

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD C. SAYERS

Appeal No. 2000-0244
Application No. 29/069,936

ON BRIEF

Before KIMLIN, HAIRSTON, and GONZALES, Administrative Patent Judges.

GONZALES, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of the following

design claim:

The ornamental design for a liquid dispenser as shown and described.

We REVERSE.

Several modified forms of the claimed liquid dispenser

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design are depicted in Figures 1 through 25 of the appellant's drawings, with Figures 14 through 19 being representative.

The references applied by the examiner are:

Guillerm	Des. 314,688	Feb. 19,
1991		
Eke et al. (Eke)	Des. 356,494	Mar. 21,
1995		
Grothoff	5,615,806	Apr. 01,
1997		

The design claim stands rejected under 35 U.S.C. § 103 as being unpatentable over Guillerm in view of Grothoff and Eke.

The full text of the examiner's rejection and responses to the arguments presented by the appellant appears in the answer (Paper No. 10), while the complete statement of the appellant's arguments can be found in the main and reply briefs (Paper Nos. 9 and 11 respectively).

OPINION

We begin our analysis by pointing out that the standard for evaluating the patentability of a design is whether it

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would have

been obvious to a designer of ordinary skill in the art involved. See In re Nalbandian, 661 F.2d 1214, 1216, 211 USPQ 782, 784 (CCPA 1981). In rejecting a claim to an ornamental design under 35 U.S.C. § 103, the examiner must supply a primary or basic reference that bears a substantially identical visual appearance to the claimed design. In re Harvey, 12 F.3d 1061, 1063, 29 USPQ2d 1206, 1208 (Fed Cir. 1993). That is, there must be a reference, a something in existence, the design characteristics of which are basically the same as the claimed design; once a reference meets this test, reference features may reasonably be interchanged with or added to those in other pertinent references. In re Rosen, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982).

The examiner concluded that Guillerm constitutes a sufficient "Rosen" reference. The appellant argues that Guillerm does not. We need not consider this issue, however, because even assuming that Guillerm is a sufficient "Rosen" reference which discloses essentially the same basic design as that of the appellant, we reject the examiner's position that an ordinary designer would have been motivated to provide an

outlet spout as claimed on the actuator disclosed by Guillerm in view of the teachings of Grothoff and Eke.

To begin with, we note that the claimed liquid dispenser design comprises three main sections, namely: an upper cylindrical actuator portion with an integrally formed outlet spout; a middle, slightly larger, cylindrical housing or collar portion for attachment to a liquid container; and a lower pump element for insertion into the container. The examiner cites the Eke reference for its teaching of a container with a pump

dispensing closure whose middle housing or collar portion flares slightly outward as it meets the container.¹ Since the appellant explicitly states that no distinctiveness is claimed in either the collar portion or the pump element,² we will focus our attention, as has the appellant, on the ornamental aspects of the claimed actuator portion design relative to the proposed combination of Guillerm and Grothoff, keeping in mind

¹ See the Office action mailed April 24, 1998, page 3 (Paper No. 3)

² See the reply brief filed July 23, 1999, page 2 (Paper No. 11).

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that it is the overall appearance of the design that must be considered in determining patentability under 35 U.S.C. § 103(a). In re Leslie, 547 F.2d 116, 120, 192 USPQ 427, 429 (CCPA 1977).

The appellant's design is for a liquid dispenser having, inter alia, an actuator portion with an outlet spout formed as an extension of the actuator sidewall. The ornamental design of the actuator creates the visual appearance of vertical sidewalls having an upper, rounded edge merging into a flat, horizontal top surface and an angulated outlet spout with curved sidewalls terminating in an angulated end face.

The examiner determined that Guillerm discloses a pump dispensing closure of substantially the same appearance as the claimed design including "an integrally formed triangular dispensing outlet." See answer, p. 3. The examiner also determined that Grothoff teaches a narrower dispensing spout having a slight downward angle and concave sidewalls. Id. It is the examiner's position (id. at 4) that, in view of Grothoff, it would have been obvious

to modify the dispensing closure of Guillerm by

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modifying its integrally formed, slightly protruding dispensing spout to become narrower and angled downward, and to show a slight inward curvature (concavity) to the side walls.

The appellant points out that the top of Guillerm's actuator includes a planar extension of the upper surface of the actuator which forms a roof or ledge covering a horizontal, rectangular spout. See main brief, p. 6. The appellant also emphasizes that the top surface of Grothoff's actuator is entirely convex, as opposed to the essentially flat top surface of the actuator of the claimed design and that the free end of the outlet spout in Grothoff is perpendicular to the longitudinal dimension of the spout. Id. at 7 and 8. Thus, the appellant argues that even if it had been obvious to modify the design of Guillerm in view of Grothoff, one would not have arrived at the appellant's claimed actuator design. Id. at 8 and reply brief, p. 4. We agree.

The Grothoff reference shows a liquid dispenser actuator portion having a convex top surface. The outlet spout is curved on an arc continuous with the top surface, rather than

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being at an angle to a flat top as claimed. The appellant is also correct in pointing out that the free end of the outlet spout in Grothoff is perpendicular to the longitudinal dimension of the spout, not angulated as claimed. Thus, it is our determination that the claimed design would not have been suggested by the combined teachings of Guillerm and Grothoff, neither of which teaches or suggests a liquid dispenser actuator portion having a flat top with an angulated spout or a free end of the spout being angulated to the longitudinal axis of the spout.

As indicated supra, Eke was cited for its teaching of a container with a pump dispensing closure whose middle housing or collar portion flares slightly outward as it meets the container, not for the design of the actuator portion. Nevertheless, we have carefully reviewed the Eke patent, but find nothing therein that makes up for the deficiencies of Guillerm and Grothoff noted above. It therefore is our conclusion that the combined teachings of Guillerm, Grothoff and Eke fail to establish a prima facie case of obviousness with regard to the claimed subject matter.

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Since the applied prior art fails to teach or suggest the aesthetic features of the claimed design, we will not sustain the standing 35 U.S.C. § 103 rejection based on Guillerm, Grothoff and Eke.

The decision of the examiner is reversed.

REVERSED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
KENNETH W. HAIRSTON)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
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