

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BARRY S. KUTNER and DANIEL A. LATOWICKI

Appeal No. 95-0084
Application 07/857,329¹

HEARD: January 15, 1998

Before JOHN D. SMITH, GARRIS and OWENS, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

¹ Application for patent filed March 25, 1992. According to appellants, this application is a continuation-in-part of Application 07/692,736 filed April 29, 1991, now U.S. Patent No. 5,413,757 issued May 9, 1996, which is a continuation of Application 07/274,768 filed November 22, 1988, now U.S. Patent No. 5,039,495 issued August 13, 1991, which is a continuation-in-part of Application 07/184,246 filed April 21, 1988, now U.S. Patent No. 5,019,344 issued May 28, 1991.

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DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 7 through 10, 12 through 16, 19 through 23, 25 through 34 and 45 through 48 which are all of the claims remaining in the application.

The subject matter on appeal relates to an apparatus for sterilizing at least one object by vapor under pressure. This appealed subject matter is adequately illustrated by independent claims 30 and 45, a copy of which taken from the appellants' brief is appended to this decision.

The references relied upon by the examiner in the rejections before us are:

Falk	4,122,324	Oct. 24, 1978
Standing et al. (Standing)	4,132,811	Jan. 2, 1979

All of the claims on appeal stand variously rejected: (1) under 35 U.S.C. § 112, second paragraph, for failing to particularly point out and distinctly claim the subject matter which appellants regard as their invention, (2) under 35 U.S.C. § 103 as being obvious over Standing taken with Falk, and (3) under the judicially created doctrine of obviousness-type double patenting over claims 1 through 35 of the appellants' patent 5,018,359 or over claims 1 through 28 of the appellants' patent 5,039,495.

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OPINION

We will not sustain any of the examiner's above noted rejections.

The Rejection Under 35 U.S.C. § 112

The examiner believes that the appealed claims are rendered indefinite by virtue of the claim term "liquid". More specifically, the examiner states that "[a] fair reading of the instant application shows that the liquid being added is material which is to be processed and hence not a proper element to be positively recited in the claims" (answer, page 2). While we appreciate that the liquid in appellants' claimed apparatus is "to be processed" in the sense that it is to be vaporized by microwave radiation, the examiner has not explained (and it is not apparent to us in the absence of such an explanation) why this fact renders the liquid "not a proper element to be positively recited in the claims" much less why the appealed claims are thereby rendered indefinite.

For these reasons, we will not sustain the examiner's § 112, second paragraph, rejection of the claims on appeal.

The Rejection Under 35 U.S.C. § 103

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On page 4 of the final Office action, the examiner expresses his position as follows:

[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to use the shielded device of Falk with the pouch of Standing et al. so as to aid in the uniform heating of the food item while preventing overheating. Using the broadest interpretation of claim language, the "shielding means" of the pending claims reads on the device 16 of Falk and the "enclosure means" reads on the bag (elements 114, 140, 124, 150 or 42) of Standing et al.

We cannot agree with the examiner that the teachings of Standing and Falk, even if combined, would have resulted in an apparatus of the type defined by the appellants' independent claims.

For example, this prior art combination would not include the independent claim 30 feature of an "enclosure means formed of microwave radiation transparent material having inwardly facing substantially rigid surfaces defining an interior cavity, said enclosure means including means for holding said pouch in said cavity, ... whereupon an overpressure is created within said pouch which causes said pouch to expand until said sheet material thereof presses against said inwardly facing surfaces of said enclosure means defining said interior cavity, to thereby prevent further expansion of said pouch". The examiner's belief that "the "enclosure means" reads on the bag (elements 114, 140, 124,

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150 or 42) of Standing" is clearly erroneous as explained by appellants on page 11 of their brief. Similarly, the examiner's apparently alternative position that "[t]he device of Falk clearly shows an enclosure means with ridged [sic] wall as set forth in the dependent claims of the instant application" (answer, page 5) is not well taken, again, for the reasons stated on page 11 of the brief.

The examiner's rejection possesses similar deficiencies with respect to each of the appellants' other independent claims. For example, the Standing and Falk combination simply would not have resulted in an apparatus possessing a positioning means of the type defined by appealed claims 45 and 46 or a pouch and shielding means which are associated in the manner recited in appealed claim 47 or the enclosure means defined by appealed claim 48.

In light of the foregoing, we also cannot sustain the examiner's § 103 rejection of the claims on appeal as being obvious over Standing taken with Falk.

The Obviousness-Type Double Patenting Rejections

On pages 18 and 19 of the appeal brief, the appellants have listed numerous claim features which are said to be neither taught nor suggested by the respective claims of patents

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5,019,359 and 5,039,495. The examiner's response thereto on page 5 of the answer reflects that he has relied upon teachings from the disclosures of these patents to supply the deficiencies of the patent claims. This reliance is clearly improper as explained, for example, in M.P.E.P. § 804, particularly at page 800-18 (Revision 3, July 1995) ("When considering whether the invention defined in a claim of an application is an obvious variant of the invention defined in the claim of the patent, the disclosure of the patent may not be used as prior art").

Because the examiner has set forth no acceptable reasoning much less evidence as to why the here claimed subject matter would have been obvious over the subject matter defined by the claims of the previously mentioned patents, his rejection of the claims on appeal under the judicially created doctrine of obviousness-type double patenting cannot be sustained.

SUMMARY

Under the circumstances recounted above, none of the rejections advanced by the examiner on this appeal can be sustained.

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The decision of the examiner is reversed.

REVERSED

JOHN D. SMITH)	
Administrative Patent Judge))	
)	
)	
BRADLEY R. GARRIS)	BOARD OF PATENT
Administrative Patent Judge))	APPEALS AND
)	INTERFERENCES
)	
)	
TERRY J. OWENS)	
Administrative Patent Judge))	

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APPENDIX

30. Apparatus for sterilizing at least one object by vapor under pressure, comprising:

a pouch formed of flexible substantially vapor-impermeable sheet material at least partially transparent to microwave radiation, said pouch being receivable of said at least one object;

liquid receivable within said pouch;

means for irradiating said pouch with microwave radiation to vaporize said liquid to produce an atmosphere of hot vapor under pressure; and

enclosure means formed of microwave radiation transparent material having inwardly facing substantially rigid surfaces defining an interior cavity, said enclosure means including means for holding said pouch in said cavity, and wherein upon irradiating said pouch with microwave radiation, said liquid receivable within said pouch is exposed to said radiation whereupon it is heated and then vaporized thereby, whereupon an overpressure is created within said pouch which causes said pouch to expand until said sheet material thereof presses against said inwardly facing surfaces of said enclosure means defining said interior cavity, to thereby prevent further expansion of said pouch.

45. Apparatus for sterilizing at least one object by vapor under pressure, comprising:

a pouch formed of flexible, substantially vapor-impermeable sheet material at least partially transparent to microwave radiation, said pouch being receivable of said at least one object;

liquid receivable within said pouch;

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means for irradiating said pouch with microwave electromagnetic radiation to vaporize said liquid to produce an atmosphere of hot vapor under pressure;

shielding means formed of microwave radiation shielding material and adapted to substantially surround at least a part of said pouch for dividing the interior of said pouch into a first interior portion which is substantially shielded from said microwave radiation during irradiation of said pouch by said irradiating means and a second interior portion which is exposed to said microwave radiation during irradiation of said pouch by said irradiating means, said first interior portion being receivable of said at least one object to be sterilized in its substantial entirety and said second interior portion being receivable of said liquid; and

means for positioning said shielding means to substantially surround at least part of said pouch to shield said first interior portion thereof, said shielding positioning means comprising an enclosure having a substantially closed interior cavity for receiving said pouch in its substantial entirety;

whereby upon irradiating said pouch with microwave radiation, said at least one object situated in said first interior portion of said pouch is substantially entirely shielded from said radiation, and said liquid situated in said second interior portion is exposed to said radiation whereupon it is heated and then vaporized thereby, whereupon said at least one object is sterilized under the effect of vapor under pressure.