



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.
14/881,531	10/13/2015	Melissa L. Covell	051238/470326	7887
826	7590	09/13/2019	EXAMINER	
ALSTON & BIRD LLP BANK OF AMERICA PLAZA 101 SOUTH TRYON STREET, SUITE 4000 CHARLOTTE, NC 28280-4000			CHOI, STEPHEN	
			ART UNIT	PAPER NUMBER
			3724	
			NOTIFICATION DATE	DELIVERY MODE
			09/13/2019	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):

usptomail@alston.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MELISSA L. COVEL and TONY STEVEN PETERSON

Appeal 2018-008462
Application 14/881,531
Technology Center 3700

Before JENNIFER D. BAHR, JOHN C. KERINS, and KEVIN F. TURNER,
Administrative Patent Judges.

KERINS, *Administrative Patent Judge.*

DECISION ON APPEAL
STATEMENT OF THE CASE

Appellant¹ seeks our review under 35 U.S.C. § 134(a) from the Examiner’s Final Office Action dated December 8, 2017 (“Final Act.”), rejecting claims 1–10, 19, and 20. Claims 11–18 are withdrawn from consideration. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

¹ We use the term “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Leatherman Tool Group Inc. Appeal Br. 2.

THE INVENTION

Appellant's invention relates to a cutting tool. Claims 1 and 5, reproduced below, are illustrative of the claimed subject matter.

1. A cutting tool comprising:

a first member comprising a first blade, a third blade, and a first handle; and

a second member pivotably coupled to the first member, comprising a second blade, a fourth blade, and a second handle;

wherein a first cutting nip is defined between the first blade and the second blade, a second cutting nip is defined between the third blade and the fourth blade, and a gap is defined between the first handle and the second handle;

wherein at least one of the first blade and the second blade comprises serrations, wherein each of the serrations comprises a first face facing away from the first handle, and a second face facing toward the first handle, wherein an angle between a surface from which the serrations extend and the first face of each serration is greater than an angle between the surface and the second face of each serration;

wherein each of the gap, the first cutting nip, and the second cutting nip are configured to be simultaneously opened and closed as the first member pivots relative to the second member,
and

wherein the gap, the first cutting nip, and the second cutting nip are each disposed at mutually exclusive positions about a pivot point between the first member and the second member.

5. A cutting tool comprising:

a first pair of blades defining a first cutting nip, wherein the first pair of blades are pivotable with respect to one another at a pivot point, wherein the first pair of blades comprises at least one serrated blade, and wherein a height of the serrations increases from a first height proximate a tip of the at least one serrated blade to a second height, greater than the first height, proximate the pivot point;

a second pair of blades defining a second cutting nip, wherein the second pair of blades are pivotable with respect to one another at the pivot point; and

a pair of handles defining a gap therebetween that are pivotable with respect to one another at the pivot point;

wherein neither the first cutting nip nor the second cutting nip are disposed within the gap.

THE REJECTIONS

The Examiner rejects:

(i) claims 7–9 under 35 U.S.C. § 112, second paragraph, as being indefinite;

(ii) claims 1–8, 19, and 20 under 35 U.S.C. § 102(b) as being anticipated by Porzky (US 3,196,540, issued July 27, 1965); and

(iii) claims 1–10, 19, and 20 under 35 U.S.C. § 103(a) as being unpatentable over Henault (US 617,018, issued Jan. 3, 1899) in view of Porzky.

DISCUSSION

Claims 7–9--35 U.S.C. § 112, second paragraph--Indefiniteness

The Examiner determines that it is not clear whether, in claim 7, the recitation of “at least one serrated blade” refers back to the “at least one serrated blade” recited in claim 5, from which claim 7 depends. Final Act. 2. Appellant responds by requesting cancelation of claim 7 “ahead of allowance,” and presents no substantive arguments traversing the rejection. Appeal Br. 7. Because there is no indication that claim 7 has been canceled, the rejection thereof is summarily sustained.

The Examiner additionally determines that claim 8 does not make clear whether the “second pair of blades” recited therein refers back to “a second pair of blades” recited in claim 5, from which claim 8 depends. Final Act. 2. Appellant responds with a request to amend claim 8 to depend from claim 5, in anticipation of having claim 7 canceled. Appeal Br. 7. No such amendment is of record, and no substantive argument against the rejection is presented. *Id.* Accordingly, the rejection of claim 8 is summarily sustained. Claim 9 depends from claim 8, and the rejection of claim 9 is also summarily sustained.

Claims 1–8, 19 and 20--35 U.S.C. § 102(b)--Porzky

Claims 1–4 and 19

The Examiner finds that Porzky discloses all limitations set forth in independent claim 1. Final Act. 2–4. In relevant part, the Examiner finds that a first cutting nip is defined between a first blade 12b and a second blade 14b; that a second cutting nip is defined between a third blade 32 and fourth blade 34; and that a gap is defined between a first handle 12a and a second handle 14a. *Id.* at 3. The Examiner additionally finds that the gap, the first cutting nip, and the second cutting nip are “each disposed at

mutually exclusive positions about a pivot point between a first member and a second member,” because each of those three elements are located at mutually exclusive locations. *Id.*

Appellant contends that Porzky fails to disclose that specifically the first cutting nip and the second cutting nip are disposed at mutually exclusive positions about a pivot point between first and second members. Appeal Br. 8. Appellant specifically maintains that that, in Porzky, the first and second cutting nips are disposed at the same position about the pivot point, in that, by virtue of both nips using the same linear blade 14, the nips are in the same position about the pivot point. *Id.*

Underlying the different stances taken by Appellant and the Examiner is a claim construction issue. According to Appellant, the claim language reciting “positions about the pivot point,” refers to directions extending from the pivot point, with those directions being mutually exclusive (i.e., different) for each of the two cutting nips and the gap, per claim 1. Appellant further argues, in this regard, that “[t]he phrase ‘about a point’ is a commonly used phrase in the field of mechanics and mathematics, such as symmetry about a point or rotation about a point.” Reply Br. 2. We understand Appellant’s argument to be that the claimed pivot point is akin to a point of origin, and that the first cutting nip, the second cutting nip, and the gap must, according to claim 1, be positioned along different vectors emanating from that point of origin.

The Examiner responds that the Specification does not support the position that “positions about a pivot point” can only mean particular angular positions about the pivot point. Ans. 3. The Examiner avers that the term “position” would be understood to mean a point or an area occupied by

an object, and that the mutual exclusivity required by claim 1 would be any locations that do not overlap each other about the pivot point. *Id.*

Appellant's Specification does not appear to include the expression "positions about a pivot point," with the exception of its appearance in claim 1 as originally filed. The expression "positions *around* a pivot point" appears once, without any definition or explanation provided as to how this is to be interpreted. Spec. ¶ 9 (emphasis added). The Specification uses the term "about" in a somewhat related manner, in connection with the folding of the handles of the cutting tool, discussing, for example, a handle rotating about a hinge point. *See, e.g.*, Spec. ¶ 50. This latter type of use appears to be generally consistent with the claim construction advanced by Appellant.

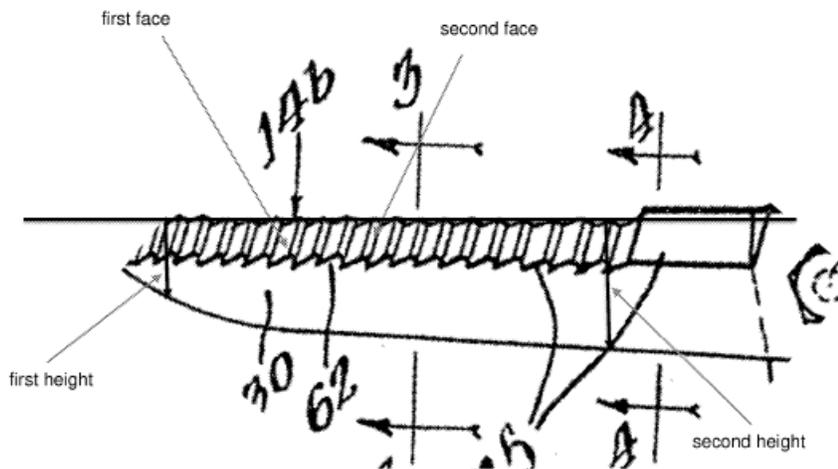
Ultimately, we find that Appellant's proposed construction is the most appropriate, and that the Examiner's is outside the realm of being a broadest reasonable interpretation, in light of the article recited in claim 1, and the Specification and attendant drawings. The Examiner's construction, i.e., that mutually exclusive positions are simply ones that do not overlap each other, is effectively without regard to the existence of, or recitation of, a pivot point. Stated another way, the three mutually exclusive positions identified in Porzky are different positions "in space," whether or not a pivot point were to exist on the tool. This construction thus can be seen as reading the further limitation, "about a pivot point," out of claim 1.

Given our determination as to the proper construction of the disputed term in claim 1, the Examiner's finding that the first and second cutting nips in the Porzky device are at mutually exclusive positions about a pivot point is in error. The rejection of claim 1, and of claims 2–4 and 19 depending therefrom, as being anticipated by Porzky is therefore not sustained.

Claims 5–8 and 20

The Examiner also finds that Porzky discloses all limitations set forth in independent claim 5. Final Act. 2–4. As with claim 1, the issue joined by Appellant and the Examiner is one of claim construction.

Claim 5 recites a cutting tool having a first pair of blades, with at least one of the pair being a serrated blade, “wherein a height of the serrations increases from a first height proximate a tip of the at least one serrated blade to a second height, greater than the first height, proximate the pivot point.” Appeal Br. 15 (Claims Appendix). The Examiner finds that Porzky meets this limitation, taking the position that “the height of the serrations can be measured from an edge surface of the blade 14 to tips of the serrations.” Final Act. 5. To visually demonstrate how the Examiner measures the height of the serrations, the Examiner provides an annotated version of Figure 1 of Porzky, showing a serrated blade portion of the Porzky cutting tool. *Id.* at 4. That annotated version is reproduced below:



Depicted above is an Examiner-annotated version of a serrated blade portion of the cutting tool in Figure 1 of Porzky, which is a plan view, rotated approximately 45° counterclockwise relative to its appearance in the

Porzky patent. In the drawing above, the Examiner has indicated where and from what position a first height and a second height of the serrations are measured, with the second height, proximate the pivot point, being greater than the first height, thus meeting the language of claim 5.

Appellant assigns error to using a claim construction allowing the measurement to be made in this manner, asserting that the Specification clearly identifies and defines that the height of the serrations is to be measured from the surface from which they protrude, to the tip of the serration.² Appeal Br. 9. Appellant maintains that it is therefore unreasonable to interpret the claimed height as being measured from the opposite side of the blade, as the Examiner does in rejecting claim 5 as anticipated by Porzky. *Id.*

The Examiner agrees with Appellant that paragraph 40 of the Specification and attendant Figure 5 provide a definition as to how the height of the serrations is to be determined, but takes the position that this applies only to Appellant's preferred embodiment. Ans. 4. The Examiner continues, positing that, under an ordinary and customary meaning, "height" can be a distance upward from a given level to a fixed point, as in, for example, with an object on a table, the object's height can be measured from the surface that the table rests on, to the top of the object. *Id.* at 4–5. The Examiner notes that claim 5 does not specify how the height is to be

² Appellant's Figure 5, which illustrates a plurality of the serrations in detail, shows the height of the serrations being constant across the span shown, and thus does not show an increase in the height of the serrations as claimed. Paragraph 41 of the Specification, which provides the definition as to the height of the serrations, explicitly states that the height may increase as the serrations are closer to the hinge point.

measured, and that it is therefore reasonable to measure, as with the object on the table, the height of the Porzky serrations from the back edge of the blade to the tips of the serrations. *Id.* at 5.

The Examiner's position might be reasonable under certain circumstances, but not here, where the Specification explicitly provides a different and contrary definition. Although, technically, the Specification describes one or more preferred embodiments, the definition provided by the Specification does not include any such qualifier. Accordingly, and consistent with the definition provided in the Specification, the claimed height of each of the serrations is to be interpreted as "the distance between the surface from which [the serration] extend[s] and the top of [the] serration." Spec. ¶ 41.

As such the Examiner's finding that the serrated blade in the cutting tool of Porzky has serrations which increase in height from the tip of the blade toward a point proximate the pivot point is in error. The rejection of claim 5, and of claims 6–8 and 20 depending therefrom, as being anticipated by Porzky is therefore not sustained.

Claims 1–10, 19, and 20--35 U.S.C. § 103(a)--Henault/Porzky

Claims 1–4

Appellant argues claims 1–4 as a group, and does not present arguments for the separate patentability of claims 2–4. We take claim 1 as representative of the group, and claims 2–4 stand or fall with claim 1.

The Examiner finds that Henault discloses all limitations set forth in claim 1, with the exception of the first pair of blades comprising at least one serrated blade. Final Act. 7–8. The Examiner turns to Porzky for the

disclosure of a pair of blades, one of which includes serrations, and concludes that it would have been obvious to modify Henault to provide serrations on one of the pair of blades, in view of Porzky, in order to provide a better holding surface to minimize slipping during shearing action. *Id.* at 8.

Appellant does not contest the Examiner’s position regarding the obviousness of the proposed modification of Henault in view of Porzky, and instead argues that Porzky fails to correct a deficiency in the teachings of Henault. Appeal Br. 12. In this regard, Appellant asserts that “a cutting nip between blades 5 and 7 of Henault will always be disposed in a position that is aligned with the gap between handles (4).” Appeal Br. 12. As such, according to Appellant, this second cutting nip and a gap between the handles are not disposed in mutually exclusive positions about the pivot point of the two scissors members. *Id.* at 11. Appellant provides (Appeal Br. 12) an annotated version of Figure 3 of Henault that is asserted to evidence the alignment of the second cutting nip and the gap between the handles, which is reproduced below:

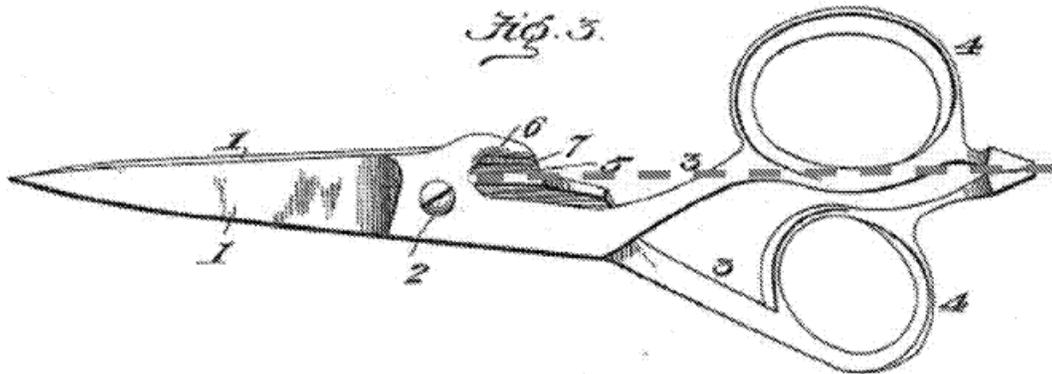


Figure 3 of Henault, above, is a side elevation of a combination cutting tool. Henault, col. 1, ll. 32–33.

Appellant annotates Figure 3 by adding a dashed line which we understand to be the asserted common direction about the pivot point along which second cutting nip and the gap between the handles lie. By the placement of this dashed line, it is apparent that Appellant takes the position that the gap between the handles in Henault is to be regarded as a spacing between what appear to be stop members at the distal ends of the handles. However, Appellant's Specification describes only that "[a] gap may be defined between the first handle and the second handle," and the only more specific discussion as to what the gap constitutes is in reference to an opening of the handles "creat[ing] a gap 160 therebetween." Spec. ¶¶ 9, 36. Reference numeral 160 appears in Appellant's Figure 3, and points not to the distal ends of the handles, but rather toward the interior intersection of the handles near the pivot point.³

As such, contrary to Appellant's assertion that the second cutting nip and the gap will always be aligned, the dashed line annotation evidences that the gap between the handles (at or near the intersection proximate the pivot point) starts in a position that is offset downwardly from the purported direction of the second cutting nip. Further, as the handles are separated, the gap will continue to be unaligned with the dashed line until, at best, the lower edge of the handle facing out of the page in Figure 3 intersects an

³ This is consistent with the identification of the first and second cutting nips 155, 190. Spec., Figure 3. In addition, if the gap could be elsewhere between the handles, i.e., at any point or area between the handles, the claim would be at risk of being found indefinite, in that a determination as to whether the first and second cutting nips would be at "mutually exclusive positions about a pivot point" from the gap would depend on what area is designated as the gap.

upper surface of the opposing handle, approximately in the region where the dashed line reaches that surface.

Accordingly, we are not apprised of error in the Examiner's finding that, in Henault, each of the first cutting nip, the second cutting nip, and the gap are disposed at mutually exclusive positions about a pivot point between the first member and second member. The rejection of claim 1 as being unpatentable over Henault and Porzky is sustained. Claims 2–4 fall with claim 1.

Claims 5–10, 19 and 20

Independent claim 5 and claim 19, which depends from claim 1, each recites that the height of the serrations increases from proximate the tip to proximate the pivot point, which limitation is discussed above with respect to the anticipation rejection of claim 5. The Examiner relies on the same flawed interpretation of the height of the serrations disclosed in Porzky in the rejection of these claims as being unpatentable over Henault and Porzky. Final Act. 10. Accordingly, this rejection of claims 5 and 19 is not sustained. Claims 6–10 and 20 depend from claim 5, and the rejection is similarly not sustained as to those claims.

DECISION

The rejection of claims 7–9 under 35 U.S.C. § 112, second paragraph, as being indefinite, is affirmed.

The rejection of claims 1–8, 19, and 20 under 35 U.S.C. § 102(b) as being anticipated by Porzky is reversed.

The rejection of claims 1–4 under 35 U.S.C. § 103(a) over Henault and Porzky is affirmed.

The rejection of claims 5–10, 19, and 20 under 35 U.S.C. § 103(a) over Henault and Porzky is reversed.

CONCLUSION

In summary:

Claims Rejected	Basis	Affirmed	Reversed
7–9	§ 112, ¶2 indefiniteness	7–9	
1–8, 19, 20	§ 102(b) Porzky		1–8, 19, 20
1–10, 19, 20	§ 103(a) Henault, Porzky	1–4	5–10, 19, 20
Overall Outcome		1–4, 7–9	5, 6, 10, 19, 20

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART