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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/468,281	05/19/2009	William P. Apps	0544 PUS3; 67080-286PUS3	9643
26096	7590	11/16/2016	EXAMINER	
CARLSON, GASKEY & OLDS, P.C. 400 WEST MAPLE ROAD SUITE 350 BIRMINGHAM, MI 48009			CASTELLANO, STEPHEN J	
			ART UNIT	PAPER NUMBER
			3781	
			NOTIFICATION DATE	DELIVERY MODE
			11/16/2016	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte WILLIAM P. APPS

Appeal 2014-009171
Application 12/468,281¹
Technology Center 3700

Before JILL D. HILL, THOMAS F. SMEGAL, and
GORDON D. KINDER, *Administrative Patent Judges*.

SMEGAL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

William P. Apps (Appellant) seeks our review under 35 U.S.C. § 134 of the Examiner’s final rejection² under 35 U.S.C. § 103(a) of claims 14–22, 24–33, 35–38, 40–42, and 44–46 as unpatentable over Apps (US 4,899,874, iss. Feb. 13, 1990) and Wallace (US 4,101,049, iss. July 18, 1978); and of claims 39, 41, 43, and 45 as unpatentable over Apps, Wallace, and Arthurs (US 4,928,841, iss. May 29, 1990).³ We have jurisdiction under 35 U.S.C. § 6(b).

¹ According to Appellant, the real party in interest is Rehrig Pacific Company. Appeal Br. 1.

² Appeal is taken from the adverse decision of the Examiner as set forth in the Final Action, dated October 28, 2013 (“Final Act.”).

³ Claims 1–13 have been canceled. *See* Amendment filed February 22, 2011. Claims 23 and 34 are no longer the subject of rejection, as the

We AFFIRM.

CLAIMED SUBJECT MATTER

Claims 14 and 27 are independent. Claim 14 is reproduced below and illustrates the claimed subject matter, with disputed limitations emphasized.

14. A low depth tray for bottles comprising:
a base;
at least one interior column projecting upwardly from the base;
a plurality of interior divider structures which project upwardly from the base, wherein each of the plurality of interior divider structures extends from the at least one interior column, and *each of the plurality of interior divider structures includes a first pocket side spaced apart from a second pocket side and having an area void of material therebetween*; and
an exterior wall structure directly attached to the base, wherein the exterior wall structure extends continuously around a perimeter of the tray.

ANALYSIS

Obviousness of Claims 14–22, 24–33, 35–38, 40–42, and 44–46 over Apps and Wallace

Claims 14–20, 24–32, 35–38, 40–42, and 44–46

Appellant argues claims 14–20, 24–32, 35–38, 40–42, and 44–46 together in contesting the rejection of these claims as obvious over Apps and Wallace. *See* Appeal Br. 3–4; Reply Br. 1–2. We select claim 14 as the representative claim for this group, and the remaining claims stand or fall with claim 14. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Examiner withdrew several non-statutory obviousness-type double patenting rejections. *See* Ans. 2.

In rejecting claim 14, the Examiner finds that Apps discloses a low depth tray for bottles, having all the structural elements recited by the claim, including a plurality of interior divider structures which project upwardly from the base and extend from the interior column, but “fails to disclose the void between the two spaced apart sides of the divider structures.” Final Act. 2. However, the Examiner also finds that “Wallace teaches divider walls having a first side adjacent to one pocket [and] a second side adjacent to an adjacent pocket,” where “the divider [walls are] hollow or [of] double-walled construction and the first and second side[s] are spaced apart having an area void of material therebetween,” and reasons that

[i]t would have been obvious to modify the divider walls of Apps to be hollow with an area void of material extending between the two sides in order to provide a divider which absorbs shock and impact loads to prevent the impact on one side of the divider from transferring to the other side or to prevent an impact load to one pocket from penetrating towards another pocket.

Id. at 2–3. The Examiner explains that “the modification with Wallace doesn’t change the shape of the divider,” because “[t]he two sides remain planar with the respective planes of the two sides being parallel.” *Id.* at 3.

Appellant first contends that, while disclosing “a case 10 having vertical walls 29 that abut columns 30 to help secure the columns 30 to a bottom portion 20,” Apps “does not disclose that the vertical walls 29 are incapable of absorbing shock and impact loads, and there is no reason to modify the case 10 of Apps [] to perform these functions.” Appeal Br. 3; Reply Br. 1.

However, we agree with the Examiner that it isn’t necessary for Apps to “discuss a deficiency before [Apps] could be modified by a secondary

reference that teaches a solution to the deficiency.” Ans. 3. As the Examiner explains, “Wallace is a better structural construction for absorbing shock and impact” because

modification of the divider [of Apps] to be two spaced walls, one wall associated with one pocket and the other wall associated with an adjacent pocket, with an area void of material between would allow the two adjacent pocket walls, one wall to deflect and absorb impact without or with minimal effect on the other adjacent wall.

Id.

The Examiner also reasons that this modification of Apps “allows shock and impact forces to be absorbed to the benefit of the objects held within the pockets by reducing the forces in adjacent pockets,” while “[t]he void area of Wallace allows for delicate objects to be handled in an efficient manner without detriment of impact loads and damage to the objects held within the pockets during shipping and storage.” *Id.* at 3–4. Furthermore, the Examiner explains that “[a]dded space between adjacent objects held within the pockets [of Apps] would be another motivational reason to add the area void of material” as “[t]his would reduce the possibility of objects touching, thus reducing damage,” from which “Apps would benefit by reducing bottle breakage or scuffing” or “fruit bruising.” *Id.* at 4.

We agree, also noting that “when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result.” *KSR Int’l*, 550 U.S. at 416. Appellant does not apprise us of error in the Examiner’s factual findings or the conclusion as to obviousness.

Referring to Figures 12 and 16 of Apps, Appellant next contends that Apps “discloses that the walls 29 are not even required.” Appeal Br. 3. Appellant continues by asserting that “the absence of walls in this embodiment further supports that bottle breakage or scuffing is not a concern is [sic] Apps.” Reply Br. 2. However, Appellant misreads the Examiner’s final rejection which is based on the disclosure of vertical walls 29, as illustrated in Figures 1–11 of Apps. We agree with the Examiner that “[e]vidence of alternate embodiments or evidence that an element can be removed entirely does not negate the teaching [relied upon],” confirming that “divider 29 is very much present in the disclosure [of Apps].” Ans. 4.

Appellant also contends that “the very thin structure of the vertical walls 29 makes it is [sic] difficult to provide a void in the vertical walls 29 [while] adding an area void of material would result in two much thinner and weaker opposing walls,” so that “the resulting structure would be less able to absorb shock and impact loads.” Appeal Br. 3–4. Appellant alternatively contends that “if the vertical walls 29 were made thicker to accommodate a void, the pockets of Apps et al. would [either] become smaller, and the objects would not be able to fit in the pockets[, or] the structure of the case 10 would need to be made larger.” *Id.* at 4. However, “[a] person of ordinary skill in the art is also a person of ordinary creativity, not an automaton.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421, (2007). “[I]n many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *Id.* at 420. Office personnel may also take into account “the inferences and creative steps that a person of ordinary skill in the art would employ.” *Id.* at 418. We are not

persuaded that one skilled in the art would not understand how to accommodate a void in Apps' walls.

In view of the foregoing, we sustain the Examiner's rejection of claims 14–20, 24–32, 35–38, 40–42, and 44–46 as obvious over Apps and Wallace.

Claims 21 and 22

Appellant contends that neither Apps nor Wallace disclose “that the plurality of external columns define an exterior wall structure having a first pair of opposed walls connected to a second pair of opposed walls,” as recited by claims 21 and 22. Appeal Br. 4. However, the Examiner points out that “the external (side, end and corner) columns 30 of Apps are all attached to an external wall (side and end wall) and are considered part of that external wall,” and observes that “Appellant might be referring to the exterior surface of the external columns being flush with interior surfaces of a perimeter wall,” but “this distinction is never claimed.” Ans. 5. Appellant has not apprised us that the Examiner's rationale is in error.

Accordingly, and based on the record presented, we sustain the Examiner's rejection of claims 21 and 22 as obvious over Apps and Wallace.

Claim 33

Appellant asserts that neither Apps nor Wallace disclose “that the plurality of external columns define an exterior wall structure having a double-walled construction,” as recited by claim 33, contending the side walls of Apps “that define the exterior wall structure have a single walled construction.” Appeal Br. 4. However, Appellant misreads Apps. As the

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Examiner points out, “the external columns of Apps are double-walled with respect to having an inner wall spaced from an outer wall by a void area.”

Ans. 5. Again, Appellant has not apprised us of a definition of the term “double-walled construction” that renders the Examiner’s finding erroneous.

Accordingly, and based on the record presented, we sustain the Examiner’s rejection of claim 33 as obvious over Apps and Wallace.

Obviousness of Claims 39, 41, 43, and 45 over Apps, Wallace, and Arthurs

Claims 39 and 43

Claims 39 and 43 are dependent on claims 14 and 27, respectively, and further limit the claims from which they depend, by reciting that “the exterior wall structure includes a first pocket side spaced apart from a second pocket side and an area void of material therebetween.” *See* Appeal Br. 11, 12 (Claims App.). We understand Appellant’s appeal of the rejection of claims 39 and 43 to rest on the same arguments presented against the proposed combination of Apps and Wallace, which we found not

demonstrative of error in the Examiner's rejection of claims 14 and 27, as set forth *supra*. Compare Appeal Br. 5, with Appeal Br. 3–4.

Accordingly, we sustain the rejection of claims 39 and 43 as being obvious over Apps, Wallace, and Arthurs, for the same reasons stated above with respect to the rejection of claims 14 and 27 over Apps and Wallace.

Claims 41 and 45

We affirm the rejection of claims 41 and 45 under 35 U.S.C. § 103(a) as being obvious over Apps and Wallace.⁴ This affirmance disposes of those claims before us on appeal. See 37 C.F.R. § 41.50(a)(1) (“The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim, except as to any ground specifically reversed.”).

DECISION

We AFFIRM the Examiner's rejections.

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

AFFIRMED

⁴ The Examiner's final rejection of claims 41 and 45 as obvious over Apps and Wallace is set forth at pages 4–5 of the final rejection.