

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STEPHANE HENTZEL

Appeal 2008-0205
Application 10/145,294
Technology Center 1700

Decided: April 30, 2008

Before CHUNG K. PAK, THOMAS A. WALTZ, and
JEFFREY T. SMITH, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL¹

Statement of the Case

This is an appeal under 35 U.S.C. § 134 from a final rejection of claims 1-20. We have jurisdiction under 35 U.S.C. § 6.

¹ An oral hearing for this appeal was held on March 12, 2008.

Appellant's invention relates to a combination of a food product and a package that is adapted specially to receive the food product while providing an attractive display of the food product. The present invention includes food items of relatively small size that are sensitive to pressure and/or puncture such as chocolate and confectionery products. An understanding of Appellant's invention can be gleaned from independent claim 1 which appears below:

1. A combination of at least one three-dimensional food product and a tray member for displaying the food product thereon, wherein:

the tray member comprises a support base and at least one first retaining means for retaining the food product therein; and

the food product comprises a side portion, a bottom surface arranged to rest on the support base and at least one preformed second retaining means that forms part of the bottom surface, with the preformed second retaining means being configured to adjust in shape engagement with the first retaining means of the tray member to resist disengagement of the food product from the tray member at least in a direction that is substantially parallel to the support base,

wherein the side portion of the food product is uncovered to allow a consumer to grip the food product and remove it from the tray member by disengagement of the first and second retaining means.

The Examiner relies on the following references in rejecting the appealed subject matter:

Haehnlen	348,671	Sep. 7, 1886
Marsh	896,131	Aug. 18, 1908
Gallagher	1,152,166	Aug. 31, 1915
Bernard	1,527,386	Feb. 24, 1925
Briese	1,947,968	Feb. 20, 1934
Ralph	2,258,716	Oct. 14, 1941
Roethel (Roethel '964)	2,498,964	Feb. 28, 1950

Appeal 2008-0205
Application 10/145,294

Roethel (Roethel '399)	2,614,399	Oct. 21, 1952
Boon	2,698,802	Jan. 4, 1955
Parish	3,250,422	May 10, 1966
Janicke	3,365,308	Jan. 23, 1968
Chinkes	3,374,884	Mar. 26, 1968
Price	3,847,397	Nov. 12, 1974
Magnussen (Magnussen '147)	4,556,147	Dec. 3, 1985
Magnussen (Magnussen '127)	4,605,127	Aug. 12, 1986
Guily	FR 2,599,235	Dec. 4, 1987
Magnussen (Magnussen '899)	4,757,899	Jul. 19, 1988

Claims 1-20 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Haehnlen, Chinkes, Marsh, Ralph, Magnussen '147, Magnussen '127, Magnussen '899, Janicke, Roethel '399, Roethel '964, Parish, Briese, Giuly², Boon, Gallagher, Bernard, and Price.

We have thoroughly reviewed each of Appellant's arguments for patentability. However, we are in complete agreement with the Examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejection.

Under 35 U.S.C. § 103, the factual inquiry into obviousness requires a determination of: (1) the scope and content of the prior art; (2) the differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). “[A]nalysis [of whether the subject matter of a claim would have been obvious] need not seek out precise teachings directed to the specific subject matter of the challenged

² An English-language translation of this document has been provided in the present record.

claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1740-41 (2007) quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006); *In re Bozek*, 416 F.2d 1385, 1390 (CCPA 1969) (“Having established that this knowledge was in the art, the examiner could then properly rely, as put forth by the solicitor, on a conclusion of obviousness ‘from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference.’”); *In re Hoeschele*, 406 F.2d 1403, 1406-07 (CCPA 1969) (“[I]t is proper to take into account not only specific teachings of the references but also the inferences which one skilled in the art would reasonably be expected to draw therefrom . . .”).

Appellant contends that to arrive at the claimed invention, the Examiner has impermissibly used hindsight to piece together the cited art, selectively picking and choosing teachings from a multitude of references in an attempt to explain what the claims recite. Appellant further contends that if the proposed modification or combination of the prior art were made it would change the principle of operation of the prior art invention being modified. (Br. 10-13).

The issue presented is as follows:

Has with the Examiner reasonably determined that a person of ordinary skill in the art would have found it obvious to form a combination of a tray comprising a retaining means and a three-dimensional food product having a complementary retaining means within the meaning of 35 U.S.C. § 103? On this record, we answer this question in the affirmative.

Appellant argues the rejected claims as a group. (Br. 11-16). Thus, we decide this appeal based on independent claims 1 and 14. 37 C.F.R. § 41.37(c)(1)(vii) (2006).

Claims 1 and 14 are drafted using means-plus-function language. Therefore, we look to the Specification and interpret that language in light of the corresponding structure, material, or acts described therein, and equivalents thereof, to the extent that the specification provides such disclosure. *In re Donaldson*, 16 F.3d 1189, 1193 (Fed. Cir. 1994). See 35 U.S.C. § 112 ¶ 6 (1994) ("An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of the structure, material, or acts in support thereof."). We determine the retaining means to include at least a general shape of upwardly projecting protrusions, with one for each individual food product. The food product has complementary retaining means in the form of a cavity provided at the bottom surface of the product. Relevant portions of the Specification are reproduced below:

The retaining means 20 of the tray member protrude upwardly from the upper surface of the support base 11. The retaining means have a general shape of upwardly projecting protrusions, with one for each individual food product. The protrusion may have the shape of a spike, a cone or even a more rounded shape, as desired.

Each food product has complementary retaining means in the form of a cavity 31 provided at the bottom surface 81 of the product.

The retaining means 20, 30 are small enough to be completely encompassed within the outside contour of the food product while leaving the sides of the food product substantially uncovered. As to the implication of the size and location of the retaining means, the lateral portions or side walls 82 of the food product extend sufficiently upwardly from the support base 11

to constitute free zones of gripping of the food product. As opposed to the known combination of the art, the side wall of the food product is uncovered or substantially uncovered by the package in order to obtain a visual 3-D aspect that the food products are placed separately on a flat surface with no visible attachment means.

(Spec. 8-9)

Haehnlen and Marsh describe trays for holding a plurality of items including confectionery items such as candy. (Haehnlen, col. 1, ll. 43-47; Marsh, ll. 11-18). Haehnlen and Marsh teach using a number of projections from the base of the tray to retain confectionery items in a spatial relationship from one another and prevent them from moving. These projections are equivalent to the first retaining means of the presently claimed invention. Haehnlen describes a desire to maintain a fresh appearance of the confectionery items and avoid injurious and disagreeable results. (Haehnlen, col. 1, ll.13-16). Marsh teaches using a number of projections to hold the display items in place. (Marsh, ll. 55-62). Neither Haehnlen nor Marsh discloses confectionery items that are formed with a retaining means complementing the retaining means of the display tray. However, the Examiner cites numerous references for describing a support device containing projection retaining means (equivalent to the claimed first retaining means) that conforms to the shape of, without piercing, the recessed surfaces of food products and other items such as cups. (Ans. 5-6). Appellant acknowledges that confectionery food items having viscous filling materials, such as chocolates with viscous fillings, were known at the time

of the claimed invention. (Tr. 11).³ A person of ordinary skill in the art would have appreciated that when the confectionery items contain viscous filling materials, impaling such confectionery items would not have been desirable because of leakage of the filling materials. The Examiner cites numerous references for describing items, to be placed on a tray, that comprise a concave recess in the base (equivalent to the claimed second retaining means) that is shaped to be receptive of an appropriate complementary projection retaining means of the tray, which combination prevents dislodging of the items as well as impaling and spillage of the viscous materials contained therein. Giuly and Parish are representative of the cited prior art.

Under these circumstances, we concur with the Examiner that a person of ordinary skill in the art would have had sufficient skill and creativity to provide complementary retaining means for confectionery items and display tray so as to display the confectionery items on the display tray as taught by Haehnlen and Marsh without damaging the confectionery items, i.e., without causing leakage of viscous materials containing therein. *KSR*, 127 S. Ct. 1740-41. A person of ordinary skill in the art who desired to display confectionery food items containing viscous fillings would have been led to the claimed subject matter, motivated by a desire to prevent damage to the confectionery items and leakage of viscous materials containing therein. Cf. *In re Ludwig*, 353 F.2d 241, 243-244 (CCPA 1965). (Patentability does not convey to an invention where only simple observation is required to ascertain a problem). Indeed, Appellant

³ The Boon reference describes a confectionery item that comprises a hollow center that may be filled with a viscous material.

acknowledges that the claimed invention is within the capabilities of one of ordinary skill in the art. (Reply Br. 4).⁴ The issue facing a person of ordinary skill in the art is whether it would have been obvious to form a confectionery item comprising a concave base suitable to prevent impaling thereof by the retaining means of Haehnlen and Marsh. As stated above, a person of ordinary skill in the art would have been motivated to prevent damage to the confectionery item and possible leakage of viscous material containing therein.

For the foregoing reasons and those presented in the Answer, the rejection of claims 1-20 under 35 U.S.C. § 103(a) is affirmed. As a final point, we note that Appellant bases no argument upon objective evidence of nonobviousness, such as unexpected results.

ORDER

The rejection of claims 1-20 under 35 U.S.C. § 103(a) is affirmed.

⁴ Specifically Appellants state “Appellants respectfully submit that the fact that the claimed invention is within the capabilities of one of ordinary skill in the art is not sufficient by itself to establish a prima facie case of obviousness. Appellants have shown that the cited references teach away from the proposed combination and/or the claimed invention because they each use different principles of operation and/or have different intended purposes.” (Reply Br. 4).

Appeal 2008-0205
Application 10/145,294

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).

AFFIRMED

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