

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. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT W. RATTE,
DOUGLAS P. FERRON, THOMAS P. DONOHOE
and
GEOFFREY S. RATTE

Appeal No. 2004-0825
Application 09/954,786

ON BRIEF

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

GARRIS, **Administrative Patent Judge**.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 20 and 21, which are all of the claims remaining in the application.

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The subject matter on appeal relates to an environmentally friendly fishing sinker made of bismuth in a non-alloyed condition or made of a eutectic alloy of 58% bismuth and 42% tin. Further details of this appealed subject matter are readily apparent from a review of the claims before us which read as follows:

20. An environmental friendly fishing sinker comprising:

a body of material, said body of material consisting of bismuth in a non-alloyed condition; and

a line support on said body of material for connecting a fishing line thereto.

21. An environmental friendly fishing sinker:

a body of material, said body of material consisting of eutectic alloy of bismuth and tin wherein the amount of bismuth is about 58% and the amount of tin is about 42%; and

a line support on said body of material for connecting a fishing line thereto.

The references set forth below are relied upon by the examiner in the § 102 and § 103 rejections advanced on this appeal:

Bond	3,745,302	July 10, 1973
Brown	5,946,849	Sept. 7, 1999

Pesticide & Toxic Chemical News, vol. 22, no. 19, Mar. 19, 1994
(hereinafter "Pesticide")

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Claims 20 and 21 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Brown.

Claim 20 stands rejected under 35 U.S.C. § 102(b) as being anticipated by the "Pesticide" reference.

Claim 21¹ stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Brown in view of Bond.

As indicated on page 4 of the brief, the appealed claims have been separately grouped and argued by the appellants. Accordingly, our disposition of this appeal has included the separate consideration of each claim and each argument made with respect thereto. See 37 CFR § 1.192(c)(7)(2002).

Rather than reiterate the respective positions advocated by the appellants and by the examiner concerning the above-noted rejections, we refer to the brief and reply brief as

¹ As appreciated by both the appellants (see page 14 of the Brief) and the examiner (see pages 4-5 of the Answer), the final rejection based on Brown in view of Bond erroneously referred to claim 20 rather than claim 21. The appellants have recognized this error and have presented in their brief and reply brief arguments against the rejection of claim 21 based on Brown in view of Bond. Under these circumstances, the examiner's aforementioned error is harmless since the appellants have not been prejudiced thereby.

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well as to the final Office action and answer for a complete exposition thereof.

OPINION

We will sustain each of these rejections for the reasons expressed by the examiner and for the reasons set forth below.

In assessing the § 102 rejections before us, we recognize that anticipation is a question of fact, that the record must contain substantial evidence to support anticipation findings and that, during examination proceedings, claims are to be given their broadest reasonable interpretation consistent with the specification. *In re Hyatt*, 211 F.3d 1367, 1372, 54 USPQ2d 1664, 1667 (Fed. Cir. 2000).

Our application of these principles to the § 102 rejection based on the Brown patent leads us to agree with the examiner's finding that the patent as a whole discloses lead-free fishing devices including sinkers made of 100% bismuth (i.e., bismuth in a non-alloyed condition) or bismuth alloyed with another non-toxic metal such as tin, antimony or zinc (e.g., see

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the paragraph bridging columns 1 and 2 as well as lines 8-22 in column 2).

Our finding that patentee's sinker can be made of 100% bismuth, meaning bismuth in a non-alloyed condition, is supported, for example, by Brown's teaching that his weight-providing element can be made of substantially pure bismuth (see lines 63-66 in column 1) and by the teaching that the bismuth-containing elements of his fishing devices "contain at least about . . . 95% by weight bismuth" (lines 5-7 in column 2; emphasis added). For these reasons, we are unpersuaded by the appellants' argument that Brown's disclosure is limited to the use of bismuth only in the form of an alloy. Further, this argument is contraindicated by patentee's disclosure that "[i]t has also been discovered that bismuth provides an excellent alloy component when combined with other non-toxic metals for forming non-toxic fishing devices" (sentence bridging columns 1-2; emphasis added). Plainly, this disclosure reflects that Brown's discovery of using a bismuth alloy for forming non-toxic fishing devices is additional to his discovery of using "substantially

pure bismuth" (lines 65-66 in column 1) for forming these devices.

For the reasons set forth above and for the reasons expressed by the examiner, we find that claim 20 is anticipated by Brown. Therefore, the examiner's § 102 rejection of claim 20 as being anticipated by Brown is hereby sustained.

As for claim 21, we share the examiner's finding that Brown discloses a fishing device such as a sinker made from an alloy of bismuth and tin wherein the alloy contains at least about 50% by weight or more bismuth or at least about 60% by weight or more bismuth (e.g., see the previously noted disclosures of the Brown patent as well as claims 1/8 and 1/9). Like the examiner, we consider patentee's teachings of these alloys to anticipatorily satisfy the claim 21 requirement of a eutectic alloy of bismuth and tin "wherein the amount of bismuth is about 58% and the amount of tin is about 42%." Additionally, we consider the appellants' use of the word "about" in the claim phrase "the amount of bismuth is about 58%" to so broaden the here claimed bismuth amount that it encompasses patentee's expressly disclosed bismuth amount of "about 60%" (see line 6 in column 2 and claim 1/9).

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Under these circumstances and for the reasons expressed by the examiner, the § 102 rejection of claim 21 as being anticipated by Brown also is hereby sustained.

Concerning the "Pesticide" reference, the last paragraph of this reference contains the following disclosure:

There are substitutes for lead and zinc sinkers that are not affected by the rule, and can be used instead, EPA said. These include sinkers made of tin, steel, antimony, bismuth, tungsten and a terpene resin putty.

In support of his nonanticipation position, the appellants argue that this disclosure does not indicate whether the sinkers are made from a combination of the listed materials or from each material in a non-alloyed condition. The appellants also argue that the disclosure constitutes "a laundry listing of possible materials that sinkers can be made from . . . [which] does not place applicant's independent claim 20 'in the possession of the public' as the cited reference 'will not suffice' as sufficient prior art to enable one skilled in the art to make applicant's independent claim 20" (Brief, page 12). Finally, it is the appellants' further argument that the

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reference under consideration contains no teaching of the line support feature of claim 20.

All of these arguments are tainted by a common deficiency. In particular, the appellants' arguments are based on a perspective which is impermissibly divorced from one having an ordinary level of skill in this art. **See *In re Graves***, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995), **cert. denied**, 517 U.S. 1124 (1996); ***In re Sasse***, 629 F.2d 675, 681, 207 USPQ 107, 111 (CCPA 1980); ***In re LeGrice***, 301 F.2d 929, 939, 133 USPQ 365, 373-74 (CCPA 1962).

For example, it would be ludicrous to believe that an artisan would interpret this reference as disclosing sinkers made of tin, steel, antimony, bismuth, tungsten and a turpene resin putty in combination with one another as the appellants implicitly urge. Similarly, there is absolutely no discernable merit in the appellants' contention that a person in this art is so devoid of skill that he would be unable to make sinkers from the materials including bismuth listed in the "Pesticide" reference. Indeed, all aspects of the record before us reflect the contrary. We here remind the appellants that it is skill,

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not stupidity, which is presumed in the art. ***In re Sovish***,
769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985).

In light of the foregoing, we agree with the examiner's anticipation finding and accordingly hereby sustain his § 102 rejection of claim 20 as being anticipated by the "Pesticide" reference.

The § 103 rejection of claim 21 as being unpatentable over Brown in view of Bond likewise is hereby sustained. To the extent that the appellants may consider Bond to be from a non-analogous art, we cannot agree. This is because the Bond reference is reasonably pertinent to the particular problem of bismuth:tin alloys with which the appellants were involved. ***See In re Wood***, 599 F.2d 1032, 1036, 202 USPQ 171, 174 (CCPA 1979). Moreover, it would have been obvious for the artisan to make the bismuth:tin alloy sinkers of Brown from the specific 58% bismuth:42% tin alloy disclosed by Bond (see lines 4-5 in column 4) in order to effectuate Brown's alloy sinker desideratum via a specific bismuth:tin alloy known in the prior art as evinced by Bond. Finally, we perceive no rational support for the appellants' argument that the examiner's proposed

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combination of Brown and Bond "would defeat the intended purpose of Brown, namely, to form non-toxic fishing devices having performance characteristics substantially the same as lead" (brief, page 16; emphasis deleted). On the other hand, the previously mentioned disclosures of Brown (e.g., again see patent claims 1/8 and 1/9) evince that the specific bismuth:tin alloy disclosed by Bond would be imminently suitable for the purposes envisioned by Brown.

In summary, the examiner has established a ***prima facie*** case of unpatentability with respect to each of the rejections advanced on this appeal which the appellants have failed to successfully rebut with argument and/or evidence of patentability. As a consequence, we have sustained each of the § 102 and § 103 rejections before us. ***See In re Oetiker***, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

The decision of the examiner is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 35 CFR § 1.136(a).

AFFIRMED

BRADLEY R. GARRIS)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
TERRY J. OWENS)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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BEVERLY A. PAWLIKOWSKI)	
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BRG:psb

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