

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARTIN BERNHARD DIERL
and EDUARD EDWARDS

Appeal No. 2003-0058
Application 09/390,190

ON BRIEF

Before COHEN, FRANKFORT, and MCQUADE, Administrative Patent Judges.

MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Martin Bernhard Dierl et al. appeal from the final rejection of claims 1 through 33.¹ Claims 34 through 57, the only other claims pending in the application, stand withdrawn from consideration pursuant to 37 CFR § 1.142(b).

THE INVENTION

The invention relates to "a reclose or zipper seal jaw design for use in a sealing carriage of a vertical form and fill

¹ Claim 1 has been amended subsequent to final rejection.

packaging machine, and, in particular, to a quick-change, reclosable zipper seal jaw module" (specification, page 2).

Representative claim 1 reads as follows:²

1. A reclose module for installation on the bridge assemblies of a sealing carriage, said module comprising:
two support members;
two opposed zipper seal facings, each attached to a respective support member,
two opposed jaw facings, each attached to a respective support member, and
wherein upon installation of the support members on said bridge assemblies, the zipper seal facings and jaw facings are located approximately equidistant from the axis of the force vectors transmitted from the bridge assemblies to the support members during sealing operations and the jaw facings are below the zipper seal facings, further wherein said reclose module is a single unit that can be installed on and removed from the sealing carriage as a unit.

THE PRIOR ART

The prior art items relied on by the examiner to support the final rejection are:

Voeller	1,529,518	Mar. 10, 1925
Runo et al. (Runo)	3,538,676	Nov. 10, 1970
Henry et al. (Henry)	3,616,087	Oct. 26, 1971
Leibinger	3,678,562	Jul. 25, 1972
Doede	5,511,363	Apr. 30, 1996
Malin et al. (Malin)	5,592,802	Jan. 14, 1997

The prior art discussed on pages 2 through 11 of the appellants' specification and shown in Figures 1 through 3 of the appellants' drawings (the admitted prior art)

² The terms "aligning handles" in claim 2 and "said seal module" in claim 19 should be changed to --aligning handle-- and --said reclose module--, respectively, to be consistent with surrounding claim terminology.

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THE REJECTIONS

Claim 1 stands rejected under 35 U.S.C. § 102(b) as being anticipated by Malin.

Claim 1 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Runo.

Claim 2 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Runo and Leibinger.

Claim 3 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Runo and Doede.

Claims 4 through 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Runo and the admitted prior art.

Claims 8 through 13, 15, 17 and 18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Leibinger and the admitted prior art.

Claim 14 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Leibinger, the admitted prior art and Doede.

Claim 16 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Leibinger, the admitted prior art and Henry.

Claims 19, 20 and 23 through 33 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Leibinger and Voeller.

Claim 21 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Leibinger, Voeller and Runo.

Claim 22 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Malin in view of Leibinger, Voeller and Doede.

Attention is directed to the appellants' main and reply briefs (Paper Nos. 16 and 19) and to the final rejection and examiner's answer (Paper Nos. 12 and 17) for the respective positions of the appellants and examiner regarding the merits of these rejections.³

DISCUSSION

Malin, the examiner's primary reference, discloses a vertical form, fill and seal machine for manufacturing plastic

³ In the final rejection, the examiner inadvertently rejected claim 13 with claim 2 rather than with parent claim 8. As this error was pointed out by the examiner in the advisory action dated December 13, 2001 (Paper No. 14) before the appeal was taken, the appellants' contention in the reply brief (see page 2) that the correction effected in the answer constitutes an impermissible new ground of rejection is somewhat disingenuous. In any event, the propriety of the examiner's corrective action is reviewable by petition to the Director rather than by appeal to this Board, and hence will not be further addressed in this decision.

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bags having a reclosable plastic zipper. The examiner focuses on the machine's cross seal jaws which are described in the reference as follows:

[r]eferring now to FIG. 5, . . . cross seal jaws 64 seal the top of the bag or package 66 being made (in an upside-down orientation) as well as the bottom of the previous package 68. In other words, the lower end of the zipper 36 shown in the figures is on the upper edge of the finished packages. A knife 69 within cross seal jaws 64 separates the packages 66, 68 after the seals are made. Cross seal jaws 64 are also indicated in FIGS. 2 and 3.

Cross seal jaws 64 also seal the webs 56 of the male and female zipper profiles 44, 46 to the plastic sheet material 10 [column 6, lines 22 through 33].

The examiner's determination (see page 2 in the final rejection and pages 5 through 7 in the answer) that the subject matter recited in independent claim 1 is anticipated by Malin is not well founded. Anticipation is established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). Notwithstanding the examiner's findings to the contrary, Malin's rather brief and non-detailed disclosure of the cross seal jaws 64 does not respond to the limitations in claim 1 requiring the recited reclose module (1) to be a single unit that can be installed on

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and removed from the sealing carriage as a unit and (2) to comprise two support members installable on bridge assemblies of the sealing carriage such that zipper seal facings and jaw facings attached to the support members are located approximately equidistant from the axis of the force vectors transmitted from the bridge assemblies to the support members during sealing operations. The examiner's contention that Malin's cross seal jaws could be installed or removed as a unit has no factual support in the teachings of the reference. Similarly, the dismissal by the examiner of the force vector limitations in the claim as not being entitled to patentable weight because they are functional in nature has no basis in law.⁴

Thus, Malin does not disclose each and every element of the reclose module recited in claim 1. Accordingly, we shall not sustain the standing 35 U.S.C. § 102(b) rejection of claim 1 as being anticipated by Malin.

In addition to being unresponsive to the foregoing limitations in independent claim 1, Malin, by the examiner's own

⁴ There is nothing intrinsically wrong with the claim drafting technique of using functional language to define something by what it does rather than by what it is. In re Hallman, 655 F.2d 212, 215, 210 USPQ 609, 611 (CCPA 1981); In re Swinehart, 439 F.2d 210, 213, 169 USPQ 226, 228 (CCPA 1971).

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admission, fails to respond to the limitations in independent claim 8 requiring an aligning handle attachable to each support member when the facings are placed in proximate contact, the limitations in independent claim 19 requiring an aligning handle for aligning opposed facings prior to installation on the sealing carriage, and the limitations in independent claim 27 requiring two support members each having at least one threaded receiver for receiving a bolt and an aligning handle having a plurality of attaching bolts threadable into the threaded receivers when the opposed facings on the support members are in proximate contact. The various secondary prior art items applied by the examiner in combination with Malin to support the obviousness rejections of these claims and the claims depending therefrom do not cure these deficiencies.

Runo, combined with Malin by the examiner for the rather dubious proposition that their collective teachings would have suggested a reclose module having zipper seal facings and jaw facings located approximately equidistant from the axis of force vectors as recited in claim 1, fails to account for the above noted failings of Malin with respect to the limitations in the claim requiring the reclose module to be a single unit that can be installed on and removed from the sealing carriage as a unit.

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Malin's shortcomings in this regard also undercut the examiner's application of Leibinger and Voeller in combination with Malin to meet the aligning handle limitations in independent claims 8, 19 and 27. Absent any indication in Malin that the cross seal jaws 64 can be installed and removed as a modular unit, the only suggestion for combining these jaws with a tool set holder as disclosed by Leibinger and/or a cylinder head grip as disclosed by Voeller for the examiner's stated purpose of facilitating alignment and removal of the cross seal jaws (see page 3 in the final rejection) stems from hindsight knowledge impermissibly derived from the appellants' disclosure. These gaps in the examiner's evidence of obviousness find no remedy in the further application of Doede, Henry and the admitted prior art.

Thus, the prior art evidence applied by the examiner does not justify a conclusion that the differences between the subject matter recited in claims 1 through 33 and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art. Therefore, we shall not sustain any of the standing 35 U.S.C. § 103(a) rejections of claims 1 through 33.

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SUMMARY

The decision of the examiner to reject claims 1 through 33
is reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
)	
)	APPEALS AND
CHARLES E. FRANKFORT)	
Administrative Patent Judge)	INTERFERENCES
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JOHN P. MCQUADE)	
Administrative Patent Judge)	

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