

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte LARA BROBERG, JEAN-JACQUES DESJARDINS  
and PIERRE DUPART

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Appeal No. 1997-1617  
Application No. 08/220,808

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ON BRIEF

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Before, JOHN D. SMITH, KRATZ, and TIMM, Administrative Patent Judges.

KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 11-28, all of the claims pending in this application.

BACKGROUND

Appellants' invention relates to breadcrumb products including breadcrumb-coated food products, and methods for preparing same. An understanding of the invention can be

derived from a reading of exemplary claims 11, 25 and 27,  
which are reproduced below.

11. A process for preparing breadcrumbs  
comprising:

introducing ingredients comprising a ground  
cereal, a reducing sugar, a fat and water into  
an extruder so that the ingredients have a dry  
matter content of at least 75% by weight and  
extrusion-cooking the ingredients at a  
temperature of at least 150°C and under a  
pressure of at least 45 bar to obtain an  
extruded, cooked product having a fat content of  
from 7% to 12% by weight;

grinding the extruded, cooked product to  
obtain a ground particulate product; and

drying the ground particulate product to  
obtain a dried product.

25. The product of the process of claim 11  
or 12.

27. A particulate extrusion-cooked  
breadcrumb product having a fat content, which  
comprises hydrogenated palm oil, in an amount of  
from 7% to 12% by weight.

The prior art references of record relied upon by the  
examiner in rejecting the appealed claims are:

Giacone et al. (Giacone)	4,609,558	Sep.
02, 1986		
Lees et al. (Lees)	2,095,529	Oct.
06, 1982 (United Kingdom)		

Claims 11-28 stand rejected under 35 U.S.C. § 103 as being unpatentable over Giacone in view of Lees.

OPINION

After careful consideration of the issues raised in this appeal and with the arguments of both appellants and the examiner, we find that the examiner's § 103 rejection of claims 11-24 is not sustainable. However, we concur with the examiner's conclusion with respect to product claims 25-28. Accordingly, we will sustain the § 103 rejection of claims 25-28. Our reasoning follows.

Claims 11-24

The difficulty we have with the examiner's position regarding the appealed method claims stems from the fact that the examiner has not shown where either of the applied references teaches or suggests the extrusion pressure conditions of the claimed process let alone the use of such pressure conditions together with the claimed extrusion-cooking temperature of at least 150°C. While Lees may disclose the use of a higher pressure than Giacone as noted by the examiner (supplemental answer mailed August 21, 1996,

pages 5-8 and supplemental answer mailed November 20, 1996, pages 2 and 3), the examiner has not shown where Lees teaches the use of an extrusion pressure of at least 45 bar as claimed. Moreover, as generally pointed out by appellants (brief, page 8), Lees generally suggests the use of an extrusion-cooking temperature of 90-210°F, a temperature lower than the temperature ranges disclosed by Giacone and called for by the appealed method claims. Hence, even if the cited references were combined, the examiner has not shown how the combined teachings thereof would have suggested modifying Giacone so as to use both a temperature and pressure as required by appellants' claimed process.

For the foregoing reasons, we find that the examiner has not established a *prima facie* case of obviousness of the claimed method. Because we reverse on this basis, we need not reach the issue of the sufficiency of the asserted showing of unexpected results in the specification (see, e.g., brief, pages 27-29). See In re Geiger, 815 F.2d 686, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987).

Claims 25-28

Our disposition of the examiner's § 103 rejection of product claims 25-28 is another matter. We note that the patentability of a product is a separate consideration from that of the process by which it is made. See In re Thorpe, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985). Moreover, determination of the patentability of a product-by-process claim, such as appealed claims 25 and 26 is based on the product itself. See In re Brown, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972). In other words, the patentability of the product does not depend on its method of preparation. See In re Pilkington, 411 F.2d 1345, 1348, 162 USPQ 145, 147 (CCPA 1969). Hence, if the claimed product is the same as or obvious from a product of the prior art that is made by a different process, the claim is unpatentable. See In re Marosi, 710 F.2d 799, 803, 218 USPQ 289, 292-293 (Fed. Cir. 1983). If the prior art product appears to be substantially the same as the claimed product, the burden is on the applicant to establish with objective evidence that the claimed product is patentably distinct from the product of the prior art. See In re Brown, 459 F.2d at 535, 173 USPQ at 688.

Here, the evidence adduced by the examiner, particularly Lees (pages 2 and 3)<sup>1</sup>, teaches a prior art breadcrumb product that may include up to 8 % by weight shortening by weight of total flour as well as other ingredients such as water and sugar which product appears to substantially correspond to the product defined by product-by-process claim 25.<sup>2</sup>

We are mindful of the evidence furnished by appellants at pages 5-9 of the specification and the arguments furnished at pages 29 and 30 of the brief. However, we do not agree with appellants' viewpoint that the furnished specification test results establish that the claimed product has characteristics that differentiate over the prior art product of Lees. In this regard, we note that the crispy texture referred to in the table on page 8 of the specification was obtained with a specified fat content of 9.5% when the product was extruded at 90 bar pressure and temperatures of at least 175°C. The

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<sup>1</sup> Since Giacone is not necessary to our affirmance of the examiner's rejection of product claims 25-28, we will not discuss the additional teachings thereof relative to those claims.

<sup>2</sup> We observe that claim 25 does not require hydrogenated palm oil by virtue of the reference to claim 11, the latter claim not specifying a particular fat.

product of appealed claim 25 is not limited to products prepared under the specific conditions reported in the specification. Also, the results reported in the table at page 7 of the specification are for products made at high temperature and pressure conditions to which the product of claim 25 is not limited, as discussed above. Consequently, we do not find the specification evidence persuasive of an actual difference in the product called for by appellants' claim 25 and the product of Lees.

Appellants have not furnished separate substantive arguments for each of the claims that are members of the separate grouping of product claims 25-28 as identified by appellants. See, e.g., pages 2, 14 and 15 of the supplemental brief filed October 23, 1996 and pages 24-26, 29 and 30 of the brief filed June 5, 1996. Hence claims 26-28 are also considered obvious over the teachings of Lees in light of the obviousness findings discussed above with respect to claim 25, the latter claim having been selected by us as a representative claim in deciding this appeal for the product claim grouping. See In re Ochiai, 71 F.3d 1565, 1566 n.2,

37 USPQ2d 1127, 1129 n.2 (Fed. Cir. 1995); 37 CFR  
§ 1.192(c)(7) and (c)(8)(1995).

Moreover, regarding the hydrogenated palm oil limitation of claims 26-28, we observe that the examiner has found that palm oil is a well-known oil which is hydrogenated and that shortening is a solid fat (supplemental answer mailed November 20, 1996, page 4). We observe that those factual findings by the examiner are not specifically disputed by appellants in the reply brief filed in response to the supplemental answer mailed November 20, 1996. Accordingly, notwithstanding appellants' opinion to the contrary regarding the obviousness of using hydrogenated palm oil as a fat in the prior art product, we find that one of ordinary skill in the art would have been led by the teachings of Lees to select a solid fat such as hydrogenated palm oil. Such a selection merely involves the matching of a well-known source of a solid fat (shortening) with Lees' expressed suggestion of using shortening as a breadcrumb ingredient.

Accordingly, on this record, we agree with the examiner that claims 25-28 are obvious, within the meaning of 35 U.S.C. § 103, over the applied prior art.

CONCLUSION

The decision of the examiner to reject claim claims 11-24 under 35 U.S.C. § 103 as being unpatentable over Giacone together with Lees is reversed and the decision of the examiner to reject claims 25-28 under 35 U.S.C. § 103 as being unpatentable over Giacone together with Lees is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

JOHN D. SMITH	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
PETER F. KRATZ	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
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	)	
CATHERINE TIMM	)	
Administrative Patent Judge	)	

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VOGT & O'DONNELL  
707 WESTCHESTER  
WHITE PLAINS, NY 10604

APPEAL NO. - JUDGE KRATZ  
APPLICATION NO.

APJ KRATZ

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DECISION: **ED**

Prepared By:

**DRAFT TYPED:** 08 Jun 01

**FINAL TYPED:**