

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WILLIAM P. APPS
and CYNTHIA R. AIKEN

Appeal 2008-1078
Application 10/156,677
Technology Center 3700

Decided: September 9, 2008

Before JENNIFER D. BAHR, LINDA E. HORNER, and BIBHU R.
MOHANTY, *Administrative Patent Judges*.

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DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellants seek our review under 35 U.S.C. § 134 of the final rejection of claims 1-11, 18-24, 29-30, and 35-52. Claims 25-28 and 31-34 have been allowed. Claims 12-17 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b) (2002). We AFFIRM-IN-PART.

THE INVENTION

The Appellants' claimed invention is directed to a collapsible crate with retractable support members which are selectively movable between a retracted position and a support position (Specification ¶[4]). Claim 1, reproduced below, is representative of the subject matter of appeal.

- 1) A crate comprising:
 - a base wall;
 - a first wall generally perpendicular to the base wall;
 - a second wall generally perpendicular to the base wall and the first wall;
 - a retractable support having a first end pivotably and slidably connected to the first wall, the support pivotable about the first end about an axis not parallel to the base wall from a retracted position generally parallel to the first wall to a support position where the support is supported at the first end by the first wall and at a second end by the second wall.

THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejections:

Wilson	US 3,904,066	Sep. 9, 1975
Mori	US 6,382,458	May 7, 2002
Schoeller-Plast	DE 19939019 A1	Feb. 22, 2001

The following rejections are before us for review¹:

¹ We note that the Examiner has withdrawn the rejections made under 35 U.S.C. § 103 using the Drader and Loftus references (Ans. 2-3).

1. Claim 24 is rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as the invention.

2. Claims 1-11, 18-21, 29-30, and 49-52 are rejected under 35 U.S.C. § 102(b) as anticipated by Wilson.

3. Claims 1-2, 6-11, 18-23, 35-46 and 49-52 are rejected under 35 U.S.C. § 102(b) as anticipated German reference '019.

4. Claim 24 is rejected under 35 U.S.C. § 103(a) as unpatentable over Wilson or German reference '019 in view of Mori.

5. Claims 47 and 48 are rejected under 35 U.S.C. § 103(a) as unpatentable over German reference '019 and Wilson.

FINDINGS OF FACT

We find the following enumerated findings of fact are supported at least by a preponderance of the evidence²:

FF1 Wilson discloses a collapsible blow molded carton having a bottom wall 11 and foldable side walls 12-15. The side walls each include a pair of recesses 21 which holds a removable fastener 22 at each corner of the carton (Fig. 1-2).

FF2. Wilson's fastener 22 cannot be removed completely from one recess 21 on one end of a side wall without removing it from the corresponding recess on the adjacent side wall as well. If the fastener 22 is placed in one

² See *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Patent Office).

recess 21 in a first side wall, but not in the corresponding recess in the adjacent side wall, the fastener 22 cannot be placed parallel to the first side wall.

FF3. German reference '019 discloses a support element 8 that pivots at one end about a pin 9 and having an opposite end inserted in a wall 3 (Fig. 3). The reference states that a combined slide-pivot motion of the support is possible (See Translation, 3:12-13).

FF4. The combined sliding and pivoting motion of the support 8 in the German reference '019 could only take place in a direction parallel to a first wall 6 since the second wall 3 is not shown to include a pivot pin (Fig. 3).

FF5. The far end 11 of the support 8 slides in a recess 12 in second wall 3 (Fig. 3).

FF6. In the German reference '019 the support element 8 must rotate through an obtuse angle from its retracted position inside side wall 6 until it reaches the support position in engagement with wall 3.

PRINCIPLES OF LAW

Principles of Law Relating to Anticipation

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, (Fed. Cir. 1987). Analysis of whether a claim is patentable over the prior art under 35 U.S.C. § 102 begins with a determination of the scope of the claim. We determine the scope of the claims in patent applications not solely on the basis of the claim language, but upon giving claims their

broadest reasonable construction in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). The properly interpreted claim must then be compared with the prior art.

Principles of Law Relating to Obviousness

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18, (1966). *See also KSR*, 127 S.Ct. at 1734 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”)

ANALYSIS

The Examiner has rejected claim 24 under 35 U.S.C. § 112, second paragraph, as being indefinite. As noted by the Examiner (Ans. 3), claim 24 recites “four supports” and claim 22 from which it depends recites “a pair of retractable supports.” As such, claim 24 clearly lacks antecedent basis

for the “four supports.” The Appellant has acknowledged that this is an obvious error (Br. 5). Accordingly, we sustain the rejection of claim 24 under 35 U.S.C. § 112, second paragraph.

The Appellants argue that the rejection of claims 1-11, 18-21, 29-30, and 49-52 under 35 U.S.C. § 102(b) as anticipated by Wilson is improper. Specifically, the Appellants argue that in the Wilson reference the fastener 22 is not movable from a retracted position generally parallel to the first wall or movable between a retracted position generally parallel to the first wall and a support position (Br. 6). The Appellant also argues that the position taken by the Examiner would require the fastener 22 to be completely removed from the grooves and no longer be “pivotably and slidably connected to the first wall” (Reply Br.³ 2) as the claims require.

In contrast, the Examiner takes the position that the fastener 22 can be partially inserted in a first groove while not inserted in a second groove with the middle portion resting on the upper edge. The Examiner states that the second wall may be pivoted down so that no portion of the second wall interferes with the fastener upon reinsertion in the retracted position (Ans. 8).

We agree with the Appellants. In Wilson, removing the fastener 22 from the second groove would necessarily require the fastener to be removed from the first groove as well. If the first leg of the fastener were reinserted with the second leg not inserted as the Examiner states, the fastener could not be placed in a position parallel to the first side wall (FF 1 & 2). Independent claims 1, 18, and 49 all recite that the support is pivotable

³ See Reply Brief filed June 18, 2007.

“from a retracted position generally parallel to the first wall” or similar language. Accordingly, we will not sustain the rejection of claims 1, 18, and 49 under 35 U.S.C. § 102(b) as anticipated by Wilson. Claims 2-11, 19-21, 29-30, and 50-52 depend from claims 1, 18, or 49 and the rejection of these claims is therefore also not sustained.

With regard to the claim rejection of claim 24 under 35 U.S.C. § 103(a) as unpatentable over Wilson in view of Mori, we note that this claim depends from 22 which requires that a pair of retractable supports are slidable and pivotable from “a retracted position generally parallel to and within a first one of the four walls.” Wilson fails to disclose a support capable of such movement (FF2) and the Examiner has not asserted that Mori does either (Ans. 6). For the above reasons, the rejection of claim 24 under 35 U.S.C. § 103(a) as unpatentable over Wilson in view of Mori is not sustained.

The Appellant argues that the rejection of claims 1-2, 6-11, 22-23, 35-46 and 49-52 under 35 U.S.C. § 102(b) as anticipated German reference ‘019 is improper. The Appellant argues that the German reference ‘019 fails to show a support that is slidable relative to the first or second wall (Br. 8-9) (arguing claims 1, 9, 22, and 49). The Appellant also argues that the German reference ‘019 fails to show a support that is movable relative to the first wall (Br. 9) (arguing claim 41). The Appellant also argues that claim 44 is patentable because the German reference ‘019 fails to show a support “movable relative to the first wall in a plane parallel to the first wall” (Br. 9).

The Examiner has found in the German reference ‘019 that the pivotable connection is deemed to be a slidable connection because the

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support slides against the underside surface of the inwardly extending rim with rotational movement (Ans. 9).

We disagree with the Appellants. The German reference '019 states that "a combined slide-pivot motion of the support element is also possible" (FF3). As such, the German reference '019 discloses an embodiment where both sliding and pivoting motion take place. The sliding and pivoting motion of the German reference '019 meets the claimed limitations of claims 1, 22, 41, and 49 since the sliding motion would be relative to the first wall. The sliding and pivoting motion in the German reference '019 could only take place in a direction parallel to the first wall (FF 4) meeting the claimed limitations of claim 44 as well. With regard to claim 9, the German reference '019 discloses an embodiment with a combined sliding and pivoting motion for a first end of the support (FF3&4). The German reference also discloses that a second end of the support 11 slides in the second wall in opening 12 (FF5) meeting this further claim limitation. Accordingly the rejection of claims 1, 9, 22, 41, 44, and 49 under 35 U.S.C. § 102(b) as anticipated German reference is sustained. The Appellants have not argued separately for patentability of dependent claims 2, 6-8, 10-11, 23, 35-40, 42-43, 45-46 and 50-52 and accordingly the rejection of these claims is also sustained.

As the Appellants have not separately argued the rejection of claim 24 under 35 U.S.C. § 103(a) as unpatentable over German reference '019 and Mori, the rejection of this claim is sustained for the reasons provided *supra* for claim 22, from which claim 24 depends.

As the Appellants have not separately argued the rejection of claims 47-48 under 35 U.S.C. § 103(a) as unpatentable over German reference '019 and Wilson, the rejection of these claims is sustained for the reasons provided *supra* for claim 41, from which claims 47 and 48 depend.

The Appellants argue that the rejection of claim 18 under 35 U.S.C. § 102(b) as anticipated German reference '019 is improper because the German reference '019 fails to show the “retractable support selectively pivotable by an acute angle between a retracted position generally to and within the first wall to a support position” (Br. 8). The Appellants argue that in the German reference '019 the support must be pivoted through an obtuse angle to reach the support position (Br. 8).

In contrast, the Examiner argues that the limitation for the claimed acute angle is met because “the obtuse angle includes the acute angle” (Ans. 9).

We agree with the Appellants. In the German reference the support 8 must be rotated through an obtuse angle to engage the second wall (FF6). Accordingly, we reverse the rejection of claim 18 under 35 U.S.C. § 102(b) as anticipated by the German reference '019. As claims 19-21 depend from claim 18, the rejection of these claims is also not sustained.

CONCLUSIONS

We conclude that Appellants have failed to show that the Examiner erred in rejecting claims 24 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as the invention.

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We conclude that Appellants have shown that the Examiner erred in rejecting claims 1-11, 18-21, 29-30, and 49-52 under 35 U.S.C. § 102(b) as anticipated by Wilson.

We conclude that Appellants have failed to show that the Examiner erred in rejecting claims 1-2, 6-11, 22-23, 35-46 and 49-52 under 35 U.S.C. § 102(b) as anticipated by German reference '019.

We conclude that Appellants have shown that the Examiner erred in rejecting claims 18-21 under 35 U.S.C. § 102(b) as anticipated by German reference '019.

We conclude that Appellants have shown that the Examiner erred in rejecting claim 24 under 35 U.S.C. § 103(a) as unpatentable over Wilson in view of Mori.

We conclude that Appellants have failed to show that the Examiner erred in rejecting claim 24 under 35 U.S.C. § 103(a) as unpatentable over the German reference '019 in view of Mori.

We conclude that Appellants have failed to show that the Examiner erred in rejecting claims 47 and 48 under 35 U.S.C. § 103(a) as unpatentable over German reference '019 and Wilson.

DECISION

The Examiner's rejection of claims 1-2, 6-11, 22-24, 35-52 is sustained. The rejection of claims 3-5, 18-21 and 29-30 is reversed.

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) (2007).

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AFFIRMED-IN-PART

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