NYUx Media Law - Grey Work 2 - Patents - Philip Hughson - philipfhughson@gmail.com - March 2021

Patently Useless

- My project is online at https://phhu.org/patently-useless
- The source code is available at https://github.com/phhu/patently-useless
- The video presentation is at https://phhu.org/patently-useless/pres.mp4

Screenshot

(Screenshot: The first two keyboards are restrictive, allowing typing only of set text, firstly "Jelly babies" repeatedly, and secondly paragraphs from the Wikipedia article on Jelly Babies. The third keyboard swaps nouns and verbs entered with

rhyming alternatives: here the entry was "I want ice cream with strawberry sauce". Note that for the purposes of this prototype, you have to click on or touch the keyboards rather than use the physical keys of a laptop, but the intent is that physical keyboards should be used)

Presentation

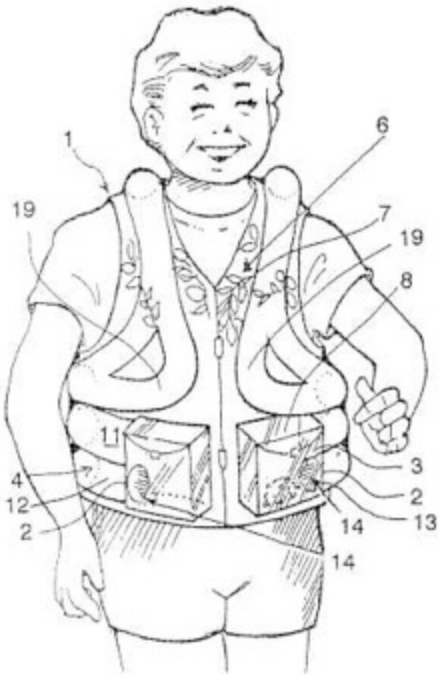
The world is full of junk, some of which is useless, and some of which is patented. We might surmise that patent law doesn't offer much protection against uselessness, but that would be doing it a disservice: after all, utility is one of the five things needed for a patent. According to https://www.law.cornell.edu/wex/patent, "the five primary requirements for patentability are: (1) patentable subject matter, (2) utility, (3) novelty, (4) nonobviousness, and (5) enablement."

If we want to make a grey work for patents, a possible strategy is to imagine a range of possibilities for some product along one of these aspects. The question though is which one. There is an obvious difficulty in creating a half-way novel or non-obvious idea: if we actually have a novel non-obvious idea, why would we half-bake it? Enablement is mostly procedural, and subject matter generally defined by precedent, so utility is perhaps the easiest aspect to attack.

Fortunately, the world of art and conceptual design has long been into useless objects, and so we can draw inspiration from it. Consider for example Katerina Kamprani's deliberately useless yellow wellington boots[1]:

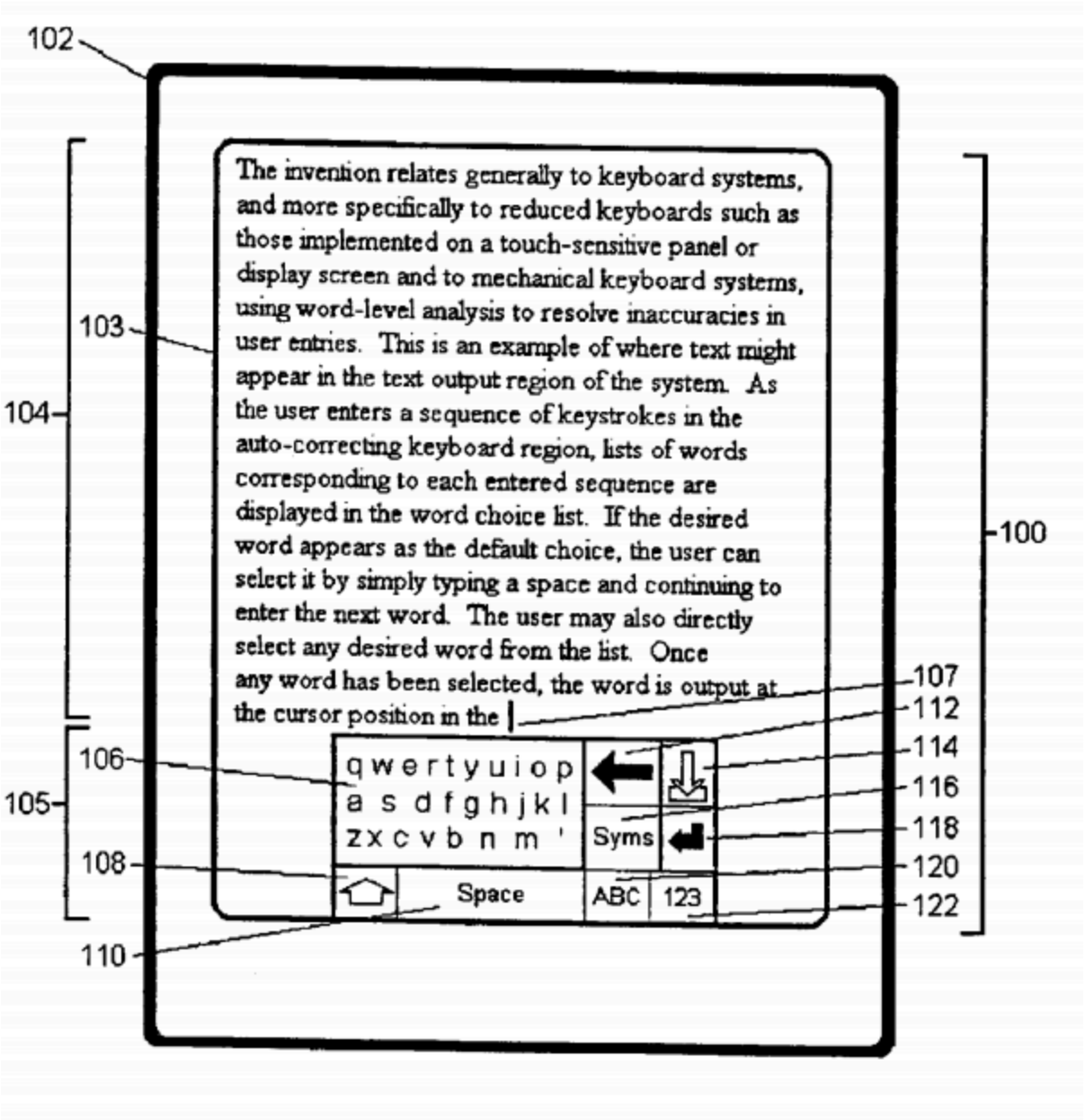
Or perhaps this "spectacle" by Giuseppe Colarusso[2]:

If we look on Google patents though, we find surprisingly few patents for such useless art. This stands to reason: acquiring a patent is expensive and legally involved, so few people are likely to want to acquire protection for something that serves no useful purpose.[3] There are patents which beg the question, such as this one for "Pet Display Clothing"[4]



But we could still explore the boundaries of patentable uselessness. This project asks for digital work, so I have thought about software. Since DIAMOND v. DIEHR (450 U.S. 175 (1981))[5] we know that software can be patented when it part of a system, perhaps physical, which solves a specific problem, like molding rubber, but since ALICE CORPORATION vs CLS BANK (573 U.S. 208 (2014))[6], we know that purely abstract software ideas cannot be patented. How then can we make a digital process or product, accessible to everyone, part of an actual physical process, which tests the bounds of uselessness?

An answer was right in front of me. Every day I prod away at a keyboard, and sometimes they mistype. If we look on Google Patents again, we find art which attempts to address this sort of problem, such as an autocorrecting keyboard[7], so there's clear evidence for the patentability of the positive end of our utility spectrum.



In this project, therefore, I propose a series of keyboards, implemented on a web page, but to be understood as physical keyboards which use software processes, to solve specific problems, as in the DIAMOND v. DIEHR case. These I would argue offer novelty and non-obviousness, so we could patent them, outlining claims for a keyboard connected to a software algorithm which does x, supplying text to a computer...

Except that the keyboards are significanlty useless. The first keyboard is only capable of typing "jelly babies". Perhaps this is a useful narrowing of the yawning field of possibilities we all face when typing? Perhaps it forces us to consider the

literary or poetic possibilities of punctuating the words "jelly" and "baby"? The second keyboard will only type out a fixed text, here from Wikipedia on Jelly Babies. Useful perhaps if you're writing an essay, and want to feel like you wrote it yourself? The third is perhaps more useful: it modifies nouns and verbs in sentences you right, producing for example "I want advice extreme with strawberry gloss" instead of the input "I want ice cream with strawberry sauce". Useful perhaps for poetic inspiration, or producing random variation on texts as an aid to creativity? We could imagine other variations too: a keyboard that doesn't type at all, one that removes vowels, or only text generated by artificial intelligence based on a few prompts.

We can try to assess these against the patent office's guidelines for utility[8], and arrange them on a spectrum of patentability or uselessness. The guidelines include the following:

> (3) If at any time during the examination, it becomes readily apparent that the claimed invention has a well-established utility, do not impose a rejection based on lack of utility. An invention has a well-established utility if (i) a person of ordinary skill in the art would immediately appreciate why the invention is useful based on the characteristics of the invention (e.g., properties or applications of a product or process), and (ii) the utility is specific, substantial, and credible.

> (1) If the applicant has asserted that the claimed invention is useful for any particular practical purpose (i.e., it has a "specific and substantial utility") and the assertion would be considered credible by a person of ordinary skill in the art, do not impose a rejection based on lack of utility.

Are these keyboards useful, or should the be rejected under 35 USC 101?

> If no assertion of specific and substantial utility for the claimed invention made by the applicant is credible, and the claimed invention does not have a readily apparent well-established utility, reject the claim(s) under 35 U.S.C. 101 on the grounds that the invention as claimed lacks utility.

I am not sure. I think I would argue that the Jelly Baby keyboard is without "substantial utility", but I could be convinced that the random rhyme keyboard is

useful, even if I would not pay the patent fees. What do you think?

---

1. for more see https://www.theuncomfortable.com/ ↩
2. for more see https://www.themost10.com/useless-product-designs-by-giuseppe-colarusso/ ↩
3. And indeed often for useful products it is often not considered worth it: for example see discussion at https://www.quora.com/Is-getting-a-patent-worth-the-money ↩
4. See https://patentimages.storage.googleapis.com/7d/6b/1c/27d5fd354ed9fa/US5901666.pdf ↩
5. See https://en.wikipedia.org/wiki/Diamond_v._Diehr or https://ocw.mit.edu/courses/sloan-school-of-management/15-628j-patents-copyrights-and-the-law-of-intellectual-property-spring-2013/readings/MIT15_628JS13_read06.pdf ↩
6. See https://www.supremecourt.gov/opinions/13pdf/13-298_7lh8.pdf ↩
7. See https://patentimages.storage.googleapis.com/2c/4a/64/c7eb5c9dc1f1ea/CA2392446C.pdf ↩
8. See https://www.uspto.gov/web/offices/pac/mpep/s2107.html ↩