UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ALAIN KRZYWDZIAK, RAYMOND COSSON, and
BRENT MUSSATTO

Appeal 2008-3587
Application 10/651,270
Technology Center 3700

Decided: December 17, 2008

Before JENNIFER D. BAHR, LINDA E. HORNER, and
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Alain Krzywdziak et al. (Appellants) seek our review under 35 U.S.C. § 134 of the final rejection of claims 1-10 and 13-18. The Examiner objected to claims 11 and 12 as being dependent from a rejected base claim,

but indicated that these claims otherwise contain allowable subject matter. As such, claims 11 and 12 are not part of this appeal. We have jurisdiction under 35 U.S.C. § 6(b) (2002). Appellants' counsel presented arguments for this appeal at an oral hearing on December 11, 2008.

SUMMARY OF DECISION

We REVERSE.

THE INVENTION

The Appellants' claimed invention is directed to a cover assembly for a paint can with an improved means for locking the cover assembly to the paint can. Spec. 1:4-6. Claim 1, reproduced below, is the sole independent claim and is representative of the subject matter on appeal.

> 1. A cover assembly for a paint can having a tubular cylindrical sidewall, an open top and an outwardly protruding rim around the open top, the rim having a downwardly facing annular surface, said cover assembly comprising:
>
> a lid dimensioned to overlie the open top of the paint can, said lid having a spout,
>
> means for attaching said lid to the paint can, said attaching means comprising at least two spaced apart resilient locking tabs which automatically engage the downwardly facing annular surface of the rim as said lid is positioned onto said top of the paint can.

THE REJECTION

The Examiner relies upon the following evidence:

Keough	US 2002/0145939 A1	Oct. 10, 2002

The Appellants seek review of the Examiner's rejection of claims 1-10 and 13-18 under 35 U.S.C. § 102(e) as anticipated by Keough.

ISSUE

The Appellants argue that Keough does not disclose attaching means comprising at least two spaced apart resilient locking tabs which automatically engage the downwardly facing annular surface of the rim as the lid is positioned onto the top of the paint can, as recited in claim 1. The Examiner found that Keough's locking feet 42 and resilient tabs 32 anticipate the claimed attaching means. Ans. 3.

The issue presented by this appeal is:

Have the Appellants shown the Examiner erred in finding that Keough discloses attaching means comprising at least two spaced apart resilient locking tabs which automatically engage the downwardly facing annular surface of the rim of the paint can?

FINDINGS OF FACT

We find that the following enumerated findings 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. Keough discloses a cover assembly for a paint can 12 including a paint can lid 18 having an annular skirt 30 and a plurality of circumferentially spaced resilient tabs 32. Keough 1:¶¶0012, 0020, 0021; Figs. 1 & 2.
2. Each tab 32 includes a first end 34, which is secured to annular skirt 30, and a free end 36, which protrudes radially inwardly. Keough 2:¶0022; Fig. 3.
3. As the lid 18 is positioned over the open top 16 of the paint can 12, the free ends 36 of the tabs 32 engage an outer periphery of the paint can 12 so that they center the lid 18 with respect to the paint can 12. Keough 2:¶0023; Fig. 3.
4. As shown in Figure 3 of Keough, when the lid 18 is positioned on top of the paint can 12, the inwardly protruding free end 36 of each tab 32 engages the upper portion and sides of the outwardly-protruding paint can rim.
5. Keough discloses that the lid 18 includes an annular seal 40 having an outer reduced thickness portion 44 which is aligned with the free ends 36 of the resilient tabs 32 to ensure that the free ends 36 do not jam under the outwardly protruding lip 45 on the paint can. Keough 2:¶0025.
6. As such, the tabs 32 are not capable of automatically engaging a downwardly facing annular surface of the rim when the lid is positioned on top of the paint can.

7. Keough further discloses that the paint can lid 18 is removably secured to the paint can 12 by any conventional means, such as locking feet 42, which compress the seal 40 between the lid 18 and the top of the paint can 12 to fluidly seal the lid 18 to the paint can 12. Keough 2:¶0024; Fig. 1.
8. The Appellants' Specification describes that conventional locking feet "are spring-loaded and are rotatable between a locked and an unlocked position. In their locked position, the locking feet extend under the paint can chime so that a portion of the paint can chime is compressibly sandwiched between the lid and the locking feet." Spec. 1:23 – 2:3.
9. The Appellants' Specification describes that the paint can chime 20, in the conventional fashion, is attached to the tubular cylindrical sidewall 14 of the paint can 12 by a rim 22. Spec. 5:13-14.
10. The Figures show the chime 20 as protruding inwardly from the sidewall of the paint can. Spec., Fig. 3.
11. Thus, Keough's conventional locking feet 42 are designed to extend under and engage the paint can chime on the interior of the paint can.
12. As such, Keough's locking feet 42 are not resilient locking tabs which are capable of automatically engaging a downwardly facing annular surface of an outwardly protruding paint can rim as the lid is positioned onto the top of the paint can.

PRINCIPLES OF LAW

When a claim uses the term "means" to describe a limitation, a presumption inheres that the inventor used the term to invoke § 112, ¶ 6. *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003). "This presumption can be rebutted when the claim, in addition to the functional language, recites structure sufficient to perform the claimed function in its entirety." *Id.*

A patent applicant is free to recite features of an apparatus either structurally or functionally. *See In re Swinehart*, 58 C.C.P.A. 1027, 439 F.2d 210, 212 (CCPA 1971) ("[T]here is nothing intrinsically wrong with [defining something by what it does rather than what it is] in drafting patent claims."). Yet, choosing to define an element functionally, i.e., by what it does, carries with it a risk. *In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997). As stated in *Swinehart*, 439 F.2d at 213:

> where the Patent Office has reason to believe that a functional limitation asserted to be critical for establishing novelty in the claimed subject matter may, in fact, be an inherent characteristic of the prior art, it possesses the authority to require the applicant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.

"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

Claim 1 includes a limitation of "means for attaching said lid to the paint can." A presumption inheres that Appellants intended to invoke § 112, ¶ 6 by use of the word "means" for this claim element. Claim 1 further recites, however, that the "attaching means compris[es] at least two spaced apart resilient locking tabs which automatically engage the downwardly facing annular surface of the rim as said lid is positioned onto said top of the paint can." As such, claim 1 further recites sufficient structure, i.e., the at least two spaced apart resilient locking tabs, to perform the recited function of "attaching said lid to the paint can" in its entirety. As such, § 112, ¶ 6 does not apply to this claim element.

Claim 1 further defines the locking tabs using functional language, stating that the locking tabs "automatically engage the downwardly facing annular surface of the rim as said lid is positioned onto said top of the paint can." In order for the prior art to anticipate this claim element, it must disclose at least two spaced apart resilient locking tabs that are inherently capable of automatically engaging a downwardly facing annular surface of an outwardly protruding paint can rim as the lid is positioned onto the top of the paint can.

Neither the resilient tabs 32 nor the locking feet 42 of Keough's cover assembly are capable of automatically engaging a downwardly facing annular surface of an outwardly protruding paint can rim when the lid is positioned on top of the paint can (Facts 1-12). In particular, no matter how much one pushes downwardly on the Keough's cover assembly, the resilient

tabs 32 are not going to engage the outer rim on the paint can because the seal under the lid is designed specifically to prevent such engagement (Fact 5). Further, Keough's locking feet are designed to engage the underside of the chime of the paint can and are not capable of engaging the outer rim (Facts 11 & 12). As such, Keough's resilient tabs 32 and/or locking feet 42 are not the claimed resilient locking tabs, and thus are not the attaching means, as recited in claim 1.

Accordingly, Keough does not disclose the attaching means of claim 1, and thus does not anticipate claim 1 or any of its dependent claims 2-10 and 13-18.

CONCLUSION

The Examiner erred in finding that Keough discloses attaching means comprising at least two spaced apart resilient locking tabs which automatically engage a downwardly facing annular surface of a rim of a paint can.

DECISION

The decision of the Examiner to reject claims 1-10 and 13-18 is reversed.

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REVERSED

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