

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 STEVEN MICHAEL HEALY and THOMAS HEASLIP

Appeal No. 2006-2374
Application No. 10/164,670
Technology Center 3700

ON BRIEF

Before LEVY, NAPPI and HORNER, *Administrative Patent Judges*.
HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the examiner's final rejection of claims 14-17 and 25-27, all of the claims pending in the application. Claims 1-13 and 18-24 have been canceled.

We reverse and make a new ground of rejection pursuant 37 C.F.R. § 41.50(b).

BACKGROUND

The appellants' invention relates to a reclosable bag having gusset sidewalls that are bonded to front and rear walls of the bag opposite the reclosable seal to form volume regions that are removed from the volume of the reclosable bag. This bonding assists in forming a substantially flat bottom to the reclosable bag. The bonding also precludes material used to fill the bag from flowing into the removed volume regions. Claim 25, reproduced below, is representative of the subject matter on appeal. A copy of all of the claims on appeal can be found in the appendix to the appellants' brief.

25. A reclosable bag comprising a front wall, a rear wall and two sidewalls, each sidewall connecting the front wall to the rear wall, each sidewall having a gusset along a substantial portion thereof, a top part of the front wall and rear wall closed by a reclosable seal, the front wall and the rear wall bonded to the adjacent gusset sidewalls opposite the reclosable seal to form volume regions within said reclosable bag opposite the reclosable seal that are removed from the volume of the reclosable bag thereby assisting in forming a substantially flat bottom to the reclosable bag and whereby a material to be filled into the bag is precluded from flowing into the removed volume regions, and a seal at the bottom edge of the reclosable bag to close the reclosable bag.

The examiner relies upon the following as evidence of unpatentability:

Dickson	3,378,189	Apr. 16, 1968
McClintock <i>et al.</i> (McClintock)	5,037,138	Aug. 06, 1991
Stolmeier <i>et al.</i> (Stolmeier)	6,257,763	Jul. 10, 2001 (filed Jun. 04, 1998)
Furukawa <i>et al.</i> (Furukawa)	JP 4[1992]-6049	Jan. 10, 1992
Noguchi	JP 05-097151	Apr. 20, 1993

The following rejections are before us for review.

1. Claims 14, 15, and 25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Noguchi in view of McClintock.
2. Claims 16 and 17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Noguchi in view of McClintock and further in view of Stolmeier.
3. Claim 26 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Noguchi in view of McClintock and further in view of Dickson.
4. Claim 27 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Noguchi in view of McClintock and further in view of Furukawa.

Rather than reiterate in detail the conflicting viewpoints advanced by the examiner and the appellants regarding this appeal, we make reference to the examiner's answer (mailed February 16, 2006) for the examiner's complete reasoning in support of the rejection and to the appellants' brief (filed December 27, 2005) and reply brief (filed April 11, 2006) for the appellants' arguments.

OPINION

In reaching our decision in this appeal, we have carefully considered the appellants' specification and claims, the applied prior art, and the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations that follow.

We begin with the rejection of claims 14, 15, and 25 under 35 U.S.C. § 103(a) as being unpatentable over Noguchi in view of McClintock. We note at the

outset that the appellants argue the claims as a group. Accordingly, we select claim 25 as representative of the group.

In rejecting claims under 35 U.S.C. § 103(a), the examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). *See also In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). The examiner can satisfy this burden by showing that some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references such that they would teach or suggest the claimed subject matter. *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). It is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. *See id.* at 1073, 5 USPQ2d at 1598. 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). The examiner must articulate reasons for the examiner's decision. *In re Lee*, 277 F.3d 1338, 1342, 61 USPQ2d 1430, 1433 (Fed. Cir. 2002). In particular, the examiner must show that there is a teaching, motivation, or suggestion to combine references relied on as evidence of obviousness. *Id.* at 1343, 61 USPQ2d at 1433.

A suggestion, teaching, or motivation to combine the relevant prior art teachings does not have to be found explicitly in the prior art. *See e.g., In re Kahn*, 441 F.3d 977, 987-88, 78 USPQ2d 1329, 1337-38 (Fed. Cir. 2006) (“the teaching, motivation, or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references”). The test for an implicit showing is what the

combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art. *Id.* at 987-88, 78 USPQ2d at 1336 (citing *In re Kotzab*, 217 F.3d 1365, 1370, 55 USPQ2d 1313 (Fed. Cir. 2000)).

These showings by the examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. *See Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444. Only if this initial burden is met does the burden of coming forward with evidence or argument shift to the appellant. *Id.* at 1445, 24 USPQ2d at 1444. *See also Piasecki*, 745 F.2d at 1472, 223 USPQ at 788. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. *See Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444; *Piasecki*, 745 F.2d at 1472, 223 USPQ at 788.

In the rejection of independent claim 25, the examiner determined that “Noguchi discloses the claimed device except for the front and rear wall being bonded to the gusset sidewalls adjacent the reclosable seal by diagonal seals.” Answer, p. 3. In particular, the examiner found that Figure 1 of Noguchi shows the bottom portions of seals 5 extending diagonally from the side edges of the front wall downward toward the bottom of the bag. Answer, p. 5. The examiner found that Figure 2 of Noguchi shows that when the bag is filled, it forms a substantially flat bottom. Reply, p. 6. The examiner relies on McClintock for the teaching that it is known in the art to bond the front and rear walls to the gusset sidewalls using diagonal seals. The examiner found that it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the bag of

Noguchi with the diagonal seals of McClintock in order to improve flow of the product from the bag. Answer, p. 3.

We make the following observations regarding the examiner's rejection. We note that claim 25 does not require "the front and rear wall being bonded to the gusset sidewalls *adjacent* the reclosable seal *by diagonal seals*" as stated by the examiner. Rather, claim 25 requires the front wall and the rear wall to be bonded to the adjacent gusset sidewalls *opposite* the reclosable seal. Further, we note that claim 25 makes no mention of diagonal seals.

The appellants argue, *inter alia*, that Noguchi does not teach a structure that promotes formation of a more planar bottom to the filled bag. In particular, the appellants contend that Noguchi does not disclose a seal of the front wall to a gusset wall and the rear wall to a gusset wall (with no seal of gusset wall to gusset wall) at the bottom of the bag to form a volume removed from the volume of the bag and into which product will not flow during bag filling. Brief, p. 6. The appellants further argue that the examiner appears to be guessing as to what the figures of Noguchi disclose about the formation of the bottom of the bags since nothing in the text of Noguchi supports the examiner's position. Brief, p. 7.

We note that claim 25 does not explicitly require that the gussets walls not be sealed to one another. Rather, claim 25 merely recites that the front wall and the rear wall are bonded to the adjacent gusset sidewalls opposite the reclosable seal to form volume regions within said reclosable bag opposite the reclosable seal that are removed from the volume of the reclosable bag thereby assisting in forming a substantially flat bottom to the reclosable bag.

We agree, however, with the appellants that the examiner is reading too much into the disclosure of Noguchi based on the figures. Although the figures form part of the prior art disclosure and can be relied upon for teachings in the art, in this case, the examiner has resorted to speculation by inferring disclosure from the figures that is not clearly shown and not described in the text of the prior art reference. We do not agree that the figures of Noguchi show all of the claimed structural features and how they are put together. For example, although Figure 1 appears to show an area about the perimeter of the sides and bottom of the bag that is sealed, it is not clear how this seal is effected and the disclosure of Noguchi provides no specific detail about the seals of the bag. Noguchi teaches only that the inward-folding V-shaped gusset (4), made of single- or multiple-ply film, is bonded to the sides (5) of the bag (1). Noguchi, para. 0013. Noguchi does not describe how the bottom of the bag is sealed in order to create the flat bottom shown in Figure 2, and it is simply not clear from the detail of the bag shown in Figure 1.

The appellants further argue that there is no motivation to combine Noguchi and McClintock because McClintock discloses diagonal seals only at the top of the bag adjacent the reclosable seal to improve flow from the bag. The appellants argue that McClintock provides a different solution to a different problem than the present invention, because McClintock does not teach using the diagonal seals to provide a flat bottom for the bag. Reply Brief, p. 1. We agree with the appellants and find that there is no teaching, suggestion, or motivation, either explicitly or implicitly from the prior art, to modify Noguchi with the seals of McClintock that would have led to the claimed invention. In particular, there is no teaching or

suggestion in either reference to use seals at the bottom of the bag to assist in forming a flat bottom for the bag. Further, because the diagonal seals of McClintock are taught only at the top of the bag to improve flow from the bag, and thus directed to a different problem, we do not find implicit motivation to apply the teachings of McClintock to the bag of Noguchi to form the bag as recited in claim 25. As such, we hold that a person of ordinary skill in the art, possessed with the understandings and knowledge reflected in Noguchi and McClintock, and motivated by the general problem facing the inventor of creating a reclosable bag that would remain in an upright position when filled, would not have been led to make the combination recited in the claims. *See In re Kahn*, 441 F.3d at 988, 78 USPQ2d at 1337. Accordingly, we do not sustain the examiner's rejection of claims 14, 15, and 25 under 35 U.S.C. § 103.

The examiner's rejections of claims 16, 17, 26, and 27 all rely on the underlying combination of Noguchi and McClintock and further rely on Stolmeier, Dickson, or Furukawa. Answer, pp. 3-5. We find that the teachings of Stolmeier, Dickson, and Furukawa do not cure the deficiencies of Noguchi and McClintock. In particular, neither Stolmeier, Dickson, nor Furukawa teach or suggest a reclosable bag having gusset sidewalls in which "the front wall and the rear wall [are] bonded to the adjacent gusset sidewalls opposite the reclosable seal to form volume regions within said reclosable bag opposite the reclosable seal that are removed from the volume of the reclosable bag thereby assisting in forming a substantially flat bottom" as recited in claim 25. Although Dickson appears to disclose the same bonding of the front and rear walls to the adjacent gusset sidewalls to make a block end, it teaches this bonding for use at the mouth of the

sack, rather than “opposite” a reclosable seal. Dickson, Figures 1 and 2 and col. 1, lines 33-45. As such, we do not sustain the examiner’s rejection of claims 16, 17, 26, and 27 under 35 U.S.C. § 103.

NEW GROUND OF REJECTION

Under our authority provided in 37 C.F.R. § 41.50(b) we enter a new ground of rejection of claims 16, 17, and 25 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 4,491,959 to Loeffberg¹ in view of Stolmeier.

Loeffberg discloses a plastic bag (2) comprising a front wall (2a), a rear wall (2b) and two sidewalls comprised of gusset fold parts (7, 7a, 8, 8a). Loeffberg, Figure 1. Each sidewall connects front wall (2a) to rear wall (2b). Loeffberg, Figure 1. Each sidewall has a gusset along a substantial portion thereof. Loeffberg, col. 2, lines 32-38. Loeffberg teaches the use of fold part seals to give the bag an optimum block shape. In particular, Loeffberg describes:

To give a bag of this type an optimum block shape in the filled condition, first fold part seals 9, 10 are provided at one side of the bag and first fold part seals 11 and 12 at the other side of the bag. The first fold part seal 9 connects the upper foil layer 2a with its subjacent gusset fold part foil layer 7, whilst the first fold part seal 10 connects the subjacent foil layer 2b with the gusset fold part foil layer 8.

On the other hand fold part seals 11 and 12 have been formed by uniting the upper foil layer 2a with the subjacent lower gusset fold part foil layer 7a and foil layer 2b with the subjacent upper gusset fold part layer

¹ U.S. Patent No. 4,491,959 to Loeffberg was made of record by the appellants in an Information Disclosure Statement filed on February 11, 2003.

8a. (Loefberg, col. 2, lines 46-57.)

What Loefberg is describing is the same bonding of the front and rear walls to adjacent gusset sidewalls as is recited in claim 25. As shown in Figure 1, these diagonal fold seal parts (9, 10, 11, 12), when bonded to their adjacent front and rear walls (2a, 2b) create volume regions (22, 23, 24, 25) of the bag at the bottom portion of the bag that are removed from the volume of the bag. *See also* Loefberg, col. 3, lines 55-60. As shown in Figure 2, these diagonal seals form a substantially flat bottom to the bag when it is filled. *See also* Loefberg, col. 2, lines 26 and 46-47. Finally, Loefberg discloses a seal (6a) at the bottom edge of the bag to close the bag. Loefberg, Figure 1 and col. 2, lines 39-45.

As such, Loefberg teaches all of the elements of claim 25 except for the top part of the front wall and rear wall closed by a reclosable seal. As noted by the examiner in the rejection of claim 16, and as admitted by the appellants on page 8 of the Brief, Stolmeier shows a zipper reclosable seal on a bag. Stolmeier teaches that the bag is filled at the factory with a product and then marketed to the consumer and if the consumer does not wholly consume the contents, he can reclose the bag using the reclosable seal and use the bag further to contain the partially filled bag. Stolmeier, col. 3, lines 39-47.

We also note that the appellants are not claiming to be the first to invent a reclosable bag. See e.g., Specification, page 1, line 12 - page 2, line 13 (appellants acknowledge that reclosable, zipper-type seals are known in the prior art and that they allow the bag to be opened and reclosed). As such, we hold that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have added the zipper reclosable seal of Stolmeier to the bag of Loefberg

to provide a means for the user to close the bag after it has been opened. Specifically, we hold that a person having ordinary skill in the art at the time the invention was made, possessed with the teachings of Loeffberg and Stolmeier, and motivated by the general problem facing the inventor of creating a reclosable bag that would remain in an upright position when filled, would have been led to make the combination recited in the claims. *See Kahn*, 441 F.3d at 988, 78 USPQ2d at 1337. Accordingly, we hold that claim 25 is unpatentable under 35 U.S.C. § 103(a) over Loeffberg in view of Stolmeier.

It is clear from the examiner's prior rejection that the teachings of Stolmeier would also render obvious claims 16 and 17 for the same reasons set forth in the examiner's final rejection. *See Answer*, pp. 3-4. In particular, we agree with the examiner that Stolmeier discloses that it is known in the art to provide a zipper as a slide zipper (slider 35) with a stop (shoulders 43 and 44) bonded to at least one end thereof in an analogous bag. We hold that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have added the slider zipper reclosable seal of Stolmeier to the bag of Loeffberg to provide a means for the user to easily close the bag after it has been opened.

We also agree with the examiner that Stolmeier discloses that it is known in the art to provide a tamper evident seal adjacent the fastener of an analogous bag. *See e.g.*, Stolmeier, col. 1, lines 17-19. We hold that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have added the tamper evident seal of Stolmeier to the bag of Loeffberg to provide a visual indication of surreptitious opening.

We note that the appellants did not contest these findings of the examiner as

to the scope and content of the Stolmeier disclosure in the Brief or Reply Brief. Based on the examiner's findings as to the scope and content of Stolmeier and the motivation to combine discussed above, we hold that claims 16 and 17 are also unpatentable under 35 U.S.C. § 103(a) over Loeffberg in view of Stolmeier.

Observations and Remarks

Because we are primarily a board of review, we have applied the Loeffberg and Stolmeier references only to claims 16, 17, and 25. We leave it to the examiner to determine whether these references, alone or in combination with other pertinent references of which the examiner is aware, should be applied to any or all of the remaining claims on appeal.

Drawing Objection

The appellants seek to have the Board review the propriety of a drawing objection under 37 C.F.R. § 1.83(a) made by the examiner in the final office action. Any challenge to a final drawing objection should be taken by petition to the Director pursuant to 37 C.F.R. § 1.181. As such, this matter is not properly before the Board, and we decline to review it here. *See* M.P.E.P. §§ 1002 and 1201.

CONCLUSION

To summarize, the decision of the examiner to reject claims 14-17 and 25-27 is reversed. Under the provisions of 37 C.F.R. § 41.50(b), we enter a new ground of rejection of claims 16, 17, and 25 under 35 U.S.C. § 103(a) as being unpatentable over Loeffberg in view of Stolmeier.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004). 37 C.F.R. § 41.50(b) provides, "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review." 37 C.F.R. § 41.50(b) also provides that the appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

- (1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner....
- (2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. The request for rehearing must address any new ground of rejection and state with particularity the points believed to have been misapprehended or overlooked in entering the new ground of rejection and also state all other grounds upon which rehearing is sought.

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

REVERSED; 37 CFR 41.50(b)

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STUART S. LEVY)	
Administrative Patent Judge)	
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ROBERT E. NAPPI)	APPEALS
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