

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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 PATRICIA ANN MITCHLER,
WILFRED EUGENE RIDDELL,
and CARMEN ANN BAKER

Appeal No. 2005-1207
Application No. 10/126,342

ON BRIEF

Before WALTZ, KRATZ and PAWLIKOWSKI, Administrative Patent Judges.
KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 10-23, which are all of the claims pending in this application. We have jurisdiction pursuant to 35 U.S.C. § 134.

BACKGROUND

Appellants' invention relates to a meltblown web that includes an air-formed layer comprising meltblown fibers and particles that penetrate the surface of the meltblown fibers. An understanding of the invention can be derived from a reading of exemplary claims 10 and 13 , which are reproduced below.

10. A substantially nondusting meltblown web, comprising at least one air-formed layer comprising meltblown fibers and particles, the particles being retained within the layer by surface penetration into the meltblown fibers.

13. A substantially nondusting meltblown web, comprising at least one layer comprising meltblown fibers, particles and staple fibers, the particles being retained within the layer by surface penetration into the meltblown fibers, the staple fibers engaging at least some of the meltblown fibers to space the meltblown fibers apart from each other, and the staple fibers being retained within the layer by entanglement with the meltblown fibers.

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

Brooker et al. (Brooker)	4,979,318	Jan. 10, 1989
McFarland et al. (McFarland)	4,604,313	Aug. 05, 1986

Claims 10-23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Brooker in view of McFarland.

We refer to the brief and reply brief and to the answer for a complete exposition of the opposing viewpoints expressed by appellants and the examiner concerning the issues before us on this appeal.

OPINION

Having carefully considered each of appellants' arguments set forth in the brief and reply brief, appellants have not

persuaded us of reversible error on the part of the examiner. Accordingly, we will affirm the examiner's rejection for substantially the reasons set forth by the examiner in the answer. We add the following for emphasis and completeness.

Appellants identify two groups of rejected claims and state that the claims of each group stand or fall together for purposes of this appeal. See page 2 of the brief. Accordingly, we select independent claim 10 as the representative claim for the claim grouping that includes claims 10-12 and 18-20 and independent claim 13 as the representative claim for the claim grouping that includes claims 13-17 and 21-23.

Appellants do not dispute that Brooker discloses a meltblown material (web) product that includes a layer containing meltblown fibers and particles. As generated by appellants' arguments, the central issue before us in assessing the merits of the examiner's obviousness rejection of representative claim 10 over the applied prior art is whether or not the teachings thereof would have reasonably suggested that the particles of Brooker would penetrate the surface(s) of the meltblown fiber(s) as maintained by the examiner.¹

¹ We note that McFarland is relied upon by the examiner for establishing the obviousness of using staple fibers in Brooker as

Concerning this matter, Brooker teaches that the meltblown fibers employed are tacky subsequent to extrusion through a die and prior to consolidation. While the fibers are in a tacky state, Brooker teaches that the particles are incorporated in the meltblown fiber stream in a manner such that the particles adhere to the surfaces of the tacky fibers thereby avoiding subsequent dusting problems with the product during use. See the abstract, column 2, lines 20-44 and column 3, lines 4-19 of Brooker. Dusting is the same or similar problem allegedly addressed by appellants' claimed invention. See page 2, lines 15-17 of appellants' specification. Moreover, Brooker teaches that the particles employed can be fed via a feed hopper using an air stream to convey the particles or powder into the stream of meltblown fibers so as to hold the particles to the fibers within the formed web by more than physical entrapment of particles among the fibers. See column 6, lines 3 through 53 of Brooker.

Given that disclosure of Brooker, we agree with the examiner that it is reasonable to conclude that the particles of Brooker would at least slightly penetrate (pass into or through, or reach) the tacky surface (outer face or boundary) of the

required by representative claim 13. Thus, we need not address McFarland with regard to representative claim 10.

meltblown fibers resulting in the particles being adhered to the fibers via a partial embedding of the particles in the fibers; that is, the air-entrained particles would penetrate the surface(s) of the tacky fibers upon contact therewith.²

Appellants argue that Brooker does not explicitly disclose that the particles penetrate the surface(s) of the meltblown fibers. However, the examiner's assertion of obviousness is not premised on an explicit disclosure of surface penetration of the fibers by the particles being supplied by Brooker. Rather, it is the reasonableness of the expectation of such penetration by following the teachings of Brooker based on the record before us that is at issue. Consequently, the argument of appellants regarding the lack of an explicit disclosure at best sets up the issue in the case before us rather than being a persuasive argument against the examiner's position as such an explicit disclosure is unnecessary for a determination of obviousness. After all, it is well settled that when a claimed product appears substantially the same as a product disclosed by the prior art, the burden is properly upon appellants to prove with objective

² See the definitions of penetrate and surface at pages 896 and 1218 of The American College Dictionary; Barnhart (Editor in Chief); Random House; 1970; a copy is attached to this decision.

evidence that the prior art product does not necessarily or inherently possess characteristics attributed to the claimed product. See In re Spada, 911 F.2d 705, 708, 15 USPQ 1655, 1658 (Fed. Cir. 1990); In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980); In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). The reason is that the Patent and Trademark Office is not able to manufacture and compare products. See Best, 562 F.2d at 1255, 195 USPQ at 434. Here, appellants have not satisfied this burden.

In this regard, appellants maintain that the heating of the particles results in the penetration of the surfaces of fibers by particles and point to pages 5, 6 and 16-23 of their specification for support. In an apparently alleged contrary manner, appellants assert that Brooker uses adhesive polymers and does not explicitly disclose heating the particles. However, at page 6, lines 15-26 of appellants' specification, appellants make plain that particle heating has not been established as being responsible for the fiber surface penetration. Rather, that argued connection between the particle heating and penetration is one of belief or theory, which appellants maintain they are not

bound by. As such, appellants have not substantiated that argument on this record.³

As for appellants remarks concerning the use of adhesive polymers in Brooker, we note that Brooker teaches that:

any polymer that is sufficiently tacky, between the die tip and the collecting surface, to hold onto the particles that contact it, can be used as the polymeric material for the meltblown fibers, and thereby qualifies as adhesive polymers. In reality, this includes most polymers that are capable of being meltblown.

In other words, that contention of appellants, to the extent appellants are arguing that the use of adhesive polymers by Brooker represents a material difference in the web product of Brooker from that called for in representative claim 10, is misplaced. For example, we note that Brooker employs polypropylene as the polymer and baking soda as the particulate in Example 3 thereof and appellants' representative claim 10 not only encompasses those materials but as evidenced by appellants' specification Example 3, appellants exemplify using polypropylene

³ Indeed, that argument of appellants is undercut by the present record. See page 12 of the prior art European Patent Application publication No. 0 156 160 appellants submitted of record wherein it is explained that the tackiness of fibers during inclusion of particulate material results in partial embedding (penetration) of the particles in the fibers.

as the polymer and baking soda as the particulate in a manner strikingly similar to Brooker.⁴ Thus, we are not persuaded by appellants' comments seemingly suggesting that an alleged adhesive polymer requirement of Brooker represents a patentable distinction.

Concerning separately argued representative claim 13 and the claims depending therefrom, appellants further argue that Brooker does not disclose using staple fibers and that McFarland is distinct from Brooker. However, for reasons set forth by the examiner in the answer and in addition to those discussed above, appellants' contentions do not persuasively refute the examiner's position that it would have been obvious to one of ordinary skill in the art at the time of the invention to add staple fibers to the web of Brooker to modify the properties thereof, such as the absorbency, as taught by McFarland. See, e.g., column 8, lines 3 - 8 of McFarland.

As a final point we note that no evidence of unexpected results has been submitted and argued by appellants in the briefs.

⁴ The temperature of the air-entrained baking soda powder stream exiting the particle feeder is not specified in Example 3 of Brooker.

CONCLUSION

The decision of the examiner to reject claims 10-23 under 35 U.S.C. § 103(a) as being unpatentable over Brooker in view of McFarland is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(iv)(effective Sept. 13, 2003; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sept. 7, 2004)).

AFFIRMED

THOMAS A. WALTZ)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
PETER F. KRATZ)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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BEVERLY A. PAWLIKOWSKI)	
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PFK/sld

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