

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL J. LYONS

Appeal No. 1999-0945
Application 08/786,665¹

ON BRIEF

Before FRANKFORT, STAAB and GONZALES, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 3, 4, 11 and 12, which are all of the claims remaining in the application. Claims 1, 2 and 5 through 10 have been canceled.

¹ Application for patent filed January 21, 1997. According to appellant, the application is a continuation of Application 08/369,120, filed January 5, 1995, now abandoned.

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Appellant's invention relates to a reusable, flexible bag or envelope for wrapping and packaging articles of various shapes. As may be seen best in Figures 1 through 5, the bag (10) is of a generally planar configuration and is comprised of a sealed envelope (12) filled with small particles (14) made from a foamed plastic material. The particles are closely packed within the envelope and the air pressure within the envelope is adjusted to be lower than atmospheric pressure. The differential air pressure acting on the bag causes the particles to be pressed together within the envelope and to be in a non-free flowing condition that gives the bag a semi-rigid character. As seen in Figure 1, this semi-rigid characteristic allows the bag to be held at one end thereof in a horizontal orientation without any deviation from its planar shape. However, as seen in Figures 6 through 10, the bag also retains a degree of flexibility such that it may be wrapped or molded by hand about an article to be packaged and will hold that configuration even when removed from the package. The bag may then be returned essentially to its original planar configuration by flattening the bag against any flat surface by hand. Subsequently, the bag may again be

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reconfigured by wrapping or molding it by hand about an article of a different shape. A copy of claims 3, 4, 11 and 12 can be found in the Appendix to appellant's brief.

The sole prior art reference relied upon by the examiner in rejecting the appealed claims is:

Jarvis et al. (Jarvis)	5,515,975	May 14,
1996		(filed Jan. 19,
1994)		

Claims 3, 4, 11 and 12 stand rejected under 35 U.S.C. § 103 as being unpatentable over Jarvis.

Rather than attempt to reiterate the examiner's full commentary with regard to the above-noted rejection and the conflicting viewpoints advanced by the examiner and appellant regarding the rejection, we make reference to the final rejection (Paper No. 9, mailed January 6, 1998) and the examiner's answer (Paper No. 14, mailed November 16, 1998) for the reasoning in support of the rejection, and to appellant's brief (Paper No. 13, filed July 7, 1998) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art reference, and to the respective positions articulated by appellant and the examiner. As a consequence of our review, we have made the determinations which follow.

Looking at page 6 of the brief, we note that appellant has indicated that claims 3, 4, 11 and 12 "stand or fall together." Thus, we focus our discussions below on independent claim 11, and consider that dependent claims 3, 4 and 12 will stand or fall therewith.

Claim 11 on appeal defines a reusable envelope for wrapping and packaging articles of different shapes. That envelope includes lightweight and compressible particles in a closed-packed arrangement positioned within the interior of the envelope, with the interior of the envelope being at a lower air pressure than the atmospheric pressure acting on the

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exterior surface of the envelope. Claim 11 also recites that the envelope and said particles therein collectively define "a planar shape having a thickness of up to about 15 centimeters." The last portion of claim 11 sets forth the requirements of

"said differential air pressure and said thickness collectively maintaining said particles in said closed packed arrangement, providing sufficient rigidity to said envelope to maintain said envelope in said planar shape when being held at one end thereof, and providing sufficient flexibility to said envelope for it to be wrapped around and assume the shape of a first article without change in said differential air pressure, returned to said planar shape without change in said differential air pressure, and for it to be wrapped around and assume the shape of a second and differently shaped article without change in said differential air [sic, pressure]."

In rejecting claims 3, 4, 11 and 12 under 35 U.S.C. § 103 based on the Jarvis patent, the examiner has taken the position that Jarvis discloses an envelope (e.g., 82 in Fig. 5) which includes most of the elements of the claims. With particular regard to claim 11 on appeal, the examiner has indicated that Jarvis lacks an express teaching that the cushion/envelope disclosed therein can have a thickness of up

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to about 15 centimeters. The examiner has concluded however that it would have been obvious to one of ordinary skill in the art to construct the envelope (82) of Jarvis to be anywhere in the range of up to about 15 centimeters, "where it was used to package an appropriately sized article, or to provide an article with more or less protection during transportation of the article" (final rejection, page 2). As for the recitations in the last eight lines of claim 11, the examiner has concluded that although the applied reference to Jarvis does not expressly teach the use of its cushion as recited in that portion of appellant's claim 11, the product sought to be encompassed in claim 11 does not distinguish over Jarvis. More specifically, the examiner urges that such "functional language in claim 11 does not in fact define any specific air pressure differential and certainly does not define air pressure differentials not encompassed in the prior art" (answer, penultimate page).

After our review of the teachings of Jarvis, even if we were to accept the examiner's conclusion that it would have been obvious to one of ordinary skill in the art to provide

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envelopes therein having a thickness in the range of up to about 15 centimeters, we must agree with appellant (brief, pages 10-13) that the resulting structure would still not be that which is set forth in claim 11 on appeal. Upon evacuation, each of the particulate filled envelopes described in Jarvis is said to be "converted from a loose, flexible structure to a compact, rigid structure" (col. 2, lines 60-61), wherein the particles within the envelope and the envelope itself decrease in size and become disposed in intimate contact with a portion of the article to be protected, and the particles within the envelope "form a rigid matrix structure" (col. 6, line 13) about a portion of the article being protected. Jarvis goes on to indicate (col. 6, lines 25-26) that the envelope maintains this shape so long as it is evacuated. By contrast, the envelope defined in appellant's claim 11 on appeal has a differential air pressure and thickness that collectively provides "sufficient rigidity to said envelope to maintain said envelope in said planar shape when being held at one end thereof" (see application Figure 1) and

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"sufficient flexibility to said envelope for it to be wrapped around and assume the shape of a first article without change in said differential air pressure, returned to said planar shape without change in said differential air pressure, and for it to be wrapped around and assume the shape of a second and differently shaped article without change in said differential air [sic, pressure]".

Thus, while the evacuated envelope in Jarvis forms a rigid matrix structure about the article to be protected, which structure is said to maintain its shape so long as the envelope is evacuated, the reusable envelope claimed by appellant is expressly required to have only a certain level of rigidity and to retain sufficient flexibility so that it can be a) wrapped around and assume the shape of a first article to be protected without change in said differential air pressure, b) returned to said planar shape without change in said differential air pressure, and c) wrapped around and assume the shape of a second and differently shape article without change in said differential air pressure. Given such a stark distinction in the physical properties of the packaging envelope of Jarvis compared with those of the packaging envelope claimed by appellant, we must disagree with the examiner's conclusion that appellant's claim

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11 does not distinguish over Jarvis, and also conclude that Jarvis does not teach or suggest a reusable envelope like that defined in appellant's claim 11 on appeal. Once evacuated, the envelope in Jarvis is strictly a rigid structure, without the degree of flexibility required in appellant's claim 11 on appeal. Moreover, it would appear to be entirely contrary to the clear teachings in Jarvis to provide the envelopes therein with a degree of flexibility (in their evacuated state) which would be like that required in appellant's claims before us on appeal.

Since the teachings and suggestions found in Jarvis would not have made the subject matter as a whole of claim 11 on appeal obvious to one of ordinary skill in the art at the time of appellant's invention, we must refuse to sustain the examiner's rejection of claim 11, and of dependent claims 3, 4 and 12 under 35 U.S.C. § 103.

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