

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

Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte H. ADDISON SOVINE

Appeal No. 2004-0100
Application No. 09/650,843

ON BRIEF

Before KIMLIN, OWENS and PAWLIKOWSKI, Administrative Patent Judges.

PAWLIKOWSKI, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1-25. A copy of each of these claims is set forth in the attached appendix.

The examiner relies upon the following references as evidence of unpatentability:

Duer	4,787,289	Nov. 29, 1988
Fumero	WO 94/27111	Nov. 24, 1994

Claims 1, 5, 7, 10, 14, 15, 17, 18, 20, 21, and 22 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Duer.

Claims 1, 2, 6, 10, 12, 13, 14, 15, 17, 18, and 19 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Fumero.¹

Claim 11 is rejected under 35 U.S.C. § 103 as being unpatentable over Duer.

Claims 11 and 16 stand rejected under 35 U.S.C. § 103 as being unpatentable over Fumero.²

Claims 8 and 9 stand rejected under 35 U.S.C. § 103 as being unpatentable over Tabler.

Claims 23, 24, and 25 stand rejected under 35 U.S.C. § 103 as being unpatentable over Duer in view of Fumero.

On page 3 of the answer, the examiner indicates that the rejection of claims 3 and 4 has been withdrawn and that these claims are considered allowable over the prior art of record.

¹ We note that the examiner included, for the first time in the answer, claim 2 and claim 6, in this rejection. In the final Office Action of Paper No. 7, on page 2, the examiner rejected claims 2 and 6 under 35 U.S.C. § 103. On page 3 of the answer, the examiner indicates that claim 2 and claim 6 are now anticipated by Fumero.

² Claims 11 and 16 were rejected under 35 U.S.C. § 103 over Fumero, along with claims 2-6, on page 3 of the final Office Action of Paper No. 7. Now, claims 2-6 are not in this rejection.

On page 6 of the brief, the appellant discusses the grouping of the claims. Insofar as the claims have been separately argued, we address the claims separately in this appeal. See 37 CFR § 1.192(c)(7) and (8)(2002).

OPINION

I. The rejection of claims 1, 5, 7, 10, 14, 15, 17, 18, 20, 21, and 22 under 35 U.S.C. § 102(b) as being anticipated by Duer

In this rejection, we consider each of the rejected claims. With respect to independent claim 1, the examiner views Duer's basket member 104 as the claimed insert, and states that Duer's basket 104 has an opening that is capable of receiving the barrel of a gun, and the mesh would function to decelerate a bullet. Answer, page 4.

On page 8 of the brief, appellant argues that Duer does not teach an insert which has an opening for receiving a gun barrel and which is formed of a bullet decelerating material.

Upon our review of Duer, we find the basket member 104 can be made of metal. See column 6, lines 23-28 of Duer. As stated by the examiner, such a material is capable of decelerating a bullet. We note, also, that the claims do not preclude a bullet that is dropped onto the deceleration material. Furthermore, upon review of Figure 2 of Duer, we observe that cover 18 is removable, and upon removal of cover 18, basket member 104 is capable of receiving the barrel of a gun. We therefore are in agreement with the examiner's findings with regard to Duer.

With regard to claim 5, we agree with the examiner's position made on page 2 of the Office Action of Paper No. 7. The mesh member of Duer allows for venting.

With regard to claim 7, we do not agree with the examiner's comments made on page 6 of the answer, that the mesh member of Duer has openings that can be considered "at least one slot" as claimed in claim 7. Appellant's figures 5A and 5B depict the claimed slots, and these slots are described on pages 14-15 of the specification. The examiner does not adequately explain how such slots are met by the mesh structure of Duer.

With regard to claim 14, on page 9 of the brief, appellant argues that Duer lacks a continuous, removable bullet deceleration insert. Appellant argues that the basket of Duer extends along a small fraction of the length of the housing and therefore cannot be a bullet deceleration chamber. On page 4 of the answer, the examiner argues that Duer's basket opening is capable of receiving the barrel of a gun and the mesh would, to some degree, decelerate a bullet. The examiner does not address appellant's specific arguments regarding claim 14 mentioned herein. We therefore reverse the rejection of claim 14 and any claims dependent thereon (which in the instant rejection includes claims 15, 17, and 18).

We now consider claims 20, 21, and 22. On pages 9-10 of the brief, appellant argues that, with respect to claim 20, Duer's basket 104 is not a bullet deceleration chamber and is not formed from a material that would be qualified as a "bullet deceleration" material. We disagree for the same reasons we stated in our comments regarding claim 1. With respect to claims 21 and 22, which depend upon claim 20, we also affirm these claims, and note that appellant does not specifically argue these claims. The housing of Duer includes a face plate 18 and filler material 16. These items equate with appellant's claim of a face plate in claim 21 and a deceleration medium of claim 22.

In view of the above, we **affirm** this rejection with respect to claims 1, 5, 10, and 20-22, but we **reverse** this rejection with respect to claims 7, 14, 15, 17, and 18.

II. The rejection of claims 1, 2, 6, 10, 12, 13, 14, 15, 17, 18, and 19 under 35 U.S.C. § 102(b) as being anticipated by Fumero

With regard to claim 1, on page 8 of the brief, appellant argues that Fumero does not disclose an insert which has an opening for receiving a gun barrel and which is formed of a bullet deceleration material.

On page 4 of the answer, the examiner states that the device depicted in Figure 22 through Figure 24 of Fumero shows a bullet removable deceleration chamber 20, which is the insert, and the insert opening is capable of receiving the barrel of a gun.

We find that the examiner's position is not explained sufficiently to support a prima facie case of anticipation here. The examiner has not explained how in fact a barrel of a gun can be inserted into inlet aperture 21 as depicted in Figure 14. Inlet aperture 21 is discussed on page 17, second full paragraph of Fumero. Because the examiner has not explained how Fumero teaches that the dimensions of inlet aperture 21 in fact can receive a barrel of a gun, we cannot agree with the examiner's position. We emphasize that claim 1 requires that the trap comprises a housing and an insert within the housing. The examiner has not explained how one could place a barrel of a gun such that the barrel of the gun would indeed reach the opening of the insert 20.

Because claims 2, 6, 10, 12, and 13, also depend upon claim 1, our position is the same with regard to these claims.

We now consider claims 14 and 15.³

With respect to claim 14, appellant argues that Fumero lacks a continuous, removable bullet deceleration insert. Appellant disagrees with the examiner's interpretation that the housing in Fumero can be considered only compartment 105. Appellant states that not only is this inconsistent with the examiner's previous assertions that the ballistic ducts form part of the insert, it is inconsistent with the teaching of Fumero, and appellant argues that the examiner cannot pick and choose from portions of Fumero.

On pages 4 and 5 of the answer, the examiner responds and states that element 20 is considered the insert in Fumero and in this regard, Fumero satisfies the elements of claim 14. We agree. Element 20 as shown in Figure 22, and as shown in Figure 14 of Fumero, is an insert that forms a bullet deceleration chamber and is slidably insertable into and removable from housing 10. Therefore, we find that compartment 105 can be considered the housing of container 20. See Figure 23 of Fumero.

With respect to claim 15, claim 15 requires that the insert is slidably removable from the housing. As pointed out by the examiner, insert 20 of Fumero is slidably removable.

With respect to claims 17, 18, and 19, because appellant has not separately argued these claims, we do not consider them in this appeal.

³ With respect to rejected claims 14, 15, 17, 18, and 19, we observe that appellant argues claims 14 and 15 on pages 9-10 of the brief. Hence, we consider claims 14 and 15 from this grouping of claims.

In view of the above, we **reverse** the rejection of claims 1, 2, 6, 10, 12, and 13 under 35 U.S.C. § 102(b) as being anticipated by Fumero. However, we **affirm** the rejection of claims 14, 15, 17, 18, and 19 under 35 U.S.C. § 102(b) as being anticipated by Fumero.

III. The rejection of claim 11 under 35 U.S.C. § 103 over Duer

Claim 11 depends upon claim 10, which depends upon claim 1, and we affirmed the rejection of claims 1 and 10 over Duer, as explained above.

Claim 11 requires that the bullet deceleration medium is formed by pieces of rubber. The examiner states that rubber is a commonly known material used in the art and would have been obvious to substitute the material of Duer with rubber. Answer, pages 2-3. Appellant does not dispute this statement made by the examiner. We therefore affirm the rejection of claim 11.

IV. The rejection of claims 11 and 16 under 35 U.S.C. § 103 as being obvious over Fumero

With regard to claim 11, claim 11 requires that the bullet deceleration medium is formed of pieces of rubber. The examiner's position here is that although Fumero does not use rubber, it is a commonly known material used in the art and would have been obvious to substitute the material used in Fumero with rubber. See page 3 of the Office action mailed April 19, 2002 (Paper No. 7). We note that claim 11 depends upon claim 10 which depends upon claim 1. In the rejection discussed above, we reversed the rejection of claim 1 under 35 U.S.C. § 102(b) as being anticipated by Fumero. We therefore reverse the rejection of claim 11, also.

With respect to claim 16, claim 16 depends upon claim 14. We affirmed the rejection of claim 14 under 35 U.S.C. § 102(b) over Fumero. We also agree with the examiner that Fumero teaches that plate 30 is removable. See Figure 7 and page 9, second full paragraph, of Fumero.

In view of the above, we **reverse** the rejection of claim 11 under 35 U.S.C. § 103 as unpatentable over Fumero. However, we **affirm** the rejection of claim 16 under 35 U.S.C. § 103 as being unpatentable over Fumero.

V. The rejection of claims 8 and 9 under 35 U.S.C. § 103 as being unpatentable over Tabler

On page 3 of the Office Action of Paper No. 7, the examiner's position is that Tabler's insert 36 comprises two bottom plates 40 and 50, and that, although the method of fastening these plates to member 42 is not specified, well-known techniques include riveting, which requires slots for the rivets. The examiner concludes that therefore the claimed two bottom plates having slots formed therein are obvious.

Beginning on page 13 of the brief, appellant objects to the fact that the examiner previously indicated the allowability of claims 8 and 9. Appellant further argues that Tabler does not support the examiner's conjecture that the plates could be attached by rivets. Appellant states that welding (versus rivoting) is also a known means of attaching plates. Appellant argues that even if a rivet was used, a rivet usually is placed in holes, not slots. Third, appellant argues that the bottom wall 40 would not have slots formed therein. We agree with appellant's position for the following reasons.

The examiner's assumptions that plates 40 and 50 could be fastened by rivets and therefore slots would be required for the rivets is not supported by the disclosure of Tabler. We note that the initial burden of presenting a prima facie case of obviousness rests on the examiner. In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). It is impermissible to conclude that an invention is obvious based solely on what the examiner considers to be basic knowledge or common sense. See In re Zurko, 258 F.3d 1379, 1386, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001). Thus, the burden is on the examiner to identify concrete evidence in the record to support his conclusion that it would have been obvious employ slots and use rivets to attach plates 40 and 50 to member 42 of Tabler. In re Kotzab, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1316-17 (Fed. Cir. 2000). In the present case, the examiner has simply failed to meet this burden.

We therefore reverse the rejection of claims 8 and 9 under 35 U.S.C. § 103 as being unpatentable over Tabler.

VI. The rejection of claims 23, 24, and 25 under 35 U.S.C. § 103 as being unpatentable over Duer in view of Fumero

With respect to claim 23, claim 23 depends upon claim 20. Claim 23 requires that the method of claim 20 comprises forming the bullet deceleration chamber from a plurality of generally flat pieces of steel.

On pages 3-4 of the Office action of Paper No. 7, the examiner's position is that Duer discloses a single bottom mesh plate. However, Fumero teaches to use a plurality of plates. The examiner concludes that it would be obvious to substitute Fumero's plurality of plates for Duer's single bottom mesh plate.

Beginning on page 14 of brief, appellant correctly points out that the combination of references cited by the examiner is inappropriate in that the express teachings of Duer indicate that the basket is used to remove bullets without removing any filler material. Appellant correctly concludes that substituting the basket of Duer with steel plates would disallow such a function. We agree, and therefore reverse this rejection with respect to claim 23.

With respect to claim 24, claim 24 depends upon claim 23 and further requires an additional limitation with respect to the generally flat pieces of steel. Therefore, for the same reasons that we reversed of claim 23, we reverse the rejection of claim 24.

With respect to claim 25, claim 25 depends upon claim 20 and recites that the method further comprises forming a plurality of vents in the bullet deceleration chamber. On page 4 of the Office action of Paper No. 7, the examiner's position is that Duer's mesh structure functions as vents. We agree. We therefore affirm the rejection of claim 25.

VII. Conclusion

We affirm the rejection of claims 1, 5, 10, 20, 21, and 22 under 35 U.S.C. § 102(b) as being anticipated by Duer. We reverse the rejection of claims 7, 14, 15, 17, and 18.

We reverse the rejection of claims 1, 2, 6, 10, 12, and 13 under 35 U.S.C. § 102(b) as being anticipated by Fumero. However, we affirm claims 14, 15, 17, 18, and 19 under 35 U.S.C. § 102(b) as being anticipated by Fumero.

We affirm the 35 U.S.C. § 103 rejection of claim 11 as being obvious over Duer.

We reverse the rejection of claim 11 under 35 U.S.C. § 103 as being obvious over Fumero. However, we affirm the rejection of claim 16 in this rejection.

We reverse the rejection claims 8 and 9 under 35 U.S.C. § 103 as being obvious over Tabler.

We reverse the rejection claims 23 and 24 under 35 U.S.C. § 103 as being obvious Duer in view of Fumero. However, we affirm the rejection of claim 25 under 35 U.S.C. § 103 as being obvious of Duer in view of Fumero.

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

AFFIRMED-IN-PART

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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)	APPEALS AND
TERRY J. OWENS)	INTERFERENCES
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BEVERLY A. PAWLIKOWSKI)	
Administrative Patent Judge)	

BAP/sld

Appeal No. 2004-0100
Application No. 09/650,843

RANDALL B. BATEMAN
P.O. BOX 1319
SALT LAKE CITY, UT 84110-1319

APPENDIX

1. A trap for receiving bullets, the trap comprising:
a housing having a cavity defined by an outerwall
surrounding a void; and

an insert forming a bullet deceleration chamber, the
insert being slidably insertable into and removable from the
void of the housing, the insert being formed of a bullet
decelerating material and having an opening for receiving a
barrel of a gun.

2. The trap for receiving bullets according to claim 1,
wherein the insert is formed by a plurality of pieces of
steel plate.

3. The trap for receiving bullets according to claim 2,
wherein the plurality of pieces of steel plate form a bottom
portion having a generally u-shaped cross-section and a top
removably engaging the bottom portion such that the insert has
a square cross-section when the top is attached.

4. The trap for receiving bullets according to claim 3,
wherein the bottom portion is formed by a bottom and a pair
of sidewalls, the bottom and sidewalls being fixedly attached
to one another.

5. The trap for receiving bullets according to claim
1, wherein the insert comprises a plurality of vents for
releasing force from the insert when a gun is fired into
the insert.

6. The trap for receiving bullets according to claim 5,
wherein the insert is formed from a top plate, a bottom plate
and a pair of sidewalls, and wherein the vents are formed
between the sidewalls and at least one of the top plate and the
bottom plate.

7. The trap for receiving bullets according to claim 5, wherein the insert has at least one plate forming a lower end, and wherein the at least one plate has at least one slot formed therein.

8. A trap for receiving bullets, the trap comprising: a housing having a cavity defined by an outerwall surrounding a void; and an insert forming a bullet deceleration chamber, the insert being slidably insertable into and removable from the void of the housing, and wherein the insert has two bottom plates and wherein the bottom plates each have slots formed therein.

9. The trap for receiving bullets according to claim 8, wherein the plates are aligned such that the slots in the plates do not overlap.

10. The trap for receiving bullets according to claim 1, wherein the insert further comprises a bullet deceleration medium disposed therein.

11. The trap for receiving bullets according to claim 10, wherein the bullet deceleration medium is formed by pieces of rubber.

12. The trap for receiving bullets according to claim 1, wherein the housing is formed from a tube having a generally square cross-section.

13. The trap for receiving bullets according to claim 1, wherein the housing is formed from a material other than plate steel.

14. A clearing trap for receiving bullets fired from a gun, the clearing trap comprising:

a housing having an outerwall with an opening at one end and a void disposed within the outerwall; and

an insert disposed in the void of the housing, the insert forming a continuous, removable bullet deceleration chamber from a position adjacent the opening of the housing to an opposing end of the bullet deceleration chamber with the void.

15. The clearing trap according to claim 14, wherein the insert is slidably removable from the housing.

16. The clearing trap according to claim 14, wherein the insert is formed by a bottom portion and a top portion, the top portion being removable from the bottom portion.

17. The clearing trap according to claim 14, wherein the insert is filled with a removable bullet deceleration medium.

18. The clearing trap according to claim 14, further comprising a leg attached to the housing for supporting the housing.

19. The clearing trap according to claim 18, further comprising a base plate attached to the housing and the leg.

20. A method for forming a clearing trap, the method comprising;

selecting a housing having a void configured to receive a bullet deceleration chamber and an open end through which a bullet passes;

selecting a bullet deceleration chamber; and

sliding the bullet deceleration chamber through the open end and into the void configured to receive the bullet deceleration chamber.

21. (Amended) The method according to claim 20, wherein the method further comprises forming a face plate at one end of the housing or insert.

22. The method according to claim 20, wherein the method further comprises filling the bullet deceleration chamber with a bullet deceleration medium.

23. The method according to claim 20, wherein the method comprises, forming the bullet deceleration chamber from a plurality of generally flat pieces of steel.

24. The method according to claim 23, further comprising fixedly attaching a plurality of the generally flat pieces of steel, and releasably attaching at least one of the generally flat pieces of steel to the plurality of generally flat pieces of steel which are fixedly attached.

25. The method according to claim 20, wherein the method comprises forming a plurality of vents in the bullet deceleration chamber.