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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOHN FELL, BARRY FRIZELL,
and WOLFGANG ZIMMERER¹

Appeal 2018-003822
Application 12/352,478
Technology Center 3700

Before JOHN C. KERINS, JAMES P. CALVE, and
FREDERICK C. LANEY, *Administrative Patent Judges*.

KERINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

John Fell et al. (Appellants) appeal under 35 U.S.C. § 134(a) from the Examiner's decision to reject claims 1, 3–7 and 9–14. We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

We AFFIRM.

¹ INNOVIA FILMS LIMITED is identified as the real party-in-interest in the Appeal Brief. Appeal Br. 3.

THE INVENTION

Appellants' invention relates to a naked collation package.

Independent claim 1 is illustrative of the claimed invention and reads as follows:

1. A naked collation package for facilitating removal of an individual unit from a unit row, comprising:

a plurality of individual units laid end-to-end or side-by-side to form a unit row comprising at least one interface between a neighbouring pair of individual units in the unit row;

the unit row being overwrapped with a sheet of polymeric film having a length and a width;

the length of the sheet being sufficient to envelop the unit row with sufficient overlap between a first end and a second end of the sheet to provide an overlap region for providing a girth seal along at least part of the length of the unit row;

the sheet being sealed to itself in that region to provide the girth seal;

the width of the sheet being longer than the unit row to provide an envelope seal region in at least one end of the unit row so that the wrapped and girth-sealed sheet is able to fold over and seal to itself at the at least one end of the unit row to provide an envelope seal;

the sheet being folded and sealed to itself in that region to provide the envelope seal; and

the sheet being provided along its length with a continuous line of weakness positioned in substantial register with a continuous length of the interface, the continuous line of weakness comprising a longitudinal axis parallel to the continuous length of the interface,

wherein the continuous line of weakness is a continuous oscillating line of weakness which extends across the entire length of the sheet,

wherein flexing the package in the region of the interface causes an individual unit or group of units to be snapped off from the remainder of the package whilst leaving the remainder of the package substantially intact.

THE REJECTIONS

The Examiner has rejected:

(i) claims 1, 3–5 and 13 under 35 U.S.C. § 103(a) as being unpatentable over Fabriques (DE 296 22 554 U1, published May 22, 1997)² in view of Suzuki (US 5,048,687, issued Sept. 17, 1991) and Vogt (US 2,752,037, issued June 26, 1956);

(ii) claim 6 under 35 U.S.C. § 103(a) as being unpatentable over Fabriques in view of Suzuki, Vogt, and Rigby (US 4,836,438, issued June 6, 1989);

(iii) claims 7, 9–11, and 14 under 35 U.S.C. § 103(a) as being unpatentable over Fabriques in view of Robins (US 3,047,140, issued July 31, 1962) and Vogt; and

(iv) claim 12 under 35 U.S.C. § 103(a) as being unpatentable over Fabriques in view of Robins, Vogt, and Rigby.

² The Applicant named in this German reference is Fabriques de Tabac Réunies S.A. The Examiner and Appellants refer to the reference as “Fabriques,” and so do we for consistency in the record. Any citation herein to the text of this reference is to a machine-generated English-language translation by the European Patent Office, of record in the application file.

ANALYSIS

Claims 1, 3–5 and 13--Fabriques/Suzuki/Vogt

Appellants' arguments are directed generally to independent claims 1 and 13, and no separate substantive arguments are presented for dependent claims 3–5. Because Appellants raise the same arguments for claims 1 and 13, we will take claim 1 as representative. Independent claim 13, and dependent claims 3–5, will stand or fall with claim 1.

The Examiner relies on Fabriques as teaching most of the limitations of claim 1, and relies on Suzuki as disclosing a packaging material of polymeric shrink film, and on Vogt as teaching the use of oscillating lines of weakness on a packaging material. Final Act. 3–4. The Examiner concludes that it would have been obvious to modify the Fabriques packaging to include the features disclosed in Suzuki and Vogt. *Id.* Appellants do not take issue with the modification of Fabriques to employ a polymeric shrink wrap material, but do take issue with the Examiner's position relative to the alleged obviousness of employing oscillating lines of weakness, as taught by Vogt, in place of the straight-line lines of weakness disclosed in Fabriques. Appeal Br. 8–10; Reply Br. 2–4.

Appellants first argue that Vogt discloses using oscillating lines of weakness across only a portion of the length of the packaging sheet, and that Vogt teaches away from having the line of weakness extend across the entire length, whereas claim 1 requires the oscillating line of weakness to extend across the entire length of the sheet. Appeal Br. 8–9. Appellants thus argue that a combination of that teaching with Fabriques would result in a packaging having an oscillating line of weakness that does not extend across

the entire length of the sheet, and thus would not meet all limitations of claim 1. *Id.*

The Examiner responds that Fabriques is relied on as teaching having a line of weakness extending across the entire length of the sheet, and that the proposed modification is to modify that line of weakness to take on an oscillating shape instead of a straight-line shape. Ans. 10. The Examiner also points out, in any event, that the teaching in Vogt of using an oscillating line of weakness across less than an entire length of the packaging sheet is essentially a teaching of one alternative, and that additional weakening can be obtained by extending score lines to the margins of the sheet, thus undermining any “teaching away” argument. *Id.* at 9 (citing Vogt, col. 3, ll. 20–25 and col. 4, ll. 12–17). After considering the evidence cited, we are persuaded that the Examiner has the better position here.

Additionally, Appellants’ argument that the structure resulting from modifying Fabriques in view of Vogt would have a line of weakness that does not extend across the entire length of the sheet is in the nature of requiring a bodily incorporation of an exact structure disclosed in Vogt. This argument fails to take into account the teachings of Fabriques and fails to address directly the Examiner’s findings regarding what the *combined* teachings of the references demonstrate would have been considered to have been obvious to a skilled artisan at the time of the invention. The argument thus does not apprise us of error in the rejection.

Appellants additionally argue that the Fabriques reference itself teaches away from the proposed modification from a straight-line line of

weakness to an oscillating line of weakness. Appeal Br. 9–10; Reply Br. 2–

4. In support, Appellants cite to a portion of *Fabriques* that states:

Thus, because each pre-cut line 11 is located exactly opposite the separation point between two successive packets, simply breaking it by pushing a fingernail into the pre-cut line will not damage the article.

Fabriques 2:10–12; *see* Appeal Br. 10.

Appellants maintain that a person of ordinary skill in the art would not be motivated to modify these pre-cut straight lines to oscillating lines, because then the line of weakness would not be arranged exactly opposite to the separation point between two successive objects. Appeal Br. 10. The Examiner takes the position that *Fabriques* is principally directed to providing weakened lines that allow the packages to be separated into a number of parts, each containing at least one packet, while the remainder of the package remains intact and holding any remaining packets. Ans. 11. The Examiner points out that using oscillating lines, as disclosed in *Vogt*, achieves exactly the same function. *Id.*

The portion of *Fabriques* that Appellants cite to support this argument does not persuasively establish that *Fabriques* criticizes, discredits or otherwise discourages the use of an oscillating line of weakness of the type disclosed in *Vogt*, as is required to rise to the level of a teaching away. *See In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004); *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994). *Fabriques* discusses how the provision of lines of weakness provide benefits over packaging employing tear strips or threads previously used to separate one portion or section of a package from another, and advises that its approach “requires no separation aid.” *Fabriques*, 1:17–21, 2:8–10. *Fabriques* does not compare, whether favorably or not, the use

different configurations of lines of weakness, such as oscillating ones, to straight-line ones. The oscillating lines of weakness disclosed in Vogt allow for the same type of separation that Fabriques teaches; both allow for separation of one or more products from the remaining products without the need for tear strips or other separation aids. As such, we do not agree with Appellants that Fabriques teaches away from the modification proposed by the Examiner.

The rejection of claim 1 is therefore sustained. Independent claim 13 and dependent claims 3–5 fall with claim 1.

Claim 6--Fabriques/Suzuki/Vogt/Rigby

Appellants rely solely on the substantive arguments raised in connection with the rejection of claim 1, and further aver that Rigby does not remedy the deficiency in the combination of references cited in rejecting claim 1. Appeal Br. 10. For the reasons discussed in the preceding section, we are not apprised of error in the rejection or of any deficiency in the combination of the teachings of the references cited in the rejection of claim 1. The rejection of claim 6 is sustained.

Claims 7, 9–11, and 14--Fabriques/Robins/Vogt

Appellants rely solely on the substantive arguments raised in connection with the rejection of claim 1 in challenging the rejection of these claims. Appeal Br. 11. For the reasons discussed in the preceding section, we are not apprised of error in that rejection. The rejection of claims 7, 9–11, and 14 is sustained.

Claim 12--Fabriques/Robins/Vogt/Rigby

Appellants rely solely on the substantive arguments raised in connection with the rejection of claim 1, and further aver that Rigby does not remedy the deficiency in the combination of references cited in rejecting claim 1. Appeal Br. 11. For the reasons discussed in the preceding section, we are not apprised of error in the rejection or of any deficiency in the combination of the teachings of the references cited in the rejection of claim 1. The rejection of claim 12 is sustained.

DECISION

The rejections of claims 1, 3–7 and 9–14 are 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