

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 GEORGE G. PAPPAS

Appeal No. 2006-1798
Application No. 09/966,413
Technology Center 3700

ON BRIEF

Before FRANKFORT, CRAWFORD, and LEVY, *Administrative Patent Judges*.
LEVY, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the Examiner's final rejection of claims 1 and 3-22. Claims 2, 23 and 24 have been cancelled. Claim 25 has been withdrawn from consideration (Brief, page 2).

We AFFIRM

BACKGROUND

Appellant's invention generally relates to candles, and in particular to a structure that reduces some fire hazards associated with burning of freestanding candles (specification, page 3). More specifically, Appellant's invention describes a flame-resistant sheet that "is contacted to a fuel-impervious wick support, and joined to a freestanding candle in proximity to a lower end of a wick" (specification, page 7).

Claim 1 is representative of the invention and is reproduced as follows:

A freestanding candle, in an operable position having a wick supported by a fuel body along a longitudinal wick axis and extending upwardly from a top surface of the fuel body, the candle comprising:

- (a) a flame-resistant, substantially flat sheet joined to the bottom surface of the fuel body in proximity to a lower end of the wick and extending outwardly at least substantially one inch from the longitudinal axis of the wick; and
- (b) an upright wick support attached to the sheet and holding the lower end of the wick, the attached support forming a liquid fuel flow barrier separating the lower end of the wick from the fuel body

wherein the candle is not contained within a container whereby the sheet prevents the leakage of melted candle wax through the bottom of the candle

onto a candle support surface.

The prior art reference relied upon by the Examiner in rejecting the appeal claims is:

Hamblet	2,310,019	Feb. 2, 1943
Gentry	3,317,290	May 2, 1967
Pappas	5,842,850	Dec. 1, 1998
Chambers et al. (Chambers)	5,961,318	Oct. 5, 1999
Pietruch et al. (Pietruch)	6,155,451	Dec. 5, 2000

Claims 1, 3-13, 16, 17, and 24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pappas.

Claims 14, 15, and 18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pappas in view of Gentry.

Claim 19 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Pappas in view of Pietruch.

Claims 20 and 21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pappas in view of Hamblet.

Claim 22 stands rejected under 35 U.S.C. § 103(a) as being unpatentable

over Pappas in view of Chambers.

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 July 12, 2005) and final rejection (mailed January 24, 2005) for the Examiner's complete reasoning in support of the rejections, and to the brief (filed May 4, 2005) and reply brief (filed September 12, 2005) for the Appellant's arguments thereagainst.

Only those arguments actually made by Appellant have been considered in this decision. Arguments which Appellant could have made but chose not to make in the brief have not been considered. *See* 37 C.F.R. § 41.37(c) (1)(vii).

OPINION

In reaching our decision in this appeal, we have carefully considered the subject matter on appeal, the rejections advanced by the Examiner, and the evidence of obviousness relied upon by the Examiner as support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, Appellant's arguments set forth in the briefs along with the Examiner's rationale in support of the rejections and arguments in rebuttal set forth in the Examiner's answer.

We note at the outset that the only claims specifically argued by appellant are claim 1 (the only independent claim before us on appeal) and dependent claim 4. accordingly, we select claim 1 as representative of the group, and will separately address claim 4.

We begin with the rejection of claims 1, 3-13, 16, 17, and 24 under 35 U.S.C. § 103(a) as being unpatentable over Pappas. We turn first to claim 1. We note as background that in rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the Examiner is expected to make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and to provide a reason why one having ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. Such reason must stem from some teaching, suggestion or implication in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir. 1988); *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 293, 227 USPQ 657, 664 (Fed. Cir. 1985); *ACS Hosp. Sys., Inc. v. Montefiore Hosp.*, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). These showings by the Examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. *Note In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). If that burden is met, the burden then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole. *See id.*; *In re Hedges*, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and *In re*

Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976).

The Examiner's position is that Pappas expressly discloses all of the elements of claim 1 with the exception of the limitation that the wick support is attached to the sheet (answer, pages 3-4). With respect to this limitation, the examiner notes that Figure 13 of Pappas shows the wick support (116) attached to a pedestal (112), which is not considered part of the plate/sheet (114). The examiner finds (answer, page 4) that the pedestal functions as one mechanism for raising the wick above the fuel to starve the candle of fuel and extinguish the flame (col. 4 lines 30-32). The Examiner notes (answer, page 4) Pappas' disclosure that the function of raising the wick above the fuel may also be performed through the use of a taller wick support (col. 4 lines 2-22 and figures 2-4, 9, and 10). The Examiner considers that a person of ordinary skill in the art would recognize that the pedestal from Figure 13 could be eliminated by using a taller wick support. The Examiner states (*id.*) that when the pedestal from Figure 13 is replaced with a taller wick support, that the claimed invention is arrived at because the wick support would then be directly attached to plate/sheet (114).

Appellant asserts (brief, pages 6 and 7) that the modification presented by the Examiner would not have been obvious to the skilled worker in light of the Pappas reference. Rather, Appellant alleges that it is a modification guided by Appellant's teachings (*id.*).

Appellant asserts (brief, page 7) that a person of ordinary skill in the art would not be motivated to combine the different embodiments of Pappas in the manner suggested by the Examiner. It is argued that none of the freestanding candle

embodiments of Pappas have a plate or sheet attached to the bottom of the candle, except for figures 13 and 14, and that neither of these has a wick support attached to the plate. It is argued (*id.*) that there is no reason apparent from Pappas to remove the pedestal of figure 13 but keep the rest of the plate part 114 and to move the wick support down and attach it to the plate 114. Appellant adds (brief, page 8) that in figure 13 of Pappas, the pedestal is integral with the plate. It is further asserted (*id.*) that

A skilled person who wanted to use a taller wick support instead of a pedestal would not modify the Fig. 13 structure to do so. That person would do what the Pappas reference itself shows for a freestanding candle. That person would do what is shown in Figs. 9 and 10 of the Pappas reference. No plate would be used if the tall wick support were used because a plate would not be needed.

Appellant (brief, page 9) disputes the Examiner's assertion that the plate serves to prevent fuel from flowing out from under the candle because Pappas discloses that the plate can be made from a combustible material such as wax. Appellant adds (*id.*) that "[o]bviously, if it is wax, it was not intended to prevent molten fuel flow out from the bottom of the candle." Appellant adds that the unmelted layer prevents flow out of the bottom. That is why no plate is needed when the high wick holder is used. Appellant additionally argues (brief, pages 11 and 12) that the prior art does not motivate attaching a wick support to a plate and attaching that plate to the bottom of a freestanding candle.

The examiner responds (answer, page 6) that in Pappas, the disclosure that the sheet or plate may be non-combustible (col. 5, lines 50-51) shows flame

resistance. The examiner further asserts (answer, page 8) that

Figure 9 of Pappas shows a candle body (80) having a wick support/sustainer (82) at the base of the candle that is not shown attached to any pedestal. Pappas makes clear how this wick support/sustainer (82) is mounted. The sustainer 82 is mounted at the candle floor, which for the candle 80 is the surface upon which the bottom of the wax fuel of the candle 80 is resting. This surface can be *an attached plate*, a container floor, a tray or any horizontal surface. (emphasis added). (see Pappas, col. 5, lines 11-15). Thus, the attached plate serves the desirable purpose of supporting the candle body and serving as a mounting for the wick support. The examiner considers that a person of ordinary skill in the art would consider the attached plate mentioned in the above quote to be the type of plate (114) shown in Figure 13 of Pappas.

We agree the assertion of appellant (brief, page 8) that

A skilled person who wanted to use a taller wick support instead of a pedestal would not modify the Fig. 13 structure to do so. That person would do what the Pappas reference itself shows for a freestanding candle. That person would do what is shown in Figs. 9 and 10 of the Pappas reference. No plate would be used if the tall wick support were used because a plate would not be needed.

From appellant's assertion, we look to the disclosure of Pappas for the description of figures 9 and 10. We find from the disclosure of Pappas that the freestanding candle of figure 9 has a sustainer (wick holder) 82 mounted at the candle floor, which for candle 80 is the surface upon which the bottom of the wax

fuel of the candle is resting. This surface can be an attached plate (col. 5, lines 11-15). From the disclosure that the wick holder is mounted at the candle floor, which is the surface upon which the bottom of the candle is resting, we find that the wick holder is mounted at the surface upon which the candle rests. From the disclosure that the surface can be an attached plate, we find that the wick holder is mounted to the attached plate at the bottom of the candle. Thus, we find that the embodiment of figure 9 of Pappas can include a wick holder mounted at the bottom of the candle to the plate upon which the candle rests.

In addition, from the disclosure of Pappas that the plate 114 can be non-combustible, we find that the plate can be flame-resistant. Moreover, we observe that claim 1 recites the wick support to be attached to the sheet. From the disclosure of Pappas that the wick supports is mounted at the surface that can be an attached plate; we find that the description of Pappas meets the claimed "an upright wick support attached to the sheet (plate)."

language "[t]he sustainer 82 is mounted at the candle floor" does not say anything about attachment of the wick support. From the additional disclosure of Pappas that "which for the candle 80 is the surface upon which the bottom of the wax fuel of the candle 80 is resting. The surface can be an attached plate," we find that the wick support is mounted at the surface, which is a plate. Since "mounted at" can include some form of attachment, such as "to place, fix, or fasten on or in the proper support, backing, etc. for the required purpose"¹ we find that the disclosure of mounting the wick support at the surface would have been suggestive of attaching the wick support to the surface, to an artisan. Accordingly, we do not agree with appellant that the above discussed portions of Pappas only recite that the candle is attached to the plate. Nor are we persuaded by appellant's assertion (brief, page 7) that "none of the freestanding candle embodiments have a plate or sheet attached to the bottom of the candle, except figures 13 and 14, as appellant has stated, reply brief, page 4) that figure 9 of Pappas describes the bottom of the wax fuel can be attached to a plate.

From all of the above, we hold that the embodiment of figure 9 of Pappas, including the plate at the bottom of the candle, meets the limitations of claim 1, and are not convinced of any error on the part of the examiner in rejecting claims 1, 3, 5-13, 16, 17, and 24 under 35 U.S.C. § 103(a) as being unpatentable over Pappas. Before turning to claim 4, we note that we further sustain the rejection of claims 1, 3, 5-13, 16, 17, and 24 under an additional rationale. Claim 1 uses the transitional

¹ Webster's New World Dictionary, © 1972. A copy of the pertinent pages is attached to the Decision.

phrase "comprising" which is open-ended. In addition, we note that the claim language "a wick support attached to the sheet" does not recite that there is a direct attachment to the sheet by the wick support. As broadly drafted, the claim does not preclude the wick support from being attached to the sheet through an integral pedestal. Thus, from this claim construction, we hold that the embodiment of figure 13 of Pappas meets the language of claim 1, and will also sustain the rejection of claims 1, 3, 5-13, 16, 17, and 24 for this reason. While this is, in effect, a holding that claim 1 is anticipated by 35 U.S.C. ' 102(b), affirmance of the 35 U.S.C. ' 103 rejection is appropriate, since it is well settled that a disclosure that anticipates under 35 U.S.C. ' 102 also renders the claim unpatentable under 35 U.S.C. ' 103, for "anticipation is the epitome of obviousness." *Jones v. Hardy*, 727 F.2d 1524, 1529, 220 USPQ 1021, 1025 (Fed. Cir. 1984). *See also In re Fracalossi*, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982); *In re Pearson*, 494 F.2d 1399, 1402, 181 USPQ 641, 644 (CCPA 1974).

We turn next to claim 4. This claim is directed to the further limitation that the flame-resistant sheet has an adhesive backing that bonds to both the wick support and the bottom surface of the candle. The examiner's position (answer, pages 9 and 10) is that Pappas discloses the plate 114 as being mounted to the bottom of the candle and refers to the plate as an attached plate, but does not give any detail as to the type of mounting or attaching means employed. The examiner (answer, page 10) relies upon the disclosure of Pappas that the pedestal can be attached to a container by adhesives.

Appellant asserts (reply brief, page 6) that the backing sheet is not suggested in the prior art because placing an adhesive backing on the sheet facilitates manufacture as there is no separate step of applying the adhesive to the sheet or candle bottom and holding them together.

From our review of the record, we are in agreement with the examiner that the disclosure of using adhesives by Pappas would have suggested to an artisan that the sheet have an adhesive backing. As correctly noted by the examiner, Pappas is silent as to how the plate can be mounted or attached. From the nature of the problem to be solved, e.g., attaching a sheet or plate to a surface, and the disclosure of Pappas of using adhesive to attach the pedestal to a container, we find that that artisan would have been motivated to use an adhesive backing on the sheet for attachment to the candle or the candle and wick holder. From all of the above, we are not persuaded of any error on the part of the examiner in rejecting claim 4 under 35 U.S.C. § 103(a) as being unpatentable over Pappas. The rejection of claim 4 is sustained.

We turn next to the rejections of claims 14, 15, and 18-22. The examiner additionally relies upon Gentry, Pietruch, Hamblet, and Chambers in the rejections of these claims (*see* final rejection, pages 4-6). From our review of the record, and the lack of any arguments presented by appellant with respect to these claims, we sustain the rejections of claims 14, 15, and 18-22 for the reasons advanced by the examiner in the final rejection.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1 and 3-22 under 35 U.S.C. § 103(a) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

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