

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 30

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RONALD D. MOFFITT

Appeal No. 1996-3817
Application 08/180,521

ON BRIEF

Before KIMLIN, GARRIS and PAK, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-5, 7 and 8, all the claims remaining in the present application.

Claim 1 is illustrative:

1. A protective multi-layer biaxially heat-shrinkable patch in combination with a biaxially heat shrinkable bag, said patch comprising:

(a) a first outer non-foamed polymeric layer,

(b) an inner foamed polymeric layer, and

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(c) a second outer non-foamed polymeric layer wherein the patch is adhered on the outside of the biaxially heat shrinkable bag.

The examiner relies upon the following references as evidence of obviousness:

Boyd et al. (Boyd)	4,657,811	Apr. 14,
1987		
Ferguson	4,755,403	Jul. 05,
1988		

Appellant's claimed invention is directed to a protective heat-shrinkable patch in combination with a heat shrinkable bag. The patch comprises first and second outer, non-foamed polymeric layers and an inner foamed polymeric layer.

Appealed claims 1-5, 7 and 8 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ferguson in view of Boyd.

Upon careful consideration of the opposing arguments presented on appeal, we will not sustain the examiner's rejection. In essence, we are in substantial agreement with the arguments advanced in appellant's brief.

Ferguson, the primary reference, discloses a protective

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patch for a heat-shrinkable bag, but does not teach or suggest that the patch comprises the presently claimed inner foamed polymeric layer. Boyd, on the other hand, discloses a three-ply

plastic film for use as a trash bag comprising outer polyolefin layers and a middle foamed layer. According to the examiner, it would have been obvious for one of ordinary skill in the art, based on the disclosure of Boyd, to make the inner layer of Ferguson a foamed polymeric material for the purpose of providing the heat-shrinkable bag of Ferguson with improved structural integrity and tear strength.

The flaw in the examiner's reasoning is that there is neither a teaching nor a suggestion in Ferguson of making the inner layer from a foamed polymer, nor a teaching or suggestion in Boyd that the three-ply plastic film would be suitable for a heat-shrinkable patch for a heat-shrinkable bag. In the absence of such suggestion in the applied references, we must agree with appellant that the examiner's rationale is based upon impermissible hindsight. As stated by

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appellant at page 15 of the brief, "nothing in either reference suggests providing a heat shrinkable film having a foamed inner layer . . . it is not clear from a reading of either reference, either together or separately, that it would even be possible to form such an oriented film, much less employ one as a protective patch."

In conclusion, based on the foregoing, the examiner's decision rejecting the appealed claims is reversed.

REVERSED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
BRADLEY R. GARRIS)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
)	
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CHUNG K. PAK)	
Administrative Patent Judge)	

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