

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 27

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOSEPH CASTRO and SEYMOUR NAPS

Appeal No. 97-1640
Application 08/326,059¹

ON BRIEF

Before CALVERT, FRANKFORT and McQUADE, Administrative Patent Judges.

CALVERT, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 11 to 15, all the claims remaining in the application.

The subject matter involved concerns a heat-shrinkable packaging sleeve, and an

¹ Application for patent filed October 19, 1994. According to the appellants, the application is a continuation of Application 07/903,912, filed June 25, 1992, abandoned.

article with such a sleeve shrunken thereover. The appealed claims are reproduced in the appendix to appellants' brief.

The references applied in the final rejection are:

Sowle	3,259,235	Jul. 5, 1966
Gottily et al. (Gottily)	3,260,358	Jul. 12, 1966
Fujio	3,679,048	Jul. 25, 1972

The claims on appeal stand finally rejected under 35 U.S.C. § 103 as being unpatentable over the following combinations of references:

- (1) Claims 11 and 15, Sowle in view of Gottily;
- (2) Claims 12 to 14, Sowle in view of Gottily and Fujio.

We have fully considered the record² in light of the arguments presented in appellants' brief and the examiner's answer. Our decisions as to each of the two rejections are set forth below under separate headings.

Rejection (1)

In making this rejection, the examiner relied on Gottily as teaching "that it is known to provide an opening at the top of a heat-shrinkable packaging sleeve," and concluded

² In reviewing the application, we note that there appears to be a discrepancy between Fig. 8 and its description. On page 7, lines 21 to 24 of the specification, it is stated that zones 50 are reinforced by folded strip 70 "having an upper layer 71 [and] a lower layer 72 folded about score line 73," but in Fig. 8 score line 73 is shown as being on edge 14 of the walls 11, 12, and layers 71, 72 are separate pieces, rather than parts of a single folded piece.

that in view of this teaching it would have been obvious to provide the top 24 of the Sowle bag 20 with such an opening (final rejection (Paper No. 18)), pages 2 to 3. Appellants argue that the combination of Sowle and Gottily would not result in the claimed structure because “The cited primary references [sic] are both closed at one end (i.e.,] they are envelopes not sleeves)” (brief, page 4, original emphasis). However, this argument would appear to be moot because appellants and the examiner have evidently both overlooked the fact that at col. 3, lines 4 to 6, Sowle specifically discloses that, instead of bag 20, the heat-shrinkable cover 10 “may be in the form of a sleeve.” Thus it was unnecessary for the examiner to rely on Gottily for the teaching of providing an opening.

Appellants, noting that Sowle’s lines of perforations 40, 42 are located centrally, halfway between the side edges of cover 10, contend that such perforations are not “proximate.....to one of said side edges.” as called for by claims 11 and 15, but instead are “as far from proximate to the side edges as is physically possible” (brief, page 5). The examiner responds that (answer, page 5):

the lines of weakness in Sowle are near one of the side edges to the same degree as appellant [sic] sets forth the structure of “proximate” in the claims.

It is not clear what the examiner means by this statement. It is well settled that, during patent examination, claims will be interpreted as broadly as their terms reasonably allow.

In re Zletz, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989); In re Prater, 415

F.2d 1393, 1404-1405, 162 USPQ 541, 550 (CCPA 1964). Also, words in a claim will be given their ordinary and accustomed meaning, unless it appears that the inventor used them differently. Envirotech Corp. v. Al George, Inc., 730 F.2d 753, 759, 221 USPQ 473, 477 (Fed. Cir. 1984). In the present case, “proximate” should be given its ordinary meaning of “close; very near,”³ since it does not appear that appellants used it differently, but even so, we do not consider it a reasonable interpretation to designate a line which is equidistant from two edges as being “proximate” to one of the edges, as the examiner has done.

In the final rejection (but not in the answer), the examiner also takes the position that if the lines 40, 42 of Sowle are not considered to be “proximate” to a side edge, then:

it would have been obvious to a person having ordinary skill in the art to move the lines of weakness 40, 42 in Sowle adjacent one of the reinforcing-levering bands. There would be no invention in shifting the lines of weakness disclosed by Sowle to a location adjacent one of the reinforcing-levering bands since operation of the sleeve would not thereby be modified.

We do not agree with the examiner that it would have been obvious from Sowle alone to move the juxtaposed perforation (tear) lines 40, 42 of Sowle to a position proximate one of the sides of cover 10, as claimed. However, we do consider that such a modification of Sowle would have been obvious in view of Gottily.

³ The Random House College Dictionary (1973).

Gottily discloses a shrink-wrap cover 3 for a bobbin 2. The cover is similar to that of Sowle in that, as shown in the drawings, oppositely arranged lines of perforations 9 extend along each side of the cover 3. In addition, however, Gottily discloses at col. 3, lines 27 to 31, that:

It will be understood that the envelope 3 construction may be modified by placing the lines of perforations in parallel close relation rather than in opposed relation if it is desirable to remove the envelope 3 from the bobbin in other than half sections.

In view of this teaching, we consider that it would have been obvious, if it were desirable to remove Sowle's cover 10 in "other than half sections," for one of ordinary skill to modify the Sowle cover by locating the lines of perforations 40, 42 "in parallel close relation." In order to preserve the function of Sowle's pull tabs 32, 34, and since Sowle's tear lines 40, 42 are juxtaposed, the parallel perforation lines would obviously be located with one of the pull tabs between them, i.e., located on opposite sides 36, 38 of the cover directly opposite each other and proximate to one of the edges of the cover.

To the extent appellants may be arguing that Sowle's bands (tabs 32, 34) are not formed by welding the first and second walls of cover 10 together, such welding (fusion) is disclosed by Sowle at col. 2, lines 60 to 67.

Accordingly, the rejection of claim 11 will be sustained.

Claim 15 adds to claim 11 limitations to the effect that the reinforcing-levering band

is “in the form of an arcuate rib” and “generally arcuate in cross-section.”⁴ The examiner asserts (answer, page 5):

appellants still fail to show that an arcuate reinforcing-levering band [is] not anything more than one of numerous configurations that a person having ordinary skill in the art would find obvious for the purpose of providing a grippable band in the Sowle packaging sleeve.

We do not find the term “arcuate” in appellants’ specification, but assume that it refers to the curled “rib-like structure 9” (page 5, line 11) which the tear strip is said to assume when the sleeve is heat shrunk onto an article (Figs. 10 and 11). With regard to the examiner’s statement, supra, we note that it is not the appellants’ burden to show that something is unobvious, but rather the examiner’s burden to present a prima facie case of unpatentability. In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). We find no teaching, motivation or suggestion in Sowle or Gottily to make the Sowle tabs 32, 34 of arcuate cross-section. Nor does it appear that ears 32, 34 would inherently curl into an arcuate cross-section when cover 10 is heat shrunk onto an object, as appellants’ strip 9 is disclosed as doing, because the Sowle ears are prevented from shrinking by a shrink resistant coating 30.

We will therefore not sustain the rejection of claim 15.

⁴ We note that in part (a) of claim 15, “second wall” apparently should be --second wall portions--, and have so construed the claim. This error should be corrected in any future prosecution.

Rejection (2)

In this rejection, the examiner adds to the combination of Sowle and Gottily the Fujio reference, as teaching the provision of “three or more layers of thickness” (col. 2, lines 9 to 15) on a reinforcing-levering band. The examiner concludes that (final rejection, page 4):

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the reinforcing-levering bands of Sowle with the thickening layers of Fujio, in order to add strength to the reinforcing-levering bands, and thus, to the tear strips.

We agree. The fact that Fujio may teach that no lines of perforations are to be used, as appellants argue on pages 4 to 5 of their brief, does not vitiate the force of its teaching of making the tear tabs 3 in three or more layers for “added strength” (col. 2, line 9). Such teaching would obviously be equally applicable to all tear tabs, including tabs 32, 34 of Sowle, regardless of whether or not they are used in conjunction with perforations.

Rejection (2) will be sustained.

Conclusion

The examiner’s decision to reject claims 11 to 15 is affirmed as to claims 11 to 14, and reversed as to claim 15.

No time period for taking any subsequent action connection with this appeal may be extended under 37 CFR § 1.136(a).

Appeal No. 97-1640
Application 08/326,059

AFFIRMED-IN-PART

IAN A. CALVERT)
Administrative Patent Judge)
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)
) BOARD OF PATENT
CHARLES E. FRANKFORT)
Administrative Patent Judge) APPEALS AND
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