

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 ERIC P. PLOURDE and STEPHEN P. SCHALLER

Appeal 2007-0368
Application 10/178,127
Technology Center 3700

Decided: July 31, 2007

Before TERRY J. OWENS, LINDA E. HORNER, and ANTON W. FETTING,
Administrative Patent Judges.

OWENS, *Administrative Patent Judge.*

DECISION ON APPEAL

The Appellants appeal from a rejection of claims 1-20, which are all of the pending claims.

THE INVENTION

The Appellants claim a zipper tape and a reclosable container including the zipper tape. Claim 1 is illustrative:

1. A reclosable container including:

a first film panel and a second film panel with at least some edges thereof joined together;

a zipper tape with first and second interlocking profile members, said first and second interlocking profile members being separated by a portion of width of said zipper tape, said portion of width of said zipper tape being shaped into a loop thereby allowing said first and second interlocking profile members to engage with each other, said loop being between said profile members and a top of said reclosable container and offset from an interior of said top of said reclosable container;

said zipper tape including at least one line of weakness spaced between and parallel to said first and second interlocking profile members;

said zipper tape including an additional layer covering one side of said at least one line of weakness thereby providing a seal to prevent passage of matter through said at least one line of weakness prior to tearing of said at least one line of weakness;

said zipper tape being sealed to an interior of said first and second film panels inwardly adjacent from one edge where said first and second film panels are joined together, whereby tearing said at least one line of weakness provides access to said first and second interlocking profile members, and subsequently provides evidence of access to said first and second interlocking profile members.

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THE REFERENCES

La Pierre	US 5,121,997	Jun. 16, 1992
Van Erden	EP 0 547 966 A1	Jun. 23, 1993
Tilman	US 6,467,956 B1	Oct. 22, 2002
		(filed Nov. 3, 2000)

THE REJECTIONS

The claims stand rejected as follows: claims 1, 2, 6, 12, 13, and 17-20 under 35 U.S.C. § 102(b) as anticipated by Van Erden; claims 3-5, 7-10, and 14-16 under 35 U.S.C. § 103 as obvious over Van Erden in view of Tilman; and claim 11 under 35 U.S.C. § 103 as obvious over Van Erden in view of La Pierre.

OPINION

We affirm the aforementioned rejections and enter a new rejection of claims 1-20 under 35 U.S.C. § 112, second paragraph.

New rejection under 35 U.S.C. § 112, second paragraph

Under 37 C.F.R. § 41.50(b) we enter the following new ground of rejection.

Claims 1-20 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter the Appellants regard as the invention.

The Appellants' independent claims are claims 1 and 12. Claim 1 recites: "said loop being between said profile members and a top of said reclosable container and offset from an interior of said top of said reclosable container". Claim 12 recites: "said loop intended to be between said profile members and an interior of a top of a reclosable container and offset from said top of said reclosable container." Those claim limitations were added by amendment (filed March 24,

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2004). In that amendment the only statement provided by the Appellants as to written descriptive support for those limitations is: “This is supported by Figure 2 of the present application” (p. 7). In the “Summary of Claimed Subject Matter” section of the Brief the Appellants do not point to written descriptive support for the above-cited limitation in claim 1 and, regarding the above-cited limitation in claim 12, the Appellants merely refer to Figures 1 and 2 (Br. 3-4).

It is not apparent where the Appellants’ Figures 1 and 2 show a loop “offset from an interior of said top of said reclosable container” as required by claim 1 or “offset from said top of said reclosable container” as required by claim 12.

Figure 1 shows the uppermost part of the illustrated “perforated cap and related structure” (Spec. 2:20-21) as being the loop (22). There does not appear to be any top or top interior from which the loop is offset. Figure 2 shows the loop (22) and the top (111), but the top appears to be the top of the loop. The loop does not appear to be offset from the top or the top’s interior. Thus, the meaning of the above-cited claim limitations is not clear in view of Figures 1 and 2 relied upon by the Appellants.

The Appellants do not point out, and it is not apparent, where the Appellants’ Specification indicates what is meant by “offset from an interior of said top of said reclosable container” or “offset from said top of said reclosable container.”

Moreover, the Appellants’ claim 12 recites: “said loop intended to be between said profile members and an interior of a top of a reclosable container”. Because the loop is merely “intended to be between”, it is not clear whether that

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positioning of the loop is actually required by the claim. Also, it is not clear who the claim encompasses as doing the intending.

For the above reasons the subject matter circumscribed by the Appellants' claims cannot be determined with a reasonable degree of precision and particularity. Consequently, the Appellants' claims do not comply with the definiteness requirement of 35 U.S.C. § 35 U.S.C. § 112, second paragraph. *See In re Moore*, 439 F.2d 1232, 1235, 169 USPQ 236, 238 (CCPA 1971). Accordingly, claims 1-20 are rejected under 35 U.S.C. § 112, second paragraph.¹

In some instances it may be impossible to determine whether or not claimed subject matter is anticipated by or would have been obvious over references because the claims are so indefinite that considerable speculation and assumptions would be required regarding the meaning of terms employed in the claims with respect to the scope of the claims. *See In re Steele*, 305 F.2d 859, 862, 134 USPQ 292, 295 (CCPA 1962). In other instances, however, it is possible to make a reasonable, conditional interpretation of claims adequate for the purpose of resolving patentability issues to avoid piecemeal appellate review. In the interest of administrative and judicial economy, this course is appropriate wherever

¹ Because the Appellants' claims fail to comply with the definiteness requirement of 35 U.S.C. § 35 U.S.C. § 112, second paragraph, we do not reach the issue of whether the claims comply with the 35 U.S.C. § 112, first paragraph, written description requirement. *See Moore*, 439 F.2d at 1235, 169 USPQ at 238 ("Once having determined that the subject matter defined by the claims is particular and definite, the analysis then turns to the first paragraph of section 112 to determine whether the scope of protection sought is supported and justified by the specification disclosure.").

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reasonably possible. *See Ex parte Saceman*, 27 USPQ2d 1472, 1474 (Bd. Pat. App. & Int. 1993); *Ex parte Ionescu*, 222 USPQ 537, 540 (Bd. App. 1984).

In the present case we consider such a reasonable, conditional interpretation to be possible. Because the Appellants' original disclosure does not appear to limit the meaning of "offset", this conditional interpretation is that "offset" encompasses any displacement.²

Rejections under 35 U.S.C. §§ 102(b) and 103

The Appellants limit their arguments regarding the rejection under 35 U.S.C. § 102(b) to the independent claims (1 and 12) (Br. 5-6). Although additional references are applied in the rejections under 35 U.S.C. § 103, the Appellants do not provide a substantive argument as to the separate patentability of the dependent claims to which the obviousness rejection is applied. We limit our discussion to the rejection and claims argued by the Appellants, i.e., the rejection of claims 1 and 12 under 35 U.S.C. § 102(b). The non-argued dependent claims, whether rejected under 35 U.S.C. § 102(b) or 35 U.S.C. § 103, stand or fall with those claims. *See* 37 C.F.R. § 41.37(c)(1)(vii)(2004).

Van Erden discloses a reclosable plastic bag having upper (10) and lower (11) layers that are joined at their tops by a fin seal (12) (col. 3, ll. 36-39). Between the bag layers is a zipper strip (13) having a fold (14) below the fin seal and having mating pressure interlocking profiles (15) such as rib and groove elements between the zipper strip's lower edges (col. 3, ll. 40-46). The zipper strip

² *See Webster's New Collegiate Dictionary* 797 (G. & C. Merriam 1973) ("**1 offset** ... **3 ... b : DISPLACEMENT**").

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has, between the fold and the interlocking profiles, lines of perforation (17, 18) for tearing off the fold (14) portion of the zipper strip when the top portion of the bag is torn off (col. 3, ll. 50-58). Between the bag's layers and the zipper strip is an air and moisture impervious cap strip (19) that blocks the perforations to prevent entry of air or moisture into the bag before it is used (col. 4, ll. 1-10).

The Appellants point out that Van Erden discloses that the zipper strip is immediately adjacent the fin seal (col. 2, ll. 25-26), and argue that because the zipper strip is immediately adjacent the fin seal it is not “offset from an interior of said top of said reclosable container” as required by claim 1 or “offset from said top of said reclosable container” as required by claim 12 (Br. 5-6). The gap between the zipper strip’s fold (14) and the lower end of the fin seal (12) in Van Erden’s Figures 2, 7, and 9 indicates that Van Erden’s term “immediately adjacent” encompasses an offset, as illustrated, between the inner end of the fin seal and the zipper strip’s fold. Moreover, regarding claim 12, if “intended to be” does not require that the loop actually is between the profile members and an interior of a top of a reclosable container and offset from the top of the reclosable container, then to anticipate the invention claimed in that claim Van Erden need not disclose the offset argued by the Appellants.

For the above reasons we are not convinced of reversible error in the Examiner’s rejections.

DECISION

The rejections of claims 1, 2, 6, 12, 13, and 17-20 under 35 U.S.C. § 102(b) over Van Erden, claims 3-5, 7-10, and 14-16 under 35 U.S.C. § 103 over Van

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Erden in view of Tilman, and claim 11 under 35 U.S.C. § 103 over Van Erden in view of La Pierre are affirmed. A new ground of rejection of claims 1-20 has been entered.

Regarding the affirmed rejection(s), 37 C.F.R. § 41.52(a)(1) provides "Appellant may file a single request for rehearing within two months from the date of the original decision of the Board."

In addition to affirming the Examiner's rejection(s) of one or more claims, this opinion contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 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 Appellant, *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. . . .

Should the Appellants elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review

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under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If the Appellants elect prosecution before the Examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

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

AFFIRMED, 37 C.F.R. § 41.50(b)

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