

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WILLIAM S. CREDLE JR.

Appeal No. 98-3079
Application No. 29/052,635¹

HEARD: December 9, 1998

Before McCANDLISH, *Senior Administrative Judge* MEISTER and
ABRAMS, *Administrative Patent Judge*.

ABRAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ Application for patent filed April 4, 1996. According to appellant, this application is a division of Application 29/027,425 filed August 24, 1994, now U.S. Design Patent No. Des. 371,281 issued July 2, 1996.

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This is an appeal from the final rejection of the following design claim:

The ornamental design for a building block drink container as shown and described.

The several embodiments of this design have been depicted in some forty views, with Figures 57 through 63 being the most representative when evaluating the examiner's rejection.

THE REFERENCES

The references applied by the examiner are:

Loofbourrow et al. (Loofbourrow) 1987	4,656,840	Apr. 14,
McLaughlin et al. (McLaughlin) 1989	D-301,260	May 23,
Zutler 1993	D-333,978	Mar. 16,

THE REJECTION

The design claim stands rejected under 35 U.S.C. § 103 as being unpatentable over Zutler in view of Loofbourrow and McLaughlin.

The rejection is explained in Paper No. 8, the final rejection.

The opposing viewpoints of the appellant are set forth in the Brief.

OPINION

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The appellant's design is for a drink container of rectangular shape with round protrusions on the front side and round recesses on the rear side so that a plurality of containers can be linked together in the nature of toy building blocks. A wide mouth circular or oval opening is provided on the top of the container, and a flange or ring surrounds this opening. The round protrusions and recesses are evenly spaced relative to one another, and are as a group spaced slightly less from the top of the sides of the container than from the bottom.

It is the examiner's position that

to modify the Zutler reference by providing rear recesses as taught by the reference to Loofbourrow and to further substitute [for] the square shape of Zutler for [sic] the rectangular shape of McLaughlin would have been obvious to a designer of ordinary skill in the art and would meet the appearance of the claimed design (Answer, page 2).

As for the other differences pointed out by the appellant in the Brief, the examiner replies that

[t]he differences cited by Appellant, mainly the spacing between the protrusions, square protrusions rather than circular and the size of the top opening are minor when considering the overall appearance (Answer, page 3).

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We begin our analysis by pointing out that the standard for evaluating the patentability of a design is whether it would have been obvious to a designer of ordinary skill in the articles involved. See *In re Nalbandian*, 661 F.2d 1214, 1216, 211 USPQ 782, 784 (CCPA 1981). In rejecting a claim to an ornamental design under 35 USC § 103, the examiner must supply a basic design reference that bears a substantially identical visual appearance to the claimed design. *In re Harvey*, 12 F.3d 1061, 1063, 29 USPQ2d 1206, 1208 (Fed Cir. 1993). That is, there must be a reference, a something in existence, the design characteristics of which are basically the same as the claimed design; once a reference meets this test, reference features may reasonable be interchanged with or added from those in other pertinent references. *In re Rosen*, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982).

On page 3 of the Brief, the appellant has listed six differences between the claimed design and that of Zutler, the primary reference. From our perspective, at the very least, two of these rise to the level of providing such a difference between the claimed design and that of Zutler, even as

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modified by the two secondary references, as to cause us not to sustain the examiner's rejection. These are the very large size of the opening in the top of the container as compared to the planform of its top, as is best shown in Figure 58, and the presence of a rim about this opening, as is best illustrated in Figures 60-63.

The opening in the top is very prominent when the claimed container is viewed from the top, in that its size is almost equal to the width of the top and encompasses a substantial portion of its length. We therefore cannot agree with the examiner that this feature is "minor when considering the overall appearance [of the claimed design]" (Answer, page 3). Such a size relationship between opening and top is not present in Zutler (see Figure 4) or, to an even greater extent, not present in Loofbourrow (see Figure 1), and there is no circular opening at all in the top of the container disclosed in McLaughlin. A rim about the opening is not shown in any of the references.

Therefore, even considering, *arguendo*, Zutler to be a *Rosen* reference, we will not sustain this rejection on the

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grounds that the evidence of obviousness adduced by the examiner would not have rendered the two features discussed above obvious to the designer of ordinary skill in the articles involved.

The rejection is not sustained.

The decision of the examiner is reversed.

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REVERSED

HARRISON E. McCANDLISH)	
Senior Administrative Patent Judge)	
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)	
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)	BOARD OF PATENT
JAMES M. MEISTER)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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APJ CALVERT

APJ McCANDLISH

REVERSED

(HEARD)

Prepared: September 24, 1999

3 Members Conference

Yes No