

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. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD H. KAUFMAN and IVICA M. LABUDA

Appeal No. 2000-2035
Application No. 08/844,282

ON BRIEF

Before COHEN, ABRAMS, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 2, 6-8, 10, 11, 17 and 19, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellants' invention relates to an easy-open beverage container in the form of a flexible pouch in which a beverage therein is consumed through a straw. A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

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

Lehmacher et al. 1967 (Lehmacher)	3,337,117	Aug. 22,
Papro A.G. (Papro)	215,885 ¹ (Austria)	July 12, 1958
Stanek	2,647,399 ² (Germany)	May 5, 1977

Claims 2, 6-8, 10, 11, 17 and 19 stand rejected under 35 U.S.C. § 103 as being unpatentable over Papro in view of Stanek.

¹ In determining the teachings of Papro, we will rely on the translation of record provided by the USPTO.

² In determining the teachings of Stanek, we will rely on the translation of record provided by the USPTO.

Claims 2, 6-8, 10, 11, 17 and 19 stand rejected under 35 U.S.C. § 103 as being unpatentable over Stanek in view of Lehmacher.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the final rejection (Paper No. 18, mailed November 23, 1999) and the answer (Paper No. 21, mailed April 28, 2000) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 20, filed April 13, 2000) and reply brief (Paper No. 22, filed May 16, 2000) for the appellants' arguments thereagainst.

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. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is

insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 2, 6-8, 10, 11, 17 and 19 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

Claim 17, the sole independent claim on appeal, reads as follows:

An easy-open beverage container in the form of a flexible pouch in which a beverage therein is consumed through a straw comprising:

a front barrier wall and a back barrier wall, each said barrier wall including top edges and upper portions of opposite side edges which matingly face one another and which form an open top therebetween;

a downwardly-extending bifold membrane located in the open top and having a longitudinal fold and peripheral edges disposed adjacent the top edges and upper portions of the opposite side edges of said front and back barrier walls;

a membrane attaching means for securely attaching the peripheral edges of said bifold membrane to adjacent top edges and upper portions of the opposite side edges of said barrier walls such that said bifold membrane completely closes the open top and the facing top edges of said barrier walls are movable away from one another about the longitudinal fold of said bifold membrane to expose the longitudinal fold for piercing by the straw;

side attaching means for securely attaching facing portions of the peripheral edges of said bifold membrane adjacent the upper portions of the opposite side edges of said barrier walls to one another whereby the facing upper portions of the opposite side edges are not movable away from one another; and

a barrier peel seal provided between facing portions of the peripheral edges of said bifold membrane adjacent the top edges of said barrier walls whereby said peel seal provides a tamper-evident and sanitary seal for said bifold membrane which is easily broken in order to move the facing top edges away from one another to expose said longitudinal fold of said bifold membrane, wherein said peel seal is a weak heat seal.

The rejection over Papro in view of Stanek

We will not sustain the rejection of claims 2, 6-8, 10, 11, 17 and 19 under 35 U.S.C. § 103 as being unpatentable over Papro in view of Stanek.

In this rejection, the examiner determined (final rejection, p. 2) that Papro disclosed the subject matter of claim 17 except for the "peel seal" and that it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the self-closing, bifold membrane of Papro with the peel seal and pull tabs of Stanek, in order to prevent premature access to the self-closing membrane.

The appellants argue (brief, pp. 4-5) that the applied prior art does not suggest the claimed subject matter. We agree.

All the claims under appeal require both a barrier peel seal provided between facing portions of the peripheral edges of the bifold membrane adjacent the top edges of the barrier walls and the barrier walls being movable away from one

another about the longitudinal fold of the bifold membrane to expose the longitudinal fold for piercing by the straw. However, these limitations are not suggested by the applied prior art. In that regard, while Papro does teach barrier walls being movable away from one another about a longitudinal fold of a bifold membrane to expose the longitudinal fold for piercing by a straw, Papro does not teach or suggest using a barrier peel seal provided between facing portions of the peripheral edges of the bifold membrane adjacent the top edges of the barrier walls. Likewise, while Stanek does teach a barrier peel seal in Figures 5 and 6, Stanek does not teach or suggest using his barrier peel seal in combination with barrier walls movable away from one another about a longitudinal fold of the bifold membrane to expose the longitudinal fold for piercing by a straw.

In our view, the only suggestion for modifying Papro in the manner proposed by the examiner to meet the above-noted limitations stems from hindsight knowledge derived from the appellants' own disclosure. The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C.

§ 103 is, of course, impermissible. See, for example, W. L. Gore and Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). It follows that we cannot sustain the examiner's rejections of claims 2, 6-8, 10, 11, 17 and 19 under 35 U.S.C. § 103 as being unpatentable over Papro in view of Stanek.

The rejection over Stanek in view of Lehmacher

We will not sustain the rejection of claims 2, 6-8, 10, 11, 17 and 19 under 35 U.S.C. § 103 as being unpatentable over Stanek in view of Lehmacher.

In this rejection, the examiner determined (final rejection, p. 3) that Figures 5 and 6 of Stanek disclosed the subject matter of claim 17 except for the bottom of the self-closing membrane 2 having a pierceable, longitudinal fold instead of being open-ended and that in view of the teachings of Lehmacher it would have been obvious to one having ordinary skill in the art at the time the invention was made to substitute a pierceable, longitudinal fold for the open end of the Stanek membrane.

The appellants argue (brief, pp. 5-6) that the applied prior art does not suggest the claimed subject matter. We agree.

As pointed out above, all the claims under appeal require both a barrier peel seal provided between facing portions of the peripheral edges of the bifold membrane adjacent the top edges of the barrier walls and the barrier walls being movable away from one another about the longitudinal fold of the bifold membrane to expose the longitudinal fold for piercing by the straw. However, these limitations are not suggested by the applied prior art. In that regard, while Stanek does teach a barrier peel seal in Figures 5 and 6, Stanek does not teach or suggest using his barrier peel seal in combination with barrier walls movable away from one another about a longitudinal fold of the bifold membrane to expose the longitudinal fold for piercing by a straw. Likewise, while Lehmacher does teach barrier walls being movable away from one another about a longitudinal fold of a bifold membrane to expose the longitudinal fold for piercing by a straw, Lehmacher does not teach or suggest using a barrier peel seal

provided between facing portions of the peripheral edges of the bifold membrane adjacent the top edges of the barrier walls.

Once again, it is our view that the only suggestion for modifying Stanek in the manner proposed by the examiner to meet the above-noted limitations stems from hindsight knowledge derived from the appellants' own disclosure. It follows that we cannot sustain the examiner's rejections of claims 2, 6-8, 10, 11, 17 and 19 under 35 U.S.C. § 103 as being unpatentable over Stanek in view of Lehmacher.

CONCLUSION

To summarize, the decision of the examiner to reject claims 2, 6-8, 10, 11, 17 and 19 under 35 U.S.C. § 103 is reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
NEAL E. ABRAMS)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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JEFFREY V. NASE)	
Administrative Patent Judge)	

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