

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN R. BURGESON

Appeal 2008-1309
Application 10/790,271
Technology Center 3700

Decided: May 27, 2008

Before TERRY J. OWENS, JENNIFER D. BAHR, and
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

O'NEILL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Burgeson (Appellant) seeks our review under 35 U.S.C. § 134 of the final rejection of claims 1, 2, 4, 5, and 8-12. Claims 3, 6, 7, and 13-16 have been withdrawn from consideration as directed to non-elected species

without traverse. (Final Office Action 2, mailed Dec. 2, 2005.) We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.¹

THE INVENTION

The claimed invention is directed to a scent wick for dispersion of a scent into the air to attract animals suitable for hunting. (Spec. 3:14-15.)

Claim 1, reproduced below, is representative of the subject matter on appeal.

1. A temperature activated scent wick for dispersion into the air above the ground of an animal attractant scent for use by hunters to take advantage of the mating process of certain species to be hunted, the wick comprising:
 - a) a container made of substantially rigid material so as to resist atmospheric pressure affects^[2] having an interior volume for holding a volume of scent and a volume of air, the container adapted for suspension above the ground;
 - b) a cap for sealing the container;
 - c) a temperature buffering scent reservoir passing through the cap with an interior intake end in flow communication with the interior scent volume and an exterior release end; and
 - d) an absorbent scent wick securable about the temperature buffering scent reservoir exterior release end wherein an increase in ambient temperature associated with morning and afternoon will result in the interior volume of air

¹ Our decision will make reference to Appellants' Appeal Brief ("App. Br.," filed May 5, 2006), Reply Brief ("Reply Br.," filed Oct. 1, 2006), and the Examiner's Answer ("Answer," mailed Aug. 1, 2006).

² [*sic*: effects]

expanding to force the scent to pass through the temperature buffering scent reservoir on to the wick and a decrease in ambient temperature associated with later day will result in stopping the scent from passing through the reservoir as to conserve the scent.

THE PRIOR ART

The Examiner relies upon the following as evidence of unpatentability:

Bundy	US 2,991,517	Jul. 11, 1961
Ohayon	US 5,810,253	Sep. 22, 1998

THE REJECTIONS

The following rejections are before us for review:

Claims 1, 2, 4, 5, and 8-12 rejected under 35 U.S.C. § 102(b) as being anticipated by Bundy.

Claims 1, 2, 4, 5, and 8-12 rejected under 35 U.S.C. § 102(b) as being anticipated by Ohayon.

ISSUES

The issues are whether the containers in Bundy and Ohayon are made from substantially rigid materials that resist atmospheric pressure effects and whether Bundy's and Ohayon's wicks are securable about a reservoir as the Appellant has claimed.

FINDINGS OF FACT

We find that the following enumerated findings of fact are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. The Specification discloses the phrase “substantially rigid material” should be construed to mean a material capable of resisting atmospheric pressure effects. (Spec. 3:18.)
2. An example of a substantially rigid material able to resist atmospheric pressure effects, in accordance with the Appellant’s invention, is a substantial rigid container made of plastic or glass. (Spec. 5:12.)
3. Bundy discloses container D that is preferably formed of a flexible plastic material such as polyethylene. (Bundy, col. 3, ll. 46-49.)
4. Bundy discloses container D is manually squeezed such that the liquid is forced through the nozzle E. (Bundy, col. 3, ll. 62-67.)
5. Bundy discloses a wick B contained within a housing A. (Bundy, col. 2, ll. 30-33.)
6. Housing A is secured to socket element C. (Bundy, col. 3, ll. 31-34 and Figure 2.)
7. Socket element C contains the reservoir end E. (Bundy, col. 3, ll. 42-43.)
8. Ohayon discloses a container 30. (Ohayon, col. 5, ll. 54-57 and Figures 1-3.)

9. An embodiment of the container 30 is made of a rigid material with a flexible cap 32. (Ohayon, col. 8, ll. 3-8.)
10. To operate the scent dispenser one manually presses the cap 32. (Ohayon, col. 8, ll. 8-11.)
11. Ohayon discloses a wick 40 contained within a ventilation housing 50. (Ohayon, col. 8, ll. 53-61.)
12. The ventilation housing 50 is connected to a housing frame 20. (Ohayon, col. 7, ll. 26-38.)
13. The housing frame 20 also is disposed about and connects the container 30 by any suitable mounting means that allows the removal of container 30. (Ohayon, col. 7, ll. 26-38.)
14. The container 30 contains the reservoir end 35. (Ohayon, col. 7, ll. 39-43.)
15. The reservoir end is directed downward to the housing containing wick. (Ohayon, col. 8, ll. 53-61.)
16. In a preferred embodiment, the reservoir end is inside the housing containing the wick. (Ohayon, col. 9, ll. 62-66 and Figure 5.)

PRINCIPLES OF LAW

Anticipation is a question of fact. *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). “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., Inc. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631 (Fed. Cir. 1987). However, the law of

anticipation does not require that the prior art reference teach the Appellants' purpose disclosed in the specification, but only that the claims on appeal "read on" something disclosed in the prior art reference. *See Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 772 (Fed. Cir. 1983).

ANALYSIS

The Appellant argues independent claim 1 and dependent claim 2 as a group. As such, we select claim 1 as representative and claim 2 will stand or fall with claim 1. 37 CFR 41.37(c)(1)(vii) (2007). The Appellant argues claims 4, 5, and 8-12 separately. The issues of whether the prior art discloses a substantially rigid material so as to resist atmospheric effects and a wick being securable about the reservoir end are central to the appeal of the rejections of independent claims 1, 8, and 11 as well as dependent claims 4, 5, 9, 10, and 12. While the Appellant has separately headed the arguments for the claims on appeal, the analysis of these two issues is the same for all claims on appeal.

Substantially Rigid Material Issue

The Appellant contends neither Bundy's nor Ohayon's disclosures satisfy the claim limitation of the container being "made of substantially rigid material so as to resist atmospheric affects [*sic*: effects]." (Reply Br. 2 and 5.) The Appellant's contention appears premised on the assumption that because both Bundy and Ohayon disclose that because the operation of their respective devices is manually to squeeze the container to dispense the scent, both containers necessarily are not "made of substantially rigid material so as to resist atmospheric pressure affects [*sic*: effects]."

The term “substantially” is a term of degree. When a word of degree is used in a claim, it is necessary to determine whether the specification provides some standard for measuring that degree. *See Seattle Box Company, Inc. v. Industrial Crating & Packing, Inc.*, 731 F.2d 818, 826 (Fed. Cir. 1984). The Appellant’s Specification defines the standard that should be used for interpreting the phrase “substantially rigid material.” The Specification discloses the phrase should be construed to mean a material capable of resisting atmospheric pressure effects. (Fact 1.) An example of a substantially rigid material able to resist atmospheric pressure effects is disclosed as a substantial rigid container made of plastic or glass. (Fact 2.) And while claims are interpreted “in light of the specification,” it is improper to read limitations from examples given in the specification into the claims unless they are otherwise required by the claims. *See Constant v. Advanced Micro-Devices, Inc.* 848 F.2d 1560, 1571 (Fed. Cir. 1988). Instead, claims are given the broadest reasonable construction consistent with the specification. *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). Accordingly, the Appellant’s Specification at page 3 defining a substantially rigid material as a material able to resist atmospheric pressure effects, and not an example of container material of glass or plastic disclosed within the Specification, guides the claim interpretation of “substantially rigid material”. As such, the relevant issue is whether Bundy and Ohayon disclose substantially rigid materials able to resist atmospheric pressure effects.

Bundy discloses container D that is preferably formed of a flexible plastic material such as polyethylene. (Fact 3.) Bundy discloses container D is manually squeezed such that the liquid is forced through the nozzle E.

(Fact 4.) The fact that the container is manually squeezed does not preclude the container being of sufficient strength to resist atmospheric pressure effects. In fact, quite to the contrary, the fact that Bundy discloses manually squeezing the container to compress it to force liquid through the nozzle implies that the container does resist atmospheric pressure, at least to some extent. Bundy does not disclose the container collapses under atmospheric pressure. Bundy thus provides a reasonable basis to support the Examiner's determination that Bundy's container resists atmospheric pressure effects so as to shift the burden to the Appellant to prove that this is not the case. *See In re King*, 801 F.2d 1324, 1327 (Fed. Cir. 1986). The Appellant has not provided evidence that Bundy's container is unable to resist atmospheric pressure effects. Instead, the Appellant has provided arguments that Bundy's container is unable to resist atmospheric pressure effects. Appellant's attorney's arguments in a brief cannot take the place of evidence. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). *See also In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984). From the evidence of record, we find Bundy's container satisfies the limitation of a substantially rigid material able to resist atmospheric pressure effects as claimed and interpreted in light of the Specification.

Accordingly, we are not persuaded by the Appellant's contention that the Examiner erred in rejecting claims 1, 8, and 11, and the claims dependent therefrom, because Bundy's container is not made of a substantially rigid material so as to resist atmospheric pressure effects.

Ohayon discloses a container. (Fact 8.) An embodiment of the container is made of a rigid material with a flexible cap. (Fact 9.) To operate the scent dispenser one manually presses the cap. (Fact 10.) The

fact that a container is manually squeezed at its top cap does not preclude the container and the cap being of sufficient strength to resist atmospheric pressure effects. In fact, quite to the contrary, the fact that Ohayon discloses manually pressing a cap to force liquid from the container implies that the container does resist atmospheric pressure, at least to some extent. Ohayon thus provides a reasonable basis to support the Examiner's determination that Bundy's container resists atmospheric pressure effects so as to shift the burden to the Appellant to prove that this is not the case. The Appellant has not provided evidence that Ohayon's container and cap are unable to resist atmospheric pressure effects. Instead, the Appellant has provided arguments that Ohayon's container is unable to atmospheric pressure effects. We find Ohayon's container and cap satisfy the limitation of a substantially rigid material able to resist atmospheric pressure effects as claimed and interpreted in light of the Specification. Accordingly, we are not persuaded by the Appellant's contention that the Examiner erred in rejecting claims 1, 8, and 11, because Ohayon's container is not made of a substantially rigid material so as to resists atmospheric pressure effects.

Securable about Issue

The Appellant contends the claim limitation of a "wick securable about the reservoir end" does not include the wicks of Bundy or Ohayon which are located below and unattached to the outlet end. (Reply Br. 3 and 5.) In support of this contention, the Appellant directs our attention to a specific embodiment disclosed in the Specification, page 5, line 27. From this support it appears the Appellant's contention is premised on the assumption that the terms "securable about" should be construed to mean "secured about" because in this preferred embodiment the wick covers the

orifice and is held in place by hook and loop fasteners. However, as stated above, it is improper to read limitations from examples given in the specification into the claims unless they are otherwise required.

Accordingly, the relevant issue is whether Bundy and Ohayon disclose a wick securable about a reservoir end.

Bundy discloses a wick B contained within a housing A. (Fact 5.) Housing A is secured to socket element C. (Fact 6.) Socket element C contains the reservoir end E. (Fact 7.) Accordingly, Bundy's wick B is securable about the reservoir end E by virtue of socket element C being secured to housing A and wick B being within housing A.

Ohayon discloses a wick contained within a housing. (Fact 11.) The housing is connected to a frame. (Fact 12.) The frame also connects the container. (Fact 13.) The container contains the reservoir end. (Fact 14.) As such, the wick, contained within the ventilation housing 50, is securable to the reservoir end of the container via the housing frame 20, which is securable, and in fact secured, about the reservoir end 35 of the container 30. In addition, the reservoir end is directed downward to the housing containing the wick. (Fact 15.) Moreover, in a preferred embodiment, the reservoir end is inside the housing containing the wick. (Fact 16.) Because these structures outlined above are secured together to form a unit and the reservoir end in one embodiment is within the housing containing the wick, we find the wick is securable about the reservoir end.

Accordingly, we are not persuaded by the Appellant's contention that the Examiner erred in rejecting claims 1, 8, and 11, and the claims

dependent therefrom, because Bundy or Ohayon does not disclose a wick securable about a reservoir end.

Additional contentions directed to independent claims 8 and 11

In the Appeal Brief, the Appellant further contends that the Examiner has not shown where Bundy or Ohayon discloses a scent reservoir passing through a cap. (App. Br. 6 and 8.) With respect to the Appellant's contentions found within the Appeal Brief that the Examiner has failed to identify where these additional limitations are found within Bundy and Ohayon, we have reviewed the Examiner's Answer and see that the Examiner has identified portions of Bundy and Ohayon that disclose the additional claimed limitations contended by the Appellant. (Answer 6 and 9-10.) Accordingly, we do not see where the Appellant has identified an error that the Examiner has made in rejecting claims 8 and 11 with respect to these additional contended limitations.

*Contentions the Examiner failed to show limitations within dependent claims
Dependent Claims 4, 5, 9, 10, and 12*

The Appeal Brief argues the dependent claims 4, 5, 9, 10, and 12 separately and contends that the Examiner has not shown where the limitations within these claims are found within Bundy or Ohayon. (App. Br. 6-8.) We have reviewed the Examiner's Answer and the Answer identifies where Bundy and Ohayon disclose these limitations. (Answer 5, 8, and 12.) For claims 4, 5, 9, and 12, the Appellant has not challenged these findings and thus fails to demonstrate that the Examiner erred in rejecting claims 4, 5, 9, and 12.

Both in the Reply Brief and the Appeal Brief, the Appellants contend that the Examiner has not shown where Bundy or Ohayon disclose where a decrease in ambient temperature will draw the scent from the tube and housing with air back into the container. (Reply Br. 4 and 6 and App. Br. 7 and 8.) We disagree. The Examiner has explained how Bundy and Ohayon disclose this limitation. (Answer 8, 15, 19, 21, 22, and 23.) We understand the Examiner's explanation to be that after heat is drawn away from either Bundy or Ohayon, the result is a decrease in pressure, i.e., the pressure and temperature are dependent when a gas is confined. As the pressure decreases the gas volume decreases. The gas volume decreasing will permit the liquid scent, also in the container, to fill the space left from the decreasing gas volume. As such, the liquid scent will be drawn back into the container until equilibrium is reached. In order for equilibrium to be reached the pressure inside a vessel has to be equal to the pressure on the outside of the vessel. Because the vessel, in this case the container, has an opening to the outside and the barrier between the gas and its pressure and the outside air pressure is a fluid that can be easily displaced, air bubbles can migrate from the outside air to the air inside the container. Moreover, the Appellant's contention is premised on the flawed assumption that the containers disclosed in Bundy and Ohayon are incapable of resisting atmospheric pressure effects.

CONCLUSIONS OF LAW

We conclude that the Appellants have not shown that the Examiner erred in rejecting claims 1, 2, 4, 5, and 8-12 as being anticipated by Bundy.

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We also conclude that the Appellants have not shown that the Examiner erred in rejecting claims 1, 2, 4, 5, and 8-12 as being anticipated by Ohayon.

DECISION

The decision of the Examiner to reject claims 1, 2, 4, 5, and 8-12 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

vsh

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