

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(2) is not binding precedent of the Board.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. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT MACK, JAMES C. McKINNEY and
KENNETH R. BERGER

Appeal No. 1999-1080
Application No. 08/681,022

ON BRIEF

Before COHEN, FRANKFORT and GONZALES, Administrative Patent
Judges

GONZALES, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the examiner's final rejection of
claims 17 through 20. Claims 1 through 16, the only other
claims in the application, have been allowed.

We AFFIRM.

The subject matter on appeal is directed to a multi-
chamber pump dispenser (specification, p. 1). An

Appeal No. 1999-1080
Application No. 08/681,022

understanding of the

invention can be derived from a reading of exemplary claim 17, which appears in the appendix to the brief (Paper No. 14).¹

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Moore et al. (Moore)	4,838,460	Jun. 13,
1989		
Favre	5,611,463	Mar. 18,
1997		
		(filed Jul. 12,
1995) ²		

Claims 17 through 20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Favre in view of Moore.

The full text of the examiner's rejection and response to the arguments presented by the appellants appears in the

¹ A correct copy of claim 18 appears in the appendix to the answer.

² We note that on November 28, 1997, the appellants filed a declaration of Kenneth Berger, one of the named inventors, under 37 CFR § 1.131 purportedly showing that the inventors made the invention in the U.S. before the U.S. filing date of the Favre patent. See Paper No. 6. This evidence has not been considered in deciding this appeal, since the evidence is not relied upon to support any argument in the brief. See 37 CFR § 1.192(a).

Appeal No. 1999-1080
Application No. 08/681,022

answer, while the complete statement of the appellants' arguments can be found in the brief.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we have made the determinations which follow.

After considering the collective teachings of Favre and Moore, we must agree with the examiner that the invention set forth in claims 17 through 20 would have been obvious to one of ordinary skill in the art at the time of the appellants' invention.

The test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. See In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

Claim 17, the sole independent claim, calls for a pump

Appeal No. 1999-1080
Application No. 08/681,022

dispenser comprising: upper [14] and lower [12] sections, the lower section containing at least two tubular containers [30, 32], each container being closed by a piston [40, 50] at a lower end; a pair of pump means [42, 52] in the upper section, the input to each pump means being aligned with a top of a tubular

container; and conduit means [44, 46, 48, 54, 56, 58] in the upper section aligned with the exit of each pump means and providing a separate channel to an exit spout [16]. In addition, claim 17 requires that each of the pump means comprises: a pump chamber defined by a pump wall [43, 53]; a first valve [49, 69] at a lower end of the pump chamber; a second valve [45, 55] located in a pump piston [41, 51] which is capable of moving inwardly and outward in the pump chamber; each valve being capable of moving into and out of contact with a valve seat [108 in Fig. 3A and 120 in Fig. 3B]; and a spring means [23, 25, 35, 37] biasing each valve into a closed position.

Favre's invention relates to:

[a] double dispenser for fluid products, comprising, in a single casing (1), two chambers (2) filled with different fluids and each closed by a pump (3) provided with a valve, the two valves being actuated by a single pusher (5). The pusher (5) has a chamber into which open the outlets of the two valves. This chamber is divided by a wall (7) so as to form two separate chambers (6', 6") into which open respectively the outputs of the two valves. The wall (7) has two outlet openings (8', 8") respectively connected to the separate chambers (6', 6"). These outlet openings (8', 8") open into cavities (10', 10") of a dispensing nose (11) of elastically deformable material. The dispensing nose (11) has an outlet slot (12) sealingly closed by

two lips (13) arranged to spread under the pressure of the mixed fluid arriving respectively in the cavities (10', 10") during depression of the pusher (5). The dispensing nose (11) comprises an intermediate partition (14) separating the cavities (10', 10"). This intermediate partition (14) is made of a single piece with the dispensing nose (11).

See Abstract.

Moore's invention relates to a dual chamber pump dispenser "for lotions, creams and the like." See col. 2, 1.

53. Moore teaches that

. . . earlier pump dispensers were often constructed with a single chamber, and an upper piston connected to the actuator cooperated with a lower, independent

piston movable in a single direction as the upper piston was retracted and sub-atmospheric conditions were created within the chamber. The lower, independent piston typically was provided with teeth or other types of gripping means to prevent backward motion, although it was found that the teeth presented certain problems during manufacture.

Col. 1, ll. 20-29. In order to avoid the problems associated with the earlier single chamber pump dispensers, Moore discloses a dual chamber pump dispenser having a reservoir chamber [14] as well as a holding chamber [26] which contains the pump piston [68]. A check valve [28] located along a passageway between the reservoir chamber [14] and the holding chamber substantially

prevents pressure from the pump piston [68] to be directed into the larger reservoir chamber [14] and toward the independent piston [16] at the bottom of the same. Id. at 30-38. Further, Moore shows a disc [64] yieldable in an upward direction, as viewed in Figure 4, as the piston [68] moves downwardly within the holding chamber [26] to admit a product from the chamber [26] and into a passage [70]. A compression spring [72] engages a lower horizontal wall of the valve body

Appeal No. 1999-1080
Application No. 08/681,022

[20] in surrounding relation to the check valve [28] and extends upwardly toward a cavity formed in the bottom of the piston [68] to bias the latter in an upwardly direction. A circular hole in the center of the piston [68] communicates with the passage [70] when the disc [64] is opened. See col. 3, ll. 41-52.

The examiner determined that Favre discloses or suggests all of the structure of the pump dispenser recited in claim 17, except for the details of the pair of pump means. The examiner also determined that Moore discloses or suggests all of the structure of the pump means recited in claim 17. See answer, p. 3. The appellants have not challenged these determinations.

The examiner also concluded that:

[i]t would have been obvious . . . to have modified the Favre pumps with first and second valves as taught by Moore et al for self priming and to prevent pressure from the working piston to be directed into the large chamber and toward the independent piston at the bottom of the same.

Id. at pp. 3 and 4. We agree.

Appeal No. 1999-1080
Application No. 08/681,022

The appellants argue that there is no suggestion or motivation to combine the teachings of the references, since neither of the references suggests a solution to the problem solved by the appellants, i.e., uniform dispensing of substances with different rheologies. See brief, pp. 5-7.

The argument is unpersuasive for the following reasons. We recognize that when a rejection depends on a combination of prior art references, there must be some teaching, suggestion, or motivation to combine the references. However, it is not necessary, as the appellants would apparently have us believe, that a suggestion or motivation to combine the teachings of the references be found in the references themselves or that the references teach a solution to the specific problem addressed by the appellants. As our reviewing court stated in In re Rouffet, 47 USPQ2d 1453, 1456 (Fed. Cir. 1998):

Although the suggestion to combine references may flow from the nature of the problem, see Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc., 75 F.3d 1568, 1573, 37 USPQ2d 1626, 1630 (Fed. Cir. 1996), the suggestion more often comes from the teachings of the pertinent references, see In re Sernaker, 702 F.2d 989, 994, 217 USPQ 1, 5 (Fed. Cir. 1983), or

Appeal No. 1999-1080
Application No. 08/681,022

from the ordinary knowledge of those skilled in the art that certain references are of special importance in a particular field, see Pro-Mold, 75 F.3d at 1573 (citing Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 297 n. 24, 227 USPQ 657, 667 n. 24 (Fed. Cir. 1985)). Therefore, "[w]hen determining the patentability of a claimed invention which combines two known elements, "the question is whether there is something in the prior art as a whole to suggest the desirability, and thus the obviousness, of making the combination.'" See In re Beattie, 974 F.2d 1309, 1311-12, 24 USPQ2d 1040, 1042 (Fed. Cir. 1992) (quoting Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co., 730 F.2d 1452, 1462, 221 USPQ 481, 488 (Fed. Cir. 1984)).

In our opinion, the motivation on the part of one having ordinary skill in the art for employing the dual chamber pump taught by Moore in the pump dispenser taught by Favre is that identified by the examiner, i.e., to obtain the self-evident advantages of a self priming pump and to avoid the disadvantages of a single chamber pump discussed by Moore at col. 1, ll. 20-29.

Claim 18 depends from claim 17 and further requires that each entire valve moves into and out of contact with a valve seat during actuation of the pump means.

The appellants argue that Moore's valves do not move into

Appeal No. 1999-1080
Application No. 08/681,022

and out of contact with the valve seats as do the appellants' valves. See brief, p. 7.

We do not agree with the appellants' argument that Moore's valves are not capable of performing the function recited in claim 18. Obviously, the valve [28] of Moore must be in contact with its seat, in the same sense that the appellants' valve [45 or 49] is in contact with its seat, when the valve is closed in order for Moore's dispenser to function as intended. We also understand Moore as teaching that valve or disc [64] is fully opened during depression of actuator [74] in order for product within chamber [26] to move upward past disc [64]. Therefore, the examiner's determination that the valves disclosed by Moore are capable of performing the function recited in claim 18 appears reasonable to us.

With respect to claim 19, the appellants argue that in Moore the entire spout portion moves during pumping and that no separate activator is in communication with the pump piston. Id. at p. 8.

Appeal No. 1999-1080
Application No. 08/681,022

We are not persuaded by this argument because there is nothing in claim 19 precluding the spout portion from moving during pumping nor does claim 19 require a separate activator in communication with the pump piston.

As to claim 20, the appellants argue that there is no teaching in either of the applied references that the valve material should have a low organic substance absorbtivity. Id.

We agree with the examiner that the subject matter recited in claim 20 would have been obvious to a person of ordinary skill in the art. We observe that an artisan must be presumed to know something about the art apart from what the references disclose (see In re Jacoby, 309 F.2d 513, 516, 135 USPQ 317, 319 (CCPA 1962)) and the conclusion of obviousness may be made from "common knowledge and common sense" of the person of ordinary skill in the art (see In re Bozek, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969)). Moreover, skill is presumed on the part of those practicing in the art. See In re Sovish, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985). With these principles in mind, it is our opinion that the artisan would have selected a material for the flap valves

Appeal No. 1999-1080
Application No. 08/681,022

which was compatible with the material to be dispensed.

For the reasons set forth above, the decision of the examiner to reject claims 17 through 20 under 35 U.S.C. § 103 is affirmed.

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

AFFIRMED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
CHARLES E. FRANKFORT)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
)	
)	
JOHN F. GONZALES)	
Administrative Patent Judge)	

jfg/vsh

Appeal No. 1999-1080
Application No. 08/681,022

JAMES M. SERAFINO
COLGATE-PALMOLIVE COMPANY
909 River Road
P.O. Box 1343
Piscataway, NJ 08855-1343