

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAUL R. SCHWAEGERLE

Appeal No. 95-3630
Application No. 08/001,993¹

ON BRIEF

Before CAROFF, JOHN D. SMITH, and ELLIS, Administrative Patent Judges.

CAROFF, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 24-26. Appellant's brief states that "a supplemental amendment canceling claim 26 accompanies this brief".

¹ Application for patent filed January 8, 1993, which is according to appellant, a continuation of application 07/858,385, filed March 25, 1992, now U.S. Patent 5,194,209, issued March 16, 1993.

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Such an amendment cannot be found in the record. Nevertheless, the examiner's answer acknowledges appellant's intention to cancel claim 26. For purposes of this appeal we shall assume that claim 26 has been withdrawn from consideration.² Accordingly, the claims before us are claims 24-25.

The claims on appeal relate to an opacified pearlescent composition which is more specifically defined in representative claim 24 as follows:

24. An opacified pearlescent composition comprising:
- (a) at least one thermoplastic polymer matrix,
 - (b) an effective amount of at least one pearlescent pigment for providing pearlescent luster, and
 - (c) from 0.1 to 3 parts of titanium dioxide opacifying pigment wherein a 4 mil thickness of said composition has a percent reflectance ratio according to TAPPI method T 425 om-86 of from about 60% to about 90%.

The sole reference of record relied upon by the examiner is:

Brennan et al (Brennan)	3,326,739	Jun. 20, 1967
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Each of the appealed claims stand rejected for obviousness under 35 USC § 103 in view of Brennan. We shall not sustain this rejection.

² Appellant should formally submit an amendment canceling claim 26 upon resumption of prosecution before the examiner.

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We find absolutely no support for the examiner's assertion that calcium carbonate, as disclosed in Brennan, can be considered a "pearlescent pigment", one of the compositional components required by the instant claims. As noted by appellant, the instant specification (page 6, lines 19-26) defines what is meant by a pearlescent pigment, albeit giving just one specific example of a commercially available embodiment of such pigment identified only by trademark. Apparently, though, such pigments are well known in the art and have well-defined characteristics as explained in appellant's specification. Moreover, appellant's brief makes note of U.S. Patent No. 3,819,566 (Pinsky et al) which is of record and which provides additional confirmation of the fact that pearlescent pigments are indeed well known in the art and have specific identifiable characteristics, i.e. the sheen or luster of a pearl. There is no basis whatsoever in this record to support the examiner's assertion that the particulate calcium carbonate of Brennan would be considered pearlescent by persons of ordinary skill in the art. Since we are not aware of any scientific or evidentiary basis for the examiners assertion, the burden of persuasion does not shift to appellant. For the foregoing reasons, the decision of the examiner is reversed.

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One additional comment is in order. We note that the expression "0.1 to 3 parts of titanium dioxide" in claim 24 is somewhat vague in that it is not related to the amount of any other composition component as, for example, in claim 26 and in the specification (p. 7, line 27 - p. 8, line 3). We find it unnecessary to reject the claims under 35 USC 112, second paragraph, for indefiniteness by applying the provisions of 37 CFR 1.196(b) since we trust that the examiner and appellant will engage in a cooperative effort to obviate this problem.

REVERSED

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MARC L. CAROFF)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JOHN D. SMITH)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
JOAN ELLIS)	
Administrative Patent Judge)	

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