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EXAMINER

SHEARER, DANIEL R

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte K. JACQUES SASSOUNI

Appeal 2010-011680
Application 11/636,671
Technology Center 3700

Before STEFAN STAICOVICI, HYUN J. JUNG and
WILLIAM A. CAPP, *Administrative Patent Judges*.

CAPP, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 of the final rejection of claims 10-15. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

THE INVENTION

Appellant's invention relates to collapsible tubes for cream, lotion, gel, toothpaste, etc. Spec. 1. Claim 10, reproduced below, is illustrative of the subject matter on appeal.

Claim 10. In a dispensing tube construction including a flexible tube element (11) (P.4, L.13) of generally cylindrical configuration having a dispensing end, a shoulder element (12) (P.4, L.8) having an end wall having a dispensing opening therein, a lid element (13) (P. 5, L.11) having a cylindrical side wall selectively engaging said shoulder element, and a flexible tab (13) (P.5, L.12) including a hinge member interconnecting said tube element and said lid element, the improvement comprising: said cylindrical side wall of said lid element forming an axially-disposed recess on an inner surface thereof including a locking recess at a closed end thereof; said shoulder element including said tab incorporating said hinge means integrally molded to a peripheral edge thereof engageable within said recess in said lid element to be retained thereby, whereby said lid element may be formed from synthetic resinous material more rigid than the material employed for forming said tube and shoulder element.

THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejections:

Magerle	US 3,313,875	Apr. 11, 1967
Shimizu	US 6,502,722 B1	Jan. 7, 2003

The following rejections are before us for review:

1. Claim 10 is rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.
2. Claims 10 and 15 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failure to particularly point out and distinctly claim the subject which applicant regards as his invention.
3. Claim 11 is rejected under 35 U.S.C. § 102(b) as being anticipated by Shimizu.¹
4. Claims 10, 12 and 14 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Shimizu.
5. Claims 13 and 15 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Shimizu and Magerle.

OPINION

Claim 10 – Rejection Under Section 112, First Paragraph

The Examiner found that the limitation directed to a material for the lid being more rigid than the material for the tube and shoulder was not described in the original Specification or claims. Ans. 3.

Appellant traverses the Examiner's rejection with a single sentence explaining that the limitation at issue relates to a result of the claimed structure and not the claimed structure itself. App. Br. 3. Otherwise, Appellant directs us to no language in the Specification or any of the filed Drawings that furnishes support for the limitation respecting rigidity of the lid element.

¹ Appellant misspelled Shimizu as "Simicu" throughout the Brief. We will hereinafter refer to Shimizu in accordance with its correct spelling.

The patentee's original disclosure serves to limit the permissible breadth of his later-drafted claims. *Gentry Gallery, Inc. v. Berklinc Corp.*, 134 F.3d 1473, 1479 (Fed. Cir. 1998). Appellant has failed to apprise us of error in the Examiner's grounds of rejection. We sustain the Examiner's rejection of claim 10 under 35 U.S.C. § 112, first paragraph.

Claim 10 – Rejection Under Section 112, Second Paragraph

The Examiner rejected claim 10 under 35 U.S.C. § 112, second paragraph, as indefinite based on Appellant's inclusion of the phrase "may be." Ans. 4. The Examiner states that, "may be" is not a positive recitation of claim scope such that it is unclear whether the limitation following the phrase "may be" is part of the claimed invention. Ans. 4, 7.

Without more, Appellant responds by stating that the expression "may be" relates to a result of the claimed structure and not the structure itself. App. Br. 3. We agree with the Examiner that the use of the phrase "may be" fails to make it clear what subject matter the claim encompasses. Thus, because the boundaries of the claim scope cannot be precisely ascertained, we agree with the Examiner that claim 10 is indefinite. We sustain the Examiner's rejection of claim 10 under Section 112, second paragraph.

Claim 15 – Rejection Under Section 112, Second Paragraph

The Examiner rejected claim 15 under 35 U.S.C. § 112, second paragraph, as being indefinite because the limitation "the recesses" lacks antecedent basis. Ans. 4, 7. Appellant responds by pointing out that claim 15 specifically refers to a recess in the lid element (156) and the recess (140). App. Br. 3. Annotated feature 140 in the drawings (Figure 7) is described in the Specification as "part of" recess 158. Spec. 5.

Claim 15 is an apparatus claim that depends from claim 13, which is a method claim that, in turn, depends from claim 11, which is also a method claim. It is unclear how the recesses recited in claim 15 relate to the method claimed in claims 11 and 13. Accordingly, we sustain the Examiner's rejection of claim 15 under Section 112, second paragraph.

Claim 11 – Rejection Under 35 U.S.C. § 102(b)

Appellant challenges the Examiner's anticipation rejection of claim 11 stating only that Figure 26 of Shimizu shows the tab as part of the lid rather than the shoulder. App. Br. 4. However, claim 11 specifically requires the lid to have a tab. App. Br., Clms. App'x. Thus, Appellant effectively admits that Shimizu satisfies the tab/lid limitation. We sustain the rejection of claim 11.

*Claims 10, 12 and 14
Rejection under 35 U.S.C. § 103(a) over Shimizu*

Claims 10 and 12

The Examiner finds that Shimizu discloses all of the elements of claims 10 and 12, except that it does not disclose a tab that is formed integral with the shoulder and the recess formed in the lid. Ans. 5. The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time of the invention to reverse the respective locations of the tab and recess so that the lid had a recess instead of a tab and the shoulder had a tab instead of a recess. Ans. 5-6.

Appellant traverses the Examiner's rejection, stating that claims 10 and 12 claim a lid with a recess and a shoulder with a tab. App. Br. 4. The Appellant observes that Figure 25 of Shimizu shows the tab molded to the lid. *Id.*

Appellant otherwise fails to address the Examiner's conclusion that it would have been obvious to reverse the location of the tab and recess in the dispensing collapsible tube of Shimizu. Ans. 5-6. It is settled that when a patent 'simply arranges old elements with each performing the same function it had been known to perform' and yields no more than one would expect from such an arrangement, the combination is obvious." *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 417 (2007). This principle applies when the old elements in the prior art perform the same function as the now claimed structures. See *In re Kuhle*, 526 F.2d 553, 555 (CCPA 1975). The tab and recess of Shimizu would function in the same manner whether located on the lid and shoulder, respectively, or *vice versa*. We thus agree with the Examiner that merely reversing the essential working parts of a device does not constitute invention. *In re Einstein*, 346 F.2d 373, 374 (CCPA 1931). See Ans. 6. As such, we agree with the Examiner that claims 10 and 12 are unpatentable and sustain the rejection of claims 10 and 12.

Claim 14

Appellant's sole contention is that Shimizu shows a lid with a tab where the hinge is apparently in the transverse wall of the lid and that member 56 of Shimizu does not flex when the container is opened. App. Br. 4. As noted above, Appellant fails to address the Examiner's conclusion that it would have been obvious to reverse the location of the tab and recess in the dispensing collapsible tube of Shimizu. Ans. 5-6. Furthermore, we agree with the Examiner that "[t]he lid element has an axially extending flexible tab (56, 57) extending therefrom that is adapted to be inserted into a recess (52) and locking recess (60) in the shoulder element to achieve a hinged (by 56) interconnection." Appellant has not come forth with any

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persuasive evidence to show error in the Examiner's interpretation. We thus likewise sustain the Examiner's rejection of claim 14.

Claims 13 and 15

Rejection under 35 U.S.C. § 103(a) over Shimizu and Magerle

The Examiner finds that Shimizu discloses all of the elements of claims 13 and 15, except that it does not disclose that the end of the tube is fused with the shoulder while still in relatively molten condition. Ans. 6. The Examiner further finds that Magerle discloses a method for making a collapsible tube with a shoulder element where "the end of the tube is fused with the shoulder element." *Id.* The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time of the invention to fuse the tube and shoulder of Shimizu with the method taught by Magerle "since Magerle discloses that the method allows for faster production of products." *Id.*

With respect to claim 13, Appellant raises no new argument other than cross-referencing the argument with respect to claim 11, from which claim 13 depends. *See* App. Br. 5. Claim 13 falls with claim 11. *See* 37 C.F.R. § 41.37(c)(1)(vii).

With respect to claim 15, Appellant argues that tab 57 of Shimizu is not flexible and that the structure of feature 56 appears to be part of a side wall. App. Br. 5. Appellant also argues that flexible opening of the lid appears to take place at a thin section of the end wall 13 of the lid element. *Id.* Otherwise, Appellant does not challenge that Shimizu and Magerle are combinable references.

In response, the Examiner determines that lid 11 of Shimizu pivots at least about first pair of hinges 56a which are not part of a sidewall of a lid 11. Ans. 8. Appellant has not come forth with any persuasive evidence to

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show error in the Examiner's interpretation . We agree with the Examiner that there is no evidence of record to support Appellant's position as to claim 15. Ans. 8; *see also Johnston v. IVAC Corp.*, 885 F.2d 1574, 1581 (Fed. Cir. 1989)(attorney argument is no substitute for evidence). We thus sustain the Examiner's rejection of claim 15.

DECISION

The decision of the Examiner to reject claim 10 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement is affirmed.

The decision of the Examiner to reject claim 10 under 35 U.S.C. § 112, second paragraph, as indefinite is affirmed.

The decision of the Examiner to reject claim 15 under 35 U.S.C. § 112, second paragraph, as indefinite is affirmed.

The decision of the Examiner to reject claim 11 as anticipated under 35 U.S.C. § 102(b) is affirmed.

The decision of the Examiner to reject claims 10 and 12-15 as unpatentable under 35 U.S.C. § 103(a) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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