

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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HUIBERT VAN DER STARRE

Appeal No. 2004-1696
Application 09/988,181

ON BRIEF

Before WARREN, OWENS and JEFFREY T. SMITH, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

Decision on Appeal

This is an appeal under 35 U.S.C. § 134 from the decision of the examiner refusing to allow claims 1 through 8 as amended subsequent to the final rejection, which claims are all of the claims in the application. Claim 1 is illustrative of the claims on appeal:

1. Flowerpot the cross-sectional surface of which at the upper boundary comprises four straight lines, each two opposing lines being essentially parallel, and the cross-sectional surface of which at the base comprises a curve that encompasses at least 50% of the circumference at that location, wherein the cross-section of said upper boundary comprises a non-square rectangle and said curve comprises an ellipse, wherein the flowerpot includes a front width dimension which is longer in width than the side width dimension.

The appealed claims, as represented by claim 1, are drawn to a flowerpot comprising at least a non-square rectangle upper boundary or top, and a base comprising at least an ellipse.

The references relied on by the examiner are:

Heubner	879,047	Feb. 11, 1908
Purohit et al. (Purohit)	5,249,390	Oct. 5, 1993
Haltenhoff ¹ (Belgian Patent)	670,665	Jan. 31, 1966

The examiner has rejected appealed claims 1 through 5 under 35 U.S.C. § 103(a) as being unpatentable over Haltenhoff, and appealed claims 6 through 8 under 35 U.S.C. § 103(a) as being unpatentable over Haltenhoff in view of Purohit and Heubner.²

Appellant states that “[a]s to the first issue . . . claims 1-5 stand together” and “[a]s to the second issue . . . claims 6-8 stand together with claims 1-5” (brief, pages 3-4). In any event, we decide this appeal based on appealed claims 1 and 6 which are representative of the respective groups of claims. 37 CFR § 1.192(c)(7) (2003).

We affirm.

Rather than reiterate the respective positions advanced by the examiner and appellant, we refer to the examiner’s answer and to appellant’s brief and reply for a complete exposition thereof.

Opinion

We have carefully reviewed the record on this appeal and based thereon find ourselves in agreement with the supported position advanced by the examiner that, *prima facie*, the claimed flowerpot article encompassed by appealed claim 1 and appealed claim 6 would have been obvious over Haltenhoff and the combined teachings of Haltenhoff, Purohit and Heubner to one of ordinary skill in this art at the time the claimed invention was made.

Accordingly, since a *prima facie* case of obviousness has been established by the examiner over the applied prior art, we have again evaluated all of the evidence of obviousness and nonobviousness based on the record as a whole, giving due consideration to the weight of

¹ We refer in our opinion to the translation of Haltenhoff prepared by the Translation Branch of the USPTO Scientific Library on May 27, 2004. A copy of the translation is attach to this decision.

² The examiner states in the answer (page 3) that the grounds of rejection are set forth in the final Office action of October 17, 2002 (Paper No. 9, pages 2-4).

appellant's arguments in the brief and the reply brief. *See generally, In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992); *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984).

As an initial matter, we find that, when considered in light of the written description in the specification, including the drawings, as interpreted by one of ordinary skill in this art, *see, e.g., In re Morris*, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989), the plain language of appealed claim 1 does not specify any dimensions for the non-square rectangle or for the ellipse. Thus, the rectangle can be off square by any dimension, however small, and the ellipse can be off circle by any dimension, however small.

Appellant submits that Haltenhoff "discloses neither a non-square rectangular top nor an elliptical base" (brief, page 4). We find here that appellant discloses in the specification that Haltenhoff's flowerpot has a "cross-sectional surface at the upper boundary [that] is square and the pot is circular at the bottom" (page 1, lines 9-10). The examiner finds that Haltenhoff "discloses the claimed invention, including a rectangular upper boundary, except for the elliptical shape of the base" (Paper No. 9, page 2).

We find that Haltenhoff discloses that the flowerpot "is preferably provided with a square support portion and a round bottom portion" wherein "[t]he shape of the pot is such that the upper square upper portion gradually changes to the round lower portion" and "[t]he invention is not limited to this shape of pot" (page 2, first full paragraph).

While the preferred flowerpots disclosed by Haltenhoff have square tops and round bottoms, the reference specifically does not exclude other top and base shapes. In this respect, the examiner contends that one of ordinary skill in this art would have modified the preferred flowerpots of Haltenhoff with other shapes, including elliptical bases, and dimensions because a change in shape and/or size would not have been expected to result in a change of function (Paper No. 9, pages 2-3). Appellant argues that the geometry of the claimed flowerpots is different from that of the flowerpots of Haltenhoff and that "[i]mprovements flow from these geometric changes" which "the prior art does not appreciate" and thus, the present invention is unobvious over Haltenhoff (brief, pages 4 and 6). The examiner responds that the flowerpots

disclosed by Haltenhoff are the functional equivalent of the claimed flowerpots and finds no criticality with respect to shape and size in appellant's specification (answer, pages 3-4).

Appellant replies that the claimed geometric configuration (1) minimizes flowerpot volume for transport and storage and (2) maximizes visual appearance of potted plants (reply brief, pages 1-2). With respect to these characteristics, appellant points out that with the non-square rectangular top, the "adjacent flowerpots [support] one another," and compared to "a square top of equal frontal dimension, more flowerpots of the invention can be transported or stored in a given horizontal space" and, for viewing, "the front dimension [is] perpendicular to the field of view of the purchaser" (*id.*, page 2). Appellant further points out that the elliptical based decreases the volume of soil used, and simplifies injection molding in manufacture as well as stacking empty pots (*id.*).

We determine that one of ordinary skill in this art would have found in the teachings of Haltenhoff the reasonable suggestion that other shapes and sizes of flowerpots can be formed following the teachings of the reference. Indeed, the mere expansion, however small, of the dimensions of two opposing parallel sides of the preferred pot of Haltenhoff would result in a non-square rectangular top, and the extension of a curve of the round base of the preferred pot, however small, would result in an ellipse, which is all that appealed claim 1 requires. Indeed, such minor changes could be the result of minor deviations from the preferred flowerpot in forming the pot following the teachings of the references. Accordingly, one of ordinary skill in this art routinely following the teachings of Haltenhoff would have arrived at the claimed flowerpot without recourse to appellant's specification.

Indeed, we are of the view that one of ordinary skill would have expected that pots with minor shape and size deviations from the preferred pots of the reference would still have the same or similar characteristics taught for the disclosed pots by Haltenhoff, the teachings of which, as we pointed out above, are not limited to the preferred pots. In this respect, we have considered the characteristics attributed to the claimed pots in the reply brief. However, we fail to find in such arguments alleging unexpected results any comparison between the claimed pots and the preferred pots of Haltenhoff, and thus such arguments of counsel are entitled to little, if any, weight. *See In re Lindner*, 457 F.2d 506, 508, 173 USPQ 356, 358 (CCPA 1972) ("This

court has said . . . that mere lawyers' arguments unsupported by factual evidence are insufficient to establish unexpected results. [Citations omitted.]”); *In re Hoch*, 428 F.2d 1341, 1343-44, 166 USPQ 406, 409 (CCPA 1970) (evidence must provide an actual comparison of the properties of the claimed compositions with compositions of the reference).

Turning now to the ground of rejection of appealed claim 6, we find that not only does appellant state that this claim stands “together” with appealed claim 1 (brief, page 4), but appellant does not present any additional substantive arguments specific to this claim which is rejected over the combined teachings of Haltenhoff and the other applied references (*id.*, page 7).

Accordingly, based on our consideration of the totality of the record before us, we have weighed the evidence of obviousness found in Haltenhoff alone and as combined with the other applied references with appellant's countervailing evidence of and argument for nonobviousness and conclude that the claimed invention encompassed by appealed claims 1 through 8 would have been obvious as a matter of law under 35 U.S.C. § 103(a).

The examiner's decision is affirmed.

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

AFFIRMED

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