

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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

Appeal No. 2005-1411
Application No. 10/340,772

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 final rejection of claims 1-6, which are all of the claims pending in this application.

We AFFIRM-IN-PART.

BACKGROUND

The appellant's invention relates to large elongate vessels in which liquids and activities in and on the liquids can be contained and controlled, the vessels being formed of materials that can readily be assembled to form an elongate raceway

(specification, page 1). Claim 1 is representative of the invention and is reproduced, *infra*, in the opinion section of this decision.

The Applied Prior Art

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

Ewald, Jr. (Ewald)	4,244,486	Jan. 13, 1981
McCloughan	4,457,441	Jul. 3, 1984
Espedalen	4,743,742	May 10, 1988

The Rejections

The following rejections are before us for review.

Claims 1, 2 and 6 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ewald.

Claim 3 stands rejected under 35 U.S.C. § 103 as being unpatentable over Ewald in view of Espedalen.

Claims 4 and 5 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ewald in view of McCloughan.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (mailed September 21, 2004) for the examiner's complete reasoning in support of the rejections and to the brief (filed July 16, 2004) and reply brief (filed November 23, 2004) 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.

Independent claim 1 reads as follows:

1. A vessel for holding flowable material comprising:
 - a) an upwardly convex^[1] curved body having a long axis and the body is formed of rollable sheets of flexible, chemically stable material that has a density of less than 1.0^[2] and a thickness of at least 0.1 inches and having a head end and a tail end,
 - b) a head end bulkhead and a tail end bulkhead formed of the same material as the body sealably secured to the head end and tail end respectively of the body to form a sealed vessel for holding flowable materials, and
 - c) Wherein the vessel is self-supporting in water and in land, and the vessel has a width of at least 3.0 feet and a depth of at least 1.5 feet and a length of at least 8 feet.

¹ In light of the agreement between the examiner and the appellant that the claim terminology "upwardly convex" will be changed to "upwardly concave" by examiner's amendment subsequent to this decision (see interview summary and communication mailed March 18, 2005), we have interpreted "upwardly convex" in claims 1 and 6 as "upwardly concave" for purposes of this appeal. The term "convex" in the first line of the first paragraph on page 7 of the specification should also be changed to "concave" for consistency.

² Although this issue is not before us in this appeal, we note that the members of this panel are not familiar with any standard definition of "density" which is expressed without units, as the appellant has done on page 7 of the specification and in claims 1 and 6.

Ewald discloses a plastic tank adapted for assembly in the field from flexible sheet material S. According to Ewald, the sheet is cut to whatever size is required to form bottom and side walls of desired length, width and height. The sheet S is ordinarily cut from flat stock which may, prior to the assembly of the “U” shape of the tank 10, be rolled into a cylinder of relatively small diameter for storage and/or transport. The tank 10 also has end walls 14 which are formed of additional sheets S’ of plastic material whose side and bottom edges are secured to the ends of the side and bottom walls of the bent sheet at flanges 15 by fasteners 16. Sheet S is maintained in its bent shape by means of struts 18 which are spaced along both sides of the tank. Angles 24 extend along the upper edge of each side wall from one end to the other of the tank, with the rigid side flange 26 of each angle reinforcing the span of the side wall between the adjacent struts 18 so as to prevent it from bowing outwardly under the pressure of the contents of the tank. Each strut 18 is also preferably secured to its adjacent angle by means of metal fasteners 28 extending through holes in recessed portion 27 of the upper end of the inner wall 19 of each strut and into the depending side flange 26 of the angle 24.

The appellant argues, on pages 10 and 12 of the brief, that Ewald’s tank does not anticipate claim 1 because it is not “self-supporting in water and in land,” presumably because Ewald discloses struts 18 and angles 24 for reinforcing the tank and maintaining the sheet S in its bent shape. This argument is not persuasive because claim 1, which includes the open-ended preambular transitional language

“comprising,” does not exclude the presence of additional unrecited elements.³

The appellant also argues that Ewald does not disclose the ranges of thickness, width, depth and length recited in claim 1. The following quotation from In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), is applicable here:

The law is replete with cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims. [citations omitted] These cases have consistently held that in such a situation, the applicant must show that the particular range is *critical*, generally by showing that the claimed range achieves unexpected results relative to the prior art range.

Ewald discloses that the sheet is cut to whatever size is required to form bottom and side walls of desired length, width and height. In this case, the appellant has not come forth with any explanation, much less evidence, showing that the claimed ranges of thickness, width, depth and length achieve unexpected results relative to the tank of Ewald so as to establish a patentable distinction between Ewald and the subject matter of claim 1.

For the foregoing reasons, the appellant’s argument is not persuasive of any error on the part of the examiner in rejecting claim 1 as being unpatentable over Ewald. Thus, the rejection of claim 1, as well as claim 6 which the appellant has not argued separately apart from claim 1 (see In re Young, 927 F.2d 588, 590, 18 USPQ2d 1089,

³ The transitional term "comprising" is inclusive or open-ended and does not exclude additional, unrecited elements. See In re Baxter, 656 F.2d 679, 686, 210 USPQ 795, 802 (CCPA 1981); Ex parte Davis, 80 USPQ 448, 450 (Bd. App. 1948)("comprising" leaves "the claim open for the inclusion of unspecified ingredients even in major amounts").

1091 (Fed. Cir. 1991); In re Wood, 582 F.2d 638, 642, 199 USPQ 137, 140 (CCPA 1978)), is sustained.

The only argument presented by the appellant as to why claim 4 is not unpatentable over Ewald in view of McCloughan is that McCloughan does not cure the perceived deficiencies of Ewald noted above. Having found no such deficiencies, it follows that the rejection of claim 4 is also sustained.

The rejection of claim 2 as being unpatentable over Ewald, however, is not sustained. Ewald discloses that the dimensions of the walls are controlled merely by the length and width of the flexible sheet from which they are formed (column 1, lines 54-56) and provides no teaching or suggestion to form the tank of at least two sheets sealably joined to each other along their long edges as called for in claim 2. Even when obviousness is based on a single prior art reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference. See In re Kotzab, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1316-17 (Fed. Cir. 2000).

Espedalen discloses a device for counting fish which includes a vessel 1 with a pipe 2 attached thereto and teaches that, as fish will always go against the current, the smolt 17 present in the vessel 1 will make for inlet 15 to pipe 2 and thus swim against the current inside the pipe. According to Espedalen, this tendency is enhanced if the vessel has a pale color inside and the inlet 15 to pipe 2 has a dark color (column 2, lines 44-48). We find nothing in this which would specifically suggest forming Ewald's tank of two outside sheets which are dark in color and at least one sheet between the outside

sheets which is light in color, as called for in claim 3. From our perspective, the only suggestion for putting the selected pieces from the references together in the manner proposed by the examiner is found in the luxury of hindsight accorded one who first viewed the appellants' disclosure. This, of course, is not a proper basis for a rejection. See In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992). The rejection of claim 3 as being unpatentable over Ewald in view of Espedalen is not sustained.

The rejection of claim 5 as being unpatentable over Ewald in view of McCloughan is also not sustained. McCloughan's screens 71 are not "bulkheads" as that term would be understood by one of ordinary skill in the art⁴ and thus would not have suggested the provision of movable bulkheads on Ewald's tank.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1-6 under 35 U.S.C. § 103 is affirmed as to claims 1, 4 and 6 and reversed as to claims 2, 3 and 5.

⁴ "A wall or embankment for holding back earth, fire, water, etc." (Webster's New World Dictionary, Second College Edition (Simon & Schuster, Inc. 1984).

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

CHARLES E. FRANKFORT)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JEFFREY V. NASE)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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)	
JENNIFER D. BAHR)	
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