

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 26

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DONALD SPECTOR

Appeal No. 1998-2531
Application 08/574,279

ON BRIEF

Before KIMLIN, HANLON, and DELMENDO, Administrative Patent Judges.

HANLON, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the final rejection of claims 1 and 3-5, all of the claims pending in the application.¹ The claims on appeal are directed to a candy-coated raisin

¹ Claims 6 and 7 were also finally rejected. However, in an AFTER FINAL AMENDMENT (Paper No. 20), claims 6 and 7 were canceled by appellant. That amendment has been entered by the

produced by a particular process which forms a thin and brittle coating on the raisin. Claim 1 is illustrative and reads as follows:

1. A candy-coated raisin having "al dente" characteristics comprising a chewy, fat-free raisin formed from a dried grape having a fleshy interior containing natural sugar, minerals and vitamins, and a candy coating including sweetening agents formed on the exterior of the raisin and adhering thereto which is substantially fat free, the coating being thin and brittle whereby when the coated raisin is masticated, the coating is crunched into small particles which intermingle with the flesh of the raisin to impart a crunchy sensation to the eating experience, said candy-coated raisin being produced by depositing raisins to be coated and a heated liquid sweetening agent and dry ingredients which compose the coating in a spinnable panning pot, and spinning the pot until the liquid cools and hardens to form a thin, brittle and uniform solid candy coating on said raisin, said coating having a polishing agent applied to its surface to impart a shine thereto.

The references relied upon by the examiner are:

Daum et al. (Daum)	3,554,767	Jan. 12, 1971
Brown et al. (Brown)	5,558,890	Sept. 24, 1996 (filed Oct. 27, 1994)

Bernard W. Minifie (Minifie), "Chocolate, Cocoa and Confectionery: Science and Technology Second Edition", pp. 450-51 (Avi Publishing Company, Inc. 1980).

The following rejections are at issue in this appeal:

(1) Claims 1 and 3 are rejected under 35 U.S.C. § 103 as being unpatentable over Daum in view of Minifie.

(2) Claims 4 and 5 are rejected under 35 U.S.C. § 103 as being unpatentable over Daum in view of Minifie as applied to claims 1 and 3, and further in view of Brown.

examiner. See Answer, p. 2.

Discussion

The claims on appeal are directed to a candy-coated raisin produced by a particular process which forms a thin and brittle coating on the raisin. Specifically, the candy-coated raisin is produced by the steps of (1) depositing raisins to be coated and the coating ingredients comprising a heated liquid sweetening agent and dry ingredients into a spinnable panning pot and (2) spinning the pot until the liquid cools and hardens to form a thin, brittle and uniform solid candy coating on the raisin.

Daum discloses a method for producing coated confectioneries including coated raisins. See col. 1, lines 43-46. The method includes the steps of (1) pouring a liquid coating suspension directly onto raisins tumbling in an angularly oriented rotating kettle, (2) rotating the kettle until the coated raisins roll freely and (3) drying the coated raisins under continuous rotation, preferably with the aid of a warm air stream or an infrared lamp. See col. 4, lines 13-22. According to Daum, an "essential advantage of this invention consists in that all of the process steps can be conducted at ambient temperature" (col. 4, lines 29-31).

Minifie also discloses processes for producing sugar coated confectioneries, particularly sugared almonds. Like Daum, Minifie discloses that hot air may be used to dry the coating once it is applied to the confectionery. See Answer, p. 4; Minifie, p. 450. Finally, Brown discloses a multilayered puffed, ready-to-eat cereal.

At the outset, we note that the claims on appeal are in product-by-process format.

Accordingly, a determination of patentability is based on the product itself. As the Court in

In re Thorpe, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985), explains:

If the product in a product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process.

Thus, the sole issue in this appeal is whether the examiner has established that the claimed candy-coated raisins are the same as or obvious from candy-coated raisins produced by the Daum process.

See In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984) (the examiner bears the initial burden of presenting a prima facie case of patentability).

The process disclosed in Daum and the process of the claimed invention are different. The examiner recognizes as much. See Answer, p. 4 ("Claim 1 differs from the reference [(Daum)] in the use of a heated liquid."). Nevertheless, the examiner maintains that the coating of a candy-coated raisin produced by the Daum process would necessarily be brittle due to the cooling step and the sugar concentration.² See Answer, pp. 4-5. However, there is simply nothing in the record to support the examiner's conclusion. Although Daum does disclose several properties of the coating produced by the disclosed process, Daum is nevertheless silent as to whether the coating produced thereby would be

² The examiner further asserts that the coating of a candy-coated raisin produced by the Daum process would necessarily be thin. See Answer, p. 5 ("no definition is seen as to what 'thin' is"); see also Daum, col. 4, lines 31-34. Based on the record before us, we agree with the examiner that a coating produced by the Daum process would be "thin."

brittle. See col. 4, lines 49-55. Therefore, based on the record before us, it is just as likely that the coating produced by the Daum process would be chewy.

According to appellant, the use of a heated liquid and its subsequent cooling is the key to producing a brittle candy coating as claimed (Brief, p. 3):

It is important to note that coating raisins with liquid candy will normally not produce a thin and brittle coating unless the coating is carried out in the manner set forth in claim 1 in which raisins and a heated liquid candy are deposited in a spinning pot, the liquid cooling and hardening as the pot spins to produce the thin and brittle candy coating.

The nature of the spinning action is such as to create a centrifugal force resulting in a very thin coating. And the concurrent cooling and hardening of the heated liquid candy produces a thin coating that is brittle.

Apparently, in an attempt to establish that the claimed candy-coated raisin would have been obvious in view of the teachings in Daum, the examiner maintains that "it would have been obvious to heat or not in the process of Daum et al to achieve a mixture of the ingredients." See Answer, p. 4. As pointed out above, Daum discloses that an "essential advantage of this invention consists in that all of the process steps can be conducted at ambient temperature" (col. 4, lines 29-31). Therefore, regardless of whether or not it would have been obvious to heat the coating ingredients initially to obtain a uniform mixture, absent appellant's disclosure, there would have been no reason to deposit the heated mixture onto the raisins in the Daum process. See In re Gordon, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984) ("The mere fact

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that the prior art could be so modified would not have made the modification obvious unless the prior art suggested the desirability of the modification.").

The examiner has failed to establish that the claimed candy-coated raisin is the same as or obvious from candy-coated raisins produced by the Daum process. The teachings of Minifie and Brown further fail to cure the deficiencies of Daum. Therefore, based on the record before us, we are constrained to reverse the decision of the examiner.

REVERSED

EDWARD C. KIMLIN)
Administrative Patent Judge)
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) BOARD OF PATENT
ADRIENE LEPIANE HANLON) APPEALS
Administrative Patent Judge) AND
) INTERFERENCES
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