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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* KATHY ROHER, CAROL HAMILTON, CELINE BRUCKER,  
LAURA AZARIA, and VICTORIA LERNER

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Appeal 2010-004566  
Application 11/231,984  
Technology Center 1700

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Before BRADLEY R. GARRIS, KAREN M. HASTINGS, and  
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 the final rejection of claims 17-20, 38-49, and 56. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

We AFFIRM.

Appellants describe hair coloring products, packaging, displays and related methods (Spec. para. [002]).

Claims 17, 38, 39, and 56 are illustrative:

17. A method of facilitating selection of a hair coloring product, the method comprising:

providing a packaging for a hair coloring product, comprising:

at least one wall defining an interior of the packaging,

wherein at least one part of the packaging visible to a subject viewing an exterior of the packaging comprises

at least one representation of hair color and

at least one reflective portion adjacent to the at least one representation of hair color, the at least one reflective portion being configured to provide a reflection of the subject's hair color so as to permit the subject to compare the reflection of the subject's hair color to the at least one representation of hair color,

wherein the at least one representation of hair color comprises at least one of a drawing, photograph, and printed image;

viewing a reflection of hair color provided by the reflective portion of the packaging; and

comparing the reflection of hair color to the at least one representation of hair color.

38. A method of facilitating selection of a hair coloring product, the method comprising:

providing a packaging for a hair coloring product, comprising:

at least one wall defining an interior of the packaging,

wherein at least one part of the packaging visible to a subject viewing an exterior of the packaging comprises a plurality of differing representations of hair color,

wherein at least one of the representations comprises a representation of hair color after treatment with a hair coloring product contained in the packaging, and

wherein at least one other of the representations comprises a representation of hair color after treatment with a hair coloring product other than the hair coloring product contained in the packaging;

viewing the representations of the packaging;

selecting, based on the viewing, at least one of the hair coloring product contained in the packaging and the hair coloring product other than the hair coloring product contained in the packaging.

39. A display relating to hair coloring products, the display comprising:

a representation of a starting hair color;

a first representation of the starting hair color after treatment with a first hair coloring product, wherein the first representation is a cooler color as compared to the starting hair color;

a second representation of the starting hair color after treatment with a second hair coloring product, wherein the second representation is a natural color as compared to the starting hair color; and

a third representation of the starting hair color after treatment with a third hair coloring product, wherein the third representation is a warmer color as compared to the starting hair color.

56. A method of facilitating selection of at least one hair coloring product from a plurality of hair coloring products, the plurality of hair coloring products comprising

a plurality of hair coloring product groups, each of the hair coloring product groups comprising a first hair coloring product, a second hair coloring product, and a third hair coloring product,

wherein each of the hair coloring product groups is associated with a respective starting hair color,

wherein the first hair coloring product is a hair coloring product for treating the starting hair color to provide a cooler color as compared to the starting hair color,

wherein the second hair coloring product is a hair coloring product for treating the starting hair color to provide a natural hair color as compared to the starting hair color, and

wherein the third hair coloring product is a hair coloring product for treating the starting hair color to provide a warmer hair color as compared to the starting hair color,

the method comprising:

viewing respective representations of hair color, each of the representations being associated a respective hair coloring product of one of the hair coloring product groups; and

selecting, based on the appearance of the representations, at least one of the first hair coloring product, the second hair color product, and the third hair coloring product.

Appellants seek review of the following rejections:

1. Claims 17-20, 38-45, 48, 49, and 56 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sakai (WO 01/80685 A1 published Nov. 1, 2001<sup>1</sup>) in view of Pereira (US Patent 6,601,704 B1 issued Aug. 5, 2003).
2. Claims 46 and 47 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sakai in view of Pereira and Verrangia (US Patent 5,647,485 issued Jul. 15, 1997).
3. Claims 46 and 47 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sakai in view of Pereira and Ploix (US Patent 6,955,261 B2 issued Oct. 18, 2005).
4. Claims 17-20, 38-45, 48, 49, and 56 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sakai in view of Brucker (US 2004/0117256 A1 published Jun. 17, 2004).
5. Claims 46 and 47 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sakai in view of Brucker and Verrangia.
6. Claims 46 and 47 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sakai in view of Brucker and Ploix.

Regarding rejections (1) and (4), Appellants argue independent claims 17, 38, 39, and 56 only (App. Br. 18-28, 31-35).

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<sup>1</sup> We rely on and cite to Sakai US Patent 6,824,387 B2 issued Nov. 30, 2004, as the English language equivalent.

Rejections (2), (3), (5), and (6), Appellants rely on their arguments made regarding rejections (1) and (4) (App. Br. 29-30, 35-36). Accordingly, claims 46 and 47, which depend on claim 39, stand or fall with Appellants' arguments regarding claim 39 under rejections (1) and (4).

Rejections (1) and (4)

CLAIM 17

#### ISSUE

Did the Examiner reversibly err in determining that the teachings of Sakai and Pereira or Brucker would have rendered obvious placing a representation of hair color comprising at least one drawing, photograph, and printed image on the packaging for the hair colorant as recited in claim 17? We decide this issue in the negative.

#### FACTUAL FINDINGS & ANALYSIS

We adopt the Examiner's findings regarding Sakai, Pereira and Brucker as our own. The Examiner finds that Sakai teaches all the limitations recited in claim 17, except for the drawing, photograph or printed image on the hair coloring package (Ans. 3-4; 6-7). The Examiner finds Pereira or Brucker to teach placing a representation such as pictures on hair coloring packages is well known in the art (Ans. 4, 7). Based on these findings, the Examiner concludes that it would have been prima facie obvious to modify Sakai's packaging by placing pictures on the packaging as is conventionally taught by Pereira or Brucker (Ans. 4, 7).

Appellants argue that Sakai teaches away from the combination because Sakai discloses a colored mirror that permits the purchaser to see

how his or her hair would look dyed the particular color which is an improvement over inferior, conventional pictures that demonstrate the resulting hair color (App. Br. 19-20).

The Examiner responds that Sakai teaches that using “only” a display of conventional pictures is not enough and this teaching does not constitute a teaching away from using such representations on packages (Ans. 9-10).

We agree.

Sakai teaches that using “only on a display” of printed pictures or a tress of colored hair is insufficient for predicting the resulting hair color (Sakai, col. 1, ll. 48-55). Sakai uses a mirror to provide a better prediction of the hair color, half of which is colored with a colored filter and the other half is unfiltered (Sakai, col. 2, ll. 63-65).

Appellants do not contest the Examiners’ findings regarding Pereira or Brucker (App. Br. 18-35).

Based on Sakai’s teachings, we agree that Sakai does not discourage or teach away from including a picture or other representation of the hair color on the package. Rather, we agree with the Examiner that Sakai’s teachings indicate that such conventional displays alone are inadequate and would have suggested using Sakai’s mirror arrangement on a package having a picture or other conventional representation to demonstrate the resulting hair color.

For these reasons, we agree with the Examiner that Sakai does not teach away from including a representation on the package as recited in claim 17.

CLAIM 38

ISSUE

Did the Examiner reversibly err in determining that Sakai's color wheel embodiment for the mirror would have suggested including a representation of hair coloring after treatment with the hair coloring contained in the package and another representation of hair color after treatment with a hair coloring product other than the hair coloring product contained in the package as recited in claim 38? We decide this issue in the negative.

FACTUAL FINDINGS & ANALYSIS

The Examiner finds that Sakai's color wheel embodiment of the mirror shown in Figure 8 shows multiple colors on a single mirror and Sakai teaches that the mirror may be attached to a package (Ans. 10). The Examiner concludes that such a teaching would have rendered obvious the subject matter of claim 38 (Ans. 10).

Appellants contend that the teachings of Sakai, Pereira, or Brucker would not have rendered obvious placing a representation of the hair color obtained by using the contents of the package and a representation of hair color obtained by a hair coloring product other than the hair coloring product contained in the package (App. Br. 22). Appellants contend that the Examiner has failed to find the differences between Sakai and Pereira or Brucker and did not articulate a legally sufficient rationale addressing the differences (App. Br. 22-23; 32-33). Appellants contend that Sakai's color wheel embodiment of the mirror is disclosed as being attached to a display for hair colorants, not to a package (App. Br. 23; Reply Br. 4).

Appellants' arguments are unpersuasive because the Examiner explains that the subject matter of claim 38 is met by Sakai, which teaches multiple representations of color on the color wheel embodiment (Ans. 3-4, 10). The Examiner further relies on Sakai's teaching that the mirror may be placed on the side of a package as suggesting that the color wheel may be positioned on a package too (Ans. 10).

Appellants' argument that Sakai does not expressly teach placing the color wheel mirror embodiment on the side of a package fails to appreciate what the art would have suggested. Sakai teaches that the mirror contains a representation of the hair colorant contained in the package (Ans. 3; Sakai, col. 4, ll. 27-34; col. 5, ll. 22-24). Sakai, as found the by Examiner, teaches placing a mirror on the side of the package. Accordingly, Sakai would have suggested placing the color wheel mirror embodiment on the side of a package. By so doing, the wheel would have obviously had a representation of the hair color contained in the package and a representation of at least one hair color other than that contained in the package.

For the above reasons, we agree with the Examiner that teachings of Sakai would have suggested the subject matter of claim 38.

CLAIMS 39 and 56

#### ISSUE

Did the Examiner reversibly err in determining that the teachings of Pereira in combination with Sakai's color wheel embodiment of the mirror would have suggested including a warmer, a cooler, and a natural shade of hair color on a display as required by claim 39 or as part of the method of

facilitating selection of a hair color as required by claim 56? We decide this issue in the negative.

#### FACTUAL FINDINGS and ANALYSIS

The Examiner finds that Sakai's color wheel mirror embodiment would have suggested attaching to the package a mirror having representations of a warmer, a cooler and a natural hair color as compared to the starting hair color (Ans. 11). The Examiner finds that Pereira teaches that color labels are generally arranged by "color family" which includes a plurality of hair dye colors having common tones and hues such as black, red, brown and blond with a variety of shades for each color (Ans. 11-12). The Examiner reasons that Pereira's color family disclosure further underscores the obviousness of including a warmer, a cooler, and a natural hair color as part of a color family on Sakai's color wheel (Ans. 11-12).

Appellants argue that the Examiner's rejection is based on a flawed theory that the colors on the wheel must be warmer or cooler because there are only two alternatives (App. Br. 25). Appellants contend that Sakai and Pereira or Brucker fail to teach or suggest the warmer, cooler, and natural color representations on the package (Ans. 24, 33). Appellants contend that they defined "warmer", "cooler" and "natural" in paragraph [48] of the Specification (Reply Br. 6). Appellants argue that merely disclosing different shades of color and color families does not result in disclosing the warmer, cooler and natural color required by claims 39 and 56 (Reply Br. 6).

We agree with the Examiner that Pereira's teachings in combination with Sakai's color wheel embodiment would have suggested using a warmer, a cooler and a natural color on the wheel. Pereira teaches that a

color family, such as blond, may include 5 or 6 shades of color (possibly even 10 shades) (Pereira, col. 8, ll. 9-12). Accordingly, it would have been within the skill of one of ordinary skill in the art to include a warmer, a natural and a cooler hair color as part of the color family on Sakai's color wheel mirror.

Appellants' description in paragraph 48 of the Specification of "cooler" as adding beige/ash tones to minimize red/orange tones, "natural" as maintaining the natural tones of the hair, and "warmer" as adding gold tones to enhance the warmth of the hair relative to the starting hair color do not appear to provide any distinction from what would have been suggested by the prior art. Indeed, Pereira's differing shades of color would have reasonably suggested shades that are lighter (or cooler) and ones that are richer (or warmer) as well as shades that maintain the natural hair color (neutral). Appellants' argument that Pereira's shade disclosure does not disclose warmer, cooler and natural color fails to account for what the art would have suggested to and the creativity of one of ordinary skill in the art. *KSR Int'l Co. v. Teleflex, Inc.*, 550 US 398, 421 (2007) ("A person of ordinary skill is also a person of ordinary creativity, not an automaton."). Clearly demonstrating variations in tone of a color or even providing different hair color blends for the consumer to view is a desirable feature as taught by Pereira and Sakai.

For these reasons, we affirm the Examiner's § 103 rejections of claims 17-20, 38-45, 48, 49, and 56 over Sakai in view of Pereira or Brucker.

Because Appellants fail to provide any additional arguments regarding rejections (2), (3), (5) or (6), we affirm these rejections of claims 46 and 47 for the same reasons discussed above regarding independent claim 39.

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Application 11/231,984

DECISION

The Examiner's decision is affirmed.

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).

ORDER

AFFIRMED

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