

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

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* PAUL A. CHAMANDY and RUDOLPH J. KLEIN

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Appeal No. 2006-1904  
Application No. 10/216,272  
Technology Center 1700

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Heard: August 8, 2006

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Before FRANKFORT, OWENS and BAHR, *Administrative Patent Judges*.  
BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the examiner's rejection of claims 27-37, 39 and 40. Claims 38 and 42 stand withdrawn from consideration as not being directed to an elected species and claim 41 has been indicated to be allowable by the examiner. Claim 32 was amended subsequent to the final rejection, in an amendment filed September 28, 2005, to overcome the rejection under 35 U.S.C. § 112, second paragraph, set forth in the final rejection (mailed July 27, 2005).



## BACKGROUND

The appellants' invention relates to a garment label having an electronic article surveillance (EAS) or radio frequency identification device (RFID) marker disposed in a pocket therein and to a method of making such a label. A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

The examiner relies upon the following as evidence of unpatentability:

Humble	US 4,254,868	Mar. 10, 1981
Frowein (Frowein '514)	US 5,624,514	Apr. 29, 1997
Frowein (Frowein '087)	US 5,896,087	Apr. 20, 1999
Senior	US 6,019,540	Feb. 1, 2000
Kolton	US 6,724,311 B1	Apr. 20, 2004

The following rejections are before us for review.

Claims 36 and 37 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Frowein '087.

Claims 27-29, 31 and 40 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Frowein '087 in view of Kolton.

Claim 39 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Frowein '087 in view of Senior.

Claims 32-37 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Frowein '087 in view of Frowein '514 and Humble.

Claim 39 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Frowein '087 in view of Frowein '514, Humble and Senior.

Claims 27-31 and 40 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Frowein '087 in view of Frowein '514, Humble and Kolton.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding this appeal, we make reference to the examiner's answer (mailed

February 24, 2006) for the examiner's complete reasoning in support of the rejections and to the appellants' brief (filed January 23, 2006) and reply brief (filed March 14, 2006) 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. As a consequence of our review, we make the following determinations.

We turn our attention first to the rejection of independent claim 36, which requires forming a label material into a pocket having a wall and inserting a detectable EAS or RFID marker *through the wall* into the inside of the pocket, and claim 37, which depends from claim 36, as being anticipated by Frowein '087. As illustrated in Figures 2 and 3 of Frowein '087 and explained in column 3, lines 42-55, the alarm tripping device 10 is inserted in the direction of arrow 20 into a pocket 22 provided between an upper layer 23 and a layer 24 of the label 11 facing the product. The pocket 22 is closed by forcing the layer 24 of the label 11 past a short loop 25 of the upper layer 23 into the hollow space of the pocket 22 so that subsequently the layer 24 is prevented from slipping out by the protruding loop 25.

The alarm tripping device 10 of Frowein '087 is inserted into the pocket 22 through an open end of the pocket that is subsequently closed by forcing the layer 24 past the loop 25 of the upper layer 23. The device is not inserted *through the wall* of the pocket as called for in claim 36. If the loop 25 and layer 24 were considered together to form a wall, as urged by the examiner on page 7 of the answer, a position which is tenable only when the layer 24 is tucked under the loop 25, as illustrated in Figure 2,

there is no indication that the device 10 could be inserted into the space formed between the loop 25 and the layer 24. In any event, Frowein ‘087 does not disclose insertion of the device 10 with the layer 24 tucked under the loop 25; rather, as illustrated in Figure 3, Frowein discloses insertion of the device 10 through the open end of the pocket with the layer 24 disposed outside of the loop 25.

As discussed above, Frowein ‘087 does not disclose a step of inserting the marker into the pocket of the label *through the wall* of the pocket as called for in claim 36. It thus follows that we cannot sustain the rejection of claim 36 or claim 37 depending from claim 36 as being anticipated by Frowein ‘087.

The rejections of claim 40 as being unpatentable over Frowein ‘087 in view of Kolton and claim 39 as being unpatentable over Frowein ‘087 in view of Senior both rest in part on the examiner's finding that Frowein ‘087 discloses a step of inserting the marker *through the wall* of the pocket. The above discussed lack of support in Frowein ‘087 for this finding, which deficiency finds no remedy in the examiner's application of Kolton or Senior, fatally taints the examiner's conclusion that the differences between the subject matter recited in claims 39 and 40 dependent on claim 36 and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.

We also cannot sustain the rejection of claims 27-29 and 31 as being unpatentable over Frowein ‘087 in view of Kolton. As discussed above, Frowein ‘087 discloses insertion of the alarm tripping device 10 into the pocket, as illustrated in Figure 3, through the open end of the pocket 22 between the loop 25 of upper layer 23 and layer 24, when the layer 24 is *not* tucked under the loop 25. Such open end is not a slit spaced from closed ends, as called for in claims 27-29 and 31. There is no indication in Frowein ‘087 that the device 10 is insertable through the space formed between the loop 25 and

the layer 24 when the layer 24 is tucked under the loop 25 to arguably form a slit spaced from closed ends as required by claims 27-29 and 31. The examiner relies on Kolton for a suggestion to adhesively attach the device 10 to the layer 24 of Frowein '087. Even if Frowein '087 were so modified, this would not make up for the deficiency of Frowein '087 discussed above.

The examiner's rationale in rejecting claims 32-37 as being unpatentable over Frowein '087 in view of Frowein '514 and Humble is set forth on pages 9-12 of the answer. Specifically, the examiner contends that

it would have been obvious to one of ordinary skill in the art to provide Frowein 087's function strip (elongate housing) such that the pocket is "closed except for the slit" (claim 32, claim 35) wherein the slit "sized to receive the marker" (claim 32) and "spaced from the closed ends" (claim 32, claim 35) and to insert the antitheft device "through the wall" (claim 36) and into the pocket 22 since (1) Frowein 087 teaches inserting an antitheft device into a **pocket** (figure 3), (2) Frowein 514 suggests locating an antitheft device in a **pocket** having *all its edges closed* so that the antitheft device cannot fall out and (3) Humble et al, which teaches an antitheft device located in a pocket having *all of its edges closed*, suggests disposing the antitheft device in the pocket of an elongate housing by inserting the antitheft device through a slot (slit) in a wall of the **pocket**. Hence, Frowein 087, directed to theft detection, teaches the combination of a label comprising fabric label material, a detectable marker and a pocket in combination with the detectable marker (alarm tripping device 10) being insertable through an opening of the label into the pocket 22. Frowein 087's label has a pair of long edges extending between the short edges 16, and is therefore elongated. Each of the long edges is closed as can be seen from the cross-sectional view of figure 3. Frowein 514 and Humble et al add to the disclosure of Frowein 087 by motivating one of ordinary skill in the art to close all four edges of Frowein 087's elongated tubular label so

as to obtain the benefit of preventing the detectable marker from falling out of the pocket. Closing all four edges of Frowein 087's label except for the opening through which the detectable marker is inserted is consistent with Frowein 087's illustration of closed long edges and Frowein 087's teaching to secure the function strip 11 at both short edges 16 where the function strip is folded in toward the product. Humble et al provides one of ordinary skill in the art with a reasonable expectation of success since Humble et al teaches inserting a detectable marker through an opening in the form of a slot (slit) in a wall of a pocket which is closed except for the slot (slit) [answer, pp. 10-11].

Frowein '514 is directed to a woven label having an alarm trigger 50 inserted into a completely closed pocket therein during the weaving process of the label and provides no teaching or suggestion to provide a slot in a fabric label wall through which an alarm triggering device is inserted into a pocket in the label. Humble is directed to an enclosure of *tough tear resistant plastic* for securing to a flat surface of an article, such as a cardboard record jacket, by pressure sensitive adhesive, the enclosure provided with a slot 45 for accepting a security tag 12 therethrough for retention within the enclosure and a tab 23 for elevating the tag to the ceiling 22 of the enclosure. When a retailer desires to affix a tag 12 to an article such as a record jacket, the tag may be inserted through the slot 45 into an enclosure 10 whereupon the release paper 18 is peeled from the panel 24 of the enclosure exposing the pressure sensitive adhesive 15. In order to remove the tag 12 from the enclosure, upon retail purchase of the record, a razor edge implement 26 is applied to the enclosure 10 to sever the enclosure at the intersection 21 between walls 19 and 20. The implement 26 includes a platform portion 37 supporting a blade 32. The platform portion 37 penetrates the enclosure so as to slip under the end of tag 12, which is located within the enclosure with its end 25 elevated toward the ceiling 22 of the

enclosure by tab 23. A post 39 projects upwardly from the platform 37 and is tapered at 40 so that upon movement of the implement through the sidewall of the enclosure the post 39 will slide under the tag 12 until it registers with and enters an aperture 41 provided in the tag 12. The tag can then be extracted from the enclosure with the implement.

Frowein '087, Frowein '514 and Humble are directed to three different types of devices for securing an antitheft alarm tripping marker to an article and, in light of their disparate approaches and structures, we find no suggestion in the applied references to combine them as proposed by the examiner. Specifically, while Frowein '087 and Frowein '514 are both directed to fabric labels, Frowein '087 provides an open-pocket arrangement with a folded-over insertion loop and Frowein '514 provides a fully-enclosed pocket. One skilled in the art viewing the teachings of the two Frowein patents in combination would have selected one or the other of the two arrangements and would have found no suggestion to modify Frowein '087 to provide a closed pocket with a slit. Humble is directed not to a fabric label but to a tough tear resistant plastic enclosure for a security tag, the enclosure being adapted for adhesive attachment to an article, and thus would not have provided any suggestion for modification of a fabric label. In light of the above, we will not sustain the rejection of claims 32-37 as being unpatentable over Frowein '087 in view of Frowein '514 and Humble.

The examiner's application of Senior and Kolton provides no cure for the deficiency of the combination of Frowein '087 in view of Frowein '514 and Humble discussed above. It follows that the rejections of claim 39 as being unpatentable over Frowein '087 in view of Frowein '514, Humble and Senior and claims 27-31 and 40 as being unpatentable over Frowein '087 in view of Frowein '514, Humble and Kolton are also not sustained.

## CONCLUSION

To summarize, none of the examiner's rejections is sustained. The decision of the examiner to reject claims 27-37, 39 and 40 is REVERSED.

REVERSED

CHARLES E. FRANKFORT )  
Administrative Patent Judge )  
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 ) BOARD OF PATENT  
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