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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte RYAN BUYNAK and MICHAEL WEINSTEIN

Appeal 2019-004407
Application 13/682,215
Technology Center 3700

Before JEREMY M. PLENZLER, GEORGE R. HOSKINS, and
MICHAEL L. WOODS, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 3–11, 13–20, 22, and 23. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Mattel, Inc. Appeal Br. 3.

CLAIMED SUBJECT MATTER

The claims are directed to toy packaging. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A packaging assembly for a toy, comprising:
 - a backing sheet; and
 - a blister pack attached to the backing sheet, the blister pack comprising:
 - a body portion,
 - an insert positioned within the body portion, the insert comprising a first and second cavity,
 - a light source positioned within the first cavity of the insert, and
 - a product positioned within the second cavity of the insert so the light source illuminates the product when actuated, wherein the product contains a photochromatic portion that is responsive to the light produced from the light source.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Yu	US 7,392,906 B2	July 1, 2008
Schmidt	US 2007/0128972 A1	June 7, 2007

REJECTION

Claims 1, 3–11, 13–20, 22, and 23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Schmidt and Yu.

OPINION

Appellant argues claims 1, 3–11, 13–20, 22, and 23 as a group.² We select claim 1 as representative. Claims 3–11, 13–20, 22, and 23 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Schmidt teaches a toy set as required by claim 1, but fails to teach a packaging assembly. Final Act. 3. The Examiner finds that Yu teaches a packaging assembly. *Id.* at 3–4. The Examiner reasons that “[i]t would have been obvious . . . to have packaged the product 300 and the light source 110 of Schmidt, in the packaging assembly of Yu” to “allow[] the product to be tried prior to purchasing to educate a potential purchaser about the product as taught by Yu.” *Id.* at 4 (citing Yu 1:27–30).

In the Answer, the Examiner clarifies that

the primary reference used in the rejection is Schmidt and . . . [t]he Yu reference is only used to show that at the time of the invention, it was well known to package a light source and a product to be activated by the light source within a blister package for allowing a user to try the light source and the product prior to purchasing.

Ans. 3. The Examiner finds that “Yu . . . is already designed to accommodate two products (a light source and reflector i.e., a device to be activated by the light source).” *Id.* at 5.

The Examiner’s rejection is largely un rebutted. Appellant’s contention that “replac[ing] the reflector 24 of Yu with one of the photo-

² Appellant notes that claim 11 includes similar features to claim 1, and also reproduces the language of claim 11 with general allegations that those features are not taught by the references (Appeal Br. 18, 22–24), which does not amount to separate argument (*See* 37 C.F.R. § 41.37(c)(1)(iv)).

chromic toys 100, 300, 400 of *Schmidt* . . . would change the principle of operation of the invention of *Yu*” (Appeal Br. 18–19) does not address the Examiner’s rejection. As noted above, the Examiner does not propose modifying *Yu*’s teachings. Rather, the Examiner cites *Yu* in support of a finding that “it was well known to package a light source and a product to be activated by the light source within a blister package for allowing a user to try the light source and the product prior to purchasing” (Ans. 3), which Appellant does not rebut.³

Appellant further contends that “*Yu* clearly discloses that the ‘product’ is the flashlight, not the reflector 24, and one of ordinary skill in the art would never interpret the reflector 24 of the shell 11 of the package 10, 50, 80 of *Yu* as the ‘product’ of *Yu*.” Appeal Br. 21. Appellant contends that “instead of replacing *Yu*’s reflector 24 with one of *Schmidt*’s non-reflective photo-chromic toys 100, 300, 400 . . . one of ordinary skill in the art would replace only the ‘product’ of *Yu* (i.e., the flashlight F) with the ‘products’ of *Schmidt*.” *Id.* at 22. Again, as noted above, “[t]he *Yu* reference is only used to show that . . . it was well known to package a light source and a product to be activated by the light source within a blister package.” Ans. 3. Regardless of whether or not reflector 24 is the “product” of *Yu*, there is no dispute that the package of *Yu* provides for “reflector 24 . . . [being] in a position so as to receive light output from a flashlight light source.” *Yu* 3:1–2. The Examiner’s proposed modification simply provides a blister package for *Schmidt*’s product and light source that allows *Schmidt*’s product to be illuminated while in the package. The Examiner is

³ Appellant did not file a Reply Brief in response to the Examiner’s Answer.

proposing packaging Schmidt's product and light source, and is not modifying the products packaged in Yu.

Appellant also contends that “the combination fails to teach, suggest, or disclose the feature of ‘an insert positioned within the body portion, the insert comprising a first and second cavity’ where ‘a product is positioned within the second cavity.’” Appeal Br. 23–24. As Appellant acknowledges, however, Yu has a “receiving contour 54 . . . that is L-shaped and extends partially through a front surface of the insert 52 and the top surface of the insert 52.” *Id.* at 24. Appellant contends that because the legs of the “L-shaped” contour are not separated from one another, they cannot be considered separate cavities (i.e., the “first and second cavity” recited in the claims). *Id.*

Appellant does not identify anything in the claim or the Specification requiring such a limited reading of the claim. Based on the record before us, we see no reason why the two distinct regions of the “L-shaped” contour (each leg) cannot properly be considered the “first and second cavity” required by the claims. Indeed, this is consistent with Appellant's Figure 3, which is reproduced below.

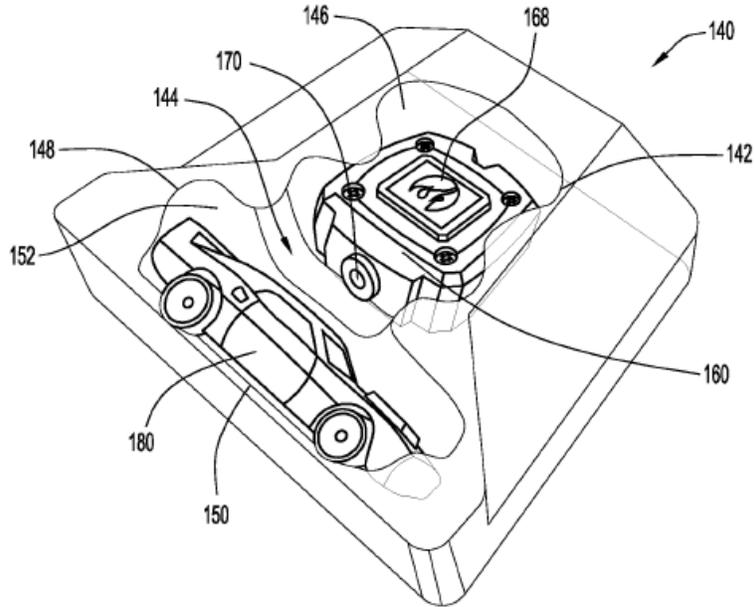


FIG.3

Appellant's Figure 3 is a front perspective view of the blister pack insert. Figure 3 illustrates first cavity 146 and second cavity 152, which are part of the same shaped contour (i.e., wall portions 142, 148 and surface 144). Spec. ¶ 41.

For at least the reasons set forth above, Appellant does not apprise us of error. Accordingly, we sustain the Examiner's decision to reject claims 1, 3-11, 13-20, 22, and 23.

CONCLUSION

The Examiner's rejection is affirmed.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3–11, 13–20, 22, 23	103(a)	Schmidt, Yu	1, 3–11, 13–20, 22, 23	

TIME PERIOD FOR RESPONSE

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