

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* DUANE NIEMEYER, MICKEY HAGGIN,  
ROBERT WAREHEIM, and TOM DICKINSON

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Appeal 2008-2359  
Application 10/990,732  
Technology Center 3600

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Decided: April 29, 2008

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Before PETER F. KRATZ, CATHERINE Q. TIMM, and  
LINDA M. GAUDETTE, *Administrative Patent Judges*.

KRATZ, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This is a decision on an appeal from the Examiner's final rejection of claims 1, 5-11, 16, and 20. We have jurisdiction pursuant to 35 U.S.C. § 6.

Appellants' invention is directed to a receptacle including a housing, lid and foot pedal for opening the lid. Claim 1 is illustrative and reproduced below:

1. A stabilized receptacle comprising:

a receptacle housing having a bottom wall and at least one sidewall extending upwardly from the bottom wall to a top edge of the sidewall, the receptacle having an interior volume and a top opening to the interior volume;

a lid attached to the housing for movement of the lid between a closed position of the lid where the lid is positioned over the housing top opening and a opened position of the lid where the lid is displaced from the housing top opening;

a foot pedal attached to the housing for movement of the foot pedal between a lid closed position and a lid opened position of the food [sic] pedal relative to the housing; the foot pedal being operatively connected to the lid to cause the lid to move to the lid opened position in response to the foot pedal being moved to the lid opened position, and to cause the lid to move to the lid position in response to the foot pedal being moved to the lid closed position, the foot pedal having an end that projects outwardly from the receptacle; and,

a stabilizing hoop having an arched shape with opposite ends attached to the housing bottom wall, the hoop having a length between the opposite hoop ends that extends outwardly from beneath the housing and around the foot pedal end.

The Examiner relies on the following prior art reference as evidence in rejecting the appealed claims:

Delmerico

US 5,230,525

Jul. 27, 1993

Claims 1, 5-11, 16, and 20 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Delmerico. We affirm for the reasons set forth in the Examiner's Answer and below.

There are three independent claims (claims 1, 8, and 16) among the commonly rejected claims. Appellants argue rejected claims 1, 5-7, 16, and 20 together and claims 8-11 together. Hence, we select independent claims 1 and 8 as the representative claims on which we decide this appeal as to the anticipation rejection before us.

"To anticipate a claim, a prior art reference must disclose every limitation of the claimed invention, either explicitly or inherently." *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997); *accord Glaxo, Inc. v. Novopharm, Ltd.*, 52 F.3d 1043, 1047 (Fed. Cir. 1995). However, anticipation by a prior art reference does not require that the reference recognize either the inventive concept of the claimed subject matter or the inherent properties that may be possessed by the prior art reference. *See Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 633 (Fed. Cir.), cert. denied, 484 U.S. 827 (1987).

Anticipation under this section is a factual determination. *See In re Baxter Travenol Labs.*, 952 F.2d 388, 390 (Fed. Cir. 1991) (citing *In re Bond*, 910 F.2d 831, 833 (Fed. Cir. 1990)).

Appellants do not dispute that Delmerico describes a receptacle/container including a housing, lid, and foot pedal as required by representative appealed claim 1. Also, Appellants do not contend that Delmerico fails to describe a receptacle/container including a housing, lid,

foot pedal, and link as required by representative claim 8.<sup>1</sup> Nor do Appellants argue with the Examiner's determination that the hoop bracket (59, Figs. 5 and 6) of Delmerico is an arch-shaped hoop corresponding to that required by the appealed claims. Rather, Appellants maintain that representative claim 1 requires that opposite ends of the arch-shaped hoop are attached to a housing bottom wall and that representative claim 8 requires that opposite ends of such an arch-shaped hoop are attached to the housing beneath a bottom wall thereof whereas Delmerico does not set forth such an attachment between a housing and a hoop.

The Examiner, on the other hand, basically takes the position that:

(1) representative appealed claims 1 and 8 are open to an indirect attachment of the hoop ends to the housing bottom wall or to the housing beneath the bottom wall thereof; and (2) the brackets (60) of Delmerico provide for attachment of the hoop (59), including the ends thereof, to the bottom wall or beneath the bottom wall of a receptacle housing in a manner embraced by the contested appealed claims.

The issue before us is: Have Appellants established reversible error in the Examiner's anticipation rejection of either representative claim 1 or representative claim 8 by their assertions that Delmerico fails to furnish a description of the requisite hoop attachment required by either of these rejected claims? We answer this question in the negative and we affirm the Examiner's anticipation rejection.

The rejected claims must first be correctly construed to define the scope and meaning of each contested limitation as we begin our review of

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<sup>1</sup> Arguments not made in the Briefs are considered to be waived. *See* 37 C.F.R. § 41.37(c)(vii) (2006).

the Examiner's anticipation determination. *See Gechter v. Davidson*, 116 F.3d 1454, 1457, 1460 n.3 (Fed. Cir. 1997). In this regard, it is well settled that, during examination proceedings, claims are given their broadest reasonable construction consistent with the specification as it would have been understood by one of ordinary skill in the art. *See In re Graves*, 69 F.3d 1147, 1152 (Fed. Cir. 1995).

Here, as explained by the Examiner:

Within the plain and ordinary meaning of "attached" under the broadest reasonable interpretation standard, the term "attached" may be either a direct connection or an indirect connection through intermediate components. That is, the claimed stabilizing hoop ends may be directly connected to the housing bottom wall or indirectly connect to the bottom wall. Similarly, the hoop ends of Delmerico et al. are "attached" to the bottom wall of the container, albeit indirectly, by brackets 60. In fact, the connection at brackets 60 attaches the entire hoop length to the housing, including the opposite ends of the hoop 59 and the pair of intermediate portions that accommodate brackets 60. See Figures 5 and 6.

(Ans. 7).

We agree with this fair and reasonable interpretation of the contested claim terms and the application of the applied prior art with respect to the properly construed claims by the Examiner, as more fully set forth in the Answer. In contrast, Appellants arguments ring hollow, particularly with regard to the arguments based on the references to page 7 and 12 of the subject Specification as allegedly supporting a narrower interpretation of the claims (Br. 6-10; Reply Br. 1-3). In this regard, we note that the portions of the Specification cited by Appellants in the Brief in support of their arguments, are directed to a furnished detailed description of preferred

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embodiments of the disclosed asserted invention as the heading presented at page 5 of the Specification makes plain.

Furthermore, the Specification provides that “[a]lthough the receptacle of the invention has been described above by reference to a preferred embodiment, it should be understood that other variations and modifications could be made to the receptacle without departing from the intended scope of protection provided by the following claims” (Specification 13).

Consequently, Appellants have not established that the Examiner’s interpretation of the disputed claim language and/or the Examiner’s application of the applied prior art to the claims is in error based on the arguments and citations to the Specification submitted. In this regard, we are of the view that the Examiner has presented a broadest reasonable claim construction that is in accord with the appealed claims as they would be understood by one of ordinary skill in the art when read in light of the subject Specification. Moreover, unlike the claim construction advanced by Appellants, the Examiner’s claim construction, with which we agree, is consonant with the well settled principle requiring that limitations are not to be read into the claims from the Specification. *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) *citing In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989).

It follows that, on this record, we affirm the Examiner’s anticipation rejection.

#### ORDER

The decision of the Examiner to reject claims 1, 5-11, 16, and 20 under 35 U.S.C. § 102(b) as being anticipated by Delmerico is affirmed.

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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) (2006).

AFFIRMED

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