

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(2) is not binding precedent of the Board.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. 53

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte EDWARD W. DUCK, INGOLF SCHEFFLER and KLAUS RUCH

Appeal No. 1997-4356
Application 08/458,628

ON BRIEF

Before KIMLIN, WARREN and DELMENDO, Administrative Patent Judges.
KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 10-12,
14, 16-20, 22, 24 and 25, all the claims remaining in the present
application. Claim 10 is illustrative:

10. A non-aqueous sprayable plastisol sound-dampening
composition free of volatile components consisting
essentially of:

a) from about 10 to about 60 percent by weight of
a polymer powder mixture having an average particle
size of less than about 60 microns, said mixture
consisting essentially of

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1) a first vinylchloride polymer component which forms a continuous phase upon gelling of the plastisol, and

2) a cross-linked swellable second polymer component selected from the group consisting of homopolymers and copolymers of esters of methacrylic acid, said second polymer component containing from about 0.5 to about 10 moles of a cross-linking agent per mole of said second polymer component which upon gelling of the plastisol is swollen but not gelled, is present as a dispersion of discrete particles in said continuous phase, and has a glass transition temperature of from about -20 to about +60 °C;

b) from about 25 to about 45 percent by weight of a phthalate plasticizer which gels only said first polymer component at a temperature of from about 80 to about 230 °C but only swells said second polymer component; and

c) from 0 to about 40 percent by weight of a filler, all weights being based on the weight of said plastisol composition.

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

Fukahori et al. (Fukahori) JP 58-39828 Mar. 08, 1983

Appellants' claimed invention is directed to a composition and process for dampening the sound of automobile parts. The composition comprises a polymer powder mixture of a first vinylchloride polymer and a cross-linked swellable second polymer of, for example, polymethyl methacrylate, and a phthalate plasticizer.

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Appellants request at page 4 of the brief that "patentability of the pending claims be separately considered." However, appellants have not advanced an argument that is reasonably specific to any claim on appeal. Accordingly, all the appealed claims stand or fall together with claim 10. In re Wood, 582 F.2d 638, 642, 199 USPQ 137, 140 (CCPA 1978). See also 37 CFR 1.192 c(7) and c(8) (1995).

All the appealed claims stand rejected under 35 U.S.C. § 103 as being unpatentable over Japanese '828.¹

We have thoroughly reviewed each of appellants' arguments for patentability. However, we are in full agreement with the examiner's reasoned analysis and application of the prior art as well as his cogent disposition of the arguments raised by appellants. Accordingly, we will adopt the examiner's reasoning as our own in sustaining the rejection of record, and we add the following for emphasis only.

Appellants do not dispute the examiner's factual determination that Japanese '828 discloses "a vibration dampening

¹ Inasmuch as the examiner has not included the final rejection of the appealed claims under 35 U.S.C. § 112, first paragraph, in the answer's statement of the rejection, and the examiner has not responded to appellants' rebuttal of the rejection in the brief, we will, for purposes of this appeal, consider the examiner's rejection under § 112, first paragraph to have been withdrawn.

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composition which incorporates a first vinyl chloride polymer component and a cross-linked swellable second polymer component which is based on the same monomeric constituents as instantly claimed." (page 3 of answer). The examiner notes that the second polymeric component of Japanese '828 "is a polymethyl methacrylate which is specifically preferred by appellants" (page 3 of answer). Appellants also do not take issue with the examiner's legal conclusion that the presently claimed average particle size of less than about 60 microns would have been obvious to one of ordinary skill in the art. Rather, the principal argument advanced by appellants is that the amount of plasticizer employed in the Japanese composition is "**less** than the amount employed in the present composition" (page 8 of brief). According, to appellants, since Japanese '828 is only concerned with forming polymeric sheets, "there exists no motivation on the part of one having ordinary skill in the art to wish to increase the amount of plasticizer employed in the Japanese reference" (page 8 of brief). It is appellants' contention that the Japanese reference "clearly **teaches away** from an increase in plasticizer content

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since such a modification would preclude the formation of a polymeric sheet as taught by the Japanese reference" (sentence bridging pages 8 and 9 of brief). According to the calculations presented at page 10 of appellants' brief, the reference teaches 12.5% and 17% by weight of plasticizer.

Simply stated, we are satisfied that the examiner, at pages 5 and 6 of the answer, has amply demonstrated that appellants' calculations regarding the amount of plasticizer disclosed by the Japanese reference is a mischaracterization of the reference disclosure. As explained by the examiner, Japanese '828 fairly teaches a dampening composition comprising, preferably, 100 parts by weight plasticizer, 100 parts by weight of the sum of a first vinyl chloride polymer and a second cross-linked polymer, and 100 parts by weight filler. This equates to a composition comprising 33.3% plasticizer which falls directly within the claimed range of 25-45% by weight. Moreover, the ranges disclosed at page 5 of the English translation of Japanese '828 encompass a number of other compositions wherein the plasticizer is present in an amount within the claimed range. Furthermore, it is evident from page 8 of appellants' specification that no criticality is

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attached to the claimed amount of plasticizer. In relevant part, appellants' specification states that "the plasticizer proportion is in the range of 15 to 65 weight% and preferably 25 to 45 weight%". Such a stated preference would seem to allay any suggestion of criticality. In re Armbruster, 512 F.2d 676, 679-680, 185 USPQ 152, 155 (CCPA 1975); In re Shepard, 319 F.2d 194, 199, 138 USPQ 148, 152 (CCPA 1963).

As a final point, we note that appellants base no argument upon objective evidence of nonobviousness, such as unexpected results. Also, although appellants make reference to an Exhibit A at page 8 of the brief, the examiner states at page 5 of the answer that he "has failed to find Exhibit A and as such, this evidence has not been considered." Furthermore, we agree with the examiner that "the Japanese reference is so clear as to the amount of plasticizer incorporated therein" (page 5 of answer).

In conclusion, based on the foregoing and the reasons well-stated by the examiner, the examiner's decision rejecting the appealed claims 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

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
)	
)	
CHARLES F. WARREN)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
)	
ROMULO H. DELMENDO)	
Administrative Patent Judge)	

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