DECISION OF THE COMMISSIONER

AGGREGATION: No functional interrelation.

A sun-bathing enclosure providing a light reflecting ceiling and lamps to illuminate the ceiling, lamps mounted to simulate sun's rays and lamps providing UVB radiation over the base area, each simulating natural phenomena of sky, sunlight or radiation, without inter-relationship with one another so as to produce a unitary result, is merely an aggregation of the several results produced by the respective elements.

FINAL ACTION: Affirmed

IN THE MATTER OF a request for a review by the Commissioner of Patents of the Examiner's Final Action under Section 46 of the Patent Rules.

AND

IN THE MATTER OF a patent application serial number 999,637 filed September 8, 1967 for an invention entitled:

ARTIFICIAL SUN-BATHING ENCLOSURE

Agent for Applicant

Messrs. Gowling & Henderson,
116 Albert Street,
Ottawa 4, Ontario.

This decision deals with a request for review by the Commissioner of Patents of the Examiner's Final Action dated November 24, 1970 refusing to allow the application.

The Patent Appeal Board conducted a hearing on April 22, 1971. Mr. G.A. Macklin and Mr. D. Puttick represented the applicant. The facts are as follows:

Application 999,637 was filed on September 8, 1967 in the name of H.R. Ruff et al and refers to "Artificial Sun-Bathing Enclosure".

In the prosecution terminated by the Final Action dated November 24, 1970 the examiner refused the application on the grounds that the application sets forth no more than a mere unpatentable aggregation of component units which are shown to be well known in the reference cited. Further, no inventive ingenuity is involved since applicant has merely brought together a number of known components to simulate a naturally occurring phenomenon.

The prior art cited is as follows:

Canadian Patents				
648,088	Sept. 4, 1962	Cl. 135-1	Dwgs 2 shts	Bird
649,479	Oct. 2, 1962	Cl. 135-1	Dwgs 1 sht	Peddell
619,168	Apr. 25, 1961	Cl. 240-112	Dwgs 2 shts	Stahlhut
568,939	Jan. 13, 1959	Cl. 240-37	Dwgs 2 shts	Frizzell
709,727	May 18, 1965	Cl. 240-34	Dwgs 3 shts	Cramer

Westinghouse Lighting H.B. 1958 Copyright, Chapter 15
(available Room 420 Canadian Patent Office)

The examiner in the Final Action maintains that the applicant discloses and claims no more than an unpatentable aggregation of readily available component units each of which has been selected for its well known capabilities of producing a separate one of the constituent effects of the well understood phenomenon of natural sun-bathing. Further in the selection and aggregation of the units no demand for any inventive ingenuity was required and none exercised since each of the units had only to be appropriately juxtaposed and used in their normal manner such that their coextensive effects could be simultaneously experienced and

"recognised", by a person within their vicinity, as a simulated sun-bathing effect.

The examiner also argued that a new combination having a new unified unexpected result has not been disclosed since the alleged invention has as its object, the artificial simulation of the well understood phenomenon of sun-bathing, and clearly consists of three separate effects.

1) Lamps shining downwardly from a matte ceiling to give the illusion of the sun's rays.
2) Blue lamps reflecting off the same ceiling to create the illusion of a sky.
3) UVB lamps reflecting off the matte ceiling to provide uniform tanning.

It is to be noted that items 1 and 2 are each directed to separate and distinct illusory effects and item (3) alone accounts for the tanning effect. Items 1, 2 and 3 are each separately met by separate pieces of art. A fourth item consisting of an air inflated enclosure is also met by separate art.

Applicant's request for review under Rule 46, dated February 24, 1971 appears to center on the stand that a combination giving rise to a single synergistic sun-bathing effect has been achieved.

Applicant also raised the issue as to whether Chapter 15 of the Westinghouse Lighting H.B. has been properly applied regarding the use of UVB lamps in the manner disclosed, i.e., reflecting UVB radiation off a matte ceiling to provide uniform room-wide irradiation. Applicant goes to some length on pages 2 to 4 of the letter dated February 24, 1971 to make a distinction between germicidal and sun lamps in order to show that the teaching related to germicidal lamps does not apply to sun lamps.

Applicant further raised the following points on which he thought the examiner had failed to properly comment on:

a) long felt want,
b) cooperation between elements and
c) obviousness.

After reviewing the grounds for rejection set forth by the examiner, as well as the arguments both written and oral set forth by the applicant I am satisfied that the rejection is well founded.

At the hearing the arguments raised during prosecution were expanded and re-emphasized, also a number of Court cases were used to support the arguments used by the applicant.

Claim 1 reads as follows:

An artificial sun-bathing enclosure comprising:

(a) a matte blue and ultraviolet light reflecting ceiling,
(b) means for supporting the ceiling over a base area,
(c) first lamp means in proximity to said ceiling and arranged to emit light directly downwards toward the base area in simulation of the sun's rays,
(d) second lamp means below said ceiling and arranged to illuminate the ceiling with diffuse bluish-white light, and
(e) a plurality of UVB lamps below said ceiling arranged in conjunction therewith to distribute UVB radiation substantially uniformly over the base area.

The considerations which must be decided are:

a) does the subject matter of the claims constitute an aggregation, and
b) was there demand for inventive ingenuity?

First I will comment on the points raised by the applicant in his response to the Final Action. With respect to whether Chapter 15 of the Westinghouse Lighting H.B. has been properly applied, I find the arguments presented are extraneous to the pertinent portion of the disclosure of the Westinghouse H.B. on pages 15-22 which deals specifically with sun lamps when used for "Room-Wide Irradiation" (as in applicant's artificial sun-bathing enclosure). In the paragraph headed "Room-Wide Irradiation" it is recognised that irradiation may be accomplished by direct radiation or be reflected radiation off the upper walls and ceiling of a room, but advises that irradiation by the latter method is extremely inefficient because of the relatively low reflectance of most room surfaces. The reference table does however provide the information that if the room surfaces are

of white plaster (which may be considered to be a matte reflecting surface) a 50% UVB reflectance may be expected. The table also shows that with various finishes of aluminum a 60-85% UVB reflectance may be expected. Applicant does not envisage any more than the use of a matte UVB reflecting ceiling.

On the question of "long felt want", I see no proof of long felt want whatsoever and I consider it to be irrelevant in view of the rejection as to aggregation. The second point raised under the same heading, b) "cooperation between the elements", I find this was adequately dealt with in the "final action" report in the paragraph spanning pages 1 and 2. This paragraph reads as follows:

> Applicant at the outset has not discovered or invented a "sunbathing" effect but has only simulated a naturally occurring phenomenon to the degree considered adequate for a particular purpose. In simulating such sun-bathing effect applicant is further seen to have accomplished no more than selected known component units capable of producing the effects of each of the known constituents of the natural phenomenon of sun-bathing and aggregated the units so selected into an enclosure for artificial sun-bathing purposes. Applicant having so done, then concludes that since a certain amount of realism has been achieved that the result must surely have been due to some degree of synergism of the aggregated component units thus proving the presence of invention. This conclusion however ignores the possibility that realism may be readily achieved by the simple juxtaposition or aggregation of a selection of common and readily available devices. After careful consideration of the disclosure and supporting arguments, it has been determined that applicant has disclosed and claimed just such an aggregation. Hence applicant's collection within an enclosure of a first set of lamps to simulate the sun's rays, a second set of blue lamps to cast blue light on the ceiling of the enclosure to approximate a sky effect, and a set of UVB lamps to provide sun-tanning is not seen to be a synergistic combination in which a unique and unitary result comprising a sun-bathing effect has been produced as stated. On the contrary, the effect of each set of lamps are seen to be sensed separately by a person within the enclosure and it is only these separate effects as sensed by the appropriate ones of the individual physical senses of the person which are then translated by the person's "mind" into recognition of the perceived sensations as a sun-bathing effect. Hence had applicant been more exhaustive in his selection and had merely added within the enclosure the sound of surf, beach sand, tropical palms and the wafting of refreshing breezes to further heighten the illusion of natural sun-bathing, the results would have been no more inventive than the present selection since no more

> than a more extensive aggregation would have been achieved. Applicant's artificial sun-bathing enclosure is therefore found to be a mere aggregation or selection of component units assembled and used in their normal manner within an enclosure so that their separate coextensive effects will to some extent correspond to natural sun-bathing. The artificial sun-bathing enclosure disclosed and claimed is therefore not inventive. In other words applicant may not claim what is the public's right to select and group known articles of their choice.

The third point under the same heading, c) "obviousness", I find this adequately answered in view of the arguments relating to item b) above and the detailed discussion of each of the separate pieces of art as they relate to the separate components of applicant's artificial sun-bathing enclosure.

I shall now deal with the basic ground of rejection: "does the subject matter of the claims constitute an aggregation of elements"? It is well established that aggregation is not invention either in process, machines or manufactures. The elements which are collocated in an aggregation may themselves, if new, amount to separate inventions, but assembling these elements, unless there is interaction, can produce no new result, and there can be no invention.

The Exchequer Court has considered what constitutes a combination sufficient to constitute patentable subject matter in Lester v. Commissioner of Patents (1946) C.P.R. 6 at 3, where the Judge stated:

> The authorities are quite clear that a combination is not patentable where each part performs its function independently of the other and the parts are not combined to produce some common result.
>
> This was expressed by Lord Tomlin in British Celanese Ltd. v. Courtaults Ltd. (1935), 52 R.P.C. 171 at p.193, as follows:
> "It is accepted as sound law that a mere placing side by side of old integers so that each performs its own proper function independently of any of the others is not a patentable combination, but that where the old integers when placed together have some working inter-relation producing a new or improved result then there is patentable subject-matter in the idea of the working inter-relation brought about by the collocation of the integers."

I find claim 1 of this application consists of elements clearly giving separate effects:

1) Lamps shining downwardly from a matte ceiling to give the illusion of the sun's rays.
2) Blue lamps reflecting off the same ceiling to create the illusion of a sky.
3) UVB lamps reflecting off the matte ceiling to provide uniform tanning.
4) An air inflated structure to form the enclosure.

I find that applicant's claims do not meet the test required of a combination. Applicant has used a number of admittedly known units and has grouped them so that each performs its own proper function independently of any of the others. There is no working inter-relationship producing a common or unitary result; hence, I find a mere aggregation of several results.

Applicant maintains that a combination giving rise to a single synergistic sun-bathing effect has been achieved. I hold that the results produced is no more than the sum of the functions of the various parts. In a true combination synergism must be present and the result must exceed the sum of the functions of the various parts.

I turn now to the other aspect of the rejection, namely, "was there a demand for inventive ingenuity"? I find this is inherently covered in the previous discussion for if I am correct in maintaining that the claims cover an aggregation, then there is no new result and there can therefore be no invention. However, applicant has merely brought together a number of known components to simulate a naturally occurring phenomenon and I hold that it would be within the province of an artisan in this field to produce a system simulating almost any naturally occurring phenomenon and thus would not require inventive ingenuity.

I am satisfied that the particular layout that applicant has disclosed may be meritorious but I fail to see that the claimed subject matter required such an exercise of creative faculties of the human mind as to merit the distinction of invention or a claim to monopoly. I am satisfied that the claimed subject matter amounts to an aggregation of known elements and further that the subject matter lacks one of the attributes of patentability - inventive ingenuity.

I recommend that the decision of the examiner, to refuse the application on the grounds that the applicant discloses and claims no more than an aggregation of readily available

components and that inventive ingenuity is lacking, be upheld.

R. E. Thomas,
Chairman, Patent Appeal Board.

I concur with the findings of the Patent Appeal Board and refuse the grant of a patent. The applicant has six months in which to appeal this decision in accordance with Section 44 of the Patent Act.

A. M. Laidlaw,
Commissioner of Patents.

Dated at Ottawa, Ontario,
this day of May, 1971.