

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(2) is not binding precedent of the Board.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. 38

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VLADIMIR GROCHOLSKI

Appeal No. 1996-3871
Application 08/354,747¹

ON BRIEF

Before JOHN D. SMITH, GARRIS, and ELLIS, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

¹ Application for patent filed December 8, 1994.
According to appellant, this application is a continuation of
Application 08/018,243, filed February 16, 1993, now
abandoned.

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This is a decision on an appeal from the final rejection of product claims 44 through 51. The only other claims remaining in the application, which are process claims 1, 3, 8, 9, 11 through 13, 32 through 39 and 41 through 43, have been allowed by the examiner.

The subject matter on appeal relates to the product produced by the process defined in certain of the aforementioned allowed claims.

The references set forth below are relied upon by the examiner in the section 102 and section 103 rejections before us on this appeal:

Sorensen	4,790,995	Dec. 13,
1988		
Aung et al. (Aung)	5,227,183	Jul. 13,
1993		
		(filed Jul. 25, 1991)

Copson, "Microwave Heating In Freeze-Drying, Electronic Ovens, and Other Applications," The AVI Publishing Company, Inc., pp. 249-250, 1962.

All of the claims on appeal stand rejected under 35 U.S.C.

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§ 102(b) as being anticipated by or under 35 U.S.C. § 103 as being obvious over Sorensen, Aung or Copson.²

We refer to the brief and to the answer for a complete exposition of the opposing viewpoints expressed by the appellant and the examiner concerning the above noted rejections.

OPINION

We will sustain these rejections for the reasons well stated by the examiner in his answer. We add the following brief comments for emphasis only.

It is the appellant's basic position that the here claimed products, which are dehydrated biological products such as food products, retain substantially the flavor and aroma of the natural (i.e., undehydrated) biological products by virtue of the process defined in certain of the allowed claims as explained on pages 27 and 28 of the subject specification (e.g., see the first sentence in the paragraph

² The appealed claims will stand or fall together; see page 4 of the brief and page 2 of the answer.

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bridging specification pages 27 and 28) and accordingly that these claimed products are different from and patentable over the products of the applied prior art. However, the laudatory comments made by the appellant regarding the retained flavor and aroma of his dehydrated products are strikingly similar to the laudatory comments made in the applied references regarding the food products described thereby (e.g., see the Abstract of the Aung patent). Thus, the record before us reflects that the here claimed products are indistinguishable from the applied prior art products.

Furthermore, as explained by the examiner in the answer, it is the appellant's burden to prove that these prior art products do not necessarily or inherently possess the characteristics of his claimed product. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). Whether the rejection is based on 35 U.S.C. § 102 or 35 U.S.C. § 103, jointly or alternatively, the burden of proof is the same, and its fairness is evidenced by the inability of the Patent and Trademark Office to manufacture products or to obtain and compare prior art products. In re Best, 562 F.2d at 1255, 195

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USPQ at 433-434. On the record before us, the appellant has not even shouldered much less carried his burden of proof.

Under the circumstances recounted above, it is apparent that the examiner's section 102 and section 103 rejections of the claims on appeal over the Sorensen, Aung and Copson references must be sustained.

The decision of the examiner is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

	John D. Smith)	
	Administrative Patent Judge)	
)	
)	
)	
	Bradley R. Garris)	BOARD OF
PATENT)	
	Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
)	
	Joan Ellis)	
	Administrative Patent Judge)	

tdc

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