

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte WILLIAM P. APPS

Appeal No. 2005-1059
Application No. 09/836,045

ON BRIEF

Before FRANKFORT, NASE and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's rejection of claims 1-39, which are all of the claims pending in this application.

We AFFIRM.

BACKGROUND

The appellant's invention relates to a stackable low depth tray for storing and transporting beverage containers, such as bottles (specification, page 1). A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The Prior Art

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

Cornelius et al. (Cornelius)	3,334,767	Aug. 8, 1967
Apps et al. (Apps '874)	4,899,874	Feb. 13, 1990
Apps et al. (Apps '002)	4,978,002	Dec. 18, 1990
Hammett	5,487,487	Jan. 30, 1996
Apps (Apps '352)	5,501,352	Mar. 26, 1996
Apps et al. (Apps '176)	5,529,176	Jun. 25, 1996
Apps et al. (Apps '461)	5,651,461	Jul. 29, 1997
Apps et al. (Apps '572)	4,842,572	Dec. 1, 1998
McGrath	6,047,844	Apr. 11, 2000
Apps et al. (Apps '793)	6,073,793	Jun. 13, 2000

The Rejections

The following rejections are before us for review.

Claims 1-39 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Apps '572, Apps '461, Apps '176, Apps '352, Hammett, Apps '002 and Apps '874.¹

Claims 1-39 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Apps '793.

Claims 1-39 stand rejected under 35 U.S.C. § 103 as being unpatentable over Apps '793, Apps '572, Apps '461, Apps '176, Apps '352, Hammett, Apps '002 or Apps '874 in view of McGrath and Cornelius.

¹ The examiner's application of 8 substantially duplicative references, in the alternative, in rejecting appellant's claims is in clear violation of the guidance set forth in Section 706.02 (CHOICE OF PRIOR ART; BEST AVAILABLE, page 700-20) of the Manual of Patent Examining Procedure (MPEP). Nevertheless, in the interest of administrative efficiency, we have decided that it would be more prudent for this panel to render a decision on this appeal than to remand the application to the examiner to restrict the rejections to the best prior art in compliance with the MPEP.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the final rejection and answer for the examiner's complete reasoning in support of the rejections and to the brief and reply brief 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 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

Each of the references relied on by the examiner in the anticipation rejections discloses a low depth bottle case or crate comprising, *inter alia*, a wall structure including a first pair of opposed walls (e.g., side walls 12 and 16 in Apps '874, Apps '002 and Apps '176) and a second pair of opposed walls (e.g., end walls 14 and 18 in Apps '874, Apps '002 and Apps '176), interior columns (30 in Apps '874, Apps '002 and Apps '176) and a plurality of interior divider walls (e.g., walls 29 in Apps '874, Apps '002 and Apps '176), extending between the columns and between the columns and the wall structure so as to cooperate with the columns and wall structure to form bottle receiving pockets. The source of the dispute in this case between the appellant and the examiner appears to be that each of the divider walls (e.g., 29) of each of the applied references is a single wall, not a double wall as disclosed by the appellant, and thus, according to

the appellant, does not meet the “including [defining] two spaced apart, generally parallel surfaces” language in independent claims 1, 14, 24, 25, 28 and 36. The appellant’s position in this regard is not well taken. We agree with the examiner that the single-wall structure of each of the divider walls of the applied references does include two spaced apart, generally parallel surfaces. Specifically, the opposite faces of the walls are generally parallel surfaces which are spaced apart by the thickness of the wall.

Inasmuch as all of the appellant’s arguments as to why the references applied in the anticipation rejections do not anticipate the subject matter of claims 1-39 are grounded on the appellant’s unsound position, discussed above, that the “two spaced apart, generally parallel surfaces” limitation is not met, they do not persuade us that the examiner’s anticipation rejections are in error. It follows that we shall sustain these rejections.

The Obviousness Rejections

As noted above, the appellant’s argument in the brief and reply brief has failed to persuade us that any of the claims on appeal is not anticipated by each of the references applied in the anticipation rejections. A disclosure that anticipates under 35 U.S.C. § 102 also renders the claim unpatentable under 35 U.S.C. § 103, for “anticipation is the epitome of obviousness.” Jones v. Hardy, 727 F.2d 1524, 1529, 220 USPQ 1021, 1025 (Fed. Cir. 1984). See also In re Fracalossi, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982); In re Pearson, 494 F.2d 1399, 1402, 181 USPQ 641,

644 (CCPA 1974). Thus, we sustain the examiner's rejections of appealed claims 1-39 under 35 U.S.C. § 103.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1-39 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

CHARLES E. FRANKFORT
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

JENNIFER D. BAHR
Administrative Patent Judge

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