

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 12

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte LEONARD GALLEGOS

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Appeal No. 98-2937  
Application D-29/057,491<sup>1</sup>

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ON BRIEF

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Before PATE, STAAB and JERRY SMITH, Administrative Patent Judges.

STAAB, Administrative Patent Judge.

*DECISION ON APPEAL*

This is a decision on an appeal from the final rejection of following design claim:

The ornamental design for an EXTENSION STRUCTURE as shown and described.

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<sup>1</sup> Application for a design patent filed July 25, 1996.

Appellant's ornamental design is disclosed to be for use with flower vases or the like. Figure 4 shows the claimed design atop a flower vase, and supporting a flower through its opening. The vase and the flower are shown in phantom in Figure 4 to indicate that they are for illustrative purposes only and form no part of the claimed design.<sup>2</sup>

The single reference of record relied upon by the examiner in support of a rejection under 35 U.S.C. § 103 is:

Dusseault	2,834,461	May 13, 1958
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*The Rejection*

The claim stands rejected under 35 U.S.C. § 103 as being unpatentable over Dusseault. The examiner explains the rejection on pages 2-3 of the final rejection<sup>3</sup> as follows:

Dusseault, specifically the bottle designated as 32, 33, and 34 in Figs. 2-5[,] has the same overall visual appearance as the claimed design. The fact that the bottle has one closed end does not alter the overall visual appearance since a closed end on a container is functional in nature, the end with the cap is open once the cap is removed, therefore this end is not being discussed.

The visual appearance of the bottle of Dusseault has the same basic

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<sup>2</sup>We note that the size of the opening in the top of the extension as shown in appellant's Figure 2 does not correspond to the size of said opening as shown in Figure 3. This inconsistency is worthy of correction.

<sup>3</sup>The examiner specifically incorporates the statement of the rejection and response to argument sections of the final rejection into the answer. Answer, page 3.

shape as the claimed design, a convex upper portion which curves into a lower vertical neck portion.

Thus it would have been obvious to one of ordinary skill in the art<sup>4</sup> at the time the article was made to take a container and open the closed functional end so something, such as a flower stem may pass through. As to whether the cited reference is analogous, it is pointed out that applicants [sic, applicant's] claimed design is a type of container since it contains a flower stem within a defined space.

Therefore, it is believed that Dusseault discloses the [same] general overall visual appearance as the claimed design, and . . . any difference is of a functional nature which does not contribute to the visual appearance.

It is well settled that it is unobviousness in the overall appearance of the claimed design, when compared with the prior art, rather than minute details or small variations in design as appears to be the case here, that constitute the test of design patentability. See *In re Frick*, [275 F.2d 741], 125 USPQ 191 (CCPA 1960) and *In re Lapworth*, [451 F.2d 1094, 1096], 172 USPQ 129 [131], (CCPA 1971).

In responding to appellant's arguments in the final rejection, the examiner makes the following additional points:

- ! any differences that may exist between Dusseault and the claimed design in the transition area from the bulb portion to the neck "is not seen to affect the overall visual appearance" (final rejection, page 3);
  
- ! appellant's entire claimed design "is extremely similar to the container shown in Dusseault . . . the closed end of Dusseault does

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<sup>4</sup>We presume the examiner means here "the designer of ordinary capability who designs articles of the type presented in the application." *In re Nalbandian*, 661 F.2d 1214, 1216, 211 USPQ 782, 784 (CCPA 1981).

not alter the overall visual appearance since a closed end on a container is functional in nature” (final rejection, page 4);

- ! “[b]oth Dusseault and the claimed design have basically the same length neck” (final rejection, page 4);
- ! “when one looks at the two designs[,] they look alike, it is when one has to search for the difference that establishes that the claimed design is not patentably distinct from Dusseault” (final rejection, page 5).

### *Opinion*

While we appreciate that certain features of appellant’s design, generally speaking, have a counterpart in Dusseault’s squat bottle, namely, the globe-like body portion and the short vertical neck, we must agree with appellant that the claimed ornamental design as a whole would not have been obvious to the designer of ordinary capability who designs articles of the type presented in the application.

First, it appears that the examiner has improperly focused solely upon the appearance of the claimed ornamental design as seen in elevation in formulating the rejection. However, we believe the bottom 38 of Dusseault’s bottle, which we presume to merely be a flat closed bottom in the absence of any indication to the contrary, would present a markedly different visual appearance as compared to the open end of the claimed ornamental design when viewed from below, i.e., as shown in appellant’s Figure 1. In this regard, we simply do not understand the examiner’s position that the closed end

38 of Dusseault's bottle does not alter the overall visual appearance thereof "since a closed end on a container is functional in nature" (final rejection, page 2). In addition, the examiner's position that it would have been obvious to provide an opening in the bottom of Dusseault's bottle is not well taken since to do so would render its incapable of functioning as a bottle.

We also cannot accept the examiner's implied position that the lower section of the vertical neck portion of Dusseault's bottle is smooth and delicate in appearance like that of the claimed design. This is clearly speculative, since the portion of Dusseault's bottle in question is obscured by the cap 35. If anything, it seems to us that the neck of Dusseault's bottle would incorporate some sort of closure structure, such as a threaded portion or a peripheral lip, to cooperate with the cap to provide for a secure closure of the bottle. In any event, Dusseault's disclosure is ambiguous as to the appearance of this portion of the bottle, and it is improper to dismiss the impact this portion has on the overall appearance of the claimed ornamental design, as the examiner has done here.

The examiner also has not adequately treated other features of appellant's ornamental design (e.g., the flanges at the top and bottom openings of the claimed design, and the transition between the globe-like portion and the lower vertical neck) in arriving at her bottom line conclusion that the claimed design and Dusseault's bottle have the same basic overall visual appearance and that any difference are de minimis. In this regard, we

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agree with appellant that the examiner has either improperly dismissed without fair comparison the visual impact of these features on the design as whole, or unreasonably assumed that unseen portions of Dusseault are exactly or colorably similar to such features.

*Conclusion*

In light of the foregoing, we will not sustain the examiner's obviousness rejection of the claimed ornamental design as being unpatentable over Dusseault.

The decision of the examiner is reversed.

REVERSED

	)	
WILLIAM F. PATE, III	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
LAWRENCE J. STAAB	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
JERRY SMITH	)	
Administrative Patent Judge	)	

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