

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte KENNETH D. ROGERS and RANDOLPH B. ROBINSON

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Appeal No. 96-3611  
Application No. 08/306,688<sup>1</sup>

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ON BRIEF

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Before THOMAS, HAIRSTON and BARRETT, Administrative Patent Judges.

HAIRSTON, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 through 6, 8 and 9. In a first Amendment After Final (paper number 7), claims 1, 4 and 9 were amended, and claims 2 and 3 were canceled. In response to this amendment, the examiner allowed claims 4 and 9 (paper number 8). In a second Amendment After Final (paper number 10), claims 4 and 8 were amended. In a third Amendment After Final (paper number 14), claims 5 and 6

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<sup>1</sup> Application for patent filed September 15, 1994.

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were canceled. In a subsequent communication (paper number 16), the examiner indicated that claims 4, 8 and 9 now stand allowed. Accordingly, claim 1 is the only claim on appeal.

The disclosed invention relates to a transparent tube for displaying a baseball bat.

Claim 1 reads as follows:

1. Apparatus for displaying a collectable baseball bat comprising:

an elongated transparent tube having an internal surface greater in cross-section than any portion of the collectable baseball bat, whereby the collectable baseball bat may be inserted in said tube with either end of the collectable baseball bat foremost;

the length of said tube exceeding the length of the collectable baseball bat;

a pair of identical closures formed of a resilient plastic material;

each closure defining a peripheral flange constructed and arranged to snugly engage either end of said tube;

each closure having an internally projecting flange portion defining a concave surface resiliently adapted to engage the adjacent end of the collectable baseball bat when inserted in said tube, whereby the collectable baseball bat is resiliently supported between said concave surfaces when both said closures are respectively applied to the ends of said tube.

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The references relied on by the examiner are:

Luebke	4,380,290	Apr. 19, 1983
Mroz	4,890,731	Jan. 2, 1990
Hager	5,082,110	Jan. 21, 1992

Claim 1 stands rejected under 35 U.S.C. § 103 as being unpatentable over Luebke in view of Mroz and Hager.

Reference is made to the briefs and the answer for the respective positions of the appellants and the examiner.

#### OPINION

The obviousness rejection of claim 1 is reversed.

We agree with appellants' arguments (Brief, pages 5 and 6) that the housing 12 in Luebke is not "transparent," that the end caps 18 and 20 are not formed from a "resilient plastic material," that the end caps 18 and 20 do not have "an internally projecting flange with concave surfaces to resiliently engage the opposite ends of the inserted skis," and that one end of the skis is "engaged by a partition 35 which is movable along the length of the housing 12." With respect to the suitcase-styled carrying case 10 in Mroz for carrying bats, we agree with appellants' argument (Brief, page 6) that "[t]here is no way that the Mroz carrying case could be utilized as a . . . transparent display case which completely encloses a baseball bat as set forth in Claim 1." Although Hager discloses a concave-shaped pedestal 17

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to seat a baseball 10, we agree with appellants (Brief, page 7) that "[t]here is no elongated tube, and no 'internally projecting flange portion defining a concave surface to engage the adjacent end of the collectable bat' on each end closure as set forth in Claim 1."

In the final analysis, we agree with appellants that "the references, taken as a whole, do not suggest the subject matter of Claim 1," and that the examiner has resorted to impermissible "hindsight" to demonstrate the obviousness of the claimed subject matter (Brief, page 7). The 35 U.S.C. § 103 rejection of claim 1 is reversed because the examiner has failed to present a prima facie case of obviousness.<sup>2</sup>

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<sup>2</sup> In view of the lack of a prima facie case of obviousness, we see no need to comment on appellants' evidence of commercial success.

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DECISION

The decision of the examiner rejecting claim 1 under  
35 U.S.C. § 103 is reversed.

REVERSED

JAMES D. THOMAS	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
KENNETH W. HAIRSTON	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
LEE E. BARRETT	)	
Administrative Patent Judge	)	

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**JENINE GILLIS**

Appeal No. 96-3611  
Serial No. 08/306,688

Judge Hairston

Judge Barrett

Judge Thomas

Received: 04 Aug 98

Typed: 05 Aug 98

DECISION: REVERSED

Send Reference(s): Yes No  
or Translation(s)

Panel Change: Yes No

3-Person Conf. Yes No

Heard: Yes No

Remanded: Yes No

Index Sheet-2901 Rejection(s): \_\_\_\_\_

Acts 2: \_\_\_\_\_

Palm: \_\_\_\_\_

Mailed: Updated Monthly Disk: \_\_\_\_\_

Updated Monthly Report: \_\_\_\_\_