

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LILLIAN R. JURANOVIC and PAUL V. TUZZIO

Appeal No. 1997-2257
Application No. 08/144,026

ON BRIEF

Before CALVERT, FRANKFORT, and GONZALES, Administrative Patent Judges.

CALVERT, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 2 to 16 and 18. Claim 17, the only other claim remaining in the application, stands withdrawn from consideration under 37 CFR § 1.142 (b) as being directed to a nonelected invention.

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The subject matter in issue is a process for producing or preparing a pretzel chip, disclosed in the specification as made of pretzel dough and having concentric rings, each connected to the adjacent ring(s) by webs. The appealed claims are reproduced in the appendix of appellants' brief.¹

The references applied in the final rejection are:

Reesman et al. (Reesman) 29, 1970	3,551,165	Dec.
Ikoma et al. (Ikoma) 26, 1990	4,937,089	Jun.
Walsh 1993	5,238,693	Aug. 24,

Claims 2 to 16 and 18 stand finally rejected as unpatentable over Walsh in view of Reesman and Ikoma, under 35 U.S.C. § 103.

The Walsh patent discloses, insofar as relevant here, an essentially conventional method of making pretzels. Reesman discloses the extrusion of dough through a die having openings 26 at its inlet and flow control pins 16 in its interior to

¹ Claims 3 and 4 in the appendix do not reflect the changes therein made by the amendment filed Dec. 28, 1995. The examiner stated in an Advisory Action (Paper No. 12, Jan. 31, 1996) that this amendment overcame the rejection of claim 4 under 35 U.S.C. § 112, second paragraph.

make a disc with relief on its faces (Fig. 4), the disc then being puffed (Fig. 5). Ikoma discloses extruding through dies of various designs protinaceous material, e.g., meat or fish, the extruded pieces being compressed into a bundle.

The examiner notes that Reesman states that adjustments in shaping and spacing of the flow control elements is variable and will give rise to differences in relief characteristics on the faces of the dough masses (discs)(col. 3, lines 16 to 20); also, Ikoma states that the die orifices may be arranged to obtain products with "rose-like, lateral-striped or wavelike cross section" (col. 2, line 63 to col. 3, line 2), and the size, cross-sectional shape and number of the orifices "may be selected in accordance with the kind of target product" (col. 4, lines 1 to 9). The examiner then finds that (answer, pages 6 to 7):

It would have been obvious to one of ordinary skill in the art [to] produce the pretzel chip^[2] of Walsh using an extrusion die with a design of one's choosing as disclosed by Reesman et al. and Ikoma et

² On page 8 of the answer the examiner acknowledges that Walsh does not disclose a pretzel chip, but notes that appellants disclose on page 1 of their specification that there is a pretzel chip on the market ("Mr. Phipps-brand").

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al. because it is well known to extrude foods, such as dough products through variously shaped dies to produce products of various new shapes that appeal to the consumer. While appellants' specific die configuration, as used in the claimed process, is not exactly disclosed by the prior art, Reesman et al. teach that the shapes of dough product are dictated by the outline of the die itself limiting the range of selectable shapes an[d] patterns. Reesman et al. suggest that the spacing of the pins of the die dictate the extrusion velocity of the dough and thus determine the shape. It is considered that it is common in the food industry to produce foods of various shapes for the enjoyment of the consumer's eye and that one of skill in the art would understand from Reesman et al. the relationship between the die and the eventual shape and be aware of the effects that changes to the die will have on the product's shape. Without Appellants showing the criticality of the

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die's configuration it is considered that appellants are merely selecting a die design of their choosing and as such the claims are obvious in view of the prior arts' [sic] teachings.

In essence, it appears to be the examiner's position that, given the shape or configuration of appellants' pretzel chip, which the examiner indicates is novel (answer, page 14), one of ordinary skill in the art would be taught by the applied prior art how to use a die to produce that shape. However, a rejection based on § 103 must rest on a factual basis. In re GPAC, Inc., 57 F.3d 1573, 1582, 35 USPQ2d 116, 1123 (Fed. Cir. 1995). In the present case, we find no evidence which would teach or suggest the particular dough product recited in independent claims 14 and 18, namely, concentric dough rings partially fused together. While the portion of Reesman cited by the examiner would suggest dough products having relief patterns other than that specifically disclosed in Fig. 4, we do not consider that the fact that the appellants' pretzel chip may be characterized as having a relief pattern, as the examiner has done on page 11 of the answer, justifies a conclusion that the particular concentric

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ring "relief pattern" on appellants' claimed dough product would have been obvious absent some teaching or suggestion thereof in the prior art.

Accordingly, the rejection will not be sustained.

Conclusion

The examiner's decision to reject claims 2 and 16 to 18 is reversed.

REVERSED

IAN A. CALVERT)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
CHARLES E. FRANKFORT)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
JOHN F. GONZALES)	
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SLD

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REVERSED

Prepared: August 17, 2001