

The opinion in support of the decision being entered today is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BRETT HATCH, BURTON HATCH, and
BARLOW HATCH

Appeal 2006-2547
Application 10/095,409¹
Patent 6,237,775
Technology Center 3700

Decided: May 31, 2007

Before ADRIENE LEPIANE HANLON, CAROL A. SPIEGEL, and
JAMES T. MOORE, *Administrative Patent Judges*.

SPIEGEL, *Administrative Patent Judge*.

DECISION ON APPEAL

- 1 This is a decision on appeal under 35 U.S.C. § 134 from the
2 Examiner's final rejection of all the claims pending in this reissue

¹ Application 10/095,409 was filed March 11, 2002 as a reissue of U.S. Patent 6,237,775 issued May 29, 2001, based on application 09/563,375, filed May 3, 2000, and assigned to T3B, Inc.

1 application, i.e., claims 1-5 and 18-28. We have jurisdiction under 35
2 U.S.C. § 6(b). We affirm.

3 Introduction

4 The subject matter on appeal is directed to a food pan having louvered
5 vents in an upper area of a surrounding side wall of the pan. The louvered
6 vents enable tempered air to flow downward across the surface of the
7 contents of the pan so that the contents are maintained at an appropriate
8 temperature. The louvered vents may extend outward from the pan to form
9 an anti-jamming mechanism when multiple pans are stacked together.

10 [Specification, col. 1, ll. 55-65.]

11 Claims 1 and 24 are illustrative and read as follows:

12 1. A food pan comprising:

13 one surrounding side wall and an imperforate
14 bottom integrally forming a main body, the side
15 wall having an imperforate lower portion abutting
16 the bottom and making direct contact with contents
17 of the food pan when the pan holds food,

18 and the side wall further having an upper edge and
19 an upper edge-adjacent portion, the upper edge-
20 adjacent portion including at least one vent
21 therethrough adjacent to the upper edge, the vent
22 being partially covered by a louver such that

23 the said at least one vent directs an airflow
24 downward and into the pan to facilitate airflow
25 contact with the upper surface of contents of the
26 food pan, the food pan being adapted to be
27 removably receivable by a food preparation table.

28 24. A food pan consisting essentially of one
29 surrounding side wall and bottom integrally

1 forming a main body, the side wall having an
2 imperforate lower portion abutting the bottom, an
3 upper edge and an upper portion abutting the upper
4 edge, the upper portion including at least one vent
5 therethrough adjacent to the upper edge, the vent
6 being partially covered by a louver, whereby the
7 vent directs airflow downward and into the pan to
8 facilitate airflow contact with an upper surface of
9 the contents of the pan.

10 The Examiner relies on the following prior art in his rejections:

11	Brandenburg	US 404,255	May 28, 1889
12	Branz	US 5,168,719	Dec. 08, 1992
13	Rostkowski	US 5,366,107	Nov. 22, 1994
14	Meyer	US 5,916,023	Jun. 29, 1999

15 Issues²

16 Claims 24-28 stand rejected under 35 U.S.C. § 112, first paragraph
17 (lack of original descriptive support). Claims 1, 2, 4, 5, 18, 19, 22, 24, 25,
18 27 and 28 stand rejected under 35 U.S.C. § 103(a) as unpatentable over
19 Brandenburg in view of Branz and Rostkowski. Claims 3, 20 and 26 stand

² In an Advisory Action mailed January 9, 2006, the Examiner entered claim amendments filed October 4, 2005 and stated that the following rejections had been overcome: the final rejections of (1) claims 4 and 5 under 35 U.S.C. § 112, second paragraph, as indefinite, (2) claims 1, 2, 4, 5, 18, 19, 21 and 22 as anticipated under 35 U.S.C. § 102(b) by Branz, (3) claims 1, 2, 4, 5, 18, 19, 22, 24, 25, 27 and 28 under 35 U.S.C. § 103(a) as unpatentable over Breen (U.S. Patent 5,667,827), Gorlich (U.S. Patent 5,866,164) and Howell (U.S. Patent 5,203,833) in view of Branz and Rostkowski, (4) claims 1, 2, 4, 5, 18, 19, 21 and 22 as unpatentable under 35 U.S.C. § 103(a) over Branz in view of Brandenburg, Breen, Gorlich and Howell, and (5) claims 1, 2, 4, 5, 18, 19, 21 and 22 as unpatentable under 35 U.S.C. § 103(a) over Rostkowski in view of Branz.

1 rejected under 35 U.S.C. § 103(a) as unpatentable over Brandenburg in view
2 of Branz and Rostkowski, as applied to claims 1 and 24, and further in view
3 of Meyer.

4 Discussion

5 We have carefully considered all of the arguments advanced by
6 Appellants in their Appeal Brief and Reply Brief, filed January 6, 2006 and
7 May 12, 2006, respectively, and by the Examiner as set forth in his Answer
8 mailed March 13, 2006. In the Final Rejection mailed August 4, 2005, the
9 Examiner had rejected claims 1-5, 18-22 and 24-28 under 35 U.S.C. § 112,
10 first paragraph (lack of original descriptive support). However, according to
11 the Answer only claims 24-28 stand rejected under 35 U.S.C. § 112, first
12 paragraph. Therefore, we dismiss the rejection of claims 1-5 and 18-22
13 under 35 U.S.C. § 112, first paragraph (lack of original descriptive support).

14 Rejection of claims 24-28 under § 112, first paragraph

15 The side wall of the food pan recited in claim 24 has an imperforate
16 lower portion abutting the bottom of the pan, an upper edge and "an upper
17 portion abutting the upper edge, the upper portion including at least one vent
18 there through adjacent to the upper edge, the vent being partially covered by
19 a louver." According to the Examiner, recitation of "an upper portion
20 abutting the upper edge" lacks original descriptive support because it "adds
21 an abutting structure that was not shown in a drawing or discussed in the
22 written text of the original specification, claims or abstract" (Answer, 4).

1 Compliance with § 112 requires sufficient information in the
2 specification to show that Appellants possessed the invention as of the time
3 of the original disclosure. *See Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555,
4 1561, 19 USPQ2d 1111, 1115 (Fed. Cir. 1991) ("Adequate description of the
5 invention guards against the inventor's overreaching by insisting that he
6 recount his invention in such detail that his future claims can be determined
7 to be encompassed by within his original creation."). "The written
8 description requirement does not require the applicant 'to describe exactly
9 the subject matter claimed, [instead] the description must clearly allow
10 persons of ordinary skill in the art to recognize that [he or she] invented
11 what is claimed.'" *In re Gosteli*, 872 F.2d 1008, 1012, 10 USPQ2d 1614,
12 1618 (Fed. Cir. 1989) (citations omitted).

13 With respect to the "upper portion abutting the upper edge" limitation
14 of claim 24, Figure 1 illustrates a food pan **10** having a side wall comprising
15 an upper end **14** or upper area that includes at least one louvered vent **16**
16 (specification, col. 2, ll. 35-44 and col. 3, l. 17) as well as an unnumbered
17 upper edge or rim abutting the upper area or upper end **14** of the sidewall.

18 Hatch's Figure 1 is reproduced below:
19

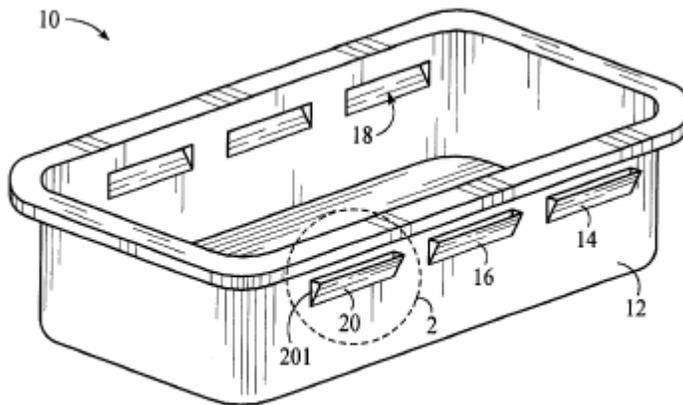


FIG. 1

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Hatch's Figure 1 depicts a food pan.

Appellants' "application need not describe the claimed subject matter in exactly the same terms as used in the claims. . . ." *Eiselstein v. Frank*, 52 F.3d 1035, 1038, 34 USPQ2d 1467, 1470 (Fed. Cir. 1995). Instead, the written description requirement can be satisfied by "words, structures, figures, diagrams, formulas, etc." *Lockwood v. Am. Airlines, Inc.* 107 F.3d 1565, 1572, 41 USPQ2d 1961, 1966 (Fed. Cir. 1997) (emphasis added). Here, we agree with Appellants (Appeal Br. 4; Reply Br. 3) that the "upper portion" recited in claim 24, which abuts "the upper edge" and "includes at least one vent" is described in the specification and illustrated in Figure 1 as the upper area or "upper end **14**" of the side wall and includes at least one vent **16**. Neither Appellants nor the Examiner have provided a substantive discussion of the "abutting structure" referred to by the Examiner (Answer, 4). However, Figure 1 reasonably conveys a structure, such as an unnumbered upper edge or lip on pan **10** which abuts the upper area or upper end **14** of the sidewall, to one of ordinary skill in the art.

1 Therefore, we reverse the decision of the Examiner to reject claims
2 24-28 under § 112, first paragraph, for lack of original descriptive support.

3 Rejection of claims 1-2, 4-5, 18-19, 21-22, 24-25 and 27-28 under § 103(a)

4 Claims 1, 2, 4, 5, 18, 19, 21, 22, 24, 25, 27 and 28 stand rejected
5 under § 103(a) over Brandenburg in view of Branz and Rostkowski. The
6 Examiner found, and Appellants do not dispute, that Bradenburg discloses a
7 vented food container "except for the louvers" (Answer, 4).

8 According to Rostkowski, containers providing moisture proof storage
9 are known and containers providing an abundance of ventilation are known,
10 especially for the storage of fruits and vegetables, but there are no known
11 largely moisture proof containers that provide a means of shielded
12 ventilation (col. 1, ll. 32-44). Rostkowski discloses shielding vents **7** with
13 integrated louvers **27** to provide ventilation for contents in a storage
14 container while protecting the contents from precipitation and sources of
15 ignition (col. 1, ll. 47-55 and col. 2, ll. 52-56).

16 Branz discloses a food preparation table having a forced air supply to
17 cool foodstuffs in condiment pans (col. 1, ll. 59-64). The pans are disposed
18 in a plenum having at least one air channel and at least one upper louver
19 (col. 2, ll. 40-65). As shown in Figs. 2 and 6, upper louvers **90** extend
20 toward and into plenum wall **70** so that air entering openings/vents **92** is
21 guided to travel in a downwardly direction toward pans **80** at about a 45
22 degree angle (col. 9, ll. 45-60). The downward bias of louver **90** also
23 prevents foodstuff from falling inside the complex wall structure of the

1 plenum, thereby contributing to the sanitary condition of the food
2 preparation table (col. 9, l. 10 - col. 10, l. 3).

3 According to the Examiner,

4 [i]t would have been obvious to add louvers to the
5 exterior of the vented passages of Brandenburg as
6 exemplified by Rostkowski's integral louvers at the
7 venting area of a container so that air is directed in
8 a downward direction for the reasons advanced by
9 Branz, specifically, so that air entering the louver
10 openings is guided to travel in a downward
11 direction at about a 45 degree angle as motivated
12 by preventing food from falling inside the complex
13 wall structure of the plenum (see column 9, line 45
14 to column 10, line 3 of Branz). [Answer, 5.]

15 In other words, "[f]ood which moves from an inner food holding area past
16 either the vents or the louver will contaminate an interstitial space and this is
17 unsanitary and not desirable" (Answer, 7).

18 Appellants argue that the Examiner's obviousness statement fails to
19 specifically point out any teaching or suggestion in Brandenburg, Branz or
20 Rostkowski that would have motivated a skilled artisan to combine these
21 references or otherwise modify Brandenburg to solve the problem
22 confronting Appellants, especially since none of Branz's pans have louvered
23 vents (Reply Br. 5-6). According to Appellants, "[t]he Examiner has done
24 no more than successfully identify within the prior art the individual
25 elements constituting the claimed invention and then presented the
26 functionality of these features as the needed motivation for one to combine
27 these elements so as to render the invention obvious" (*id.*, 7). Appellants
28 attack Bradenburg, Branz and Rostkowski individually and contend that they

1 are nonanalogous art (*id.*, 8-9). In particular, Appellants argue that the food
2 containers of Brandenburg, although holding food, are "not in the field of
3 food pans utilized with food preparation tables" (*id.*, 8). Appellants further
4 argue that Branz's food pans themselves block air flow to the food, which is
5 the specific problem being faced by Appellants (*id.*, 9). As to Rostkowski,
6 Appellants contend that while it may have been obvious to vent harmful
7 gases in a firewood holder, that was not the problem being faced by
8 Appellants (*id.*).

9 Appellants additionally argue that the transitional phrase "consisting
10 essentially of" in claim 24 and its dependent claims precludes application of
11 Brandenburg, Branz and Rostkowski as prior art because they would
12 materially change the characteristics of Appellants' food pan (Reply Br., 10).
13 Specifically, Brandenburg's food container requires a handle and a cover;
14 Branz's plenum requires ledges to support condiment pans and is
15 incorporated into a food preparation table; and, Rostkowski's storage
16 container requires a cover and handles (Reply Br., 10-11).

17 "[I]f a technique has been used to improve one device, and a person of
18 ordinary skill in the art would recognize that it would improve similar
19 devices in the same way, using the technique is obvious unless its actual
20 application is beyond his or her skill." *KSR Int'l v Teleflex, Inc.*, 127 S.Ct.
21 1727, 1740, 82 USPQ2d 1385, 1396 (2007). "The test for obviousness is not
22 whether the features of a secondary reference may be bodily incorporated
23 into the structure of the primary reference; nor is it that the claimed
24 invention must be expressly suggested in any one or all of the references.
25 Rather, the test is what the combined teachings of the references would have

1 suggested to those of ordinary skill in the art." *In re Keller*, 642 F.2d 413,
2 425, 208 USPQ 871, 881 (CCPA 1981). Moreover, "[o]bviousness is not to
3 be determined on the basis of purpose alone." *In re Graf*, 343 F.2d 774, 777,
4 145 USPQ 197, 199 (CCPA 1965). However, "rejections on obviousness
5 grounds cannot be sustained by mere conclusory statements; instead, there
6 must be some articulated reasoning with some rational underpinning to
7 support the legal conclusion of obviousness." *In re Kahn*, 441 F.3d 977,
8 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).

9 Here, the Examiner has provided a reason for making the
10 combination, which we find credible and which Appellants have not
11 materially challenged, i.e., to effectively direct air flow and prevent food
12 passage out of the food pan into an interstitial space (Answer, 7). Instead,
13 Appellants have simply proffered an alternative means for removing "stray"
14 food that may drop into the interstitial space along with any residual water
15 when the food pans are removed from the preparation table (Reply Br., 6).
16 The fact that the Examiner's reason is not the same as Appellants' alternative
17 solution is insufficient to rebut the conclusion of obviousness presented by
18 the Examiner. *KSR Int'l v Teleflex, Inc.*, 127 S.Ct. at 1741, 82 USPQ2d at
19 1396; *In re Dillon*, 919 F.2d 688, 693-94, 16 USPQ2d 1897, 1901-02 (Fed.
20 Cir. 1990).

21 Secondly, "consisting essentially of" language opens the claimed
22 invention to unlisted components or ingredients that do not materially affect
23 the basic and novel properties of the invention. *PPG Indus. v. Guardian*
24 *Indus. Corp.*, 156 F.3d 1351, 1354, 48 USPQ2d 1351, 1354 (Fed. Cir. 1998).

1 The basic and novel property of the claimed food pan is its louvered vents.
2 Appellants have not explained, and it is not apparent to us, how using the
3 claimed food pan in combination with other structures, e.g., a lid, would
4 materially affect the basic and novel characteristics of the claimed food pan.
5 For example, covering the claimed food pan, as might be done to protect its
6 food contents prior to serving the food, would not appear to alter materially
7 the pan's ability to hold food or properly ventilate the food contained therein.

8 Thirdly, relating to the argument that Rostkowski is nonanalogous art,
9 the Appellant has put forth no persuasive evidence refuting the Examiner's
10 finding that the louvered vents of Rostkowski are pertinent to the problem of
11 moving or directing air in a container. (Answer, p. 7, ll. 1-2).

12 Therefore, based on the foregoing, we will sustain the rejection of
13 claims 1, 2, 4, 5, 18, 19, 22, 24, 25, 27 and 28 under § 103(a) as
14 unpatentable over Brandenburg in view of Branz and Rostkowski.

15 Rejection of claims 3, 20 and 26 under § 103(a)

16 Claims 3, 20 and 26 stand rejected under § 103(a) as unpatentable
17 over Brandenburg in view of Branz and Rostkowski, as applied to claims 1,
18 18 and 24 above, and further in view of Meyer.

19 According to the Examiner, the combination of Bradenburg, Branz
20 and Rostkowski "discloses the invention except for a connecting side wall of
21 the louver. Meyer teaches a vent and louver wherein the louver has a
22 connecting side wall. It would have been obvious to add a side wall in order
23 to reinforce and support the louver in a specific position." [Answer, 6.]
24 Appellants contend that Meyer "would never be considered reasonably

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