

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LEE V. GORMAN

Appeal No. 1997-1073
Application No. 08/218,540¹

HEARD: November 15, 1999

Before THOMAS, DIXON, and GROSS, Administrative Patent Judges.
GROSS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 16, which are all of the claims pending in this application. In an Advisory Action mailed October 24, 1995, the examiner withdrew the rejection of

¹ Application for patent filed March 28, 1994.

Appeal No. 1997-1073
Application No. 08/218,540

claims 7, 8, 15, and 16 and objected to them as being dependent from rejected base claims. In a second Advisory Action mailed August

30, 1996, the examiner entered appellant's amendment to claims 7, 8, 15, and 16, filed July 29, 1996, and indicated that claims 7, 8, 15, and 16 are now allowable. Accordingly, claims 1 through 6 and 9 through 14 remain before us on appeal.

The appellant's invention relates to a system for obtaining a sample of a fluid that accurately represents the various strata of the fluid in a container. Claim 1 is illustrative of the claimed invention, and it reads as follows:

1. A system for obtaining an accurate sample of a fluid, comprising:

a container having a longitudinal axis for accommodating the fluid to be analyzed;

a hollow vessel of predetermined varying internal fluid receiving volume dimensions from one end of said vessel to an opposing end of said vessel disposed within said container; and

Appeal No. 1997-1073
Application No. 08/218,540

We have carefully considered the claims, the applied prior art reference, and the respective positions articulated by the appellant and the examiner. As a consequence of our review, we will reverse both the anticipation rejection of claims 1 through 4 and 9 through 12 and also the obviousness rejection of claims 5, 6, 13, and 14.

The examiner rejects claims 1 through 4 and 9 through 12 under 35 U.S.C. § 102 as being anticipated by Banu. "It is axiomatic that anticipation of a claim under §102 can be found only if the prior art reference discloses every element of the claim." In re King, 801 F.2d 1324, 1326, 231 USPQ 136, 138 (Fed. Cir. 1986); Lindemann Maschinenfabrik v. American Hoist and Derrick, 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984).

Banu relates to a system for obtaining a sample of a fluid. Banu can be interpreted as including a container with a hollow vessel therein. However, claim 1 requires a "means to permit and stop fluid flow from said container into said vessel in at least three positions substantially along the longitudinal axis" (emphasis added). Clearly the openings at the upper and lower ends of the Banu device could satisfy such means for two

Appeal No. 1997-1073
Application No. 08/218,540

positions. Therefore, the question for anticipation is whether or not Banu discloses a third position through which fluid flows from the container into said vessel.

The examiner relies on valve 3 in Banu for the third position. Turning to the reference, we find that all discussion in Banu about receiving water into the container refers only to the two ends of the container. For example, Banu discloses in column 2, lines 13-17, "two end portions with openings for receiving a water sample, two end plugs for closing the openings, and means for closing the end plugs by remote action so as to entrap a water sample in the substantially rigid body." On the other hand, Banu discloses in column 2, lines 37-39, "valve means disposed in the lower collar means for selectively purging water sample from the sealed container." The same language is recited in claim 4 of Banu. Also, Banu, in column 4, lines 4-5, refers

to valve 3 as being a "sample dispensing valve". In other words, the valve in Banu's device is for removing the fluid from the vessel and the container, not for permitting fluid to

Appeal No. 1997-1073
Application No. 08/218,540

flow into the vessel. Accordingly, as Banu does not include the third position through which fluid flows from the container into said vessel, Banu cannot anticipate claim 1 or the claims which depend therefrom, claims 2 through 4.

Claim 9 parallels the language of claim 1 with a step of "starting and stopping fluid flow from said container into said vessel in at least three positions substantially along the longitudinal axis." (emphasis added). As Banu only permits fluid to flow into the vessel at the top and bottom, as discussed above, Banu does not meet the requirement of the three positions of claim 9. Accordingly, claim 9 and its dependents, claims 10 through 12, are not anticipated by Banu.

As to the obviousness rejection of claims 5, 6, 13, and 14, Banu does not meet all of the limitations of the independent claims, and the examiner provides no motivation for modifying Banu to remedy the deficiencies. Thus, Banu does not render obvious dependent claims 5, 6, 13, and 14. Therefore, we will reverse the obviousness rejection.

Appeal No. 1997-1073
Application No. 08/218,540

CONCLUSION

The decision of the examiner rejecting claims 1 through 4 and 9 through 12 under 35 U.S.C. § 102 and claims 5, 6, 13, and 14 under 35 U.S.C. § 103 is reversed.

REVERSED

JAMES D. THOMAS)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JOSEPH L. DIXON)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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Appeal No. 1997-1073
Application No. 08/218,540

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