings of White, would simply have simply recessed the protrusion 6 as suggested by the

examiner (see answer, page 12) or provided a laterally extending grasping means such as that taught by White at 9 (see page 1, column 2, lines 19-21).

The appellant further argues that even if the references were combined in the manner proposed by the examiner "the closure cap 10 [of Cordero] is removably attached to the inner conical wall rather than the top wall of the dispenser" (see brief, pages 21 and 22). First, this argument is not commensurate in scope with the claimed subject matter since there is no claim limitation which requires the cap to be **removably attached** to the top wall of the dental floss dispenser. Instead, the claims under consideration more broadly recite a means **adjacent** the top wall for removably attaching the dispenser to the cap. As we have noted above, the steeply angled frusto-conical surface or socket 9 depicted in Figs. 2 and 3 of Cordero is clearly "adjacent" the top wall for attaching the housing to the cap means 10. Second, even if such a limitation had been claimed, the steeply angled frusto-conical surface or socket 9 depicted in Figs. 2 and 3 of

Cordero is indeed attached to the "top wall" (i.e., the wide-angled frusto-conical surface 9 depicted in Figs. 2 and 3).

In view of the above, we will sustain the rejection of 12, 15, 17 and 22 under 35 U.S.C. § 103 based on the combined teachings of Cordero and White.

Rejection (3)

The examiner is of the opinion that it would have been obvious to removably mount a dental floss dispenser on the cap Paulson (rather than mounting a coil of dental floss within the cap as taught by Paulson in Fig. 3) in view of the teachings of Grussmark. According to the appellant, however,

the Examiner's combination here is illogical and incorrect because Grussmark teaches removably attaching a dental floss dispenser to a closure cap and Paulson teaches a closure cap which also functions as a dental floss dispenser. Combining both references in this manner without hindsight reconstruction using the teachings of Appellant's invention would lead to a dental floss dispenser attaching to the combination of a closure cap and dental floss dispenser, thereby rendering device with two dental floss dispensers. [Brief, pages 17 and 18.]

Such contentions are not persuasive. The test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. **In re Young**, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991) and **In re Keller**, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). Here, as we have noted above, Paulson discloses a dental floss dispenser mounted within the cavity of the cap 12 of a toothpaste container (see Fig. 3) and Grussmark teaches removably attaching (note column 4, lines 32-34) a dental floss dispenser 22 to a socket or recess defined by a peripheral wall 18 on the cap 16 of a toothpaste container. In our view, a combined consideration of Paulson and Grussmark would have fairly suggested to the artisan to provide a removably mounted dental floss dispenser on the surface 16 of the cap means 12 of Paulson (in **lieu** of the dental floss dispenser 30, 32 disposed internally within the cap means 12) as taught by Grussmark at 22 in order to achieve Grussmark's self-evident advantages of easy replacement of the dental floss holder and the ability to use the toothpaste container and dental floss holder separately. As to the appellant's contention that the

examiner's combination of Paulson and Grussmark would result in two dental floss holders, we must point out that all of the features of the secondary reference need not be bodily incorporated into the primary reference (*see In re Keller*, at 642 F.2d 425, 208 USPQ 881) and the artisan is not compelled to blindly follow the teaching of one prior art reference over the other without the exercise of independent judgment (*Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889, 221 USPQ 1025, 1032 (Fed. Cir. 1984)). Accordingly, we do not believe that one of ordinary skill in this art, in following the combined teachings of Paulson and Grussmark, would be so unskilled as to provide the modified device of Paulson with two dental floss dispensers as the appellant would have us believe. Accordingly, we will sustain the rejection of claim 15 under 35 U.S.C. § 103 based on the combined teachings of Paulson and Grussmark.

Rejection (4)

The examiner relies upon the combined teachings of Paulson and Grussmark in the manner set forth above in Rejection (3), and further concludes that it would have been obvious to form

the dispenser of Paulson, as modified by Grussmark, with a bottom wall having a footprint that is greater than the top wall thereof in view of the teachings of White. Even if we were to agree with the examiner that it would have been obvious to combine the teachings of the references in the manner proposed, we must point out that the claimed invention would not result. That is, claim 16 expressly requires that the socket means on the cap frictionally receive the **side wall** of the dental floss dispenser. The examiner has relied upon Grussmark for a teaching of mounting a dental floss holder on the cap of the toothpaste container by means of a socket. In Grussmark, however, the socket formed by the peripheral wall 18 does not engage the **side wall** of the dental floss dispenser but, instead, is spaced therefrom (see, e.g., Fig. 3). Instead, in Grussmark only the peripheral end of the top wall 20 of the dental floss dispenser frictionally engages the socket. This being the case, we will not sustain the rejection of claim 16 under 35 U.S.C. § 103 based on the combined teachings of Paulson, Grussmark and White.

Rejection (5)

It is the examiner's position that it would have been obvious to provide the cap on the toothpaste container of Miles with a dental floss dispenser in view of the teachings of Grussmark. The appellant disagrees, contending that Grussmark does not teach (1) that the top wall of the dental floss dispenser should be connected to the second part of a two-part cap of a toothpaste container and (2) a bottom wall that is "sized and formed" to allow the combination container and dispenser to stand on a planar surface.

We do not agree with the appellant's contentions. The cap on the toothpaste container of Miles is of the two-part type wherein a second part 14 is pivotally mounted with respect to a first part 13, and the second part 14 of the cap of Miles has a planar surface. Grussmark teaches a combination toothpaste container and dental floss dispenser wherein the outermost surface of Grussmark's cap 16 is provided with a recess or socket (defined by peripheral wall 18) for receiving the top wall 20 of dental floss dispenser 22 and the bottom wall of this dispenser has a planar surface 25 of significant extent (see Figs. 2 and 3). We share the examiner's view that one of ordinary skill in this art would have found it obvious to mount

a dental floss dispenser on the second part 14 of the two-part cap means of Miles in order to achieve Grussmark's expressly stated advantage of providing a dental product that reminds a user to floss, as well as brush, their teeth (see column 1, lines 37 and 38). In view of the significant extent of the planar bottom wall 25 of Grussmark's dental floss dispenser, we are of the opinion that there is a sound basis for the examiner's conclusion that the bottom wall in the combination toothpaste container and dental floss holder of Miles, as modified by Grussmark, would inherently "adapt" the modified device to stand in an upright position (see final rejection, pages 8 and 9). This being the case, we will sustain the rejection of claim 24 under 35 U.S.C. § 103 based on the combined teachings of Miles and Grussmark.

In summary:

The rejection of claims 1, 2 and 23 under 35 U.S.C. § 103 based on the combined teachings of Miles, Grussmark and Paulson is reversed.

The rejection of 12, 15, 17 and 22 under 35 U.S.C. § 103 based on the combined teachings of Cordero and White is affirmed.

The rejection of claim 15 under 35 U.S.C. § 103 based on the combined teachings of Paulson and Grussmark is affirmed.

The rejection of claim 16 under 35 U.S.C. § 103 based on the combined teachings of Paulson in view of Grussmark and White is reversed.

The rejection of claim 24 under 35 U.S.C. § 103 as being unpatentable over Miles in view of Grussmark is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

JAMES M. MEISTER)	
Administrative Patent Judge)	
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Administrative Patent Judge)	AND
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