

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte PATRICK J. FINN,  
ANTHONY J. FORMICOLA,  
JOSEPH R. BLASZAK,  
ROBERT M. FERGUSON  
and  
LAURENCE J. LYND

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Appeal No. 1999-1002  
Application No. 08/672,493

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ON BRIEF

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Before GARRIS, LIEBERMAN, and PAWLIKOWSKI, Administrative Patent Judges.

PER CURIAM.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 17-26, 28-36 and 38-46,<sup>1</sup> which are all the claims

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<sup>1</sup>We note the following informality is deserving of correction for claim 21, "the fuser roll" lacks antecedent basis

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pending in this application.

The subject matter on appeal is adequately illustrated by independent claim 17, a copy of which taken from the appellants' brief is appended to this decision.

All of the claims on appeal stand rejected under 35 U.S.C. § 102(b) as being anticipated due to the claimed invention having been on sale and/or in public use more than one year prior to the filing date of the application. In the alternative, the examiner has rejected all of the claims on appeal under 35 U.S.C. § 103(a) as obvious over the subject matter which was in public use and/or on sale more than one year prior to the application filing date.

The subject matter on appeal relates to a method for manufacturing a polymeric printing member (or fuser roll) for use in a printing machine (or xerographic copier). The method comprises the steps of coating a substrate by rotating the substrate about its longitudinal axis and applying to the substrate a coating from an applicator in a stream whereby the dynamics of the rotation of the substrate and the position of the stream on the substrate assist in the uniform distribution of the coating onto the substrate.

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and should be corrected to "said substrate".

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

OPINION

For the reasons that follow, we cannot sustain the rejections before us on this appeal.

I. PUBLIC USE REJECTION UNDER 35 U.S.C. § 102(b)

The burden resides with the examiner to establish a prima facie case of anticipation based on the facts in this case. In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). Thus, the examiner bears the burden to establish that the claimed invention was in public use more than one year prior to the application filing date.

It has long been held that

"Public use" of a claimed invention under section 102(b) has been defined as any use of that invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor . . . . Such use, however, has been held not to be a statutory bar to patentability if the use was primarily for bona fide experimental purposes  
[citations omitted].

In re Smith, 714 F.2d 1127, 1134, 218 USPQ 976, 983 (Fed. Cir. 1983).

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We begin our analysis by indicating that the appellants, without conceding public use, have acknowledged that certain activities did indeed occur more than one year before the application filing date of June 26, 1996. Appeal brief, page 5. Appellants field-tested flow coated fuser rolls beginning on or about February 1994, and concluding on or about November 10, 1995. Appellants also acknowledge that the fuser rolls tested were made via the claimed method.

Briefly, coated fuser rolls were tested by providing the rolls to a number of copy machines located at several testing sites that leased these machines from appellants' assignee Xerox Corp. These rolls were placed inside the machines and, once placed, were not visible to the field test users. The machines were located in secure areas of the testing sites and their access was limited to those having the appropriate authority to use the machines, including test site employees and Xerox technicians. There were no express written confidentiality agreements between the appellant/Xerox Corporation and the field test users but there was an understanding that the flow coated fuser rolls were experimental and information concerning them should be kept confidential. See Brief, page 6. Appellants state that the

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tested fuser rolls appeared virtually identical to conventional fuser rolls and, thus, the method claimed in the subject application could not be ascertained from observing the field tested fuser rolls.

The examiner's position is that such activities constitute public use and do not fall within the experimental use exception. See Answer page 5. The examiner argues that the coated fuser rolls were visible and therefore disclosed to the public. To support his contention the examiner states the applicants admit that, "the flow coated fuser roll may have been in view to the public during roll removal and replacement" (Brief, page 6). The examiner further concludes from the above admissions that because the public "may" have seen the coated fuser rolls there was a public use. Further, the examiner argues that the lack of a written confidentiality agreement between the appellants and the users of the test facility supports a finding of "public use" within the prohibitions of §102(b). See Answer page 9.

The Supreme Court laid the foundation for the experimental use exception to public use by stating that "[t]he use of an invention by the inventor himself, or of any other person under his direction, by way of experiment, and in

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order to bring the invention to perfection, has never been regarded as such a [public] use." City of Elizabeth v. American Nicholson Pavement Co., 97 U.S. 126, 134 (1878); see also, Smith, 714 F.2d at 1134, 218 USPQ at 983. The Federal Circuit has taken the position that "[t]he experiment to improve and perfect the invention must be the real purpose in such public use and not merely incidental and subsidiary [citations omitted]." Smith, Id.

There are a number of factors that the examiner must consider in making a determination of whether the experimental use exception applies to a particular public use. Section 2133.03(e)(4) of the Manual of Patent Examining Procedure (MPEP) (7th Ed., Rev. 1, Feb. 2000) lists several factors that can be persuasive of experimental activity. Among those factors are:

(A) the nature of the invention was such that any testing had to be to some extent public (City of Elizabeth v. American Nicholson Pavement Co., 97 U.S. at 126);

(B) testing had to be for a substantial period of time (Id.);

(C) testing was conducted under the supervision and control of the inventor (Id.);

(D) the inventor regularly inspected the invention during the period of experimentation (Id.);

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(E) extent of any obligations or limitation placed on a user during a period of experimental activity, as well as the extent of an testing actually performed during such period (Egbert v. Lippmann, 104 U.S. 333 (1881));

(F) conditional nature of any sale associated with experimental activity (Hall v. Macneale, 107 U.S. 90 (1882));

(G) length of time and number of cases in which experimental activity took place, viewed in light of what was reasonably necessary for an alleged experimental purpose (International Tooth Crown Co. v. Gaylord, 140 U.S. 55 (1891));

(H) explicit or implicit obligations placed upon a user to supply an inventor with the results of any testing conducted during an experimental period and the extent of inquiry made by the inventor regarding the testing (Monon Corp. v. Stoughton Trailers, Inc., 239 F.3d 1253, 1258, 57 USPQ2d 1699, 1703 (Fed. Cir. 2001); Robbins Co. v. Lawrence Mfg. Co., 482 F.2d 426, 434, 178 USPQ 577, 583 (9th Cir. 1973));

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(I) disclosure by an inventor to a user regarding what the inventor considers as unsatisfactory operation of the invention (In re Dybel, 524 F.2d 1393, 1401, 187 USPQ 593, 599 (CCPA 1975));

(J) effort on the part of an inventor to retrieve any experimental samples at the end of an experimental period (Monon, 239 F.3d at 1258, 57 USPQ2d at 1703; Omark Indus., Inc. v. Carlton Co., 458 F.Supp. 449, 454, 201 USPQ 825, 830 (D. Ore. 1978)); and

(K) a doctor-patient relationship where the inventor/doctor conducted the experimentation (TP Labs., Inc. v. Professional Positioners, Inc., 724 F.2d 965, 971, 220 USPQ 577, 582 (Fed. Cir.), cert. denied, 469 U.S. 826 (1984)).

The examiner must determine whether the scope and length of the activity were reasonable in terms of the experimental purpose intended by the applicant and the nature of the subject matter involved. No one of, or particular combination of, factors (A) through (K) is necessarily determinative of this purpose.

MPEP § 2133.03(e)(4) (7th Ed., Rev. 1, Feb. 2000).

We note that the claimed subject matter of the application is a method for producing coated fuser rollers. The Examiner's rejection is based on the public use of an article, the coated fuser rolls, that are the end product of the claimed method. Apparently, the examiner believes that a public use of the fuser rolls is a public use of the process to make the fuser rolls within the prohibitions of §102(b).

The appellants' originally filed application contained

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claims for both the method of producing the fuser rolls and to the fuser rolls themselves. The examiner issued a restriction requirement in the subject application asserting that two independent and distinct inventions were claimed in one application. See 35 U.S.C. § 121. In response to the examiner's restriction requirement, the appellants' elected original claims 17-46 directed to a method for manufacturing the non-elected fuser rolls. The examiner after originally arguing that the fuser rolls and the method of producing the fuser rolls were separate and distinct inventions, now asserts that the use of the non-elected fuser rolls constitutes a public use of the elected method of production.

We find a contradiction in this approach. The appellants have stated and the examiner has not disputed that the appealed claims are directed to a method for the manufacture of the fuser rolls. The appellants have indicated that there are no visual differences between the conventional fuser rolls and the fuser rolls produced using the claimed method. In addition, inspection of the field-tested fuser rolls in no way teaches the steps of appellants' claimed method of producing fuser rolls. Therefore use of the field tested fuser rolls does not support a public use rejection of claims to the

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appellants' method of producing fuser rolls. The claimed method of production was not disclosed to the public as the production of the fuser rolls occurred internally at Xerox Corporation under the supervision of Xerox employees in a manner completely removed from the public eye. Thus, we agree with appellants that the "claims relate to an internal process that was not disclosed to the public as a result of the experimental testing" (Appellants' Brief, page 17),

Nevertheless, for purposes of completion, we proceed to consider the evidence purporting to support a case of public use. The examiner supports his position that the public use was not within the experimental use exception to 35 U.S.C. § 102(b) by arguing that there was no need to field-test the fuser rolls outside the Xerox environment because "there is no reason why the tests could not be performed in a "real" environment at Xerox involving continuous usage of the rolls over a much shorter period of time (See Examiner's Answer, page 4) and that there was no reason for the rolls to be tested to failure because Xerox could have estimated the performance of the rolls without having to make 2 million copies.

In response, the appellants argue that a "real

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environment" was required for the testing of the coated rolls because of the number of variables that can affect the rolls' performance could not be simulated in the lab. See Appellants' Brief, page 7. The appellants further argue that a real environment was required to determine the utility of the experimental fuser rolls as a replacement for conventional rolls in the market. According to appellants, the claimed rolls had to produce the same quantity of copies as the conventional rolls, a quantity equal to 2.2 million copies, for the rolls to fulfill their intended purpose of replacing the existing fuser roll designs. Further, they argue that the field-testing procedure required a substantial but reasonable period of time in order for the experimental rolls to produce the target quantity of 2.2 million copies.

After careful consideration of the record before us, we agree with appellants that the field-testing activities conducted in the period between February 1994 and November 10, 1995 fall within the experimental use exception for public use. In discussing our position, we refer to the factors (A) through (K) listed above that are determinative of experimental use.

We agree with appellants that the nature of the invention

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was such that "any testing had to be to some extent public" (factor A) and "conducted "for a substantial period of time (factor B) (Appeal Brief, pages 8 through 9). The appellants were testing to determine the utility of the fuser rolls as a replacement for the commercially available rolls. In order to be a suitable replacement, the experimental flow-coated rolls had to at least match the 2.2 million copies the conventional rolls could produce. Specifically, the appellants were testing to determine the occurrence of delamination of the outer coating of the flow coated fuser rolls and whether the flow-coated rolls could produce 2.2 million copies. The field-testing procedure required a substantial period of time in order for the experimental rolls to produce the 2.2 million copies.

In addition, the experimentation was an iterative process, meaning the lessons learned from one trial were incorporated in the next. The appellants tested the experimental roll in 8 different configurations at 35 test sites, for a time period that spanned from February of 1994 to November 10, 1995, in a substantial effort to improve and perfect the invention. All these activities support appellants' contention that the public use was experimental.

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We are not persuaded by the examiner's argument that the testing could have been conducted in-house (Examiner's Answer, page 6) since it is merely conclusory. The examiner simply dismisses appellants' reasons for the various testing sites without providing adequate explanation.

We are also in agreement with appellants that the testing was conducted under their supervision in accordance with factors (C), (D), and (E). The evidence of record is sufficient to conclude that representatives of the appellants/assignee regularly inspected the invention during the period of experimentation and that the testing was conducted under the supervision and control of the appellants/assignees. Routine inspections, supervision, and control of the experiment by the inventor are factors that indicate conduct within the experimental use exception to 102(b). Egbert, 104 U.S. at 336.

Xerox employees inspected the experimental rolls every six weeks throughout the testing and although Xerox employees did not conduct the testing between inspection dates, the employees of the field test facilities who conducted the testing were under the control and supervision of the appellants/assignees. The employees had a general

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understanding of the experimental nature of the rolls and were under obligation to report what the inventor considered to be unsatisfactory copy performance. See Lillee Declaration at item 30 on pages 7-8. Explicit or implicit obligations placed upon a user to supply an inventor with the results of any testing conducted during an experimental period is a factor indicating whether the inventor's activities are within the experimental use exception to Section 102(b). Monon, 239 F.2d at 1258, 57 USPQ2d at 1730; Robbins, 482 F.2d at 434, 178 USPQ at 583. Another factor that indicates that the appellants' activities are within the experimental use exception is disclosure by the inventor to a user regarding what the inventor considers as unsatisfactory operation of the invention. Dybel, 524 F.2d at 1401, 187 USPQ at 599 (CCPA 1975). The appellants supplied field test manuals to each testing site, including a disclosure to the user of what the inventor regarded as unsatisfactory operation of the invention. The manual includes instructions to report failed components or abnormal performance, good or bad to the inventor. Further, the field test locations were secure and were only accessible to Xerox technicians and employees of the test site. We find that the obligations placed on the

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employees and the restricted access of the test facilities are indicative of conduct within the experimental use exception.

Finally, the appellants argue that their efforts to retrieve the test samples at the conclusion of experimentation indicate that their conduct is within the experimental use exception. Effort on the part of an inventor to retrieve any experimental samples at the end of an experimental period is a factor that indicates conduct within the experimental use exception. Monon, 239 F.3d at 1258, 57 USPQ2d at 1703; Omark, 458 F.Supp. at 454, 201 USPQ at 830. Each test site technician received a field test manual that included directions on how to return the experimental rolls to Xerox after the field-testing had been completed. In addition, the manuals also included pre-paid and pre-addressed mailing envelopes that were to be used to return the experimental rolls. Using the above directions and mailing envelopes Xerox technicians returned 159 test rollers at the conclusion of their field-testing. The efforts to retrieve the experimental rolls support a conclusion that the appellants' conduct was within the experimental use exception.

The examiner's position on this issue is that the fact that not every roll was returned suggests that people outside

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of Xerox had and still possibly have access to the rolls. Once again the examiner has failed to fulfill his burden of proof. The examiner has not produced any evidence to support that the experimental rolls were disclosed to the public. Instead the examiner relies on broad speculation as to what "may" or "could" have happened. Such speculation does not take the place of evidence. In addition, if the public had obtained the claimed rolls, such possession would not disclose the here claimed method particularly since these rolls were identical to the pre-existing commercial rolls.

The examiner also argues that, because there was no written confidentiality agreement between the appellants and the users of the test facility, there was a "public use" within the prohibitions of §102(b). While the examiner recognizes that there was a "general understanding at the test sites of the confidential nature of the experimentation", it is the examiner's position that there is no evidence to support that the information was indeed kept confidential.

See Answer, page 9.

The presence or absence of a confidentiality agreement is not itself determinative of the public use issue, but is one factor to be considered along with the time, place, and

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circumstances of the use, which show the amount of control the inventor retained over the invention. See *Moleculon Research v. CBS, Inc.*, 793 F.2d 1261, 1265, 229 USPQ 805, 809 (Fed. Cir. 1986), cert. denied, 479 U.S. 1030 (1987). In addition to the "general understanding of the confidential nature of the testing", the circumstances of the testing indicate that the inventors maintained control over the invention. The examiner is basing his rejection on speculation that confidentiality "may" have been compromised. Absent any explanation or evidence, the examiner has failed to fulfill his initial burden of proving a case of public use more than one year prior to the application filing date.

The circumstances of the experimentation indicate that the experimentation was under the control of the inventors. The field test sites were secure from the public, allowing access only to field test facility users and Xerox technicians. The users and technicians were under obligation to report field test rolls performance to the inventors. The inventors conducted on site inspection of the experimental rolls every six weeks. The inventor made provisions available to return the test rolls after the experimentation was concluded and a number of rolls were to be returned to Xerox.

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The above circumstances indicate the experimentation was under the control of the inventors.

When considering the factors discussed above, we find that the evidence supports appellants' position that the activities constituting public use are within the experimental use exception.

For the above-stated reasons, we reverse the rejection under 35 U.S.C. § 102(b) based on public use.

#### II. ON SALE REJECTION UNDER 35 U.S.C. § 102(b)

Like the rejection based on public use, the burden is also on the examiner to establish that the claimed invention was on sale more than one year prior to the application filing date. A sale is a contract between parties wherein the seller agrees "to give and to pass rights of property" in return for the buyer's payment or promise "to pay the seller for the things bought or sold." In re Caveney, 761 F.2d 671, 676, 226 USPQ 1, 4 (Fed. Cir. 1985). If the sale was for the commercial exploitation of the invention, it is "on sale" within the meaning of 35 U.S.C. § 102(b). Dybel, 524 F.2d at 1401, 187 USPQ at 599 ("Although selling the devices for a profit would have demonstrated the purpose of commercial exploitation, the fact that appellant realized no profit from

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the sales does not demonstrate the contrary." ). "The usual way [to support a conclusion that the invention was not placed on sale within the statute's meaning prior to the critical date] is to show that the primary purpose underlying the offer to sale was experimental and not commercial." In re Hamilton, 882 F.2d 1576, 1580, 11 USPQ2d 1890, 1893 (Fed. Cir. 1989).

As indicated previously, the fuser rolls were field tested in copier machines that were leased by the field test facilities from Xerox. Xerox had service agreements with the field test facilities. The service agreements provided for copier machine maintenance and roll replacement. The field test facilities paid Xerox for the service agreements and all service agreements were in effect before the experimentation started. Xerox did not sell the rolls directly to any of the field test facilities. The cost of the experimental fuser rolls was greater than that of the conventional rolls due to their low volume of production.

The examiner argues that the activities described above constitute an "on sale" bar. It is the examiner's position that the "claimed products were sold or leased to the public, i.e., revenue was received from customers using the machines equipped with the claimed rollers." Examiner's Answer, page

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5. The revenue to which the examiner refers was generated from service agreements. According to the examiner, the service agreements included replacement of the rolls as part of the maintenance of the copier and paying for the maintenance is equivalent to paying for the rolls. The examiner argues that "revenue was received" one year prior to the application date and, therefore, it constitutes an on sale §102(b) bar. See Examiner's Answer, page 11.

Similar to the examiner's rejection based on public use, the examiner's on sale § 102(b) rejection fails to address that the appealed claims relate to a method. The examiner's position is that the rollers are the "claimed products [which] were sold or leased to the public". See Examiner's Answer, page 5. To make a prima facie case for rejection an examiner, at minimum, must explain his position in a sufficient manner that allows an applicant to respond to the pertinent issues. Although it may be possible that a sale of an unclaimed product might support a rejection of a claimed method of production of that product (Cf., Caveney, 761 F.2d at 675-76, 226 USPQ at 3-4), this issue has not been specifically addressed by the examiner on this appeal. The examiner has failed to make a distinction between the unclaimed fuser rolls

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and the claimed method of producing the fuser rolls. Regardless of the above insufficiency, the examiner's § 102(b) on sale rejection fails under other grounds, as discussed further in this opinion.

The appellants argue that any revenue received was incidental to the primary purpose of the field-testing, which was experimentation and development of the invention. The appellants further argue that they did not charge the operators at the test site for the use of the rolls, and "that no money was paid by any of the sites for the rolls. . . ." See Appellants Brief, page 17. In addition, the leases the examiner refers to as a source of income were obtained prior to the start of the experimentation. Finally, the appellants argue that the experimental rolls were in fact more expensive than the current production models due to their low volume of production.

We do not consider the examiner's position on this matter to be well founded. First, the "public use" and "on-sale" bars are meant to prevent the inventor from commercially exploiting the exclusivity of his or her invention substantially beyond the statutorily authorized period. See RCA Corp. v. Data Gen. Corp., 887 F.2d 1056, 1062, 48 USPQ2d

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1641, 1646-47 (Fed. Cir. 1989). The Supreme Court has held that the on-sale bar under 35 U.S.C. § 102(b) applies when (1) the invention at issue had become the "subject of a commercial offer for sale" more than one year before the filing of the patent application; and (2) the invention was ready for patenting. See Paff v. Wells Elec., Inc., 525 U.S. 55, 66 (1998).

The extent of the commercial activity, which constitutes a 102(b) bar, depends upon the circumstances of the activity, the basic indicator being the subjective intent of the inventor to commercially exploit his or her invention as manifested through objective evidence. Indications of a subjective intent to commercialize include: preparations of various contemporaneous "commercial" documents, e.g. orders, invoices, receipts, delivery schedules; preparation of price lists; display of samples to prospective customers; demonstration models or prototypes; use of an invention where an admission fee is charged and advertising in publicity releases, brochures, and various periodicals. The examiner has not indicated that the appellants have participated in any of the above activities.

In addition, the receipt of revenue is not dispositive of

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a sale within the prohibitions of §102(b). If the use or sale was experimental, there is no bar under 35 U.S.C. § 102(b). The basic test is that the experimentation must be the primary purpose and any commercial exploitation must be incidental. See MPEP 2133.03(e) (7th Ed., Rev. 1, Feb. 2000). As indicated above, we have found the activities conducted by appellants fall within the experimental exception to public use.

Accordingly, we also reverse the rejection under 35 U.S.C. § 102(b) based on an on sale bar theory.

III. PUBLIC USE/ON SALE REJECTION UNDER 35 U.S.C. 103(a)

The examiner's 35 U.S.C. § 103(a) rejections suffer the same deficiencies as his § 102(b) rejections. Accordingly, we reverse the rejection under 35 U.S.C. § 103(a) based on public use/on sale.

CONCLUSION

The examiner's rejections under 35 U.S.C. §§ 102(b) and 103(a) are reversed.

REVERSED

BRADLEY R. GARRIS )  
)

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| Administrative Patent Judge | ) |                 |
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|                             | ) | BOARD OF PATENT |
| PAUL LIEBERMAN              | ) |                 |
| Administrative Patent Judge | ) | APPEALS AND     |
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|                             | ) |                 |
| BEVERLY A. PAWLIKOWSKI      | ) |                 |
| Administrative Patent Judge | ) |                 |

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APPENDIX

17. A method for manufacturing a polymeric printing member for use in a printing machine, said method comprising the steps of:

providing a generally cylindrically shaped substrate

rotating the substrate about a longitudinal axis thereof in a substantially horizontal direction; and

applying a coating from an applicator in a stream in a generally vertically downward direction to an outer periphery of the substrate, said stream contacting the outer periphery of the substrate at a position substantially above a horizontal centerline of the substrate and contacting the outer periphery of the substrate at a position spaced from an uppermost location of the substrate in a direction of the rotation of the substrate, whereby the dynamics of the rotation of the substrate and the position of the stream on the substrate assist in the uniform distribution of the coating onto the substrate.

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