

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.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 DAVID BUSZARD, MATTHEW D. PHILLIPS,
RICHARD S. ROSE and STEPHEN B. FALLOON

Appeal No. 2006-1120
Application No. 10/429,429

ON BRIEF

Before GARRIS, KRATZ and KIMLIN, Administrative Patent Judges.
GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1-39.

The subject matter on appeal relates to a flame retardant composition, to a flexible foamed article made from this composition, and to a method of providing flame retardant flexible polyurethane compositions. This appealed subject matter is adequately represented by independent composition claim 1 and independent article claim 13 which read as follows:

1. A flame retardant composition comprising:

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a dialkyl tetrahalophthalate ester;

a phosphorus-containing flame retardant having at least about 5 wt.% phosphorus; and

a flexible polyurethane foam reaction mixture.

13. A flexible foamed article made from the flame retardant composition of claim 1.

The reference set forth below is relied upon by the examiner in the § 102 rejection before us:

Eling et al. (Eling) WO 99/31173 June 24, 1999

All of the appealed claims are rejected under 35 U.S.C. § 102(b) as being anticipated by Eling.¹

Rather than reiterate the respective positions advocated by the appellants and by the examiner, we refer to the Brief and Reply Brief as well as to the Answer for a complete exposition thereof.

¹ In the Brief and Reply Brief, the rejected claims 1-39 have been argued as a group rather than separately. Under this circumstance, we may select a single claim from the argued group to decide the appeal with respect to all claims 1-39 on the basis of the selected claim alone. 37 CFR § 41.37(c)(1)(vii) (Sep. 13, 2004). For the purpose of deciding this appeal, we select independent article claim 13 as representing all appealed claims. Notwithstanding this selection of representative claim 13 for purposes of deciding this appeal, independent composition claim 1 also will be discussed in our opinion.

OPINION

For the reasons which follow, we will sustain this rejection.

Claim 13 is directed to a product which is defined, in part, as having been made from the flame retardant composition of claim 1. Viewed in this context, claim 13 is at least analogous to a product-by-process claim. It is our view, therefore, that the patentability of claim 13, as with a product-by-process claim, is determined based on the product itself. See Scripps Clinic & Research Foundation v. Genentech, Inc. 927 F.2d 1565, 1583, 18 USPQ2d 1001, 1016 (Fed. Cir. 1991) and In re Thorpe, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985).

In their Brief and Reply Brief, the appellants do not even present argument, much less evidence, that their claimed flexible foamed article differs (i.e., in terms of the product itself) from the flexible foamed articles taught by Eling. On the other hand, the record before us reflects that these respective articles are indistinguishable. That is, the articles of both appellants and Eling constitute flexible polyurethane foam which contains fire retardants of the type under consideration (e.g., see Eling at lines 13-21 on page 5, line 6 on page 20 through line 20 on page 22, the disclosure regarding Examples 1-7 on

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pages 23-26 and claim 2 on page 29). Moreover, both the appellants and Eling envision using their flexible polyurethane foams as articles in the form of cushioning materials in home furnishing and automotive applications (e.g., see lines 3-5 on page 8 of the subject specification in comparison with lines 6-9 on page 20 of the reference).

Under the circumstances recounted above, it is our determination that the reference evidence adduced by the examiner establishes a prima facie case of anticipation with respect to representative article claim 13 which the appellants have failed to successfully rebut with argument or evidence to the contrary. See In re Oetiker, 977 F.2d 1443, 1444, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

For completeness, we will now address independent composition claim 1 since this claim recites the feature "a flexible polyurethane foam reaction mixture" which the appellants argue is not disclosed by Eling.

As the appellants recognize, claim language is given its broadest reasonable interpretation consistent with the specification. For example, see In re Graves, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995). With this guidance in mind, an artisan would interpret the claim language "a

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flexible polyurethane foam reaction mixture" as a mixture of ingredients which react under certain conditions to produce a flexible polyurethane foam. We consider Eling to disclose the so-interpreted claim feature. This is because the corresponding mixture of the reference includes ingredients which are reacted under certain conditions to produce a polyurethane foam which is transformed from a rigid to a flexible form by a crushing technique (e.g., again see lines 13-21 on reference page 5).

It appears to be the appellants' implicit position that Eling's above-described polyurethane foam reaction mixture does not constitute "a flexible polyurethane foam reaction mixture" as recited in claim 1 because the foam is initially rigid and then made flexible by a crushing technique. However, we do not understand and the appellants do not explain why an artisan would interpret the claimed feature under consideration as somehow excluding the crushing step taught by Eling. Certainly, an artisan would consider the flexible polyurethane foam disclosed by appellants as resulting from certain steps (e.g., adding, mixing, heating, etc.), and the appellants point to nothing in their claims which would have excluded from these steps the crushing step of Eling.

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Thus, it is our perception that the appellants' claimed reaction mixture includes any reaction mixture which produces, at least ultimately, a flexible polyurethane foam. It follows that the claim feature under consideration includes Eling's reaction mixture. Moreover, contrary to the appellants' contention in their Brief and Reply Brief, this claim interpretation is not inconsistent with the subject specification.

For example, the specification discloses in the last full sentence on page 7 that "[t]he flexible polyurethane foam compositions . . . according to the present invention include all well known, industrial compositions" (emphasis added). Use of the term "all" supports the proposition that the aforementioned industrial compositions include the compositions of Eling. Additionally, in the sentence bridging pages 7 and 8 of the specification, the appellants disclose that "flexible polyurethane foam compositions can be made according to the present invention by reacting an isocyanate with a polyol in the presence of a foam-forming agent and a blend of tetrahalophthalate esters and phosphorus-containing flame retardant additives." Because these enumerated ingredients correspond fully to those taught by Eling, the claim interpretation

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discussed earlier is consistent with this disclosure of the appellants' specification.

Referring to the disclosure in Table 3 on page 11 of their specification and to an exhibit² attached to their Reply Brief, the appellants additionally urge that the claim feature "a flexible polyurethane foam reaction mixture" should be interpreted as limited to reactants having certain molecular weight and functionality characteristics. Such an interpretation would be inappropriate for two reasons. First, nothing in their specification or the proffered exhibit establishes that flexible polyurethane foam can be made only from reactants having these certain characteristics, and the Eling reference evinces the contrary. Second, such an interpretation would require the unacceptable importation of limitations from the specification into the claims. See Prima Tek II, L.L.C. v. Polypap, S.A.R.L., 412 F.3d 1284, 1289, 75 USPQ 1219, 1223 (Fed. Cir. (11) 2005).

In conclusion, we find no persuasive merit in the appellants' position that the appealed claims are not anticipated by the Eling reference. We hereby sustain, therefore, the § 102 rejection of claims 1-39 as being anticipated by Eling.

² The appellants' proffer of this exhibit does not comply with 37 CFR § 41.41(a)(2).

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The decision of the examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

AFFIRMED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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BRADLEY R. GARRIS)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
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BRG:clm

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