

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte MALCOLM I. HEYWORTH

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Appeal No. 98-3291  
Application 08/534,705<sup>1</sup>

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ON BRIEF

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Before FRANKFORT, STAAB and NASE, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 5 through 10, which are all of the claims remaining in the application. Claims 1 through 4 have been canceled.

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<sup>1</sup> Application for patent filed September 27, 1995.

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Appellant's invention relates to a Christmas tree watering device. One embodiment of the invention (claims 5-7) is seen in Figure 3 of the drawings, while a second embodiment of the invention (claims 8-10) is found in Figures 1 and 2 of the application. Independent claims 5 and 8 are representative of the subject matter on appeal and a copy of those claims, as reproduced from the Appendix to appellant's brief, is attached to this decision.

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

Spinosa	4,993,176	Feb. 19, 1999
Lorenzana et al. (Lorenzana)	5,009,028	Apr. 23, 1991
Copenhaver	5,369,910	Dec. 6, 1994

Claims 5 through 7 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. In particular, the examiner urges that these claims are rendered indefinite by a lack of proper antecedent basis for "said tree stand" in lines 6-7 and 9 of claim 5.

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Claims 5 through 7 stand rejected under 35 U.S.C. § 103 as being unpatentable over Copenhaver in view of Spinosa.

Claims 8 through 10 stand rejected under 35 U.S.C. § 103 as being unpatentable over Copenhaver in view of Lorenzana.

Rather than reiterate the examiner's full statement of the above-noted rejections and the conflicting viewpoints advanced by the examiner and appellant regarding the rejections, we make reference to the examiner's answer (Paper No. 13, mailed September 3, 1997) for the examiner's reasoning in support of the rejections, and to appellant's supplemental brief (Paper No. 12, filed May 5, 1997) for appellant's arguments thereagainst.

#### OPINION

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

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consequence of our review, we have made the determinations which follow.

Looking first at the rejection of claims 5 through 7 under 35 U.S.C. § 112, second paragraph, after reviewing appellant's specification and drawings, and claim 5 in light thereof, it is our opinion that the scope and content of the subject matter embraced by claim 5 on appeal is reasonably clear and definite, and fulfills the requirement of 35 U.S.C. § 112, second paragraph, that it provide those who would endeavor, in future enterprise, to approach the area circumscribed by the claim, with the adequate notice demanded by due process of law, so that they may more readily and accurately determine the boundaries of protection involved and evaluate the possibility of infringement and dominance. See, In re Hammack, 427 F.2d 1378, 1382, 166 USPQ 204, 208 (CCPA 1970). In that regard, we agree with appellant that one of ordinary skill in the art would have readily associated the recited "said tree stand" found in lines 3, 6-7 and 9 of claim 5 with the "stand for

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holding... a Christmas tree" set forth in line 2 of claim 5. Accordingly, we will not sustain the examiner's rejection of appellant's claims 5 through 7 under 35 U.S.C. § 112, second paragraph.

We next look to the examiner's prior art rejections of the appealed claims, turning first to the rejection of claims 5 through 7 under 35 U.S.C. § 103 as being unpatentable over Copenhaver in view of Spinosa. Claims 5 through 7 are directed to the embodiment of appellant's invention seen in Figure 3.

Claim 5 expressly sets forth a tree stand which holds the butt of a Christmas tree above the surface on which the tree stand rests and a receptacle for retaining water adapted to be positioned

beneath the butt end of said tree, with said receptacle being "separate and apart from said tree stand." Recognizing that the water receptacle (e.g., 32) in Copenhaver is clearly part of the tree stand, the examiner turns to Spinosa, urging that Spinosa teaches a tree irrigation device wherein "the receptacle for retaining water (30) is separate from the tree

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stand (18)" (answer, page 4). Having made this determination with regard to Spinosa, the examiner concludes that it would have been obvious to one of ordinary skill in the art to "substitute the tree stand with separate receptacle for retaining water as taught by Spinosa for the tree stand with integral receptacle of the apparatus of Copenhaver."

Appellant (brief, page 7) argues that the examiner's findings with regard to Spinosa are in error and that the receptacle or container (30) of Spinosa is mounted to the stand (18) and therefore a part thereof. We agree. The tree stand as seen in Spinosa is clearly like that shown in appellant's Figures 1 and 2, and in Lorenzana (Fig. 1), wherein the receptacle for retaining water is part of the tree stand itself. Thus, like appellant, we fail to find in either Copenhaver or Spinosa any teaching or suggestion regarding a water retaining receptacle adapted to be positioned beneath the butt end of a tree and which is "separate and apart from said tree stand," as required in claim 5 on appeal. For that reason, it is clear that any combination of Copenhaver and Spinosa would not

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render obvious the Christmas tree watering device that is set forth in appellant's claim 5 on appeal. Thus, the examiner's rejection of claim 5 under 35 U.S.C. § 103, and of claims 6 and 7 which depend therefrom, based on Copenhaver in view of Spinosa will not be sustained.

The next rejection for our review is that of claims 8 through 10 under 35 U.S.C. § 103 as being unpatentable over Copenhaver in view of Lorenzana. In this instance, the only distinction between appellant's claimed subject matter and that seen in Copenhaver (Figure 1) resides in the particular form of tree stand required in appellant's claim 8. However, Lorenzana (Figure 1) clearly shows the exact same type of tree stand (at 17) that is defined in appellant's claim 8 on appeal and describes such stand as being "of a type that is widely available for supporting Christmas trees during the Holiday Season" (col. 2, lines 37-38). Based on the collective teachings of Copenhaver and Lorenzana, we must agree with the examiner that it would have

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been obvious to one of ordinary skill in the art to substitute a tree stand like that seen at (17) in Lorenzana for the tree stand (30) of Copenhaver.

Appellant's argument (brief, page 10) that there is no suggestion whatsoever to combine the tree stand and vacuum dispensing system of Lorenzana with the unusual tree stand and different system of Copenhaver, is unpersuasive. This argument appears to entirely miss the point of the examiner's rejection, which is that only the tree stand (17) of Lorenzana is to be substituted for the tree stand (30) of Copenhaver, thereby resulting in a Christmas tree watering device as set forth in appellant's claim 8 on appeal. While we understand that the systems as a whole in Lorenzana and Copenhaver are somewhat different from one another, we see no reason to conclude that it would have been unobvious to one of ordinary skill in this art at the time of appellant's invention to substitute one type of tree stand for another as the examiner has done in this rejection, and we note that appellant has provided no argument supporting the

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unobviousness of such a substitution. Accordingly, the examiner's rejection of claim 8 under 35 U.S.C. § 103 is sustained.

In accordance with appellant's grouping of the claims on page 4 of the brief, it follows that claims 9 and 10 will fall with independent claim 8, from which they depend.

To summarize: the decision of the examiner to reject claims 5 through 7 under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter which appellant regards as the invention, is reversed, as is the examiner's decision rejecting claims 5 through 7 under 35 U.S.C. § 103 based on Copenhaver and Spinosa. However, the decision of the examiner to reject claims 8 through 10 under 35 U.S.C. § 103 as being unpatentable over Copenhaver in view of Lorenzana is affirmed. Thus, the decision of the examiner is affirmed-in-part.

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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

CHARLES E. FRANKFORT	)	
Administrative Patent Judge	)	
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LAWRENCE J. STAAB	)	BOARD OF PATENT
Administrative Patent Judge	)	
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JEFFREY V. NASE	)	

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APPENDIX

5. A Christmas tree watering device comprising:  
a stand for holding the butt of a Christmas tree above the surface on which said stand rests;  
a receptacle for retaining water having a base and sides and adapted to be positioned beneath the butt end of said tree, said receptacle being separate and apart from said tree stand;  
a water reservoir having a base and sides, said reservoir being located apart from said tree stand; and  
a single conduit having a first end connected to said base of said water reservoir and a second end connected to said base of said receptacle for retaining water,  
whereby when water is placed in said water reservoir, the water passes to said receptacle and automatically remains at the same height as the water in said water reservoir.

8. A Christmas tree watering device comprising:  
a stand having a means for holding the butt of a Christmas tree, said means comprising at least three legs which engage a ring and are in spaced relationship to each other, the free ends of each leg supporting a second ring which has a series of adjustable screws at a position equally spaced around said second ring and threaded therethrough to

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hold the trunk of said tree which is positioned coaxially with said second ring;

a receptacle for retaining water having a base and sides and adapted to be positioned beneath the butt end of said tree, said receptacle being mounted to said tree stand;

a water reservoir having a base and sides, said reservoir being located apart from said tree stand; and

a single conduit having a first end connected to said base of said water reservoir and a second end connected to said base of said receptacle for retaining water,

whereby when water is placed in said water reservoir, the water passes to said receptacle and automatically remains at the same height as the water in said water reservoir.