

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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

MAILED
JUL 10 1997
PAT.&TM. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Appeal No. 95-3567
Application No. 29/008,026¹

ON BRIEF

Before GARRIS, HAIRSTON, 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 the single design claim pending in this design application.

We REVERSE.

¹ Application for patent filed May 7, 1993.

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BACKGROUND

The appellants' invention relates to a design for a bottle.

The claim on appeal is:

The ornamental design for a bottle as shown and described.

The prior art references of record relied upon by the examiner as evidence of obviousness under 35 U.S.C. § 103 are:

Schwartz	Des. 217,848	June 23, 1970
Blocksom et al. (Blocksom)	Des. 279,261	June 18, 1985
Gonda et al. (Gonda)	Des. 348,613	July 12, 1994
		(filed Nov. 5, 1992)

Beauty Fashion, "Lancome Hydracreme" bottle, p. 83, June 1984
(Beauty Fashion)

The design claim stands rejected under 35 U.S.C. § 103 as being unpatentable over Blocksom in view of Beauty Fashion and Gonda or Schwartz.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the § 103 rejection, we make reference to the examiner's answer (Paper No. 10, mailed April 24, 1996) for the examiner's complete reasoning in support of the rejection, and to the appellants' brief (Paper No. 9, filed November 16, 1995) for the appellants' arguments thereagainst.

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OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' drawings, specification and claim and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

The examiner's rejection of appellants' design claim under Blocksom in view of Beauty Fashion and Gonda or Schwartz cannot be sustained.

At the outset, we keep in mind that, in a rejection of a design claim under 35 U.S.C. § 103, there is a requirement that there must be a single basic reference, a something in existence, the design characteristics of which are basically the same as the claimed design in order to support a holding of obviousness. See In re Harvey, 12 F.3d 1061, 1063, 29 USPQ2d 1206, 1208 (Fed. Cir. 1993) and In re Rosen, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982).

The examiner relies upon the appearance of the bottle of Blocksom as the basic design reference, i.e., as a Rosen reference (answer, pp. 4-5). The appellants have not contested

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the examiner's conclusion that the bottle of Blocksom is a basic design reference.

At this point, we note that once such a basic design reference is found, other references may be used to modify it to create a design that has the same overall visual appearance as the claimed design. See In re Harvey, 12 F.3d at 1063, 29 USPQ2d at 1208. These secondary references may only be used to modify the basic design reference if they are so related to the basic design reference that the appearance of certain ornamental features in one would have suggested the application of those features to the other. See In re Borden, 90 F.3d 1570, 1574, 39 USPQ2d 1524, 1526 (Fed. Cir. 1996). However, such modifications cannot destroy fundamental characteristics of the basic design reference. See In re Rosen, supra. Thus, the focus in a design patent obviousness inquiry should be on visual appearances rather than design concepts. See In re Harvey, 12 F.3d at 1064, 29 USPQ2d at 1208.

The examiner relies upon the design shown in Beauty Fashion to establish that at the time of the invention, it would have been obvious to slightly recess the bottom edge of Blocksom's

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bottle to form a small inset base as suggested by Beauty Fashion.
We agree.

The difficulty we have with the examiner's rejection is that the examiner then concludes that it would have been further obvious to form the bottle and base into the tapered plan form shown by Gonda and Schwartz and that these modifications would result in a bottle that is strikingly similar to the claimed design (answer, p. 3). We do not agree. The combination of the applied prior art would not have yielded the overall design claimed by the appellants. We share the appellants' view (brief, p. 2) that the applied prior art designs do not evidence and would not have been suggestive of the distinct line between the taper of the shoulders and the remainder of the side of the bottle.² In that regard, it is our opinion that the visual impression of how appellants' planar sides of the bottle flow upwardly and outwardly to form the shoulders of the bottle (as shown in the upper portion of Figure 4) is significantly different from the visual impressions of Blocksom's bottle (sides of the bottle flow upwardly, but not outwardly, to form the shoulders of the bottle as shown in Figure 3), Beauty Fashion's bottle (curved sides of the bottle that round into horizontal

² See especially Figure 4.

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