

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

*Ex parte JACK E. ELDER*

---

Appeal 2008-0282  
Application 10/133,235  
Technology Center 3700

---

Decided: March 19, 2008

---

Before TONI R. SCHEINER, DONALD E. ADAMS, and DEMETRA J. MILLS, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-10, 12-18, and 20-32. Claim 19, the only remaining pending claim, stands objected to as dependent upon a rejected base claim (April 3, 2006 Office Action 3) and therefore is not before this panel for review. We have jurisdiction under 35 U.S.C. § 6(b).

## INTRODUCTION

The claims are directed to a spout (claims 1-10, 12-21, and 32) and a container assembly (claims 22-31). Claim 1 is illustrative:

1. A spout assembly for use with a container having an internal chamber in communication with a predefined opening that is sealed with a frangible sealing material, the spout assembly comprising:

a base member formed of a first material and configured to be secured to the container, the base member configured to cover the predefined opening;

a hollow body defining a passage therethrough, the hollow body rotatably mounted to the base member to be movable between an open position and a closed position, the hollow body formed of a second material that is different from the first material;

a puncture member formed with said hollow body, the puncture member configured to puncture the sealing member when the hollow body is moved from the closed position to the open position.

The Examiner relies on the following prior art references to show unpatentability:

Libit	US 3,111,245	Nov. 19, 1963
Hazard et al.	US 3,718,238	Feb. 27, 1973
Dark	US 6,119,898	Sep. 19, 2000
Coy	WO 01/54991 A1	Aug. 2, 2001

The rejections as presented by the Examiner are as follows:

1. Claims 1-5, 10, and 22-26 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Coy and Libit.

2. Claims 6-9, 12-18, 20, 21, and 27-31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Coy, Libit, and Hazard.
3. Claim 32 stands rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Coy, Libit, and Dark.

We affirm.

## DISCUSSION

1. Claims 1-5, 10, and 22-26 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Coy and Libit. The claims have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Accordingly, we limit our discussion to representative claim 1.

Claim 1 is drawn to a spout assembly. The intended use of the spout assembly is for use with a container having an internal chamber in communication with a predefined opening that is sealed with a frangible sealing material. The spout assembly comprises:

1. a base member formed of a first material and configured to be secured to the container, the base member configured to cover the predefined opening;
2. a hollow body defining a passage therethrough, the hollow body rotatably mounted to the base member to be movable between an open position and a closed position, the hollow body formed of a second material that is different from the first material; and

3. a puncture member formed with said hollow body, the puncture member configured to puncture the sealing member when the hollow body is moved from the closed position to the open position.

The Examiner finds that Coy teaches every limitation of claim 1 but for the use of different materials to form the body and base member (Answer 4). To make up for the deficiency, the Examiner relies on Libit to teach that “the base and hollow body [of a dispensing device] can be made of the same or differing materials” (*id.*). Based on these findings, the Examiner concludes that “[i]t would have been obvious to one of ordinary skill in the art to have made the base member and hollow body of differing material as taught by Libit et al as an alternative equivalent means for forming a spout assembly” (*id.*).

In response, Appellant asserts that “Libit does *not* teach that the use of different materials for a spout and base is equivalent to using the same materials for a spot and base” (App. Br. 8). Instead, “Libit only teaches that, *under some circumstances*, different materials may be used” (*id.*).

According to Appellant, since “Libit only teaches that, *under some circumstance*, different materials may be used; [o]ne can fairly infer that for all *other* circumstances, Libit does not recommend the use of different materials” (*id.*). We disagree. Libit simply prefers that a resilient material be used for both the base and the moveable part.

Libit’s invention is drawn to “a combined closure and dispensing valve for incorporation with a receptacle containing fluent material” (Libit, col. 1, ll. 8-10). Libit’s “closure comprises only two parts, namely, a fixed part 10, sometimes herein termed a base, and a movable part 11, sometimes herein termed a spout” (Libit, col. 4, ll. 7-9). While Libit prefers that “both

the fixed and movable parts are comprised of substantially shape-retaining but resilient material”; Libit teaches that “only one part may, under some circumstances, be resilient and the other comparatively rigid” (Libit, col. 2, ll. 61-66). In this regard, Libit teaches “[a]t least one of the parts is of resilient material to permit initial assembly by momentary distortion or deformation of one of said parts. In practice both parts are *preferably* of resilient material” (Libit, col. 4, ll. 9-13 (emphasis added)). Thus, contrary to Appellant’s intimation, only one of Libit’s parts need be made of a resilient material to permit initial assembly by momentary distortion or deformation of one of the parts during assembly (*see id.*).

We recognize Appellant’s assertion that Libit does not identify where or when it would be appropriate to use parts made of different materials (App. Br. 8). We are not persuaded. We find that a person of ordinary skill in the art would recognize that only one of Libit’s parts need be made of a resilient material to permit initial assembly by momentary distortion or deformation of one of the parts. *See KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007) (It is proper to “take account of the inferences and creative steps that a person of ordinary skill in the art would employ.”). *See also id.* at 1742 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”). For the same reasons we are not persuaded by Appellant’s assertion that “[t]here is no teaching anywhere that would suggest that Coy would benefit from using a resilient material for one part and a rigid material for another part” (App. Br. 9). In sum, we agree with the Examiner’s conclusion that a spout having the requirements set forth in Appellant’s claim 1 would have been *prima facie* obvious to a person of

ordinary skill in the art at the time the invention was made in view of the combination of Coy and Libit.

Accordingly, we affirm the rejection of claim 1 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Coy and Libit.

Claims 2-5, 10, and 22-26 fall together with claim 1.

2. Claims 6-9, 12-18, 20, 21, and 27-31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Coy, Libit, and Hazard. The claims have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Accordingly, we limit our discussion to representative claim 6.

Claim 6 is drawn to the spout assembly of claim 1 wherein at least one of the hollow body or base member includes a first detent for engaging a first feature in the other of the hollow body or base member when the hollow body is in the closed position.

The Examiner relies on the combination of Coy and Libit as discussed above (Ans. 4). The Examiner finds that this combination fails to teach a device with a first detent as required by claim 6 (*id.*). To make up for this deficiency the Examiner relies on Hazard to teach “detents to lock the spout in the closed position [to protect] against accidental or inadvertent movement” (*id.*). Based on this evidence, the Examiner concludes that “it would have been obvious to one of ordinary skill in the art to have modified . . . [Libit’s] spout with first and second detents as taught by Hazard et al to lock the spout in the closed position [to protect] against accidental or inadvertent movement” (Ans. 4-5). We find no error in the Examiner’s *prima facie* case.

However, Appellant asserts that “there is no motivation or suggestion to modify the spout assembly of Coy (as modified by Libit) with detents as taught by Hazard” (App. Br. 11). According to Appellant “Hazard is direct[ed] to solving the problem of making a cap that cannot be opened by children in order to prevent possible access to hazardous material” (*id.*). In contrast, Appellant asserts that “Coy is directed to a juice box closure . . . Juice is generally not considered to be a hazardous material” (*id.*). Therefore Appellant concludes “[t]here is no motivation to place a child-proof ‘safety closure’ intended for hazardous materials, as taught by Hazard, on a closure for a juice box” (*id.*). We disagree with Appellant’s limited view of Coy. Coy expressly states that “[t]he present invention relates to fluid containers” (Coy 1: 3). While Coy states that “[m]ost particularly, the present invention relates to a drinking spout for a juice box or the like” (Coy 1: 5-6), a person of ordinary skill in the art would recognize that Coy’s container for fluid may contain any number of fluids, including juice. Accordingly, we are not persuaded by Appellant’s argument that Coy’s disclosure is limited to juice containers and therefore one would not modify the spout assembly taught by the combination of Coy and Libit with the teachings of Hazard.

We are also not persuaded by Appellant’s unsupported assertion that “it would appear that there would be disadvantages to using a rigid part and a resilient part in combination with a detent structure designed for retention” (App. Br. 12). Arguments of counsel cannot take the place of factually supported objective evidence. *See In re Kahn*, 441 F.3d 977, 990 (Fed. Cir. 2006). Therefore, while Appellant asserts that “the rigid part may tend to erode or degrade the resilient part because it does not give when opening or

closing” (App. Br. 12), there is no evidence on this record to support this argument. In this regard, the Examiner explains “[a] resilient material can also have some rigid properties” (Ans. 6). Conrary to Appellant’s position, the Examiner’s position is supported by Libit, which teaches

[a]s the description of the function of the closure proceeds it will become apparent that the term ‘shape-retaining’ is a purely relative one and that absolute rigidity is not a prerequisite. Similarly with respect to the meaning to be attributed to the relative words ‘resilient’ or ‘resiliency’ which are used only to make clear that the ‘generally shape-retaining’ characteristic implies such degree of resiliency or elasticity as is required for initially assembly and subsequent function.

(Libit, col. 4, ll. 18-26.)

On reflection, we find no error in the Examiner’s prima facie case of obviousness, accordingly we affirm the rejection of claim 6 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Coy, Libit, and Hazard. Claims 7-9, 12-18, 20, 21, and 27-31 fall together with claim 6.

3. Claim 32 stands rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Coy, Libit, and Dark.

Claim 32 is drawn to the spout assembly of claim 1, wherein the hollow body is configured to form a part of a mold used for forming the base member.

The Examiner relies on the combination of Coy and Libit as discussed above (Ans. 5). The Examiner finds, however, that Coy and Libit do not teach “the hollow body is configured to form a part of a mold used for forming the base member” (*id.*). To make up for this deficiency, the Examiner relies on Dark to teach that “the cap is molded in one piece” (*id.*).

Appeal 2008-0282  
Application 10/133,235

Based on this evidence, the Examiner concludes that “[i]t would have been obvious to one of ordinary skill in the art to have made the . . . [Libit] spout molded as one piece as taught by Dark to reduce manufacturing costs” (*id.*). We find no error in the Examiner’s *prima facie* case of obviousness.

In response, Appellant relies on the arguments made against the Examiner’s rejection of claim 1 (App. Br. 13). Having found no error in the Examiner’s rejection of claim 1, we are not persuaded by Appellants’ arguments.

Accordingly, we affirm the rejection of claim 32 under 35 U.S.C. § 103(a) as unpatentable over the combination of Coy, Libit, and Dark.

#### CONCLUSION

In summary, we affirm the rejections of record.

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

Maginot, Moore & Beck LLP  
Chase Tower  
111 Monument Circle, Suite 3250  
Indianapolis IN 46204-5109

lp