

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

Ex parte MICHAEL G. R. ZOBEL

---

Appeal No. 95-4359  
Application No. 08/041,190<sup>1</sup>

---

HEARD: January 15, 1998

---

Before McQUADE, NASE, and CRAWFORD, Administrative Patent Judges.  
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 2, 3, 5, 6 and 9 through 12, which are all of the claims pending in this application.<sup>2</sup>

---

<sup>1</sup> Application for patent filed April 1, 1993. According to the appellant, the application is a continuation of Application No. 07/623,675, filed December 6, 1990, now abandoned, which was a continuation of Application No. 07/377,071, filed July 10, 1989, now abandoned.

<sup>2</sup> Claim 5 has been amended subsequent to the final rejection by an amendment filed on September 30, 1994 (Paper No. 12).

Appeal No. 95-4359  
Application No. 08/041,190

We REVERSE.

BACKGROUND

The appellant's invention relates to a packaging method. Claim 12 is representative of the subject matter on appeal and a copy of claim 12, as it appears in the appendix to the appellant's brief, is attached to this decision.

The prior art references of record relied upon by the examiner as evidence of obviousness under 35 U.S.C. § 103 are:

Nawata et al. (Nawata)	2 068 991 (United Kingdom)	Aug. 19, 1981
Isaka et al. (Isaka)	0 243 965 (European Patent Application)	Nov. 4, 1987

Claims 2, 3, 5, 6 and 9 through 12 stand rejected under 35 U.S.C. § 103 as being unpatentable over Isaka in view of Nawata.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the § 103 rejection, we make reference to the examiner's answer (Paper No. 14, mailed December 21, 1994) and the supplemental examiner's answer (Paper No. 16, mailed May 4, 1995) for the examiner's complete reasoning in support of the rejection, and to the appellant's brief (Paper

No. 13, filed September 30, 1994) and reply brief (Paper No. 15, filed February 21, 1995) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we have made the determination that the examiner's rejection of the appealed claims under 35 U.S.C. § 103 is not well founded and will therefore not be sustained. Our reasoning for this determination follows.

The test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. See In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re

Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art to make the modifications necessary to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 9 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

With this as background, we turn to the examiner's rejection of claim 12, the only independent claim on appeal.

Claim 12 recites a method of packaging plant material in a perforate polymeric film comprising, inter alia, selecting a perforate polymeric film having from 10 to 1000 perforations per square meter wherein the perforations have a mean diameter of 20 to 100 microns, placing the plant material in the perforate polymeric film and sealing the film to form a package containing the plant material.

The examiner's statement of the rejection is:

Isaka et al substantially shows the invention as claimed except for the particular size and number of the

perforations. However, Nawata et al shows a packaging method comprising packaging the material in a film having 50 micron diameter perforations. See page 1, lines 81-85. . . . It would have been obvious to one of ordinary skill in the art at the time the invention was made to supply the film of Isaka et al with the 50 micron perforations as taught by Nawata et al to provide low gas permeabilities and control over gas permeability, while maintaining the water transmission, especially since Isaka et al teaches that the size of the perforations should be adjusted to obtain suitable gas composition inside the package. Further, the desired number of perforations per area of the film is a function of the particular plant material to be packaged. Isaka et al teaches adjusting the number of perforations to obtain the most desirable gas composition in the package for the particular contents, and the particular number of perforations depends merely on the contents and the opium atmosphere desired. . . . It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the film of Isaka et al with 10-1000 perforations per square meter to provide the best gas composition inside the package for the particular contents, since applicant has not shown that the particular range of perforations provides any particular advantage.

The appellant argues (brief, p. 5) that a prima facie case of obviousness from the combined teachings of the applied prior art has not been established. We agree. It is our opinion that the combined teachings of Isaka and Nawata, relied upon by the examiner, would not have suggested the claimed micron sized perforations required by the claims on appeal. That is, the claimed limitation that perforations in the polymeric film have a mean diameter of 20 to 100 microns is not taught or suggested by the applied prior art. In that regard, contrary to the

examiner's determination, Nawata at page 1, lines 81-85, does not disclose a film having 50 micron diameter perforations. Nawata at page 1, lines 81-88, discloses film having openings in the "range of 0.01-50 microns, and a distance across the short axis is less than 2 microns." Thus, Nawata discloses fine slits (up to 2 microns wide by 50 microns long), not 50 micron diameter perforations. Thus, the examiner has not established the obviousness of the perforations in the polymeric film having a mean diameter of 20 to 100 microns.

In summary, we see no motivation in the applied prior art of why one skilled in the art would have modified the device of Isaka to make the modifications necessary to arrive at the claimed invention. Thus, the examiner has failed to meet the initial burden of presenting a prima facie case of obviousness.<sup>3</sup> Thus, we cannot sustain the examiner's rejection of appealed independent claim 12, or claims 2, 3, 5, 6 and 9 through 11 which depend therefrom, under 35 U.S.C. § 103.

---

<sup>3</sup> Note In re Rijckaert, supra; In re Lintner, supra; and In re Fine, supra.

Appeal No. 95-4359  
Application No. 08/041,190

Page 8

CONCLUSION

To summarize, the decision of the examiner to reject claims 2, 3, 5, 6 and 9 through 12 under 35 U.S.C. § 103 is reversed.

REVERSED

JOHN P. McQUADE	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
JEFFREY V. NASE	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
MURRIEL E. CRAWFORD	)	
Administrative Patent Judge	)	

Appeal No. 95-4359  
Application No. 08/041,190

Page 10

CHARLES R. WOLFE, JR.  
BACON & THOMAS  
625 SLATERS LANE -- FOURTH FLOOR  
ALEXANDRIA, VA 22314

Appeal No. 95-4359  
Application No. 08/041,190

APPENDIX

12. A method of packaging plant material in a perforate polymeric film comprising

selecting a perforate polymeric film having from 10 to 1000 perforations per square meter, said perforations having a mean diameter of 20 to 100 microns, said film having a water vapor transmission rate which is substantially the same as the rate for the film without perforations and having an oxygen transmission rate which is controlled by the size and/or frequency of the perforations in the film,

placing the plant material in the perforate polymeric film and

sealing the film to form a package containing the plant material such that improved shelf life of the packaged plant material is obtained.

APPEAL NO. 95-4359 - JUDGE NASE  
APPLICATION NO. 08/041,190

APJ NASE

APJ CRAWFORD

APJ McQUADE

DECISION: **REVERSED**

Prepared By: Delores A. Lowe

**DRAFT TYPED:** 21 Dec 98

**FINAL TYPED:**

**HEARD: 15 Jan 98**