

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(2) is not binding precedent of the Board.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. 11

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROGER D. WILKINSON and
DEAN R. LINDSAY

Appeal No. 96-2715
Application 08/359,673¹

ON BRIEF

Before KRASS, JERRY SMITH, and BARRETT, Administrative Patent Judges.

JERRY SMITH, Administrative Patent Judge.

¹ Application for patent filed December 20, 1994.
According to appellants, the application is a continuation of
Application 07/943,949, filed September 11, 1992, now Patent
No. 5,383,558.

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DECISION ON APPEAL

This is a decision on the appeal under 35 U.S.C. § 134 from the examiner's rejection of claims 2, 3, 6-10, 24 and 25, which constitute all the claims remaining in the application. An amendment after final rejection was filed on July 18, 1995 and was entered by the examiner. This amendment resulted in the removal of a rejection under 35 U.S.C. § 112.

The disclosed invention pertains to a sealed container comprising a base, wide-mouth jar and a removable lid which seals the wide-mouth opening with the lid.

Representative claim 24 is reproduced as follows:

24. A sealed container which is easily opened and resealed comprising:

(a) a base, wide-mouth jar for containing a substance, said jar including:

(1) a bottom wall;

(2) a side enclosure extending upwardly from said bottom wall and including an upper portion disposed radially about a central axis with a screw thread about said upper portion; and

(3) a curved upper wall extending inwardly and upwardly from said upper portion of said side enclosure and radially about the central axis, said curved upper wall forming a truncated dome, and said upper wall including a

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circular brim which defines a wide-mouth opening for said jar;
and

(b) a removable lid for said jar which seals said wide-mouth opening, said lid including:

(1) a top wall disposed about a central axis;

(2) an encircling member extending downwardly from said top wall and radially about the central axis, said encircling member including a screw thread which matingly engages with the screw threads located at the upper portion of said side enclosure; and

(3) a circular flexible flange extending downwardly from said lid and radially about said central axis, said flexible flange having a tip which is radially flexed relative to a remainder of said flange upon engagement with said curved upper wall of said base jar to seal therewith as the screw threads on the upper portion of the side enclosure of the base jar matingly engage with the screw threads on the encircling member of the removable lid.

The examiner relies on the following references:

Novitch	3,811,591	May 21, 1974
Abe et al. (Abe)	4,907,709	Mar. 13, 1990
Bourdier et al. (Bourdier) (French Patent Publication)	2,431,432	Feb. 15, 1980

Claims 2, 3, 6-10, 24 and 25 stand rejected under 35 U.S.C. § 103. As evidence of obviousness the examiner offers Abe in view of Bourdier with respect to claims 2, 3, 6-9, 24 and 25, and adds Novitch with respect to claim 10. The final

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rejection also contained a rejection of all the claims on the ground of obviousness-type double patenting. This rejection was not repeated in the answer because appellants indicated a willingness to file a terminal disclaimer rather than contest this rejection. Rather than repeat the arguments of appellants or the examiner, we make reference to the brief and the answer for the respective details thereof.

OPINION

We have carefully considered the subject matter on appeal, the rejections advanced by the examiner and the evidence of obviousness relied upon by the examiner as support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, the appellant's arguments set forth in the briefs along with the examiner's rationale in support of the rejections and arguments in rebuttal set forth in the examiner's answer.

It is our view, after consideration of the record before us, that the evidence relied upon and the level of skill in the particular art would not have suggested to one of ordinary skill in the art the obviousness of the invention as

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set forth in claims 2, 3, 6-10, 24 and 25. Accordingly, we reverse.

Appellants have indicated that for purposes of this appeal the claims will stand or fall together in the following two groups: Group I has claims 24, 25, 2, 3 and 8-10², and Group II has claims 6 and 7 [brief, page 3]. Consistent with this indication appellants have made no separate arguments with respect to any of the claims within each group. Accordingly, all the claims within each group will stand or fall together. Note In re King, 801 F.2d 1324, 1325, 231 USPQ 136, 137 (Fed. Cir. 1986); In re Sernaker, 702 F.2d 989, 991, 217 USPQ 1, 3 (Fed. Cir. 1983). Accordingly, we will only consider the rejection against claims 24 and 6 as representative of all the claims on appeal.

We consider first the rejection of independent claim 24 as unpatentable over the teachings of Abe and Bourdier. In

² Although the rejection of claim 10 relies on an additional reference than the other claims, appellants make no arguments with respect to the separate rejection of claim 10. Therefore, our discussion of claim 24 will dispose of claim 10 as well.

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rejecting claims under 35 U.S.C. § 103, it is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. See In re Fine, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and to provide a reason why one having ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. Such reason must stem from some teaching, suggestion or implication in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. Uniroyal Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988); Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 293, 227 USPQ 657, 664 (Fed. Cir. 1985), cert. denied, 475 U.S. 1017 (1986); ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). These showings by the examiner are an essential part of complying with the

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burden of presenting a prima facie case of obviousness. Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

The examiner's rejection of claim 24 indicates that Abe essentially teaches all the features recited in claim 24 except for the ratio of the container mouth width to the width of the container wall upper portion. The examiner cites Bourdier as teaching this relationship, and the examiner concludes that it would have been obvious to the artisan to provide the container of Abe with the large-mouth opening of Bourdier [answer, pages 3-4].

Appellants argue that the upper wall of Abe is not curved, does not extend inwardly and upwardly from the upper portion, and does not form a truncated dome as recited in independent claim 24 [brief, page 3]. Appellants also argue that Bourdier does not provide these missing teachings, and that there would be no motivation to combine the Abe bottle teachings with the Bourdier wide-mouth teachings [Id. at pages 3-4].

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We agree with all of appellants' arguments. The enlarged view of upper wall 12 in Abe's Figure 2B shows that the upper wall does not extend inwardly as claimed, but instead, the upper wall remains at the same diameter about the central axis through its entire length. Thus, upper wall 12 does not form a truncated dome as claimed but is nothing more than a truncated cylinder. Appellants are also correct that flange 10b of Abe does not flex as recited in claim 24 because the diameter of upper portion 12 is constant. Finally, appellants are correct that there is absolutely no motivation to apply the Bourdier wide-mouth teachings to the narrow-mouth bottle of Abe. The Abe seal is specifically designed for a narrow-mouth container as shown therein.

Thus, the examiner has erroneously identified recitations of independent claim 24 as being present in Abe when they are not taught therein. Since the examiner has not addressed the obviousness of these differences between Abe and the claimed invention, the examiner has failed to establish a prima facie case of obviousness. Accordingly, we do not sustain the rejection of claims 24, 25, 2, 3 and 8-10. Since

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claims 6 and 7 depend from claim 24, we also do not sustain the rejection of these claims.

In summary, we have not sustained the examiner's rejection of the claims under 35 U.S.C. § 103. Accordingly, the decision of the examiner rejecting claims 2, 3, 6-10, 24 and 25 is reversed.

REVERSED

ERROL A. KRASS)
Administrative Patent Judge)
JERRY SMITH) BOARD OF PATENT
Administrative Patent Judge) APPEALS AND

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