

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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

Appeal No. 95-0353
Application 07/837,241¹

HEARD: April 8, 1997

Before KIMLIN, JOHN D. SMITH² and WEIFFENBACH, Administrative Patent Judges.

WEIFFENBACH, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1-6. We reverse.

¹ Application for patent filed February 14, 1992.

² Administrative Patent Judge Thierstein, who participated in the oral hearing held on April 8, 1997, was not available to take part in this decision. Administrative Patent Judge John D. Smith has been substituted for Administrative Patent Judge Thierstein. In re Bose Corp., 772 F.2d 866, 869, 227 USPQ 1, 4 (Fed. Cir. 1985).

Appeal No. 95-0353
Application 07/837,241

The Claimed Subject Matter

The claims on appeal are drawn to a hollow four layered plastic blow molded container. Claim 1 is illustrative of the claimed subject matter:

1. A plastic blow molded container of a hollow construction, comprising: a coextruded blow molding including a wall having:

(a) an inner layer of virgin plastic that is contacted by a product received within the container;

(b) an inner intermediate layer of recycled plastic which has a first color;

(c) an outer intermediate layer of an opaque plastic that visually hides the color of the recycled plastic layer; and

(d) an outer layer of a pigmented plastic of a lighter color than the inner intermediate layer of recycled plastic, and the darker color of the inner intermediate layer of recycled plastic being visually blocked by the opaque plastic of the outer intermediate layer so as not to visually distort the lighter color of the pigmented plastic of the outer layer.

The Rejections

The following prior art reference is relied upon by the examiner to support the rejection of the claims for obviousness:

Bonis et al. (Bonis) 3,878,282 Apr. 15, 1975

Claims 1-6 stand rejected under 35 U.S.C. § 103 as obvious over Bonis. Claims 1-6 also stand rejected under 35 U.S.C.

Appeal No. 95-0353
Application 07/837,241

§ 112, first paragraph, for failing to provide an adequate description.

Opinion

We have carefully considered the respective positions advanced by appellants and the examiner. For the reasons set forth below, we will not sustain either of the examiner's rejections.

Rejection Under 35 U.S.C. § 103

The issue before us with regard to the obviousness rejection is whether the teaching of Bonis would have suggested to one having ordinary skill in the art to insert an opaque plastic outer intermediate layer between appellants' claimed inner intermediate layer and outer layer of pigmented plastic to arrive at the subject matter of the claims on appeal. Bonis discloses a process for molding multilayered hollow plastic containers and teaches that where a recycled plastic is employed, thin outer and inner plastic films are applied to recycled plastic "to bury it" (col. 1, lines 33-46). We find that the prior art falls short of suggesting the claimed subject matter.

According to appellants, the problem is that recycled plastic often has a dark color and that if the thin plastic films applied to the recycled plastic have a lighter pigment, then the

Appeal No. 95-0353
Application 07/837,241

darker color of the recycled plastic shows through the lighter pigmented films. Appellants' solution to the problem is to insert an opaque plastic layer containing sufficient pigment to visually block the darker color of the recycled plastic.

The examiner states that Bonis "discloses the use of opacifiers, pigments and colorants ..." (answer, page 5). The examiner cites the following passage at col. 6, lines 43-48 of Bonis for support:

Although preferred illustrative embodiments of the invention have been shown and described, it is to be understood that various modifications and substitutions may be made by those skilled in the art without departing from the novel spirit and scope of the present invention.

We agree with appellants that this is boiler plate language and does not, in any way, convey to the skilled artisan that Bonis teaches or suggests using opacifiers, pigments and colorants in the thermoplastic materials making up the layers of the molded containers. Bonis neither recognizes appellants' problem nor suggests or discloses inserting an opaque plastic layer between a dark plastic layer and a pigmented layer to visually block the dark plastic layer, or for that matter, using any opacifier, pigment or colorant to reduce light transmission. While the examiner concludes that "[i]t is well known in the art to use opacifier [sic, opacifiers], pigments and colorants in [a]

Appeal No. 95-0353
Application 07/837,241

plastic container to obtain ... reduced light transmission ..."
(answer, page 5) he has not presented any objective evidence to
support this conclusion.

Accordingly, for the foregoing reasons, the rejection of
claims 1-6 for obviousness over Bonis is reversed.

Rejection Under 35 U.S.C. § 112

The examiner rejected the claims on appeal under the first
paragraph of 35 U.S.C. § 112 on the ground that the "trademarks
Blue White PE MB and 21249-R11G are inadequate descriptions of
the materials used" (answer, page 3). According to the examiner,

[t]he relationship between a trademark and the
product it identifies is sometimes indefinite,
uncertain and arbitrary. The formula or
characteristics of the product may change from time to
time and yet it may continue to be sold under the same
trademark.

In patent specifications, every element or
ingredient of the product should be set forth in
positive, exact, intelligible language, so that there
will be no uncertainty as to what is meant. Arbitrary
trademarks which are liable to mean different things at
the pleasure of manufacturers do not constitute such
language.

Where the identification of a trademark is
introduced by amendment it must be restricted to the
characteristics of the product known at the time the
application was filed to avoid any question of new
matter [see MPEP 608.01(v)].

Appeal No. 95-0353
Application 07/837,241

The examiner's reasoning for the rejection appears to be based on indefiniteness, and not on an inadequate disclosure. In either event, we find that the examiner has not presented sufficient reasoning or objective evidence to support a rejection on either ground. While it is not clear whether "Blue White PE MB" is a trademark, it is an example of a product containing titanium dioxide which can be used as an opacifier in the opaque plastic layer. The same is true for "21249-R11G" which appears to be a product code for an orange pigment which can be employed in the plastic pigment layer. We find appellants' descriptions of these products on page 5, lines 19-30 of the specification to be adequate to convey to the skilled artisan, by way of example, the types of pigments and opacifiers that can be used in practicing the disclosed invention. We find nothing in the examiner's reasoning to persuade us that a person skilled in the art would find the descriptions indefinite or ambiguous. For the foregoing reasons, the examiner's rejection is reversed.

Appeal No. 95-0353
Application 07/837,241

Conclusion

The examiner's rejection of claims 1-6 for obviousness under 35 U.S.C. § 103 and the examiner's rejection of the claims under the first paragraph of 35 U.S.C. § 112 are reversed.

REVERSED

EDWARD C. KIMLIN)	
Administrative Patent Judge))	
)	
)	
JOHN D. SMITH)	BOARD OF PATENT
Administrative Patent Judge))	APPEALS AND
)	INTERFERENCES
)	
CAMERON WEIFFENBACH)	
Administrative Patent Judge))	

Appeal No. 95-0353
Application 07/837,241

Brooks and Kushman
1000 Town Center, 22nd Floor
Southfield, MI 48075