

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(2) is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

Ex parte ALISSA LEIBOWITZ

---

Appeal No. 97-1883  
Application 08/254,973<sup>1</sup>

---

ON BRIEF

---

Before CALVERT, Administrative Patent Judge, McCANDLISH, Senior Administrative Patent Judge, and CRAWFORD, Administrative Patent Judge.

CRAWFORD, Administrative Patent Judge.

**DECISION ON APPEAL**

This is a decision on an appeal from the examiner's final rejection of claims 1, 2, 4 and 7-10. Claims 3, 5 and 6 have been canceled.

---

<sup>1</sup> Application for patent filed June 7, 1994.

Appeal No. 97-1883  
Application 08/254,973

The appellant's claimed subject matter is an ergonomic container for fluids. Claim 1 is exemplary of the subject matter on appeal and recites:

1. An ergonomic container for fluids, comprising:

a generally rectangular, hollow body having a U-shaped top section, a first side wall, a second side wall, a front wall and a rear wall, wherein the bottom and rear walls are perpendicular to each other and have generally planar surfaces such that the container can stably support itself in either a horizontal or vertical orientation;

a first rounded edge between the front wall and the top section;

a second rounded edge having an enhanced curvature located between the front wall and the bottom wall;

an angled spout located on the first rounded edge; and

a hollow handle portion connected to the U-shaped top such that it is approximately half-way between the front and rear walls, half-way between the first and second side walls and near the center of gravity of a full container, wherein liquid may flow through the hollow handle portion and wherein the size of the handle permits a diverse mix of individuals to acquire a complete hand grip;

and wherein when the bottom of the container is resting on a surface a user may pour liquid by grasping the handle and rolling the container about the second rounded edge in contact with the surface.

#### THE REFERENCE

The examiner has relied on the following reference:

Howlett

3,250,434

May 10, 1966

Appeal No. 97-1883  
Application 08/254,973

THE REJECTION

Claims 1, 2, 4, and 7-10 stand rejected under 35 U.S.C. § 103 as being unpatentable over Howlett.

Rather than reiterate the entire arguments of the appellant and the examiner in support of their respective positions, reference is made to the appellant's brief (Paper No. 9) and reply brief (Paper No. 12) and the examiner's answer (Paper No. 10) for the full exposition thereof.

OPINION

In reaching our conclusions on the issues raised in this appeal, we have carefully considered appellant's specification and claims, the applied reference, and the respective viewpoints advanced by the appellant and the examiner. As a consequence of our review, we have made the determination that the rejection of the examiner should not be sustained.

We initially note that a rejection based on 35 U.S.C. § 103 must rest on a factual basis, with the facts being interpreted without hindsight reconstruction of the invention from the prior art. In making this evaluation, the examiner has initial burden of supplying the factual basis for the rejection. To meet this burden, the examiner must establish why one of ordinary skill in the art would have been led to the claimed

Appeal No. 97-1883  
Application 08/254,973

invention by the expressed or implied suggestions found in the prior art. In re Sernaker, 702 F.2d 989, 994, 217 USPQ 1, 5 (Fed. Cir. 1983). The examiner may not, because he or she doubts that the invention is patentable, resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in the factual basis. See In re Warner, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967).

In the instant case, it is the examiner's opinion that Howlett shows all the structure of the device recited in the claims except the specific shape, angle and material. The examiner states:

...Howlett shows the corners are substantial round since they are not completely square. Moreover such specific shape would be considered as an obvious matter of design as no specific unobvious nor unexpected results are seen. The mere change of the shape is pure a design of choice. It would have been obvious to one having ordinary skill in the art to make any corner rounded for the sake of safety to prevent the formation of any harmful shape corner. [Final Rejection at page 2]

We do not agree with the examiner that Howlett shows substantially rounded edges. In our view, the edges of Howlett are angular. Further, there is no disclosure, teaching or suggestion of a second rounded edge having an enhanced curvature which is defined in the specification at page 6 as having more pronounced curvature than the first rounded edge.

Appeal No. 97-1883  
Application 08/254,973

In addition, we do not agree with the examiner that the requirement of a second rounded edge having an enhanced curvature of claim 1 would have been an obvious design choice. In specifically disclosing that the second rounded edge has a more pronounced curvature, the appellant also makes clear that this pronounced curvature has been chosen to facilitate pouring from the container. Far from being a matter of obvious design choice, this is a matter which is at the very heart of appellant's disclosed and claimed invention. The examiner can not simply brush this feature aside.

Finally, we find no factual basis for concluding that a person of ordinary skill in the art would have been motivated to make any corner rounded for the sake of safety to prevent the formation of any harmful shaped corner.

Appeal No. 97-1883  
Application 08/254,973

The decision of the examiner is reversed.

REVERSED

IAN A. CALVERT	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
HARRISON E. McCANDLISH, Senior	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
	)	
MURRIEL E. CRAWFORD	)	
Administrative Patent Judge	)	

MEC/gjh

Appeal No. 97-1883  
Application 08/254,973

FISH & RICHARDSON, P.C.  
45 ROCKEFELLER PLAZA  
NEW YORK, NY 10111