

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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 RUDOLF HELBER, HARTMUTH HUBER, HANS KNOCH,
THOMAS PISCHEL, THOMAS REUSCH and WERNER WALTHER

Appeal No. 1998-1768
Application No. 08/403,826

ON BRIEF

Before KIMLIN, OWENS and DELMENDO, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-14, all the claims in the present application. Claim 1 is illustrative:

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1. Aqueous, spray-resistant foam (S) produced by mechanical foaming of a corresponding aqueous composition (W), wherein the aqueous phase comprises

(A) a curable polymer system, which consists of 30 to 100% by weight of (U) an ionomeric polyurethane containing polyether and/or polyesterether chains or a mixture of said ionomeric polyurethanes

and optionally

(P) one or more further polymers curable at least together with (U),

and (B) at least one foam-stabilizer

and the liter-weight of (S) at 20EC and normal pressure is in the range of 400 to 700 g.

In the rejection of the appealed claims, the examiner relies upon the following references:

Bocks et al. (Bocks)	4,029,534	Jun. 14, 1977
Reischl et al. (Reischl)	4,184,990	Jan. 22, 1980
Orr et al. (Orr)	4,690,953	Sep. 1, 1987

Appellants' claimed invention is directed to an aqueous, spray-resistant foam wherein the aqueous phase comprises an ionomeric polyurethane containing polyether and/or polyesterether chains and a foam-stabilizer. According to page 1 of the present specification, the foam of the present invention "can be applied in the form of foam even with conventional spray-apparatuses (in particular spray-guns) and

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also after drying the foam structure is substantially maintained" (paragraph 3).

Appellants submit at page 2 of the principal brief that "[t]he claims on appeal can be grouped as one." Accordingly, all the appealed claims stand or fall together with claim 1.

Appealed claims 1-14 stand rejected under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103 as being unpatentable over either Bocks, Reischl or Orr.

Upon careful consideration of the opposing arguments presented on appeal, we will sustain the examiner's rejection of the appealed claims to the extent it is based upon the disclosure of Bocks. We will not sustain the examiner's rejections based upon Reischl or Orr.

Considering first the rejection over Bocks, Bocks discloses a foam comprising an aqueous phase containing a curable ionomeric polyurethane comprising polyesterether units and a foam-stabilizer. While appellants contend that Bocks discloses polyester urethanes, "unlike the polyether- or polyesterether-containing polyurethanes characterizing the foams of the present invention" (page 3 of principal brief),

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the examiner has made the factual determination that Bocks discloses "the use of tri and tetraethylene glycol and 1,6 hexandiol in the making of polyesters and polycarbonates which meets the claimed limitation of the polyuremethane having polyesterether claims [sic, chains] (col. 5, lines 45-50)" (page 5 of Answer). Since appellants have not challenged this finding of the examiner in either their principal or reply briefs on appeal, we will accept the examiner's finding as fact. In re Fox, 471 F.2d 1405, 1407, 176 USPQ 340, 341 (CCPA 1973); In re Kunzmann, 326 F.2d 424, 425 n.3, 140 USPQ 235, 236 n.3 (CCPA 1964). Also, the foam of Bocks' EXAMPLE 1 has a density of about 600 to 700 g/liter, which range falls directly within the claimed density range of 400 to 700 g/liter. Consequently, although Bocks does not describe the disclosed foam as spray-resistant, we find that, since the foam of Bocks comprises the same components and has the same density as the claimed foam, it is reasonable to conclude that the foam of Bocks is also spray-resistant, at least to the unspecified degree claimed by appellants. Appellants have proffered no evidence which presents a comparison between foams fairly taught by Bock and foams

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within the scope of the appealed claims which serves to rebut the reasonable inference that the foam of Bocks is spray-resistant. See In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990); In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). Also, as noted by the examiner, appellants have not defined the claimed property, spray-resistant, in any quantitative terms such that any spray resistance exhibited by the foams of Bocks would meet the claim limitation.

Turning to the separate rejections over Reischl and Orr, the examiner has committed the reversible error of not recognizing and giving consideration to a claim limitation, namely, the recited density of the foam of 400 to 700 g/liter. To wit, the examiner states at page 6 of the Answer that "the claims are devoid of density limitations" and "the claims are not limited to any particular density." As a result, the examiner has not met the initial burden of demonstrating how Reischl and Orr describe or render obvious the claimed density. As pointed out by appellants, Reischl exemplifies foams having a density considerably less than the claimed density, whereas Orr exemplifies a foam having a density, 8

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lbs/ft³ (128 g/liter), that is considerably less than the claimed density.

In conclusion, based on the foregoing, 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)	
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TERRY J. OWENS)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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