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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/400,035	04/07/2006	Petra Brockmann	LSG06305	9616

50488 7590 06/11/2014

ALLEMAN HALL MCCOY RUSSELL & TUTTLE LLP
806 SW BROADWAY
SUITE 600
PORTLAND, OR 97205-3335

EXAMINER	
DOAN, ROBYN KIEU	

ART UNIT	PAPER NUMBER
3776	

MAIL DATE	DELIVERY MODE
06/11/2014	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PETRA BROCKMANN and
THOMAS BROCKMANN-KNODLER

Appeal 2012-003914[1]
Application 11/400,035
Technology Center 3700

Before BIBHU R. MOHANTY, MICHAEL C. ASTORINO, and KEVIN W. CHERRY, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1–20. The Appellants provide the Declaration of Petra Brockmann and Thomas Brockmann-Knodler under 37 C.F.R. § 1.132, hereinafter "Declaration," as declaratory evidence. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE.

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[1] The record includes a transcript of the oral hearing held May 8, 2014.

Claimed Subject Matter

Claims 1 and 17 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

> 1. A method for the cutting of hair wherein a slice of hair is taken up and is guided by a hand, namely the guide hand, with the slice of hair being pinched between two fingers, namely the guide fingers of the guide hand, and wherein the slice of hair is cut along the guide fingers using a cutting device that is actuated by another hand, namely the cutting hand, wherein the guide hand is moved continuously or step-wise after the taking up of the slice of hair; and in that the cutting of the slice of hair takes place at least partially during the movement of the guide hand or, in the case of step-wise movement, during and/or between the movement steps.

Rejections

The Appellants request our review of the following Examiner's rejections.

I. Claims 1–20 are rejected under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter.

II. Claims 1, 6–8, 10, 11, 17, and 18 are rejected under 35 U.S.C. § 102(b) as anticipated by Bertero (US 4,383,374, iss. May 17, 1983).

III. Claims 1, 2, 17, and 19 are rejected under 35 U.S.C. § 102(b) as anticipated by Haircentres' Hairstyle Videos, http://www.haircentres.coml/video /sCznN8jJY&feature=youtube gdata player (hereinafter "Haircentres' Hairstyle Video").[2]

IV. Claims 3–5, 9, 12–16, 18, and 20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Bertero or Haircentres' Hairstyle Video.

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[2] The Examiner refers to this reference as "Hairstyle videos." *See* Ans. 6. The Appellants refer to this reference as "YouTube." App. Br. 10.

OPINION

Rejection I

The Examiner explains that method claims 1–20 are directed to non-statutory subject matter because: *first*, the claimed "cutting device" is not a sufficient recitation of a particular machine; *second*, "cutting human hair does not result in a transformation of that hair"; and *third*, the Appellant "invented a method of moving the human body (guide hand) while the hair is cut with a cutting device, which the examiner views as a merely a general concept," which "would effectively grant a monopoly over the concept." Ans. 4–5 and 8.

The Appellants contend that the Examiner's rejection is improper because the Examiner's second and third explanations are inadequately supported. *See* App. Br. 11–17.

As for the Examiner's second explanation, the Appellants assert that the claims include a step of cutting slices of hair, which changes the lengths of hair in the slice of hair, and as such, transforms the hair into a different state. *See* App. Br. 11-12. In response, the Examiner makes a conclusory statement that even if cutting hair is a transformation, then it is merely post-solution activity. Ans. 8. This conclusory statement does not persuade us that the Examiner has determined correctly that the method claims are directed to non-statutory subject matter. Rather, the Appellants' contention and assertion persuades us of Examiner error.

As for the Examiner's third explanation, the Appellants assert "[t]he claimed method[s] do[] more than simply claim cutting hair as a general concept." App. Br. 13. The Appellants support this assertion by explaining how the method claims "describe[] a particular solution to a problem to be

solved" and "implement[] a concept in some tangible way," and the performance of the method steps are "observable and verifiable" at pages 13–16 of the Appeal Brief. The Examiner does not explain how or why the Appellants' assertion and its support are in error. The Appellants' contention and assertion persuades us of Examiner error.

Thus, the rejection of claims 1–20, under 35 U.S.C. § 101, is not sustained.

Rejection II

The Examiner finds Bertero discloses the method of claims 1 and 17. Ans. 5–6 and 8.

The Appellants contend, among other things, that Bertero does not disclose, "multiple movement steps [of the guide hand] occur during the cutting of one slice of hair, let alone that the cutting of the slice of hair takes place at least partially between such steps" (App. Br. 20–21). *See also* App. Br. 19–22, 25. The Examiner's response to this contention, that "the claim[s] can be reasonably interpreted that there are more than one slice of hair being cut" (Ans. 8) is incorrect. As pointed out by the Appellants, the claims exclude the possibility that the slice of hair includes different slices of hair by consistently using the phrase "a slice of hair," and thereafter "the slice of hair" (Reply Br. 2–3). Further, we agree with the Appellants that the Examiner is required to weigh the Declaration as evidence and does not do so. *See* App. Br. 26; *see also* Reply Br. 8. *But see* Ans. 10. As such, the Appellants' contentions are persuasive of Examiner error.

Thus, the rejection of claims 1, 6–8, 10, 11, 17, and 18 as anticipated by Bertero is not sustained.

Rejection III

The Appellants contend that the Haircentres' Hairstyle Video does not qualify as prior art because, among other things, the date of November 30, 1999 that is relied upon by the Examiner is not the publication date of the reference. *See* App. Br. 36–40, Reply Br. 6–8. For example, in the Reply Brief at page 7, lines 6–11, the Appellants point out that multiple commentators posted comments about the video in the same minute the content of the video was uploaded, i.e., November 30, 1999 at 12:00 a.m. As such, it is more likely than not that the published date and time of the video is erroneous because it appears that all time-stamps for the Haircentres' Hairstyle Video website are November 30, 1999 at 12:00 a.m. *See* Reply Br. 6. Moreover, with the evidence in the record, we cannot determine that the publication date of the Haircentres' Hairstyle Video is more than one year prior to the date of the instant patent application to satisfy the requirements under 35 U.S.C. § 102(b). As such, the Appellants' contention that Haircentres' Hairstyle Video does not qualify as prior art is persuasive.

Furthermore, the Appellants also contend that the Examiner is required to weigh the evidence in the Declaration. *See* Ans. 10. In response, the Examiner does not address the section 103 rejection as it pertains to the Haircentres' Hairstyle Video. As such, this contention is also persuasive of Examiner error.

Thus, the rejection of claims 1, 2, 17, and 19 as anticipated by Haircentres' Hairstyle Video is not sustained.

Rejection IV

The remaining rejections under 35 U.S.C. § 103(a) as unpatentable over Bertero or Haircentres' Hairstyle Video are based on their respective rejections under 35 U.S.C. § 102(b) as anticipated by Bertero or Haircentres' Hairstyle Video. These remaining rejections do not cure the deficiencies of the rejections of independent claims 1 and 17 under either Bertero or Haircentres' Hairstyle Video under 35 U.S.C. § 102(b).

Thus, the rejection of claims 3–5, 9, 12–16, 18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Bertero or Haircentres' Hairstyle Video is not sustained.

DECISION

We REVERSE the rejections of claims 1–20.

REVERSED

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