

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 44

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KLAUS THOEREN ET AL.

Appeal No. 1997-1620
Application No. 08/409,959¹

ON BRIEF

Before CALVERT, COHEN, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

ON REQUEST FOR REHEARING

This is in response to the appellant's request for rehearing^{2,3} of our decision mailed March 11, 1999, wherein we

¹ Application for patent filed March 23, 1995. According to the appellants, the application is a continuation of Application No. 08/099,528, filed July 30, 1993, now abandoned.

² Filed April 12, 1999.

³ Effective Dec. 1, 1997, 37 CFR § 1.197(b) was amended to change the term "reconsideration" to "rehearing." See the final rule notice published at 62 Fed. Reg. 53131, 53197 (Oct.

affirmed the examiner's rejection of claims 1, 2, 4, 5, 7, 8 and 21 under 35 U.S.C. § 103 and reversed the examiner's rejection of claims 9 to 14 under 35 U.S.C. § 103.

We have carefully considered the argument raised by the appellants in their request for rehearing, however, that argument does not persuade us that our decision was in error in any respect.

The argument (pp. 2-3) raised by the appellants is that it is technically impossible to use a biaxially oriented film of Janocha in a deep draw operation, since a biaxially oriented film would inevitably shrink in such a deep draw operation.

We continue to find this argument unpersuasive for the reasons set forth on page 8 of our earlier decision. That is, while the evidence establishes that it was not technically

10, 1997), 1203 Off. Gaz. Pat. Office 63, 122 (Oct. 21, 1997)).

feasible for a person skilled in the art to make a cigarette pack with **the film of Janocha** using Wiley's disclosure of how to make a cigarette pack (i.e., a deep draw operation) since the film of Janocha was too thin (i.e. less than 200 μm), it is our view that the combined teachings of Wiley and Janocha would have suggested starting with **a thicker sheet** (e.g., 0.45 inch (1143 μm)) which is then deep drawn into the shape of the main body part. In addition, we must point out that it is not required that all of the features of the secondary reference (e.g., the actual thickness of film of Janocha) be bodily incorporated into the primary reference (see *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981)) and the artisan is not compelled to blindly follow the teaching of one prior art reference over the other without the exercise of independent judgment (see *Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889, 221 USPQ 1025, 1032 (Fed. Cir. 1984)).

Upon weighing all the evidence (i.e., the teachings of Wiley and Janocha and the evidence of nonobviousness submitted

by the appellants), we remain of the opinion expressed on pages 6-7 of our earlier decision that

it would have been obvious to one of ordinary skill in the art at the time the invention was made to have selected a thermoplastic material which is biaxially-oriented and a multilayer structure for use as Wiley's thermoplastic material in view of Wiley's teaching that the thermoplastic material may be one of many commercially available such as polypropylene and Janocha's teaching that biaxially draw-oriented thermoplastic film (polypropylene is disclosed as one material) provides a film of particularly high inherent rigidity and is neither tear-starting nor tearing-off. The suggestion for this modification comes not from the appellants' disclosure but from the teachings and suggestions from the applied prior art. In that regard, Wiley clearly teaches the thermoplastic material may be polypropylene. While Wiley does not specifically teach the species of biaxially-oriented multilayered polypropylene, Janocha's teaching of biaxially-oriented multilayered polypropylene shows that the species was a known material suitable for wrapping.

In light of the foregoing, the appellants' request for rehearing is granted to the extent of reconsidering our decision, but is denied with respect to making any change thereto.

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

REQUEST FOR REHEARING - DENIED

IAN A. CALVERT)	
Administrative Patent Judge)	
)	
)	
)	
)	BOARD OF PATENT
IRWIN CHARLES COHEN)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
JEFFREY V. NASE)	
Administrative Patent Judge)	

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ON REQUEST FOR REHEARING

APPEAL NO. 1997-1620 - JUDGE NASE
APPLICATION NO. 08/409,959

APJ NASE

APJ CALVERT

APJ COHEN

DECISION: **Denied**

Prepared By: Gloria Henderson

DRAFT TYPED: 21 May 99

FINAL TYPED: