

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STEPHEN B. SCHREIBER

Appeal No. 2001-0483
Application No. 08/996,842¹

ON BRIEF

Before ABRAMS, McQUADE, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1, 2, 12 to 15 and 21 to 24.² Claims 3 to 11 and 16 to 20 have been allowed. No claim has been canceled.

¹ According to the appellant, the application is a continuation-in-part of Application No. 08/187,111, which application was the subject of Board of Patent Appeals and Interferences decisions dated May 29, 1996 and September 27, 1996 and a Court of Appeals for the Federal Circuit decision dated October 23, 1997.

² Claims 14 to 20 were amended subsequent to the final rejection.

Appeal No. 2001-0483
Application No. 08/996,842

We REVERSE.

BACKGROUND

The appellant's invention relates to a dispenser for consuming popped-popcorn in movie houses, entertainment arenas, amusement parks and the like (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Hoffmann 1963	3,072,277	Jan. 8,
Fisher 1970	3,537,623	Nov. 3,
Harz 1934	172,689 ³	Oct. 31,

(Switzerland)

Claims 1, 14 and 21 to 24 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Harz.

³ In determining the teachings of Harz, we will rely on the translation of record provided by the USPTO.

Claims 12 and 13 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Hoffmann.

Claims 2 and 15 stand rejected under 35 U.S.C. § 103 as being unpatentable over Harz in view of Fisher.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections⁴, we make reference to the answer (Paper No. 16, mailed June 2, 2000) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 15, filed March 14, 2000) and reply brief (Paper No. 17, filed August 7, 2000) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and

⁴ Since the other grounds of rejection set forth in the final rejection (Paper No. 7, mailed October 7, 1999) were not set forth in the examiner's answer we assume that these other grounds of rejection have been withdrawn by the examiner. See Ex parte Emm, 118 USPQ 180, 181 (Bd. App. 1957).

claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

The anticipation rejections

To support a rejection of a claim under 35 U.S.C. § 102(b), it must be shown that each element of the claim is found, either expressly described or under principles of inherency, in a single prior art reference. See Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984).

Claims 1, 14 and 21 to 24

We will not sustain the rejection of claims 1, 14 and 21 to 24 under 35 U.S.C. § 102(b) as being anticipated by Harz.

Claims 1 and 14 are drawn to a dispensing top for passing only several kernels of a popped popcorn at a time from an open-ended container filled with popped popcorn. The dispensing top has a generally conical shape with the opening

at the reduced end being of a diameter greater than one inch thereby allowing several kernels of popped popcorn to pass through at the same time.

Claims 21 to 24 are drawn to a dispensing top for passing only several kernels of a popped popcorn at a time from an open-ended container filled with popped popcorn. The dispensing top has a generally conical shape with the opening at the reduced end being about one and one-half inches in diameter thereby allowing several kernels of popped popcorn to pass through at the same time.

The examiner determined that claims 1, 14 and 21 to 24 were anticipated by the cap 6 shown in Figure 5 of Harz (answer, p. 3). We do not agree. Harz does not specifically state the diameter of the opening at the reduced end of the cap 6 shown in Figure 5. In the decision of September 27, 1996 in the parent application, that panel of the Board of Patent Appeals and Interferences found that the opening at the reduced end of the cap 6 shown in Figure 5 was approximately $15/16$ of an inch. This, being the case, Harz does not expressly

describe or under principles of inherency disclose the diameter of the opening at the reduced end being either greater than one inch as recited in claims 1 and 14 or about one and one-half inches as recited in claims 21 to 24.

Since all the limitations of claims 1, 14 and 21 to 24 are not disclosed in Harz for the reasons set forth above, the decision of the examiner to reject claims 1, 14 and 21 to 24 under 35 U.S.C. § 102(b) as being anticipated by Harz is reversed.

Claims 12 and 13

We will not sustain the rejection of claims 12 and 13 under 35 U.S.C. § 102(b) as being anticipated by Hoffmann.

Claims 12 and 13 are drawn to a mechanism for holding a conically-shaped top having a generally circular edge onto a container having a generally circular edge formed with a bead. The mechanism for holding a conically-shaped top includes tabs of the same material as the rest of the top and folded over therefrom to define creases.

The examiner determined that claims 12 and 13 were anticipated by the structure shown in Figure 5 of Hoffmann (answer, pp. 3-4). We do not agree. We agree with the appellant's argument (brief, p. 11-13) that Hoffmann does not anticipate claims 12 and 13. While it is true that Hoffmann in Figure 5 shows a conically-shaped sealing insert 8' held in place on a neck 1 of a bottle by spring tags 11 of stopper cap 7 engaging the enlarged collar 2 of the bottle on mounting of the sealing insert 8' and stopper cap 7 on the bottle, it is also true that Hoffmann does not disclose tabs (i.e., spring tags 11) "of the same material as rest of the top," or tabs which are "folded over... to define creases about which they are yieldably pivoted," as required in claims 12 and 13 on appeal. The spring tags 11 of Hoffmann are molded of a hard-elastic plastic, while the sealing insert 8' (i.e., the conically-shaped top) is made of a relatively soft-elastic material, with the tags being formed during the molding process (see Figure 3 of Hoffmann) and not by being "folded over therefrom to define creases about which they are yieldably pivoted." Thus, it is readily apparent to us that the appellant's claims 12 and 13 presently on appeal are not

readable on the mechanism and arrangement of Figure 5 of Hoffmann.⁵

Since all the limitations of claims 12 and 13 are not disclosed in Hoffmann for the reasons set forth above, the decision of the examiner to reject claims 12 and 13 under 35 U.S.C. § 102(b) as being anticipated by Hoffmann is reversed.

The obviousness rejection

We will not sustain the rejection of claims 2 and 15 under 35 U.S.C. § 103 as being unpatentable over Harz in view of Fisher.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of

⁵ This decision is consistent with the position reached with respect to then pending claims 12 and 13 in the Board of Patent Appeals and Interferences decision of May 29, 1996 in the parent application.

obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

Claims 2 and 15 are drawn to a dispensing top for passing only several kernels of a popped popcorn at a time from an open-ended container filled with popped popcorn. The dispensing top has a generally conical shape with the opening at the reduced end being of a diameter greater than one inch thereby allowing several kernels of popped popcorn to pass through at the same time. In addition, means are provided at the reduced end of the top to close-off the opening thereat.

The examiner determined (answer, p. 4) that Harz discloses all the features of claims 2 and 15 except the means for closing off the reduced end of the top and that such would have been obvious from the teachings of Fisher.

Even if the examiner were correct that it would have been obvious from the teachings of Fisher to provide the dispensing top shown in Figure 5 Harz with means for closing off the reduced end of the top such would not have arrived at the claimed invention for the reasons set forth by the appellant (brief, pp. 13-15). In that regard, Harz does not disclose all the features of claims 2 and 15 except the means for closing off the reduced end of the top since Harz does not disclose the diameter of the opening at the reduced end being greater than one inch as recited in claims 2 and 15 for the reasons set forth above with respect to claims 1 and 14. Furthermore, in this rejection before us in this appeal the examiner did not determine that such difference would have been obvious at the time the invention was made to a person of ordinary skill in the art. Accordingly, a prima facie case of obviousness has not been established with respect to claims 2 and 15.

For the reasons set forth above, the decision of the examiner to reject claims 2 and 15 under 35 U.S.C. § 103 is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1, 12 to 14 and 21 to 24 under 35 U.S.C. § 102(b) is reversed and

the decision of the examiner to reject claims 2 and 15 under
35 U.S.C. § 103 is reversed.

REVERSED

NEAL E. ABRAMS)	
Administrative Patent Judge)	
)	
)	
)	
)	BOARD OF PATENT
JOHN P. McQUADE)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
JEFFREY V. NASE)	
Administrative Patent Judge)	

Appeal No. 2001-0483
Application No. 08/996,842

Page 14

JOSEPH B. TAPHORN
8 SCENIC DR
HAGAN FARMS
POUGHKEEPSIE, NY 12603-5521

Appeal No. 2001-0483
Application No. 08/996,842

Page 15

JVN/jg