

**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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 23

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* BENJAMIN Y. MANADANAS, JAMES M. SKAGGS,  
SEAN P. O'SULLIVAN and CHRISTOPHER J. HEDIN

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Appeal No. 96-1753  
Application 08/063,202<sup>1</sup>

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HEARD: February 3, 1998

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Before ABRAMS, FRANKFORT and McQUADE, *Administrative Patent Judges*.

ABRAMS, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This is an appeal from the decision of the examiner finally rejecting claims 1 and 3 through 22, which constitute all of the claims remaining of record in the application.

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<sup>1</sup>Application for patent filed May 18, 1993.

Appeal No. 96-1753  
Application 08/063,202

The appellants' invention is directed to a dispensing device for dispensing several viscous materials (claims 1, 3 through 14, and 22), and to a method for so doing (claims 15 through 21). The subject matter before us on appeal is best illustrated by reference to claims 1 and 15, which can be found in an appendix to the Brief.

#### THE REFERENCES

The references relied upon by the examiner to support the final rejection are:

Ekdahl	2,103,111	Dec. 21, 1937
Strumor	2,944,705	Jul. 12, 1960
Moore	4,715,518	Dec. 29, 1987

#### THE REJECTIONS

Claims 1, 3 through 10, 12 through 14 and 15 through 22 stand rejected under 35 U.S.C. § 103 as being unpatentable over Moore in view of Ekdahl.

Claim 11 stands rejected under 35 U.S.C. § 103 as being unpatentable over Ekdahl in view of Moore.

Claim 1 also stands rejected under 35 U.S.C. § 103 as being unpatentable over Moore in view of Strumor.

Appeal No. 96-1753  
Application 08/063,202

The rejections are explained in Paper No. 14.

The opposing viewpoints of the appellants are set forth in the Brief.

#### OPINION

At the outset, we note that the appellants have not argued the merits of any particular claim apart from the others. Therefore, all of the apparatus claims will stand or fall with representative claim 1, and all of the method claims with representative claim 15. See *In re Young*, 927 F.2d 588, 18 USPQ2d 1089 (Fed. Cir. 1991).

All of the claims stand rejected under 35 U.S.C. § 103. The question under Section 103 is not merely what the references expressly teach but what they would have suggested to one of ordinary skill in the art at the time the invention was made. See *Merck & Co., Inc. v. Biocraft Laboratories, Inc.*, 874 F.2d 804, 807, 10 USPQ2d 1843, 1846 (Fed. Cir. 1989). While there must be some suggestion or motivation for one of ordinary skill in the art to combine the teachings of references, it is not necessary that such be found within the four corners of the references themselves; a conclusion of obviousness may be made from common knowledge and common sense of the person of ordinary

Appeal No. 96-1753  
Application 08/063,202

skill in the art without any specific hint or suggestion in a particular reference. See *In re Bozek*, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969). Further, in an obviousness assessment, skill is presumed on the part of the artisan, rather than the lack thereof. *In re Sovish*, 769 F.2d 738, 742, 226 USPQ 771, 774 (Fed. Cir. 1985).

Claim 1 first stands rejected as being unpatentable over Moore and Ekdahl. Moore is directed to a dispenser for striped viscous products. It discloses a container holding a first viscous material 64 axially disposed therein and a second viscous material 68 axially contacting the first viscous material in a plurality of axial stripes. The container is topped by a spout 34 having a passage 36 through which the two viscous materials flow simultaneously when a pumping piston 28 is operated. The appellants have not disputed that with each operation of the pumping piston, a controlled amount of the second material is dispensed with respect to the amount of the first material.

According to claim 1, there must be a dispensing means "for shaping" the first and second viscous materials as they are being dispensed. While it could be argued that the narrowed exit 38 of the spout in the Moore device "shapes" the materials issuing

Appeal No. 96-1753  
Application 08/063,202

therefrom, the examiner has considered this limitation not to be taught by Moore.

For this teaching the examiner turns to Ekdahl, which discloses a package for containing and dispensing plastic materials. Ekdahl teaches extruding materials from a package by squeezing them through a nozzle so that they assume a "decorative" form (page 1, line 21). It is our view that one of ordinary skill in the art would have found it obvious to equip the Moore device with an extrusion nozzle whose exit comprises a design "for shaping" the first and second viscous materials as they exit outlet 38, suggestion being found in Ekdahl's explicit teaching that such would provide a decorative extrusion. It is our further view that it also would have been obvious to one of ordinary skill in the art to orient the design of the shaping nozzle in such a fashion as not to compromise Moore's objective of dispensing a striped product.

The rejection of claim 1 as being unpatentable over Moore and Ekdahl is sustained. The rejections of apparatus claims 3 through 10, 12 through 14 and 22, based upon Moore in view of Ekdahl, and claim 11, based upon Ekdahl in view of Moore, also are sustained. *In re Young, supra*. With regard to claim 11, we note that the appellants merely referred to the arguments set out

Appeal No. 96-1753  
Application 08/063,202

in their Brief against the rejection of claim 1 *et al.*, in which the order of the two references was reversed.

Method claim 15 stands rejected as being unpatentable over Moore in view of Ekdahl. This claim first recites providing a core of first viscous material with a second viscous material "surrounding" the core, and then goes on to require dispensing means including shaping means "for shaping only said outer material" (emphasis added).<sup>2</sup> Neither Moore nor Ekdahl teach such a feature. Therefore, they fail to establish a *prima facie* case of obviousness with regard to the subject matter of this claim, and we will not sustain the rejection. Nor, it follows, will we sustain the rejection of dependent claims 16 through 21.

Claim 1 also has been rejected as being unpatentable over Moore in view of Strumor, the latter being cited for its teaching of dispensing two viscous materials through an aperture which decoratively shapes the issuing material. For the same reasons as were expressed above with regard to the rejection based upon Moore and Ekdahl, we also will sustain this rejection of claim 1.

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<sup>2</sup>We observe that there is no antecedent basis in claim 15 for "said outer material," although it is clear that this is intended to refer to the second viscous material which surrounds the core of first material. This discrepancy in terminology is worthy of correction.

Appeal No. 96-1753  
Application 08/063,202

With regard to all of the rejections which we have sustained, we have carefully considered the arguments presented by the appellants. However, they have not convinced us that the decisions of the examiner were in error. Our position with regard to each of the arguments should be apparent from the foregoing recitations.

**SUMMARY**

The rejection of claims 1, 3 through 10, 12 through 14 and 22 as being unpatentable over Moore in view of Ekdahl is sustained.

The rejection of claims 15 through 21 as being unpatentable over Moore in view of Ekdahl is not sustained.

The rejection of claim 11 as being unpatentable over Ekdahl in view of Moore is sustained.

The rejection of claim 1 as being unpatentable over Moore in view of Strumor is sustained.

The decision of the examiner is affirmed-in-part.

Appeal No. 96-1753  
Application 08/063,202

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

**AFFIRMED-IN-PART**

NEAL E. ABRAMS	)	
Administrative Patent Judge)	)	
	)	
	)	
CHARLES E. FRANKFORT	)	BOARD OF PATENT
Administrative Patent Judge)	)	APPEALS AND
	)	INTERFERENCES
	)	
JOHN P. McQUADE	)	
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Appeal No. 96-1753  
Application 08/063,202

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