

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DOUGLAS S. MARTIN and JOEL WENNERSTROM

Appeal No. 2004-0117
Application 09/779,312

ON BRIEF

Before OWENS, DELMENDO and PAWLIKOWSKI, *Administrative Patent Judges*.

OWENS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal is from the final rejection of claims 1-12, which are all of the claims in the application.

THE INVENTION

The appellants claim a package comprising a container and closure combination. Claims 1 and 5 are illustrative:

1. A package comprising a container having a mouth, a sealing membrane on the mouth of the container, and a reclosable dispensing closure overlying the container mouth and the sealing membrane, the closure including a base with a central dispensing aperture and a movable lid for alternately opening or closing the aperture, the seal membrane being releasably secured to the container across the mouth, the base being receivable on the container around the mouth laterally outwardly of the mouth in a fully assembled position wherein surfaces of the base and the container are inter-engaged, the base being spaced from the seal member when the base is fully assembled on the container whereby, with the lid moved to open the container, the seal membrane can be removed from the container by operations conducted through the base aperture without risk that the seal membrane can be pinched between the closure and the container.

5. A package comprising a container and a closure, the container being an injection blow-molded thermoplastic body, the closure being an injection molded thermoplastic body, the container having a neck finish with concentric generally upstanding inner and outer walls, a seal membrane sealed to the inner wall, the closure having surfaces complimentary to and in sealing engagement with the outer container wall as a result of being assembled on said container with a push-on motion.

THE REFERENCES

Tupper	4,027,778	Jun. 7, 1977
Kubis et al. (Kubis)	4,834,259	May 30, 1989
DeCoster et al. (DeCoster)	D318,015	Jul. 9, 1991
Bowen	5,657,894	Aug. 19, 1997
Fritz	869,478	May 31, 1961
(United Kingdom patent specification)		
King	2,257,693	Jan. 20, 1993
(United Kingdom patent application)		

THE REJECTIONS

The claims stand rejected under 35 U.S.C. § 103 as follows: claims 1-4 over King in view of Bowen; claims 5 and 10 over Fritz or Tupper, in view of Kubis; claims 6-9 and 12 over Fritz or Tupper, in view of Kubis and DeCoster; and claim 11 over Fritz in view of Kubis and Tupper.¹

OPINION

We reverse the aforementioned rejections. We need to address only the independent claims, i.e., claims 1 and 5.²

Claim 1

King discloses a foil-sealed container/closure combination which is useful for a variety of purposes, particular examples being as a medicine bottle, a coffee jar and a drink container (page 1, lines 9-11). The container has a sealing web or foil (28) which is releasably secured across the mouth of the container (page 4, lines 25-27; page 6, lines 17-21). When the

¹ Rejections under 35 U.S.C. § 103 of claims 1-4 over Bowen in view of King and claims 5 and 10 over Evans in view of King in the final rejection (mailed August 27, 2002, paper no. 6, pages 2-4) are not maintained in the examiner's answer. We consider these rejections to be withdrawn by the examiner.

² The examiner does not rely upon DeCoster for any disclosure that remedies the deficiency in the applied references with respect to the independent claims.

closure (12) has been snapped or screwed over the mouth of the container, there is a space between the closure and the sealing web or foil which prevents the closure from applying stress to the sealing web or foil (page 3, lines 7-17 and 28-30; page 5, lines 11-18; figures 1 and 2). King's closure provides complementary tapered container and closure surfaces (18,20) which form an interference fit and seal the closure to the neck of the container at a region clear of both the closure's crown (120) and the container mouth's lip (30) to which the sealing web or foil is attached (abstract). King does not disclose a closure having a base with a central dispensing aperture and a movable lid for alternately opening or closing the aperture.

Bowen discloses a closure for a welding rod container which permits the container to be reclosed in an air and moisture tight manner, thereby preventing welding rods therein from being oxidized (col. 1, lines 8-10 and 44-46). The closure has a generally rectangular frame (20) with an opening (30) therein, a latchable lid (14) which is hingedly connected to the frame, and flanges (20) extending downwardly from the frame outer edges for secure attachment to the container (col. 1, lines 44-63). The frame includes a platform (28) extending around its inner

periphery far enough from the frame inner side to prevent potentially injurious contact of a person's hand with the open edge of the container (col. 2, lines 35-38; figure 1).

The examiner argues that "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the lid [of] King with a hinged portion over an apertured base portion as taught by Bowen. Doing so allows for dispensing of the container contents without complete removal of the closure from the container and resealing of the same" (answer, page 3).

For a *prima facie* case of obviousness of the appellants' claimed invention to be established, the prior art must be such that it would have provided one of ordinary skill in the art with both a suggestion to carry out the appellants' claimed invention and a reasonable expectation of success in doing so. See *In re Dow Chemical Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988). "Both the suggestion and the expectation of success must be founded in the prior art, not in the applicant's disclosure." *Id.* The mere possibility that the prior art could be modified such that the appellants' invention is carried out is not a sufficient basis for a *prima facie* case of obviousness. See *In re Brouwer*, 77 F.3d 422, 425, 37 USPQ2d 1663, 1666 (Fed.

Appeal No. 2004-0117
Application 09/779,312

Cir. 1996); *In re Ochiai*, 71 F.3d 1565, 1570, 37 USPQ2d 1127, 1131 (Fed. Cir. 1995).

Although, as argued by the examiner, Bowen's closure, unlike that of King, permits the contents of the container to be removed without completely removing the lid, the examiner has not taken into account the disclosed benefits of the particular characteristics of King's closure and explained why one of ordinary skill in the art would have been motivated by King and Bowen to forgo these benefits or to modify Bowen's closure such that these benefits are obtained. That is, the examiner has not explained why the mere fact that the lid of Bowen's welding rod container can be opened without the entire closure being removed would have led one of ordinary skill in the art to use Bowen's closure on King's foil-sealed container, the exemplified uses of which are for containing medicine, coffee and drinks, or to modify Bowen's closure such that it provides the benefits desired by King.

With respect to the reasonable expectation of success in combining King and Bowen, the examiner argues that "[t]he top portion of the base portion [of Bowen] would be spaced from the seal member as the base of the King closure is already spaced from the seal member as seen in figure 2" (answer, page 6).

Bowen's closure, however, has a platform (28) between the opening and the inner flange wall (figure 1). The examiner has not established either that if Bowen's closure were used with King's container, Bowen's platform would be spaced apart from the sealing foil or web as desired by King, or that King and Bowen would have led one of ordinary skill in the art to modify Bowen's closure such that it provides such spacing.

For the above reasons we conclude that the examiner has not carried the burden of establishing a *prima facie* case of obviousness of the package claimed in the appellants' claim 1. We therefore reverse the rejection of this claim and the claims that depend therefrom.

Claim 5

Rejection over Fritz in view of Kubis

Fritz discloses a shoe polish container and closure, wherein the container is made of a polymeric substance that is inert to weak acids that might be contained in shoe polish and the lid is made of metal (page 1, lines 24-26 and 61-67). The container has a neck finish with concentric generally upstanding inner and outer walls (walls on the sides of groove b in the figure). The closure has surfaces complementary to and in sealing engagement with the outer container wall as a result of being assembled on

the container with a push-on motion (page 1, lines 79-83). A metal lid is used in combination with a polymeric container to provide air tightness of the container even if there is shrinking or expansion of the polymeric substance (page 1, lines 14-31). Fritz does not disclose that the polymeric substance can be thermoplastic and injection molded or that the lid can be an injection molded thermoplastic body, and does not disclose a seal membrane sealed to the inner wall of the container.

Kubis discloses a container for a product such as food, having a removable plastic lid which is secured, preferably by heat bonding, to a flange around the opening of the container, and which can be torn off using a pull tab (col. 1, lines 52-59; col. 2, lines 30-35).

The examiner argues that "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to apply Kubis's teaching of a seal membrane to the container of Fritz. Doing so would extend the shelf-life of the container contents prior to first use by preventing drying of the contents" (answer, page 4).

The examiner has not explained why, in view of Fritz's teaching that the closed container is airtight (page 1, lines 82-83), Fritz and Kubis would have motivated one of ordinary skill

in the art to place a seal membrane over the opening of Fritz' container to prevent drying of the contents. Also, the examiner has not established that one of ordinary skill in the art would have had a reasonable expectation of success in fastening Kubis' peelable lid to the rim of the opening of Fritz's container which has no flange, or that, even though Fritz's closed container is airtight, one of ordinary skill in the art would have been led by Fritz and Kubis to provide a flange on the opening of Fritz's container for attachment of a seal membrane. The examiner's argument that "[a] seal membrane can be attached to any upper surface of a container rim so long as an adhesive is applied to either of the seal membrane or the container rim" (answer, page 7) is not persuasive because it is unsupported by evidence.

The examiner argues that "one of ordinary skill in the art would provide a seal membrane as taught by Kubis to the container of Fritz to prevent the contents from contamination or partial removal by persons which are not the end user" (answer, page 7). The examiner, however, has not established that Fritz and Kubis would have led one of ordinary skill in the art to prevent contamination or partial removal of Fritz's shoe polish. The examiner argues that obviousness can be based upon knowledge generally available to one of ordinary skill in the art, see *id.*,

but the examiner has not established that a need to prevent contamination or partial removal of shoe polish was common knowledge generally available to one of ordinary skill in the art.

The examiner argues that "[b]low molding the container and injection molding the lid do not structurally limit the final product. Thus, the product-by-process does not patentably distinguish the claimed product from the product of the prior art" (answer, page 4). The examiner has the initial burden of establishing a *prima facie* case of unpatentability by providing evidence or reasoning which indicates that the appellants' injection blow molded thermoplastic container and Fritz's polymeric container are identical or substantially identical, see *In re Thorpe*, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985); *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977), or that one of ordinary skill in the art would have been led by the references to form Fritz's container such that it is the same or substantially the same as an injection blow molded thermoplastic container. The examiner has not carried this burden. Moreover, the examiner has not explained why the applied references would have fairly suggested, to one of ordinary skill in the art, replacing Fritz's metal lid with the injection molded

thermoplastic lid required by the appellants' claim 5.

For the above reasons we reverse the rejections of claims 5 and 10 over Fritz in view of Kubis, claims 6-9 and 12 over Fritz in view of Kubis and DeCoster, and claim 11 over Fritz in view of Kubis and Tupper.

Rejection over Tupper in view of Kubis

Tupper discloses a container for materials, particularly food and drink, that need to be sealed from the atmosphere (col. 1, lines 4-6). The container has, around its rim, a moat such that the container rim and the outer edge of the moat provide a double seal (col. 2, lines 45-52; figures).³ Tupper discloses that such containers and their push-on lids are made of synthetic plastic materials (col. 1, lines 7-11).

The examiner argues that "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to apply Kubis's teaching of a seal membrane to the inner wall of the container of Tupper. Doing so would ensure the integrity of the container contents upon first use" (answer, page 5). The examiner also argues that "one of ordinary skill in the art would provide a seal membrane to a container rim to

³ This moat corresponds to the appellants' neck finish with concentric generally upstanding inner and outer walls.

prevent the contents from contamination or partial removal by persons which are not the end user. This is a well established motivation in the art, particularly to ensure the safety and integrity of products to be ingested by humans" (answer, page 8).

The examiner has not established that the food storage containers disclosed by Tupper have therein, when they are sold, contents to be protected before first use. Regardless, the examiner has not established that Tupper's rim is capable of having Kubis' peelable lid attached to it, or that Tupper and Kubis would have fairly suggested, to one of ordinary skill in the art, modifying Tupper's container such that it has Kubis' flange or another structure which would permit attachment of Kubis' peelable lid.

The examiner, therefore, has not carried the burden of establishing a *prima facie* case of obviousness over the combined teachings of Tupper and Kubis of the package claimed in the appellants' claim 5. Accordingly, we reverse the rejections of claims 5 and 10 over Tupper in view of Kubis, and claims 6-9 and 12 over Tupper in view of Kubis and DeCoster.

DECISION

The rejections under 35 U.S.C. § 103 of claims 1-4 over King in view of Bowen, claims 5 and 10 over Fritz or Tupper, in view

Appeal No. 2004-0117
Application 09/779,312

of Kubis, claims 6-9 and 12 over Fritz or Tupper, in view of
Kubis and DeCoster, and claim 11 over Fritz in view of Kubis and
Tupper, are reversed.

REVERSED

TERRY J. OWENS)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
ROMULO H. DELMENDO)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
BEVERLY A. PAWLIKOWSKI)	
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Appeal No. 2004-0117
Application 09/779,312

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