

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
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Paper No.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MCNEIL-PPC, INC.

Appeal No. 98-1550
Reexamination Control No. 90/003,637¹
Reexamination Control No. 90/004,088²

HEARD: November 4, 1998

Before McCANDLISH, Senior Administrative Patent Judge,
PATE and NASE, Administrative Patent Judges.

NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-7, 9, 18, 20, 30, 31 and 34-36, which are all of the claims pending in this proceeding.

¹ Reexamination for U.S. Patent No. 4,900,320, issued February 13, 1990 to McNeil-PPC, Inc. U.S. Patent No. 4,900,320 issued from Application No. 06/874,978, filed June 16, 1986. Request for reexamination filed November 10, 1994.

² Reexamination for U.S. Patent No. 4,900,320, issued February 13, 1990 to McNeil-PPC, Inc. Request for reexamination filed December 27, 1995. The reexamination proceeding was merged with the above-noted reexamination proceeding on March 25, 1996.

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We AFFIRM.

BACKGROUND

The appellant's invention relates to a sanitary napkin with panty gathering flaps. An understanding of the invention can be derived from a reading of exemplary claim 1, which appears in the appendix to the appellant's brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Rickard 1968	3,397,697	Aug. 20,
McNair 1981	4,285,343	Aug. 25,
Van Tilburg 1986	4,589,876	May 20,
		(filed Mar. 20, 1984)
Mattingly 26, 1986	4,608,047	Aug.
		(filed May 28, 1985)

Claims 18, 20, 30, 31 and 34-36 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to provide an adequate written description of the invention.

Claims 1-7, 9, 18, 20, 30, 31 and 34-36 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Van Tilburg.

Claims 1-4, 8 and 9 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Rickard.

Claims 18, 20, 30, 31 and 34-36 stand rejected under 35 U.S.C. § 103 as being unpatentable over Rickard in view of Mattingly and McNair.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the examiner's answer (mailed November 19, 1997) for the examiner's complete reasoning in support of the rejections, and to the appellant's brief (filed August 13, 1997) and reply brief (filed January 20, 1998) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the

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examiner. As a consequence of our review, we make the
determinations which follow.

The written description issue

We will not sustain the rejection of claims 18, 20, 30, 31 and 34-36 under 35 U.S.C. § 112, first paragraph.

The test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language. See Vas-Cath, Inc. v. Mahurkar, 935 F.2d 1555, 1563-64, 19 USPQ2d 1111, 1116-17 (Fed. Cir. 1991) and In re Kaslow, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983).

The examiner has the initial burden of presenting evidence or reasons why persons skilled in the art would not recognize in the appellant's disclosure a description of the invention defined by the claims. See In re Wertheim, 541 F.2d 257, 265, 191 USPQ 90, 98 (CCPA 1976); Ex parte Sorenson, 3

USPQ2d 1462, 1463 (Bd. Pat. App. & Inter. 1987). This the examiner has not done. In any event, it is our opinion that the claimed language in dispute (i.e., adhesive means longitudinally disposed about at least a portion of a longitudinal centerline on said garment facing side) is described is the original disclosure for the reasons set forth on pages 6-10 of the appellant's brief and pages 3-4 of the reply brief.

The anticipation rejection under § 102(e)

We sustain the rejection of claims 1-7, 9, 18, 20, 30, 31 and 34-36 under 35 U.S.C. § 102(e).

Initially we note that anticipation by a prior art reference does not require either the inventive concept of the claimed subject matter or the recognition of inherent properties that may be possessed by the prior art reference. See Verdegaal Bros. Inc. v. Union Oil Co., 814 F.2d 628, 633, 2 USPQ2d 1051, 1054 (Fed. Cir.), cert. denied, 484 U.S. 827 (1987). A prior art reference anticipates the subject of a

claim when the reference discloses every feature of the claimed invention, either explicitly or inherently (see Hazani v. Int'l Trade Comm'n, 126 F.3d 1473, 1477, 44 USPQ2d 1358, 1361 (Fed. Cir. 1997) and RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984)); however, the law of anticipation does not require that the reference teach what the appellants are claiming, but only that the claims on appeal "read on" something disclosed in the reference (see Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984)).

Claim 1

Claim 1 reads on Van Tilburg in the following manner:
An improved sanitary napkin (see Figures 9 and 10 of Van Tilburg) comprising a central absorbent element (Van Tilburg's central absorbent pad 12 having an absorbent core 116) and having generally longitudinally extending edges (Van Tilburg's outermost longitudinal edges of flaps 124, 124'), a body facing side (the portion of topsheet 114 opposite backsheet

118) and a garment facing side (the portion of topsheet 114 adjacent backsheet 118); said napkin provided with two flaps (Van Tilburg's flaps 124, 124'), each affixed at one end thereof to the garment facing side of the napkin with the remainder of the flaps freely extending laterally in a direction transverse to the longitudinal edges of the napkin (as shown in Figure 10, the flaps 124, 124' are affixed/secured to the portion of topsheet 114 adjacent backsheet 118 and extended outwardly therefrom), said flaps adapted to encircle the crotch portion of the undergarment (the flaps 124, 124' are inherently capable of encircling the crotch portion of a suitable undergarment³) and provided with means for affixing said flaps in said encircling portion (Van Tilburg's flap adhesives 36 and 36'); said flaps being affixed to the garment facing side of the napkin at an affixation point which is inward from the longitudinal edge of the napkin (as shown in Figure 10, the flaps 124, 124' are affixed/secured to the portion of topsheet 114 adjacent backsheet 118 inward from the outermost longitudinal edges of

³ See column 5, lines 41-46, and column 7, lines 7-13.

flaps 124, 124' (i.e., the longitudinal edges of the napkin)); whereby when said flaps are affixed in said encircling position, the edges of the undergarment are gathered toward the longitudinal centerline of the napkin and are shielded from body fluids by the garment facing side of the napkin (the flaps 124, 124' are inherently capable of encircling and gathering the edges of the crotch portion of a suitable undergarment and thus shield the gathered crotch portion from bodily fluids).

The appellant argues (brief, pp. 11-18 and reply brief, pp. 4-7) that Figures 9 and 10 of Van Tilburg do not anticipate the subject matter of claim 1. We do not agree. As set forth above, claim 1 is readable on Van Tilburg's napkin depicted in Figures 9 and 10.

The appellant first argues that Van Tilburg's flaps 124, 124' are affixed at the longitudinal edges of the sanitary napkin and therefore the flaps are not affixed at a point inward from the longitudinal edge of the napkin. This

argument is unpersuasive for the following reasons. During reexamination, claims are given their broadest reasonable interpretation consistent with the specification, and limitations appearing in the specification are not to be read into the claims. See In re Yamamoto, 740 F.2d 1569, 1571, 222 USPQ 934, 936 (Fed. Cir. 1984). Claim 1 recites an improved sanitary napkin comprising "a central absorbent element and having generally longitudinally extending edges, a body facing side and a garment facing side; said napkin provided with two flaps." Thus, the sanitary napkin, as claimed, comprises, inter alia, a central absorbent element and two flaps. In addition, the sanitary napkin, as claimed, has generally longitudinally extending edges. However, the claim does not require those longitudinally extending edges to be the longitudinally extending edges of the central absorbent element (see edges 14 shown in the appellant's Figures 1-5). The appellant's Figures 1-5 also show the flaps of the napkin have longitudinally extending edges adjacent the pressure-sensitive means 29. It is our view that the broadest reasonable interpretation consistent with the specification,

and not reading limitations appearing in the specification into the claim, that the claimed longitudinally extending edges read on the outermost longitudinally extending edges of Van Tilburg's flaps 124, 124'. Thus, flaps 124, 124' are affixed at a point inward from longitudinal edges of the napkin.

In any event, it is our opinion that even if the longitudinal edges of the napkin were to be read as meaning the longitudinal edges of the central absorbent element Figures 9 and 10 would still anticipate claim 1. In that regard, as clearly shown in Figure 10, the central absorbent pad has an upper planar surface, a lower planar surface, and two curved peripheries connecting the upper planar surface to the lower planar surface. The flaps are connected to the lower planar surface inwardly of the outermost longitudinal edges of the two curved peripheries. Thus, the flaps are connected to the central absorbent pad inwardly of the outermost longitudinal edges of the central absorbent pad.

The appellant also argues that the disclosure of the sanitary napkin shown in Van Tilburg's Figures 9 and 10 is ambiguous based upon the showing of that napkin in Figure 11 and therefore cannot constitute an anticipation. We do not agree. Figure 11 is disclosed as being a fragmentary coronal view showing the sectioned panty of Figure 6 and the sectioned sanitary napkin of Figure 9⁴ in place on a user. We see nothing ambiguous about the structure of Van Tilburg's alternate embodiment depicted in Figures 9-11. In any event, it is our view that the specific configuration shown in Figure 10 with regard to the connection of the flaps to the central absorbent pad would be controlling over the fragmentary view of the napkin represented in Figure 11.

The appellant argues that the limitation that "the flaps freely extending laterally in a direction transverse to the longitudinal edges of the napkin" is not met by Van Tilburg. We find this argument to be without merit. As clearly shown

⁴ Figure 10 is a sectional view taken along line 9-9 of Figure 9.

in Figures 9 and 10, the flaps 124, 124' freely extend in a direction transverse to the longitudinal edges of the napkin from their outermost longitudinal edges inwardly to about the longitudinal edges of the central absorbent pad.

For the reasons set forth above, the decision of the examiner to reject claim 1 under 35 U.S.C. § 102(e) is affirmed.

Claims 4-7, 9, 18, 20 and 34

Claims 4-7, 9, 18, 20 and 34 have not been separately argued by the appellant. Accordingly, these claims will be treated as falling with claim 1. See In re Young, 927 F.2d 588, 590, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987); and In re Wood, 582 F.2d 638, 642, 199 USPQ 137, 140 (CCPA 1978). Thus, it follows that the decision of the examiner to reject claims 4-7, 9, 18, 20 and 34 under 35 U.S.C. § 102(e) is also affirmed.

Claims 2, 3, 30, 31, 35 and 36

The appellant's argue (brief, pp. 18-20 and reply brief, pp. 7-8) that Figures 9 and 10 of Van Tilburg do not anticipate the subject matter of claims 2, 3, 30, 31, 35 and 36 (i.e., the inward spacing of the affixation point from the longitudinal edge). We do not agree. The width of Van Tilburg's flaps 124, 124' outwardly from the central absorbent pad as shown in Figure 9 would by necessity exceed one quarter inch. Thus, the point of attachment of Van Tilburg's flaps 124, 124' to the central absorbent pad is at least one quarter inch inward from the outermost longitudinal edge of each flap. Accordingly, the decision of the examiner to reject claims 2, 3, 30, 31, 35 and 36 under 35 U.S.C. § 102(e) is affirmed.

The anticipation rejection under § 102(b)

We sustain the rejection of claims 1-4, 8 and 9 under 35 U.S.C. § 102(b).

Claim 1

Claim 1 reads on Rickard in the following manner:

An improved sanitary napkin (see Figure 4 of Rickard) comprising a central absorbent element (Rickard's central disposed neck-like portion 37) and having generally longitudinally extending edges (Rickard's outermost longitudinal edges of upper rectangular panel 35), a body facing side (the side not shown in Figure 4) and a garment facing side (the side shown in Figure 4); said napkin provided with two flaps (Rickard's wing-like portions 38, 39), each affixed at one end thereof to the garment facing side of the napkin with the remainder of the flaps freely extending laterally in a direction transverse to the longitudinal edges of the napkin (as shown in Figure 4, the wing-like portions 38, 39 are affixed/secured to the central disposed neck-like portion 37 and extended outwardly therefrom), said flaps adapted to encircle the crotch portion of the undergarment (the wing-like portions 38, 39 are inherently capable of encircling the crotch portion of a suitable undergarment in the manner shown in Figure 3) and provided with means for affixing said flaps in said encircling portion (Rickard's strips 40 and 41); said flaps being affixed to the garment

facing side of the napkin at an affixation point which is inward from the longitudinal edge of the napkin (as shown in Figure 4, the wing-like portions 38, 39 are affixed/secured to the neck-like portion 37 inward from the outermost longitudinal edges of upper rectangular panel 35 (i.e., the longitudinal edges of the napkin)); whereby when said flaps are affixed in said encircling position, the edges of the undergarment are gathered toward the longitudinal centerline of the napkin and are shielded from body fluids by the garment facing side of the napkin (the wing-like portions 38, 39 are inherently capable of encircling and gathering the edges of the crotch portion of a suitable undergarment and thus shield the gathered crotch portion from bodily fluids).

The appellants argue (brief, pp. 20-22 and reply brief, p. 9) that Rickard does not anticipate the subject matter of claim 1. Specifically, the appellant argues that Rickard fails to anticipate the claim "because there is no disclosure of a sanitary napkin having two flaps that are **affixed** to the garment facing side of the napkin, let alone a sanitary napkin

having flaps that are affixed at an affixation point which is inward from the longitudinal edge of the napkin. We do not agree. As set forth above, claim 1 is readable on Rickard's sanitary shield depicted in Figure 4. Rickard's two flaps (i.e., wing-like portions 38, 39) are **affixed** to both the garment facing side of the napkin as well as the body facing side of the napkin since Rickard's sanitary shield is formed together as a single unit. In addition, as pointed above, Rickard's two flaps (i.e., wing-like portions 38, 39) are affixed to neck-like portion 37 at an affixation point which is inward from the longitudinal edge of the napkin (i.e., the outermost longitudinal edges of upper rectangular panel 35).

For the reasons set forth above, the decision of the examiner to reject claim 1 under 35 U.S.C. § 102(b) is affirmed.

Claims 4, 8 and 9

Claims 4, 8 and 9 have not been separately argued by the appellant. Accordingly, these claims will be treated as

falling with claim 1. See In re Young, supra; In re Nielson, supra; and In re Wood, supra. Thus, it follows that the decision of the examiner to reject claims 4, 8 and 9 under 35 U.S.C. § 102(b) is also affirmed.

Claims 2 and 3

The appellant's argue (brief, p. 23 and reply brief, pp. 9-10) that Rickard does not anticipate the subject matter of claims 2 and 3 (i.e., the inward spacing of the affixation point from the longitudinal edge). We do not agree. The width of Rickard's two flaps (i.e., wing-like portions 38, 39) would by necessity exceed one quarter inch. Thus, the point of attachment of Rickard's two flaps to the neck-like portion 37 is at least one quarter inch inward from the outermost longitudinal edge of upper rectangular panel 35. Accordingly, the decision of the examiner to reject claims 2 and 3 under 35 U.S.C. § 102(b) is affirmed.

The obviousness issue

We sustain the rejection of claims 18, 20, 30, 31 and 34-36 under 35 U.S.C. § 103.

The appellant has not contested the examiner's modification of Rickard by the teachings of Mattingly and McNair. The appellant's only argument (brief, pp. 26-27) with regard to this rejection is that the claimed affixation point enabling the edges of the undergarment to be gathered is not taught by Rickard. This argument is unpersuasive with respect to this rejection for the reasons set forth above with respect to claim 1. Accordingly, the decision of the examiner to reject claims 18, 20, 30, 31 and 34-36 under 35 U.S.C. § 103 is affirmed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 18, 20, 30, 31 and 34-36 under 35 U.S.C. § 112, first paragraph, is reversed; the decision of the examiner to reject claims 1-7, 9, 18, 20, 30, 31 and 34-36 under 35 U.S.C. § 102(e) is affirmed; the decision of the examiner to reject

claims 1-4, 8 and 9 under 35 U.S.C. § 102(b) is affirmed; and the decision of the examiner to reject claims 18, 20, 30, 31 and 34-36 under 35 U.S.C. § 103 is affirmed.

Since at least one rejection of each of the appealed claims has been affirmed, the decision of the examiner 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

HARRISON E. McCANDLISH)	
Senior Administrative Patent Judge)	
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GJH

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APPEAL NO. 98-1550 - JUDGE NASE
REEXAMINATION NOS. 90/003,637 &
90/004,088

APJ NASE

APJ PATE

SAPJ McCANDLISH

DECISION: **AFFIRMED**

Prepared By: Gloria

Henderson

DRAFT TYPED: 13 Nov 98

FINAL TYPED:

HEARD 3 MEMBER CONF.

**Gloria: Please fill in the Paper No. for this decision
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