



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/469,192	05/11/2012	Suzanne K. Cole	519935-2000	6655
20999	7590	03/07/2018	EXAMINER	
HAUG PARTNERS LLP 745 FIFTH AVENUE - 10th FLOOR NEW YORK, NY 10151			NOBREGA, TATIANA L	
			ART UNIT	PAPER NUMBER
			3776	
			NOTIFICATION DATE	DELIVERY MODE
			03/07/2018	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docket@haugpartners.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SUZANNE K. COLE¹

Appeal 2017-003361
Application 13/469,192
Technology Center 3700

Before ERIC B. GRIMES, RICHARD M. LEOVITZ, and
DEVON ZASTROW NEWMAN, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a method of using a shower cap, which have been rejected as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

STATEMENT OF THE CASE

Claims 8, 9, and 11–16 are on appeal. Claim 8 is illustrative and reads as follows:

8. A method of using a hair protection cap, comprising:

¹ Appellant identifies the Real Party in Interest as Suzanne K. Cole. (Appeal Br. 2.)

providing a hair protection cap having an inside surface and outside surface, forming an interior space having a first opening and a second opening opposite the first opening, wherein a first closing device is associated with the first opening and a second closing device is associated with the second opening;

putting a user's head through the first opening and then the second opening with the inside surface disposed against the user's neck;

positioning the first opening to surround the user's head at the user's hair line;

reducing the perimeter of the first opening using the first closing device so that the first opening is secured at the position surrounding the user's hair line forming a substantially water resistant fit at the user's hairline;

confining dry hair of the user inside of the cap;

closing the second opening of the cap using the second closing device to reduce the possibility of the entry of water from the outside through the second opening and into the interior space;

rolling the second opening towards the first opening;

securing the rolled second opening with a securing device to hold the rolled position of the protective cap; and

subjecting the cap with the user's dry hair inside to water in a shower such that the user's dry hair remains substantially dry,

wherein the outside surface is a pliable material that extends over the perimeter of the first opening on the inside surface and also extends over a perimeter of the second opening on the inside surface.

DISCUSSION

The Examiner has rejected claims 8, 9, and 11–15 under 35 U.S.C. § 103(a) as obvious based on Duffin,² Kahn,³ and Finan.⁴ (Ans. 2.) The Examiner has rejected claim 16 under 35 U.S.C. § 103(a) as obvious based on Duffin, Kahn, Finan, and Hickey.⁵ (Ans. 9.) Because Appellant has waived arguments based on Hickey (*see* Appeal Br. 9), the same issue is dispositive for both rejections.

The Examiner finds that Duffin discloses a method similar to that of claim 8, except that

Duffin does not disclose the user's hair being dry when the cap is donned and rolling the second opening towards the first opening; securing the rolled second opening with a securing device to hold the rolled position of the protective cap; and subjecting the cap with the user's hair inside to water in a shower. (Ans. 3.)

The Examiner finds, however, that Duffin teaches that its hair cap can have a water-proof or water-resistant outer layer, and Kahn discloses a similar hair cap that can be used for protecting hair in a shower. (*Id.*) The Examiner finds that Finan also teaches a shower cap, and teaches “rolling/furling the second opening towards the first opening and securing the rolled second opening.” (*Id.* at 4.)

The Examiner concludes that it would have been obvious to use Duffin's cap to keep dry hair from getting wet in the shower, as taught by

² US 2012/0030858 A1, published Feb. 9, 2012.

³ US 2,568,399, issued Sept. 18, 1951.

⁴ GB 2463272, published Mar. 10, 2010.

⁵ US 5,950,636, issued Sept. 14, 1999.

Kahn, and to achieve the turban-styled configuration described by Duffin “by rolling the second opening toward the first opening as taught by Finan et al. in order to arrange the hair and cap in a neat and compact configuration which prevents the cap from opening.” (*Id.* at 4–5.)

We agree with the Examiner that the cited references would have made the method of claim 8 obvious to a person of ordinary skill in the art. Duffin discloses “an absorbent sleeve to dry a user’s head, face, and hair.” (Duffin ¶ 13.) “The absorbent sleeve **10** includes a cylindrical member **12**.” (*Id.* ¶ 39.) “[C]ylindrical member **12** includes a looped layer of absorbent material,” which “may include: cotton, terry cloth, wool, textiles, fabric, synthetic materials, or the like or combinations thereof. There may be a water-proof or water resistant layer disposed on an exterior surface, interior surface, and/or sandwiched between absorbent layers.” (*Id.* ¶ 40.) In one embodiment, “[t]he cylindrical member **12** includes a waterproof layer **77** disposed on an exterior surface thereof. The waterproof-layer **77** is configured to keep water from saturating an interior surface from an exterior surface of the cylindrical member **12**.” (*Id.* ¶ 63.)

Duffin’s device includes cinch loops (**24, 30**) at the top and bottom of the cylindrical member **12**, allowing a user to open the cylinder to insert their head through it and also to close off the openings partially or completely. (*Id.* ¶¶ 42–43.) Duffin describes the use of its device as follows:

[A] user takes a shower or a bath and prepares to dry their face and hair afterwards. The user disposes the absorbent sleeve over the user’s head and disposes the absorbent sleeve around the neck region of the user by positioning the head through the first and second apertures of the cylindrical member. The user pulls out

their hair from the absorbent sleeve thereby disposing the hair outside thereof. The user pulls the absorbent sleeve back over the user's face through the second aperture and dries the user's face with the interior surface of the absorbent sleeve. Wherein the user has long hair, the hair is then hanging outside and over a back portion of the sleeve. The user then pulls the absorbent sleeve over the user's face through the first aperture and disposes the absorbent sleeve over the user's hair. The user dries the hair with the interior of the absorbent sleeve. The absorbent sleeve is configured to securely hold the user's hair away from the user's face.

(Id. ¶ 44.)

Kahn discloses “headgear for drying the hair after the hair has been washed, and for other purposes.” (Kahn 1:1–3.) Kahn discloses that its device can be made with multiple layers: “For example, . . . the inner layer may be made of toweling or other absorbent material, and the outer layer of a relatively water-resistant material.” (*Id.* at 3:56–59.) “[T]he toweling may be removably attached . . . to enable the user to remove the toweling for laundering, or for independent use. When thus separated, the waterproof outer covering may also be used for protecting the hair in a shower bath.” (*Id.* at 3:61–67.)

Finan discloses “a shower cap comprising a layer or laminate of a flexible material that is substantially waterproof . . . and having an elasticated annular portion surrounding a first opening to serve as a headband to grip to the head of a wearer in use.” (Finan 2.) “Being an open-ended tube, it may be pulled on to the head down beyond the length of the hair in a single motion so that all of the hair may be swept up together and enveloped in the tube.” (*Id.*)

“The layer or laminate may then be folded, twisted or furled to close the second opening.” (*Id.*) Finan states that “closing of the second opening of the tube, can be simple to perform and intuitive, making use of the length of the flexible tubular form to fold it back and suitably allowing the second end of the tubular form to be tucked under the band into the cap.” (*Id.*)

These disclosures would have made obvious the method of claim 8. Duffin discloses a hair protection cap having the structure recited in claim 8, including two openings with closing devices (cinch loops) associated with them. Duffin states that the device is used by putting a user’s head through both openings so that the sleeve is around the user’s neck, then disposing the user’s hair inside cylindrical member, with the cinch loops closed around the hairline and against the end of the hair. (Duffin ¶ 61.)

Duffin suggests including a water-proof or water-resistant layer on the exterior surface of its device, and Kahn discloses that a similar device with an absorbent inner layer and water-resistant outer layer can be used for protecting hair in the shower. (Kahn 3:56–59.) Thus, it would have been obvious to a skilled artisan to use Duffin’s device—with a water-proof or water-resistant exterior layer—to keep a user’s hair dry during a shower.

Finally, it would have been obvious to roll the second opening of Duffin’s device toward the first opening and to secure it there because Finan discloses a shower cap shaped as an open-ended tube and suggests that, after the hair is enveloped in the tube, the device can be furled (i.e., rolled) to close the second opening, which is then secured under cap’s elastic band. Thus, all of the limitations of claim 8 would have been obvious based on the teachings of Duffin, Kahn, and Finan.

Appellant argues that it would not have been obvious to combine Finan and Duffin because Finan states that using its open-ended tube involves “‘twisting and tucking of the cap second end’ to capture the user’s hair,” while “Duffin explicitly states, ‘Advantageously, a sleeve [*i.e.*, the shower cap] does not requires a user to twist or tangle hair during the use thereof.’” (Appeal Br. 7, alteration in original.)

This argument is not persuasive, because Finan states that the second opening can be closed by folding, twisting, *or* furling. (Finan 2.) Thus, twisting Finan’s shower cap is not essential to its operation. In addition, Duffin states that its device can include coupling members at the first and second ends, and these coupling members “permit[] the user to create a ‘turban’ styled configuration where the hair is bunched” (Duffin ¶ 63), similar to the configuration of Finan’s device after closing the second end by furling it, and then tucking it under the cap’s elastic band.

Appellant also argues that Duffin and Finan cannot be reasonably combined, because Duffin’s device is directed to drying wet hair, while Finan’s device is directed to keeping hair dry during a shower. (Appeal Br. 8.) For essentially the same reason, Appellant argues that Duffin and Finan are nonanalogous art. (Reply Br. 11–12.)

These arguments are also unpersuasive, because Kahn provides evidence that a device with an absorbent inner layer and a water-resistant outer layer is useful both for drying hair after it has been washed and for protecting hair during a shower. Thus, a skilled artisan would have recognized, based on Kahn’s teachings, that Duffin and Finan are in the same field of endeavor and therefore analogous art.

We affirm the rejection of claim 8 under 35 U.S.C. § 103(a) based on Duffin, Kahn, and Finan. Claims 9 and 11–15 have not been argued separately and therefore fall with claim 8. 37 C.F.R. § 41.37(c)(1)(iv).

Claim 16 stands rejected under 35 U.S.C. § 103(a) based on Duffin, Kahn, Finan, and Hickey. Appellant has waived arguments based on Hickey. (Appeal Br. 9.) We therefore affirm the rejection of claim 16 for the reasons set out in the Examiner’s Answer and as discussed above. *See* 37 C.F.R. § 41.37(c)(1)(iv) (Appeal Brief must contain “[t]he arguments of appellant with respect to each ground of rejection.”); *Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008) (“When the appellant fails to contest a ground of rejection to the Board, . . . the Board may treat any argument with respect to that ground of rejection as waived.”).

SUMMARY

We affirm both of the rejections on appeal.

TIME PERIOD FOR RESPONSE

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

AFFIRMED