

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN H. SCHNEIDER

Appeal No. 2006-0836
Application No. 10/154,221

ON BRIEF

Before GARRIS, FRANKLIN, and LINCK, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the Examiner's final rejection of claims 1 through 9. We REVERSE.

Independent claim 1 is representative of the subject matter on appeal and is set forth below:

A reclosable package comprising:

a front sheet and a back sheet, said front and back sheets defining said package having a top, a bottom a first side and a second side, said front sheet having a line of weakness running transversely thereacross at said top of said package, said front sheet and said back sheet being sealed to one another along said bottom, first side and second side of said package; and

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a zipper disposed transversely across said package between said front and back sheets and sealed thereto at said top of said package to provide a reclosable opening therefor, said zipper having two interlocking profiles each integrally formed with a web and having a slider to facilitate the opening and closing thereof, one of said webs being sealed to the front sheet and the other of said webs being sealed to the back sheet while both of said webs remain unsealed to each other, whereby said zipper is sealed to said front and back sheets, said interlocking profiles being above said line of weakness relative to said top and said front sheet being sealed to one of said webs below said line of weakness, said front and back sheets being connected to one another with a peel seal above said zipper, thereby forming a header for hanging said package for display above said zipper relative to said top, to provide said package with tamper-evident features.

The Examiner relies upon the following references as evidence of unpatentability:

Hustad et al. (Hustad)	5,077,064	Dec. 31, 1991
La Pierre et al. (La Pierre)	5,121,997	June 16, 1992
Ausnit	6,131,369	Oct. 17, 2000

Claims 1 through 9 stand rejected under 35 U.S.C. § 103(a) as being obvious over Ausnit, La Pierre and Hustad.

We refer to the brief and to the answer for a discussion of the respective viewpoints expressed by the Appellant and by the Examiner concerning the above noted rejection.

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OPINION

For the reasons set forth below, we will not sustain this rejection.

According to the Examiner,

Ausnit '369 discloses the claimed invention except that the package must be torn along two lines of weakness in order to access the first and second interlocking members instead of a peel seal and a line of weakness. La Pierre et al. shows that accessing first and second interlocking members by a peel seal and line of weakness is an equivalent structure known in the art. Therefore, because these two access means were art-recognized equivalents at the time the invention was made, a person having ordinary skill in the art would have found it obvious to substitute a peel seal and line of weakness accessing means for two lines of weakness accessing means. Furthermore, having met the structure of applicant's claimed line of weakness and peel seal, applicant's claimed "header" is considered to be met (Final Office Action, page 3).

Appellant's principal argument about this combination is

that one skilled in the art would not be motivated to combine the Ausnit reference with the La Pierre reference because they disclose packages of different constructions that are not interchangeable. Claim 1 requires the package to be sealed along the

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sides (i.e., side seals) [sic,.] However, the Ausnit reference only discloses packages that have a lap seal extending from the top to the bottom of the package along the middle of the package. One skilled in the art would not be motivated to modify the Ausnit reference to provide side seals as disclosed in the La Pierre reference because such a modification would change the principle operation of the Ausnit reference Altering the structure of the bags of the Ausnit reference would require a drastic alteration of the disclosed method of making the bags. Therefore, one skilled in the art would not be motivated to alter the Ausnit reference to provide side seals as shown in the La Pierre reference [Brief, paragraph bridging pages 5 and 6].

In response to this argument, the Examiner merely cites, and paraphrases the opinion of, In re Keller, 642 F.2d 413, 208 USPQ 871 (CCPA 1981), without further explanation (Answer, page 5).

We agree with the Appellant that the Examiner's rejection is not well founded.

In contrast to the subject matter recited in independent claim 1, and as correctly argued by Appellant, Ausnit does not disclose a reclosable package with front and back sheets "being

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sealed to one another along said bottom, first side and second side of said package." Ausnit's package is made from a single sheet that is formed into a tube and joined to itself through a single longitudinal backseal 43 (Figure 1; col. 3, lines 11-17). While La Pierre's Figures 1 and 2 show a reclosable package with front and back sheets sealed at the bottom and its sides, the Examiner does not specify how the references are to be combined to meet the aforequoted feature of claim 1. Indeed, the Examiner has not specifically addressed this distinguishing claim feature in either the Final Office Action or the answer. The reference to Hustad is specifically applied by the Examiner to meet the limitation of claim 3 and is not relied upon to cure the deficiencies of Ausnit and La Pierre.

In light of the above, it is apparent that the Examiner has failed to carry the initial burden of establishing a prima facie case of obviousness. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). We are compelled by this circumstance to hereby reverse the Examiner's § 103(a) rejection

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of claims 1-9 as being unpatentable over Ausnit, La Pierre and
Hustad.¹

The decision of the Examiner is reversed.

REVERSED

BRADLEY R. GARRIS)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
BEVERLY A. FRANKLIN)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES

¹ As earlier explained, the Examiner's rejection is deficient because it fails to address with any reasonable specificity the independent claim feature involving side seals expressly argued by the Appellant as distinguishing over the Ausnit reference. In the sense that the dissent attempts to supply this deficiency, the proffered rationale is unacceptable (at least) because it is new to the proceeding and thus affords the Appellant no adequate opportunity for response thereto. In re Kumar, 418 F.3d 1361, 1366-68, 76 USPQ2d 1048, 1051-52 (Fed. Cir. 2005).

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LINCK, Administrative Patent Judge, dissenting.

I respectfully dissent. In view of Appellant's own admissions in his Specification, the cited prior art teachings, and the general knowledge in the art, I do not believe the claimed invention is patentable.

In his "Description of the Prior Art," Appellant includes a description of reclosable plastic bags "hermetically sealed until consumers purchase them . . . and open them for the first time." (Specification at 1.) These prior art bags have flexible plastic zippers which he describes in some detail in this section. He points out that "in recent years, plastic zippers . . . have been equipped with sliders" (id. at 2). Also admitted to be in the prior art are "tamper-evident features" including a "tamper-evident non-reclosable peel seal." (Id. at 2.)

Having described the state of the prior art, Appellant summarizes the substance of his invention: "The present invention represents an alternative approach toward providing a

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reclosable package with a tamper-evident feature." His claim 1 reads:

A reclosable package comprising:

a front sheet and a back sheet, said front and back sheets defining said package having a top, a bottom[,] a first side and a second side, said front sheet having a line of weakness running transversely thereacross at said top of package, said front sheet and said back sheet being sealed to one another along said bottom, first side and second side of said package; and

a zipper disposed transversely across said package between said front and back sheets and sealed thereto at said top of said package to provide a reclosable opening therefore, said zipper having two interlocking profiles each integrally formed with a web and having a slider to facilitate the opening and closing thereof, one of said webs being sealed to the front sheet and the other said webs being sealed to the back sheet while both of said webs remain unsealed to each other, whereby said zipper is sealed to said front and back sheets, said interlocking profiles being above said line of weakness relative to said top and said front sheet being sealed to one of said webs below said line of weakness, said front and back sheets being connected to one another with a peel seal above said zipper, thereby forming a header for hanging said package for display above said zipper relative to said top, to provide said package with tamper-evident features.

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Based on his "Description of the Prior Art," the following claimed features are admittedly in the prior art—reclosable plastic bags having a zipper with a slider, such as that claimed, and a tamper-evident peel seal. While Appellant included a description of these features in the prior art section of his application, he did not so describe reclosable bags with a second tamper-evident feature, i.e., a line of weakness below the zipper, and a header for hanging, such as those claimed (see underlining in claim).

The Examiner determined that the claimed reclosable package would have been obvious in view of Ausnit, La Pierre et al. (La Pierre) and Hustad et al. (Hustad). With the exception of the header for hanging the package for display, Appellant does not dispute the Examiner's findings with regard to what features are found in the prior art. Rather Appellant argues:

One skilled in the art would not be motivated to combine the Ausnit reference with the La Pierre reference because they disclose packages of different constructions that are not interchangeable. Claim 1 requires the package to be sealed along the sides (i.e., side seals). However, the Ausnit reference only discloses packages that have a lap seal . . . along the middle of the package Altering the structure of the bags of the Ausnit reference would require a drastic alteration of the disclosed method of making the bags [Brief at 5.]

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As I understand Appellant's position, his main focus is on the fact that his reclosable packages have two side seals rather than the one seal disclosed in Ausnit resulting from the type of equipment used to make Ausnit's package. According to Appellant, because of the difference in manufacturing equipment, the Ausnit reference would require "drastic alteration" to arrive at the claimed invention.

The Examiner responds to this argument as follows:

[T]he test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See In re Keller, 642 F.2d 413, [425,] 208 USPQ 871, [881] (CCPA 1981). [Answer at 5.]

I agree with the Examiner with respect to this issue. Interchangeability of the methods of manufacture is not required, particularly given that the claims are not directed to a method. "Claims may be obvious in view of a combination of references, even if the features of one reference cannot be substituted physically into the structure of the other reference." Orthopedic Equipment Co. v. United States, 702 F.2d 1005, 1013, 217 USPQ 193, 200 (Fed. Cir. 1983). "What matters

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in the § 103 nonobviousness determination is whether a person of ordinary skill in the art, having all of the teachings of the references before him, is able to produce the structure defined by the claim." Id. (citations omitted). There is no question in my mind that one skilled in the art, given the level of skill and general knowledge in the art, would know how to apply the prior art teachings to make the claimed bag with side seals. The Appellant's focus on this aspect of Ausnit is misplaced.

In addition to the cited prior art teachings showing packages with side seals (La Pierre and Hustad), the general knowledge in the art would clearly include the fact that plastic bags are routinely made with two side seals. In addition to La Pierre and Hustad, many other references evidence this level of general knowledge regarding packages with side seals. Thus, one skilled in the art, searching for alternative ways to provide and improve upon tamper-evident features for packages with side seals, would have considered the relevant art relating to tamper-evident features, including those cited by the Examiner. With that art before him or her, that skilled artisan would have recognized that a second tamper-evident feature, such as that disclosed in Ausnit or Hustad, could be used with traditional

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zippered plastic bags having two side seals and a tamper-evident peel seal.

References are valid for all that they teach. In this case, Ausnit teaches the use of two tamper-proof features—one of the claimed elements that Appellant's prior art description did not include.² Appellant does not dispute this fact.

With respect to a header for hanging the package, Appellant argues that

the combination of Ausnit and La Pierre fails to teach or suggest "a header for hanging said package for display" as required by claim 1. In order to provide a header to hang the package sufficient material must exist between the peel seal and the line of weakness to allow the bag to be hanged. [Brief at 6.]

The Examiner responds to this argument as follows:

[T]he feature upon which applicant relies (i.e., "sufficient material . . . between the peel seal and the line of weakness") [is] not recited in the rejected claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See In re Van Geuns, 988 F.2d 1181, [1184,] 26 USPQ2d 1057, [1059] (Fed. Cir. 1993). [Answer at 6.]

² The Ausnit reference discloses a tamper-evident seal (68) above the zipper and a peel seal (77) below it when the bag is reoriented so that the zipper is on the top of the bag (col. 3, lines 55-61). Hustad also discloses a reclosable package with two tamper-evident features--a line of weakness above the reclosable seal and a peel seal below the reclosable seal. See, e.g., col. 2, lines 7-15 & lines 34-40.

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I agree with the Examiner that the claims are not so limited. In any case, Appellant's statement overlooks Hustad, the third cited reference. Hustad very clearly discloses "a header for hanging said package for display." (See the figures in Hustad.) Additionally, the general knowledge in the art includes such hangers for packaging. The "Background" teachings of La Pierre evidence this fact (see col. 1, lines 42-46 (referencing U.S. Patent No. 4,615,045 to Siegel)).³

Given the state of this art, Appellant's "Description of the Prior Art," the general knowledge in the art, and the teachings of the relevant art—that related to providing reclosable packages with tamper-evident features—it would have been obvious to one skilled in the art to make Appellant's claimed invention. Thus, I would affirm the Examiner.

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³ Moreover, anyone who has ever gone into a grocery store would have knowledge of the use of headers to hang packages (as well as packages with two side seals).

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