

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PATRICK D. ARNELL

Appeal No. 2003-0589
Application No. 09/564,326

ON BRIEF

Before COHEN, FRANKFORT, and BAHR, Administrative Patent Judges.
FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's refusal to allow claims 1 through 13 as amended subsequent to the final rejection in a paper filed June 6, 2002 (Paper No. 15). Claims 14 through 18, the only other claims remaining in the application, have been withdrawn from further consideration by the examiner pursuant to a restriction requirement.

Appellant's invention is directed to a process of making non-rectangular zipper closable plastic bags without creating

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large amounts of waste material and wherein each upper edge and each lower edge of each plastic bag has a functioning zipper, with at least the lower edge of each bag also having a sealing line disposed parallel to and proximate to the zipper on the lower edge. Independent claim 1 is representative of the subject matter on appeal and a copy of that claim can be found in the examiner's answer (page 3).

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

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| Clark | 5,968,310 | Oct. 19, 1999 |
| Ouchi | 6,068,585 | May 30, 2000 |

Claims 1 through 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ouchi in view of Clark.

Rather than attempt to reiterate the examiner's full commentary with regard to the above-noted rejection and the conflicting viewpoints advanced by the examiner and appellant regarding the rejection, we make reference to the final rejection (Paper No. 9, mailed December 31, 2001) and examiner's answer (Paper No. 17, mailed September 25, 2002) for the reasoning in

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support of the rejection, and to appellant's brief (Paper No. 14, filed June 5, 2002) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we have made the determination which follows.

On page 2 of the final rejection the examiner makes note of what Ouchi discloses relative to appellant's claimed process for making zipper closable plastic bags, and expressly indicates that Ouchi "does not disclose that [sic] a plastic zipper strip on both the first and second edge of the plastic sheets." To account for this difference, the examiner turns to the Clark patent, urging that "Clark discloses a plastic sheet (48) having a plastic zipper strip (102) on both the first and second edge (Fig. 3) to provide a reclosable plastic bag for sealably packaging a wide variety of articles including food products (column 2, lines 33-36)" (final rejection, pages 2-3). From the

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combined teachings of Ouchi and Clark, the examiner concludes that it would have been obvious to one of ordinary skill in the art at the time of appellant's invention

to have modified Ouchi's process for making zipper closable plastic bags by having a plastic zipper strip on both the first and second edge of the plastic sheets, as suggested by Clark, in order to provide a reclosable plastic bag for safely packaging a wide variety of articles including food products.

In addition to the foregoing, the examiner also makes note, on page 3 of the final rejection, that Ouchi and Clark "failed to disclose a plurality of spaced apart transverse sealing lines disposed at non-right angles with respect to the side edges of the side edges [sic]." The examiner's position with regard to this aspect of appellant's claimed subject matter is that

it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Ouchi's process for making zipper closeable plastic bags by having a plurality of spaced apart transverse sealing lines disposed at non-right angles with respect to the side edges of the side edges, as a matter of engineering design choice, since the examiner takes an official notice that a plurality of spaced apart transverse sealing lines disposed at non-right angles with respect to the side edges of the side edges is old, well known, and available in the art, see for example US patents 5,496,252 and 6,183,590.

On page 5 of the brief, appellant argues that the problems addressed in the present application as compared to Clark and

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Ouchi are totally different, in that neither Ouchi or Clark are directed to the efficient production of non-rectangular or trapezoidal bags. In addition, appellant urges that

Neither Ouchi or Clark suggest a bag or method where each top and bottom edge has a functioning zipper, and where the bottom edges of each plastic bag are sealed along a sealing line disposed parallel to and proximate to the zipper on the bottom edges of each plastic bag.

Moreover, on page 6 of the brief, appellant specifically disagrees with the examiner's further conclusion that the claimed limitations not taught in the combination of the references to Ouchi and Clark are merely matters of obvious engineering design choice. In that regard, appellant provides the following commentary to evidence that the examiner has failed to appreciate important limitations in claim 1 on appeal:

While these references do teach trapezoidally shaped bags, nowhere do they teach or suggest zipper sealed bags, or bags with a sealing line disposed parallel to and proximate to the zipper on the bottom edges of each plastic bag. Likewise, neither teaches or suggest a bag or method where each top and bottom edge has a functioning zipper, where the bottom edges of each plastic bag are sealed along a sealing line disposed parallel to and proximate to the zipper on the bottom edges or each plastic bag. Contrary to the Examiner's opinion, one or [sic; of] ordinary skill in the art would not produce the invention as claimed if they modified Ouchi or Clark to adopt the designs taught in example US patents 5,496,252 and 6,183,580.

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Even when all of the above reference are combined, they fail to teach or suggest a method for efficiently producing trapezoidal bags without waste material in which the bags have top and bottom edges, each with a functioning zipper where the bottom edges of each plastic bag are sealed along a sealing line disposed parallel to and proximate to the zipper on the bottom edges of each plastic bag.

In considering the prior art references to Ouchi and Clark, we note, as appellant has, that neither of these patents is directed to a method or process of making non-rectangular zipper closable plastic bags. Moreover, while the examiner has found that Clark discloses or teaches "a plastic sheet (48) having a plastic zipper strip (102) on both the first and second edge (Fig. 3) to provide a reclosable plastic bag for sealably packaging a wide variety of articles including food products" (final rejection, page 2), we find no such teaching in the Clark patent.

Instead, it is readily apparent from even a cursory review of the Clark patent that Figure 3 therein is directed to a laminate composite for use in making reclosable plastic bags, wherein the laminate composite includes first (48) and second (68) sheets of plastic film material bonded together to form a first composite (77), a pair of soft malleable wire strips (84a)

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adhesively secured to one surface of the first composite near respective edges thereof, and beads (102) of suitable elastomeric encapsulating material applied over the wire strips so that articles stored in a bag made from the laminated composite material can never come in contact with the bendable wire strips. As clearly indicated in even the Abstract of the Clark patent

The bags of the invention, after being opened, can quickly and easily be closed by rolling the open end downwardly upon itself in a manner to sealably deform one or more inelastic, malleable metal filaments which are interconnected with at least one of the laminate side walls of the bag.

Thus, the examiner's factual findings with regard to the Clark patent are clearly erroneous, and even if one were to attempt to combine the teachings of Clark with those of Ouchi, appellant's claimed process for making non-rectangular zipper closable plastic bags would not be the result. Moreover, given the entirely different problems to be addressed and solved by Ouchi and Clark, and the entirely different structures involved in the reclosable bags therein, it does not appear to us that one of ordinary skill in the art would have been reasonably led to a combination of these two patents.

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As for the examiner's attempt to rely on U.S. Patent Nos. 5,496,252 and 6,183,590 (final rejection, page 3), we observe that these patents have not been set forth in the statement of the § 103 rejection presently before us on appeal. As pointed out by the Court in In re Hoch, 428 F.2d 1341, 1342, 166 USPQ 406, 407 (CCPA 1970), where a reference is relied upon to support a rejection, whether or not in a minor capacity, there would appear to be no excuse for not positively including the reference in the statement of the rejection.¹

Moreover, we note that even taking into account the examiner's attempt to rely on engineering design choice, Official Notice, and U.S. Patent Nos. 5,496,252 and 6,183,590, it does not appear to us that appellant's claimed process for making non-rectangular zipper closable plastic bags would have been obvious to one of ordinary skill in the art. In that regard, appellant's arguments on page 6 of the brief are particularly apropos.

¹ In making any future rejection of the type present here, the examiner would be well served to review the memorandum issued to the Examining Corps by Deputy Commissioner for Patent Examination Policy, Steven G. Kunin, entitled "Procedures for Relying on Facts Which are Not of Record as Common Knowledge or for Taking Official Notice," dated February 21, 2002.

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Like appellant, we find that the examiner has failed to establish a *prima facie* case of obviousness with regard to appellant's claimed subject matter, because the references applied do not teach or suggest a process of making non-rectangular zipper closable plastic bags wherein each upper edge and each lower edge of each such plastic bag along a plastic bag strip have a functioning zipper and wherein the lower edge of each plastic bag is sealed along a sealing line disposed parallel to and proximate to the zipper on the lower edge along the plastic bag strip.

On the basis of the foregoing, we must refuse to sustain the examiner's rejection of claims 1 through 13 under 35 U.S.C. § 103(a) based on Ouchi and Clark.

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The examiner's decision rejecting claims 1 through 13 of the present application under 35 U.S.C. § 103(a) is, accordingly, reversed.

REVERSED

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| IRWIN CHARLES COHEN |) | |
| Administrative Patent Judge |) | |
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| |) | BOARD OF PATENT |
| CHARLES E. FRANKFORT |) | APPEALS |
| Administrative Patent Judge |) | AND |
| |) | INTERFERENCES |
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