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14/988,386	01/05/2016	Johannes BAYER	CFLAY.01054	6872
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Carstens & Cahoon, LLP PO Box 802334 Dallas, TX 75380			AXTELL, ASHLEY	
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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* Johannes BAYER, MARTIN BERNHARD DIERL, EDUARD EDWARDS, NIKLAS GUSTAFSSON, DAVID LESTAGE, SUNITHA NAIR, BICH-VAN PHAM, STEPHEN TYNER, and PATRICK RYAN WINDLEY

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Appeal 2018-008765  
Application 14/988,386  
Technology Center 1700

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Before CATHERINE Q. TIMM, JEFFREY T. SMITH, and JAMES C. HOUSEL, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner’s final decision to reject claims 1–26. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Frito-Lay North America, Inc. Appeal Br. 2.

The following rejections are presented for appeal: <sup>2</sup>

I. Claims 1–4, 7–15, and 18–22 are rejected under 35 USC § 103 as unpatentable over Craddock et al. (US 3,079,062, issued Feb. 26, 1963) in view of Wollen et al. (WO 96/22230, published July 25, 1996) in view of Unilever (DE 7838633, issued Nov. 7, 1978 (Espacenet Translation)) (“Unilever”) in view of Schneider et al. (US 3,224,640, issued Dec. 21, 1965) in view of Imer (US 5,228,782, issued July 20, 1993).

II. Claims 5, 6, 16, and 17 are rejected under 35 USC § 103 as being unpatentable over Craddock, Wollen, Unilever, Schneider, Imer, Franic (EP 1103472 A2, published May 30, 2001 (Espacenet Translation)), and Huth et al. (US 2008/0023534 A1, published Jan. 31, 2008).

III. Claims 23–26 are rejected under 35 USC § 103 as being unpatentable over Craddock, Wollen, Unilever, Schneider, Imer, and Chapman (US 2,143,646, issued Jan. 10, 1939).

Appellant’s invention relates to a snack container with a three dimensional base and a two dimensional top. (Spec. ¶ 2.) Claim 1 is illustrative of the subject matter on appeal and is reproduced below:

1. A snack container having a base, side walls, and a top edge, said top edge having a left side and a right side, wherein said container comprising:
  - a substantially square base, said base having left, right, front, and back corners,
  - wherein the final container is rigid;

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<sup>2</sup> The complete statement of the rejection on appeal appears in the Final Office Action. (Final Act. 2–16).

a first fold starting at the left corner of said base and terminating at the left side of the top edge of the container;

a second fold starting at the right corner of said base and terminating at the right side of the top edge of the container;

a first “V” shaped crease starting at the front corner of said base and terminating at the first and second folds at points in the same horizontal plane below the top edge of the container;

a second “V” shaped crease starting at the back corner of said base and terminating at the first and second folds at points in the same horizontal plane as the top of the first “V” shaped crease;

a flat portion defined by the top edge of the container and extending to a horizontal tear feature located above the termination points of the “V” shaped creases, wherein below the termination points of the top of the “V” shaped creases the folds and “V” shaped creases define four right-triangle shaped side walls and two isosceles triangle shaped side walls, wherein further above the termination points of the top of the “V” shaped creases the container consists of two side walls which are in planar contact with each other above the horizontal tear feature, thus forming a top seal and forming a front surface and a back surface, both of said surfaces located above the termination points of the “V” shaped creases;

a front score line along the front surface running from the first fold to the second fold;

a back score line along the back surface running from the first fold to the second fold, wherein the intersectional positions of the front score line at the first fold and the second fold corresponds to the intersectional positions of the back score line at the first fold and the second fold, wherein further said vertical location of the intersectional position of each score line at the first fold

is different from the vertical location of the intersectional position of each score line at the second fold; and  
a cut below said front score line and within the first “V” shaped crease.

### OPINION<sup>3</sup>

We have reviewed each of Appellant’s arguments for patentability. We will not sustain the Examiner’s rejections for essentially those reasons expressed by Appellant. (App. Br. 8–20.)

The Examiner finds Craddock describes a tapered container comprising first and second “V” shaped creases starting at the base and terminating at the first and second fold points in the same horizontal plane as the top of the first and second “V” creases. (Final Act. 3; Figs. 1–2.) The Examiner recognizes Craddock fails to describe several elements including the horizontal tear feature and a top seal as required by independent claims 1 and 12. (Final Act. 3–4.) Craddock also fails to teach or suggest the intersectional positions of the first and second score lines as required by independent claims 1 and 12. The Examiner cites Wollen and Unilever to suggest modifying Craddock to meet the requirements of independent claim 1 and 12. (Final Act. 4–9.) The Examiner recognizes that the combination of Craddock, Wollen, and Unilever fails to describe the intersectional positions of the first and second score lines as required by independent claims 1 and 12. (Final Act. 9.) The Examiner cites Schneider and Imer for describing the intersectional positions of the first and second score lines as required by independent claims 1 and 12. (Final Act. 9.) The Examiner

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<sup>3</sup> We limit our initial discussion to independent claims 1 and 12.

concluded:

It would have been obvious to one of ordinary skill in the art modify Craddock in view of Wollen in view of Unilever NV in view of Schneider such that the vertical location of the intersectional position of each score line at the first fold is different from the vertical location of the intersectional position of each score line at the second fold as taught by Imer since Imer teaches it was well known in the art to reclose an open container by folding the opened top at an angle in order to secure the opened top into a cut below the fold to prevent remaining contents of the opened container from spilling out and since it would have been obvious to use known techniques to improve similar products in similar ways to obtain predictable results.

(Final Act. 10.)

The prior art references cited by the Examiner alone or in combination fails to teach or suggest a front score line along the front surface running from the first fold to the second fold, and a back score line along the back surface running from the first fold to the second fold, wherein the intersectional positions of these score lines correspond to each other and whose vertical locations at the first and second folds are different, as required by independent claims 1 and 12. The Examiner's discussion in the Answer, 8–10, does not adequately explain why the score lines required by the claimed invention would have been obvious over the cited prior art. Schneider and Imer do not teach a package having intersectional positions of score lines at folds as required by the claimed invention because the containers are flexible packages that do not include folds and are heat sealed. (Schneider 1, ll. 9–14; Imer 1, ll. 5–11.) The Examiner has not adequately explained why a person of ordinary skill in the art would have looked to heat sealed flexible packaging to suggest score lines running between various folds of cardboard packaging such as described by Craddock and Wollen.

Accordingly, a preponderance of the evidence supports Appellant’s position that the Examiner is using impermissible hindsight to reconstruct Craddock, Wollen, Unilever, Schneider, and Imer. (App. Br. 15–16.) The Examiner has not adequately explained why the skilled artisan’s knowledge or inferences and creativity would have supported the obviousness determination based on the teachings of the applied references without an improper hindsight reconstruction. The fact finder must be aware “of the distortion caused by hindsight bias and must be cautious of arguments reliant upon ex post reasoning.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007) (citing *Graham v. John Deere Co.*, 383 U.S.1, 36 (1966) (warning against a “temptation to read into the prior art the teachings of the invention in issue”)).

The Examiner does not establish that the additional references as applied in the § 103 rejections of dependent claims 5, 6, 16, 17, and 23–26 cure these deficiencies and/or otherwise provides another rationale that cures these deficiencies.

Accordingly, we reverse the § 103 rejections on appeal.

## DECISION

The Examiner’s rejections are reversed.

## DECISION SUMMARY

<b>Claims Rejected</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1-4, 7-15, and 18-22	§ 103 Craddock, Wollen, Unilevel, Schneider, and Imer		1-4, 7-15, and 18-22
5, 6, 16, and 17	§ 103 Craddock, Wollen, Unilevel, Schneider, Imer, Franic, and Huth		5, 6, 16, and 17
23-26	§ 103 Craddock, Wollen, Unilevel, Schneider, Imer, and Chapman		23-26
<b>Overall Outcome</b>			1-26

REVERSED