

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 28

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LEN C. KRETCHMAN and DAVID GESKE

Appeal No. 2003-1775
Application No. 845,925

HEARD: December 10, 2003

Before KRATZ, JEFFREY T. SMITH and PAWLIKOWSKI, Administrative Patent Judges.

KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's refusal to allow claims 39-41, which are all of the claims pending in this application.

BACKGROUND

Appellants' invention relates to a crustless sandwich comprising first and second cut bread portions having perimeters that are sealed by compression at outer margins thereof. Closely spaced depressions of compacted bread are formed in a sealed marginal area to resist separation of the bread portions at the outer perimeters. A central filling is disposed between the

bread portions and the filling does not extend into the compressed sealed outer margins. A further understanding of the invention can be derived from a reading of exemplary claims 39 and 40, which are reproduced below.

39. A crustless sandwich comprising: a first portion of bread with its crust cut off to define a first predetermined outer shape bordered by a first outer margin with a first perimeter, a second portion of bread with its crust cut off to define a second predetermined outer shaped identical to said first outer shape of said first bread portion with said outer shape of said second portion having a second outer margin with a second perimeter, said second margin being coextensive with said first outer margin, a central filling between said bread portions in an area within, but smaller than said first and second outer margins, said cut bread portions being sealed by compression between said outer margins and in a sealed marginal area whereby said compressed sealed outer margins are free of said filling and spaced outwardly from said filling, closely spaced depressions of compacted bread along said sealed marginal area to crimp said compressed marginal area at spaced points to prevent said bread portions from separating at said outer perimeters and with said compressed marginal area extending outwardly to said outer shapes of said bread portions defined by said perimeters.

40. A crustless peanut butter and jelly sandwich comprising: a first portion of bread with its crust cut off to define a first predetermined outer shape bordered by a first outer margin with a first perimeter, a second portion of bread with its crust cut off to define a second predetermined outer shape identical to said first outer shape of said first bread portion with said outer shape of said second portion having a second outer margin with a second perimeter, said second margin being coextensive with said first outer margin, a first layer of peanut butter between said bread portions in an area within, but smaller than said first and second outer margins, a layer of jelly

generally centered on said first layer of peanut butter leaving an exposed surface of said first peanut butter layer surrounding said jelly layer, a second layer of peanut butter over said first layer of peanut butter and sealed to said first peanut butter layer at said exposed surface whereby said jelly is encapsulated by peanut butter of said layers, said cut bread portions being sealed by compression between said outer margins and in a sealed marginal area whereby said compressed sealed outer margins are free of peanut butter and/or jelly and spaced outwardly from said layers of peanut butter, closely spaced depressions of compacted bread along said sealed marginal area to crimp said compressed marginal area at spaced points to prevent said bread portions from separating at said outer perimeters and with said compressed marginal area extending outwardly to said outer shapes of said bread portions defined by said perimeters.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Kaiser, Pasta, Pies and Pastries, "Tart Recipes from around the World" , pp. 2, 7-9, 11, 30, 43, 48, 115 and 116, cover pages, an unnumbered page entitled "About the Author", two unnumbered pages illustrating devices, and a "Table of Contents" page (no publication date provided).¹

Shideler, "Ways to Make it Through the First Day of School," Wichita Eagle, Aug. 14, 1994.

Claim 39 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Kaiser. Claims 40 and 41 stand rejected under

¹ Appellants do not dispute the examiner's finding that the excerpts from Kaiser, which were submitted by appellants, represent published prior art to the here claimed invention. A 1992 or earlier publication date is attributed to the book containing the excerpts. See page 3 of the examiner's answer.

35 U.S.C. § 103(a) as being unpatentable over Kaiser in view of Shideler.

We refer to the briefs and to the answer for a complete exposition of the opposing viewpoints expressed by appellants and the examiner concerning the issues before us on this appeal.

OPINION

Having carefully considered each of appellants' arguments and the evidence in support thereof as set forth in the brief and reply brief, appellants have not persuaded us of reversible error on the part of the examiner. Accordingly, we will affirm the examiner's rejections for substantially the reasons set forth by the examiner in the answer. We add the following for emphasis.

Rejection of Claim 39

Kaiser² discloses, inter alia, a crustless sandwich formed using a device comprising a Tartmaster or Krimpkut sealer to cut and seal the bread. See, e.g., Kaiser, at pages 1, 2, 7 and the devices, such as the devices labeled H2001, H2003 and H2009

² Our consideration of Kaiser is limited to the excerpts therefrom supplied by appellants, which we find furnish sufficient evidence alone (claim 39) and in combination with Shideler (claims 40 and 41) to make out a prima facie case of obvious on the record before us. In the event of further prosecution of this subject matter before the examiner, appellants and the examiner may wish to consider whether the entire work of Kaiser should be made of record for consideration by the examiner.

(unnumbered pages of illustrated devices preceding the Table of Contents page of Kaiser). As essentially found by the examiner (answer, page 5), Kaiser teaches or suggests the formation of marginal areas spaced inwardly from a compressed sealed edge/perimeter of the crustless sandwich, which marginal areas include spaced crimped regions. See, e.g., pages 7, 11, 115 and the cover page of Kaiser. As explained at page 11 of Kaiser, the sandwich filling is arranged "in the center of the bread leaving a 1/4 inch margin of bread around the edge for a secure seal."³

Consequently, we agree with the examiner's prima facie obviousness conclusion and assertion (answer, page 5) that:

[i]t would have been obvious to one [ordinarily] skilled in the art to keep the filled material away from the outside margin area so that effective[] sealing can take place[] between the two slices of bread because if the filling is [too] close[] to the outside edge, the filling will leak out and the edge will not be properly sealed.

³ Thus, the examiner may have understated the relevant teachings of Kaiser in asserting that "[t]he book is silent about the compressed sealed outer margins being free of the filling" (answer, page 5). However, we find that understatement/error harmless in so far as the examiner's obviousness position is concerned in that the expressly described 1/4 inch sealing margin of Kaiser coupled with the other submitted portions of the excerpts from Kaiser's book makes plain that a compressed bread to bread seal without filling is fairly related by Kaiser.

Appellants argue that it would not have been obvious to select Kaiser as an applied reference, or select teachings therefrom, since Kaiser allegedly does not show the claimed sandwich structure. In particular, appellants maintain (brief, page 16) that the claim 39 limitations "said [cut] bread portions being sealed by compression [between said outer margins and] in a sealed marginal area" and "closely spaced depressions of compacted bread [along said sealed marginal area] to crimp the [sic] compressed marginal area [at spaced points] to prevent the bread portions from separating [at said outer perimeters]" are not taught or suggested by the applied prior art.

Concerning these limitations, appellants argue that "no seal is suggested by the cookbook" (brief, page 17) and refer to the compression seal shown in their drawing figures 3 and 4 and several portions of their specification in asserting that the claimed seal "structure is not suggested by the cookbook" (brief, page 17 and reply brief). We disagree for the reasons discussed herein and in the answer.

Appellants misinterprets the teachings of Kaiser in their assertion that "no seal is suggested by the cookbook" (brief, page 17). This is so since Kaiser (page 11) instructs that the Tartmaster or Krimpkut sealers are used to cut, crimp and seal at

a location inside the bread crust. Also, see, e.g., pages 7, 8, 30, 43 and 48, and the cover pages of Kaiser. As for the spaced depressions (pressure points) called for in claim 39, the examiner, in maintaining the rejection, has basically determined that the inner crimping and sealing ring of the Tartmaster (such as models H2001 and H2003) used by Kaiser would have resulted in spaced depression along the sealed perimeter area of crustless sandwiches made as evident by the spaced depressions shown on the products illustrated, such as on the cover pages and the sandwich illustrated on page 115. Furthermore, see the bear-shaped product sandwich shown at the top of the unnumbered page entitled "Cuts, Crimps & Seals in One Step." and the sandwiches being made using the Krimpkut Sealer on pages 7, 8 and 48 of Kaiser.

Appellants rely on a second declaration of Leon Levine (attachment No. 7) in an apparent attempt to discredit the disclosure of Kaiser, particularly at item No. 2 of pages 30 and 31, wherein forming sandwiches by cutting and sealing multiple bread slices with the devices are explicitly described. We do not find appellants' arguments and evidence persuasive in establishing that Kaiser does not suggest forming a sandwich with an edge seal structure as required by appellants' claim 39.

The portion of the second Levine declaration referred to by appellants is directed to tests performed with a device (Second Levine declaration, Exhibit I), which is alleged to be like the CUT-N-Seal device sold by Pampered Chef. That latter device is alleged to correspond to the Tartmaster of Kaiser. According to Dr. Levine (numbered paragraph 6 of the second declaration), the CUT-N-Seal-like device was employed by placing two slices of bread under the unit and pressing down on a top plunger of the device. Dr. Levine (second declaration, numbered paragraph 6) reports that:

[e]ven with a high degree of pressure, the bread slices were not completely cut. However, the edge seal under the sealing ring was completely compressed so the bread was molded together in a homogenous mass, as shown in Exhibit K

In numbered paragraphs 7 through 10 of that second declaration, Dr. Levine further describes the resulting product of the experiment as including an "amorphous homogenous mass" of bread. Dr. Levine concludes that the sealed sandwich depicted in U.S. patent No. 6,004,596⁴ was not duplicated by the sandwich he

⁴ The present application was filed as a continuation of application No. 09/404,701, now abandoned, which latter application was filed as a continuing (divisional) application of prior application No. 08/986,581. Grandparent application No. 08/986,581 was issued as U.S. Patent No. 6,004,596. That patent

made with the CUT-N-Seal-like device. Moreover, a sandwich having the brand name "Uncrustables" was obtained by Dr. Levine and found by him to have an edge seal that differed from that of his CUT-N-Seal-like device prepared sandwich. The other Levine declaration referred to at page 6 of the brief is of little probative value since that declaration is not specifically directed to the present claim 39 product and the Kaiser reference.

The tests conducted in the second Levine declaration were conducted by pushing down on the top plunger of the device used in the tests without pushing down on the outer ring of a "Tartmaster." As is readily apparent from an inspection of the construction of the Tartmaster with a plunger (such as model H2001 or H2003), there are only a few ways to use the device. One of ordinary skill in the art would have recognized that pressing on the outside edge would have been an option that yields greater cutting force if the particular bread slices selected are difficult to cut. In such a case, pushing the

is currently undergoing reexamination (Control No. 90005948). Moreover, U.S. Patent No. 6,004,596 is involved in litigation (brief, page 27). Application No. 10/314,770 was filed as a continuation of application No. 09/821,137, which latter application is another related application on appeal (appeal No. 03-1754).

plunger simultaneously with or after the cutting to seal and crimp the perimeter would have been readily recognized options by one of ordinary skill in the art seeking to optimize the cutting and sealing operations.

Furthermore, we agree with the examiner's criticisms of the declaration evidence as set forth at pages 7-9 of the answer. Appellants' claim 39 is not limited to the specific product depicted in drawing figures 3 and 4 of their application. Moreover, we note that the second Levine declaration merely refers to using a device like a Tartmaster in the experiments conducted, not the Tartmaster, such as the plunger-containing models H2001 or H2003 of the applied Kaiser reference, which teaches cutting and sealing bread slices to form sandwiches with the Tartmaster devices thereof.⁵ Nor does that declaration

⁵ Also, we note that the Levine declarations do not test the Krimpkut and Tartmaster devices not having a plunger, such as the H1000 -H1015 and H2009 devices shown on the unnumbered pages preceding the Table of Contents page and declaration. As is readily apparent from an inspection of those other Tartmaster devices not having a plunger and the Krimpkut sealer together with the illustrations and text explaining the use thereof, Kaiser reasonably suggests to one of ordinary skill in the art how those devices would also be usable in forming crustless sandwiches having a centrally located filing with the sandwich having sealed edges as claimed herein. See, e.g., the cover pages, unnumbered pages and pages 7, 8, 11 and 48 of Kaiser. Using those devices in a fashion so as to cut off the crust and seal the remaining perimeter would have been readily accomplished by one of ordinary skill in the art seeking to optimize the

specify the type or thickness of the bread slices employed in the experiments conducted. In this regard, the appealed claims are open to any type and size of sliced bread that may be cut and sealed whereas the specific types of bread and fillings used in the brand name "Uncrustables" comparison was not even disclosed in the declarations. Moreover, Kaiser clearly illustrates that fingers and/or a thumb are placed on the outer cutting cylinder in using the plunger-containing Tartmaster device as illustrated in the figure at the top left corner of page 7. Also, see pages 9 and 30 of Kaiser. As such, appellants have not discharged their burden of establishing that the Tartmaster or Krimpkut devices of Kaiser would not cut and seal as described therein, such as at pages 7, 11, 30, 43 and 48, and result in an edges seal as claimed.

In the reply brief (fourth page), appellants misinterpret the disclosure of Kaiser by asserting that "there is no concern about filling preventing the bread portions from holding together" In fact, Kaiser (page 11) teaches "leaving a 1/4 inch

cutting and sealing operations in making such a sandwich.

margin of bread around the edge for a secure seal.”⁶ Against that background, we do not find appellants’ arguments about a lack of suggestion in Kaiser of sealing the cut bread slices at an outer margin area free of filling to be persuasive.

From the above discussion, it follows that we do not agree with appellants assertions concerning the argued spaced depressions as being distinguishing features. Kaiser describes or suggests sealing the bread slices via the use of the inner crimping ring of the Tartmaster. See the products on the cover pages that depict sealed edges, the Tartmaster H2003, and pages 11, 15, 30 and 43 of Kaiser. Clearly, the product sandwiches of Kaiser that are made have depressions formed by the use of that Tartmaster device. Thus, we agree with the examiner that use of the Tartmaster inner sealing and crimping element (ring) will result in spaced pressure points or depression as claimed as

⁶ Moreover, we note that appellants furnish evidence with their brief, such as Funabashi et al., U.S. Patent No. 4,608,918, (brief, attachment No. 3), which patent teaches “causing outer peripheries of the sandwich to adhere to each other” (column 2, lines 47 and 48) using “an adhesive force of the sliced breads themselves” (column 3, lines 41 and 42). Also, see Sollerund (U.S. Patent No. 3,782,270, attachment No. 2 of the brief) at column 1, lines 58-63 and column 2, lines 16-21. See In re Hedges, 783 F.2d 1038, 1039-40, 228 USPQ 685, 686 (Fed. Cir. 1986).

fairly represented by the products depicted on the cover page of Kaiser.⁷

To be of probative value, any secondary evidence must be related to the claimed invention (i.e., a nexus is required). Thus, the weight attached to evidence of secondary considerations will depend upon its relevance to the issue of obviousness and the amount and nature of the evidence. To be given weight in the determination of obviousness or nonobviousness, evidence of secondary considerations must be relevant to the subject matter as claimed, and therefore we must determine whether there is a nexus between the merits of the claimed invention and the evidence of secondary considerations. See Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 305 n.42, 227 USPQ 657, 673-674 n. 42 (Fed. Cir. 1985). The term "nexus" designates a factually and legally sufficient connection between the objective evidence of nonobviousness and the claimed invention so that the evidence is of probative value in the determination of nonobviousness. See Demaco Corp. v. F. Von

⁷ Also, note the product sandwiches formed with the Krimpkut sealer and other Tartmaster devices not having a plunger, such as shown on pages 7, 8, 48 and at the top of the unnumbered page entitled "Cuts, Crimps & Seals in One Step."

Langsdorff Licensing Ltd., 851 F.2d 1387, 7 USPQ2d 1222 (Fed. Cir., 1988).

Here, appellants (brief, page 15 and reply brief) have not established a nexus between the invention of claim 39 and the evidence of commercial success (Oakland declarations, Purcell declaration). The commercial success evidence is directed to the sales of prepackaged (presumably frozen) crustless peanut butter and jelly sandwiches of a particular type. Appealed claim 39 is not limited to a peanut butter and jelly sandwich, let alone such sandwiches for which the sales data are provided.

Under the circumstances recounted above, it is our determination that the evidence of record for and against a conclusion of obviousness, reconsidered in light of the respective arguments and evidence advanced by appellants and the examiner, on balance, weighs most heavily in favor of an obviousness conclusion with respect to the rejection under consideration. Accordingly, we shall sustain the examiner's § 103(a) rejection of claim 39.

Rejection of Claims 40 and 41

Concerning this grouping of claims, we refer to our findings above concerning the teachings of Kaiser with regard to the outer bread portions of the crustless bread sandwich and the sealing

edge thereof, as well as our rebuttal of appellants' arguments and evidence concerning such structure. We note that appellants (brief, page 19) maintain that "a jelly layer, 'encapsulated by peanut butter' of the peanut butters layers" is a limitation required by claims 40 and 41, which is not taught by the combined teachings of Kaiser and Shideler. Respecting the filling, independent claim 40⁸ requires:

a first layer of peanut butter between said bread portions in an area within, but smaller than said first and second outer margins, a layer of jelly generally centered on said first layer of peanut butter leaving an exposed surface of said first peanut butter layer surrounding said jelly layer, a second layer of peanut butter and sealed to said first peanut butter layer at said exposed surface whereby said jelly is encapsulated by peanut butter of said layers

Kaiser (page 11) teaches that the sandwich filling can be selected from a relatively small list of ingredients that includes peanut butter and jelly or jam as separately listed ingredients. Kaiser teaches that a combination of the listed ingredients may be used (Of course, one of ordinary skill in the

⁸ We consider claim 40 to be a representative claim for this grouping of claims. Concerning appellants' reference to the features of claim 41 at page 28 of the brief, we do not consider that reference to limitations recited in claim 41 as a separate argument for the patentability of that dependent claim. See 37 CFR § 1.192(c)(7)(2000); and In re McDaniel, 293 F.3d 1379, 1383, 63 USPQ2d 1462, 1465 (Fed. Cir. 2002).

art would have especially recognized the well-known combination of peanut butter and jelly as asserted by the examiner, as an option for the filling). Kaiser (page 11) also teaches that "[w]hen using a moist filling, spread the bread with butter, margarine or mayonnaise to prevent the bread from getting soggy." Correspondingly, Shideler teaches that "if you put peanut butter on both slices of bread, the jelly in the middle won't make the bread soggy."

Based on the combined teachings of Kaiser and Shideler, the examiner (answer, page 5) has reasonably determined that it would have been obvious for one of ordinary skill in the art at the time of the invention to apply peanut butter on the bottom slice of bread in Kaiser as a filling ingredient, add jelly on top of that peanut butter and apply another layer of peanut butter next to the top slice of bread so as to prevent the bread from getting soggy. Since one disclosed purpose of the two peanut butter layers in making the sandwich is to protect the bread from contact with the jelly as taught by Shideler, the examiner has fairly determined that one of ordinary skill in the art at the time of the invention would have drawn the reasonable inference from the teachings of the applied references that the peanut butter should be applied in a manner so as to encapsulate the

jelly, that is, the jelly layer would be made smaller in area so that it does not contact the bread. We again observe that Kaiser (page 11) suggests that a 1/4 inch margin free of filling should be maintained "for a secure seal."

For reasons as set forth in the answer and above, we do not find appellants' arguments concerning a lack of motivation or suggestion for the examiner's proposed combination of references to be persuasive. Similarly, we do not agree with appellants' assessment of the teachings of Kaiser with respect to forming a sealed crustless sandwich for the reasons set forth above and in the answer.

Appellants have the burden of showing that any evidence of commercial success presented is a direct result of the unique characteristics of the claimed subject matter. See In re Huang, 100 F.3d 135, 140, 40 USPQ2d 1685, 1689 (Fed. Cir. 1996). While claims 40 and 41 are drawn to a peanut butter and jelly sandwich, appellants have not established such a nexus between the claimed invention and the evidence of commercial success of record (Oakland declarations, Purcell declaration). In this regard, we agree with the examiner's criticism of the commercial success evidence as set forth in the answer. Also, the effect on sales of the particular bread recipe employed and the amounts and

specific types of peanut butter and jelly used in the sandwiches sold has not been established on this record. Nor have appellants furnished any sales figures for competing products. As such, it is not clear from the submitted evidence if the sales are due to any potential merit of the present invention or if they are the result of other factors. Appellants have not carried their burden of establishing that nexus.

Concerning the litigation with respect to the patent issued from the grand parent application, we do not find that the mere existence or the filing of such a civil action represents persuasive evidence of copying as seemingly asserted by appellants (reply brief, page 2).

In view of the foregoing and for reasons as set forth in the answer, we are satisfied that when all the evidence and arguments before us are considered, the evidence of nonobviousness fails to outweigh the evidence of obviousness. Accordingly, we will sustain the examiner's separate rejection of claims 40 and 41.

CONCLUSION

The decision of the examiner to reject claim 39 under 35 U.S.C. § 103(a) as being unpatentable over Kaiser and to reject claims 40 and 41 under 35 U.S.C. § 103(a) as being unpatentable over Kaiser in view of Shideler is affirmed.

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

AFFIRMED

PETER F. KRATZ)	
Administrative Patent Judge)	
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)	
)	
)	BOARD OF PATENT
JEFFREY T. SMITH)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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