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for publication and is not binding precedent of the Board.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 ANTHONY ROBERT KNOERZER
and
GARRET WILLIAM KOHL

Appeal No. 2005-1318
Application No. 10/191,198

ON BRIEF

Before McQUADE, NASE, and BAHR, 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 to 4, 6 to 9 and 14, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellants' invention relates to product packaging and more particularly to providing packaging of a product, such as a snack food, in a stand-up pouch (specification, p. 2). A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

The rejections before us in this appeal are as follows:

(1) Claims 1 to 4, 6 to 9 and 14 under 35 U.S.C. § 103 as being unpatentable over U.S. Patent No. 3,354,601 to Schneider et al. (Schneider) in view of U.S. Patent No. 6,245,367 to Galomb; and

(2) Claims 1 to 4, 6 to 9 and 14 under 35 U.S.C. § 103 as being unpatentable over Admitted Prior Art (APA) in view of Galomb.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the answer (mailed June 24, 2004) for the examiner's complete reasoning in support of the rejections, and to the brief (filed April 28, 2004) and reply brief (filed August 11, 2004) for the appellants' arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art, and to the respective positions articulated by the appellants and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 1 to 4, 6 to 9 and 14 under 35 U.S.C. § 103. Our reasoning for this determination follows.

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 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).

Teachings of the applied prior art

Schneider

Schneider's invention relates generally to packages and/or containers for fluent materials such as liquids, powders, and the like; and it is more especially concerned with a novel construction for packages and/or containers having flexible walls. Schneider teaches (column 1, lines 14-70) that:

> One general type of article of this kind is the rigid package or container such as the familiar glass bottle or the cardboard carton. Containers of this type have many advantages since the walls are sufficiently rigid to retain a given shape and various advantages result from this physical characteristic of the container. Thus, containers having rigid walls stand upright on a base, independently of the amount of the contents, and there is no leakage or accidental discharge of the contents after the package is opened. Another advantage of this type of container is that there is a relatively large volume-to-surface ratio which has the practical advantage that a minimum amount of material is required to package a given volume of product.
>
> There are other advantages to containers of a rigid nature. For example, the rigid walled containers do not crush or deform easily, they stand upright on the retailer's shelf for display purposes, and they provide a suitable structure upon which to apply advertising and the like.
>
> Another very popular and well known type of package or container is that in which the walls are entirely made of flexible material, such as the familiar flat or envelope type of packages. These packages are generally made from thin film having heat-sealing characteristics. From a practical standpoint, the flexible wall packages have their advantages too. Most importantly among these advantages is the relatively low cost of packages of this character since they are made entirely from very thin, flexible film which is relatively inexpensive and they can be produced rapidly on form-and-fill machinery which operates at comparatively high speeds. Packages of this type lend themselves readily to the use of a wide range of materials, such as transparent plastic films, metal foils, and various types of laminates which may include an exterior layer of foil. The

> film or other material can be printed in advance so that no labels are necessary, and attractive display advertising can be imprinted on the packages very economically.
>
> From the standpoint of the user, flexible wall packages of this type have attractive features. They can be closed at at [sic] least one end with a flat, transversely extending seal so that the package can easily be opened by tearing across the seal, or even across the entire package, thus making it easy to pour out of the package. Packages of this type are also easily disposable, light in weight and, in many instances, can be easily carried in the pocket or the like.
>
> It is a general object of the present invention to provide a novel type of construction of a container for fluent materials which combines, as far as possible, the advantages of both the general types of packages described above.
>
> More particularly, it is an object of the present invention to provide a novel design for a package, the major portion of which has flexible walls for the sake of economy and yet which is adapted to stand up on a well-defined base to secure various advantages, such as to display advertising and to prevent discharge of contents after the package is opened.

Figures 1-4 show a package 10 constituting one embodiment of Schneider's invention. The package 10 is made in two major portions, one, the rigid base member 11, and the other the upper tubular portion 12 made from a thin flexible film. The base 11 is in the shape of a circular disc having a cylindrical peripheral surface 14 rising upwardly above and from a radially outstanding flange 15. The bottom of the disc provides a surface 16 on which the container can stand upright. The upper end of portion 12 is closed by a flat, transversely extending seal 18 which extends entirely across the package.

The film used for the portion can be any one of a number of synthetic resins, such as Mylar, cellulose acetate, or other materials coated on the inside with a layer of polyethylene. The polyethylene is thermoplastic and enables the inner face of the film to be sealed to itself, face-to-face. Thus, the transverse seal 18 is formed by the application of heat pressure and the tubular portion 12 of the package is attached to the rigid base 11 also by the application of heat and pressure sealing the inside face of walls 12 to surface 14 of the base. Although the upper portion of the package may be made from a length of seamless tubing, Schneider prefers that the package be made from a flat web which is shaped around a mandrel into tubular form at the time of making the package. As a result, the opposite marginal areas of the flat web are brought together into overlapping relationship and are sealed together to produce an overlapping, longitudinal seal 20 (see Figure 1). Base 12 may be made of any suitable material; but Schneider prefers to use a material adapted to heat-sealing operations, for example polyethylene.

Package 10 comprises a rigid base which does not crush and gives to the package at one end relatively large transverse dimensions as compared to the flat or envelope package, as well as providing a surface 16 upon which the package can rest in an upright position without danger of tipping over. Thus, after the package is once opened at the upper end, as by cutting off sealed area 18 or by tearing off a corner as

along line 17, it can be set down without danger of the contents spilling or leaking out of the open upper end. At the same time, the major portion of the package in terms of external area is made from inexpensive, flexible film, which readily lends itself to manufacture of the container or package at the time of filling.

Galomb

Galomb's invention relates generally to flexible packages, and more particularly to flexible packages for holding food or other edible products, and which once opened are arranged to serve as bowls from which the food or other edible product(s) may be eaten. Figures 1-4 show a package 20 comprising a front wall or panel 22, a rear wall or panel 24, and a bottom wall or panel 26. In the embodiment shown the front and rear walls or panels each include a linear top edge 28, a pair of opposed arcuate convex side edges 30 and 32, and a slightly concave arcuate bottom edge 34. The bottom wall or panel 26 is of a generally "canoe" shape as best seen in Figure 4.

The front panel 22, rear panel 24, and the bottom panel 26 are each formed of a sheet or web of the flexible stock material. The front panel 22 and the rear panel 24 are permanently secured or sealed together along their respective arcuate sides edges 30 and 32. The permanent securement may be achieved by any conventional technique, e.g., heat sealing, welding, adhesives, etc. The periphery of the bottom panel 26 is

permanently secured or sealed to the inner surface of the front panel 22 and the inner surface of the rear panel 24 along respective seal lines 36 and 38 in order to form a hollow pocket 40 therebetween. The seal lines 36 and 38 are identical in shape, e.g., compound curves. The permanent securement of the bottom panel to the front and rear panels may be achieved by any conventional technique, e.g., heat sealing, welding, adhesives, etc.

APA

The APA is directed to paper cups and is set forth on pages 3-4 of the appellants' specification and is shown in Figures 2-3D of the appellants' application. Figure 2 shows a wall blank 210 and a circular base blank 212 that have been cut out of paperboard to use in forming a basic paper cup. Figure 3A shows a first step during manufacture, where the wall blank 210 is wound around a tapering mandrel 380, then the ends are secured with an adhesive to form the tapering tube 310 with seam 311. In a separate step, a piston forces the base blank 212 through an opening having a smaller diameter than the blank itself, forming a rim or short, cylindrical edge 314 that projects at a right angle to the circular base, as seen in Figure 3B. The formed base 312 is then inserted into the bottom of the now- sealed tube 310. As seen in Figure 3C, the rim of the base section 312 can be positioned slightly above the lower edge 316 of the wall section 310. Finally, the lower edge 316 of the wall section 310 is crimped over

the rim 314 of the base section 312 and sealed with an adhesive to form the reinforced rim 318, as seen in Figure 3D.

Rejection 1

We will not sustain the rejection of claims 1 to 4, 6 to 9 and 14 under 35 U.S.C. § 103 as being unpatentable over Schneider in view of Galomb.

In the rejection (answer, p. 3), the examiner concluded that "[i]t would have been obvious to one of ordinary skill in the art to use in the Scneider [sic, Schneider] package the same materials for both the wall and base as taught by Galomb to have a more efficient and inexpensive packaging operation." We do not agree.

In our view, the teachings of Galomb would not have provided any motivation, suggestion or incentive for a person having ordinary skill in the art at the time the invention was made to have modified Schneider so as to arrive at the claimed subject matter. Schneider specifically teaches that his package comprising a rigid base member 11 and an upper tubular portion 12 made from a thin flexible film. As such, to have modified Schneider's rigid base member 11 to be made from a thin flexible film goes against the explicit teachings of Schneider. Furthermore, Galomb provides no rationale for an artisan to go against the explicit teachings of Schneider that the base of

the package be rigid. Thus, the only possible suggestion for modifying Schneider in the manner proposed by the examiner stems from hindsight knowledge derived from the appellants' own disclosure. The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. § 103 is, of course, impermissible. See, for example, W. L. Gore and Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

For the reasons set forth above, the decision of the examiner to reject claims 1 to 4, 6 to 9 and 14 under 35 U.S.C. § 103 as being unpatentable over Schneider in view of Galomb is reversed.

Rejection 2

We will not sustain the rejection of claims 1 to 4, 6 to 9 and 14 under 35 U.S.C. § 103 as being unpatentable over the APA in view of Galomb.

In the rejection (answer, p. 4), the examiner concluded that:

> It would have been obvious to one of ordinary skill in the art to transversely seal the top of package of the APA as taught by Galomb to enclose and protect the contents. Furthermore, it would have been obvious to one of ordinary skill in the art to use in the APA package the same heat sealable materials for both the wall and base as taught by Galomb to have a more efficient and inexpensive packaging operation.

In our view, this is a classic case of an examiner utilizing hindsight knowledge derived from the appellants' own disclosure to make a rejection. Clearly, the teachings of Galomb to provide a top seal for a flexible plastic package would not have provided any motivation, suggestion or incentive for a person having ordinary skill in the art at the time the invention was made to have modified the paper cup of the APA to have a transverse seal at the top of the cup. Likewise, the teachings of Galomb to provide a flexible plastic package would not have provided any motivation, suggestion or incentive for a person having ordinary skill in the art at the time the invention was made to have modified the paper cup of the APA to be made from flexible plastic material. The only conceivable suggestion for modifying the paper cup of the APA in the manner proposed by the examiner stems from impermissible hindsight knowledge derived from the appellants' own disclosure.

For the reasons set forth above, the decision of the examiner to reject claims 1 to 4, 6 to 9 and 14 under 35 U.S.C. § 103 as being unpatentable over the APA in view of Galomb is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1 to 4, 6 to 9 and 14 under 35 U.S.C. § 103 is reversed.

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

REVERSED

JOHN P. McQUADE Administrative Patent Judge	)	
JEFFREY V. NASE Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
JENNIFER D. BAHR Administrative Patent Judge	)	

CARSTENS YEE & CAHOON, LLP
P O BOX 802334
DALLAS, TX 75380

JVN/jg