Intellectual Property Office

BL O/0702/23

21 July 2023

PATENTS ACT 1977

APPLICANT	Obrist Closures Switzerland Gmbh
ISSUE	Whether patent application GB2016335.8 complies with sections 1(1)(a) and 2 of the Patents Act 1977
HEARING OFFICER	B Micklewright

DECISION

Introduction

1 Patent application GB2016335.8, in the name of Obrist Closure Switzerland Gmbh, is the national phase entry of international application PCT/EP2019/060821 filed under the Patent Cooperation Treaty (PCT) on 26 April 2019. Priority was claimed from three earlier GB applications with priority dates of 26 April 2018, 1 October 2018 and 12 December 2018 respectively. The application was published as WO 2019/207149 A1. The national phase application was allocated GB publication number GB 2586757 A.

2 The examiner raised various novelty and inventive step objections during the prosecution of this application. Moreover several sets of third-party observations have been submitted and considered by the examiner. The examiner and the attorney could not reach agreement and the matter accordingly came before me at an online hearing on 12 May 2023. At the hearing the applicant was represented by Mr Bruce Jones of Kuits and Dr Greenwood of Bryers.

3 In their pre-hearing report the examiner argued that the claims lack novelty and/or an inventive step. There is a question as to whether independent claims 1 and 2 relate to a single inventive concept. The examiner has not however raised unity of invention in their latest report and I will not therefore consider it in this decision. If this application was found to be allowable in relation to novelty and inventive step then the application would need to be referred back to the examiner for a consideration of unity of invention.

4 The issue of entitlement of the claimed inventions to the claimed priority date arose during prosecution of the application. I will consider this briefly below. It will also be necessary for me to consider whether it is possible to extend the compliance period so that further amendments may be filed, following a request from the applicant's representatives at the hearing. I will consider this in my assessment.

The invention

5 The invention relates to a non-removable and tamper-evident flip-top sports closure. Such a closure could for example be used for a sports bottle where the bottle is intended to be drunk directly therefrom. The closure has a lid and a base, and the lid has a dispensing spout. The lid is hinged to the base of the closure. The base includes a side skirt which engages with the neck of the bottle in a manner such that it cannot be removed and in which there is no slitting of the base. This is achieved in claim 1 by a plurality of upturned flaps and in claim 2 by a snap bead. The enclosure is constructed so as to provide evidence if it has been opened or removed.

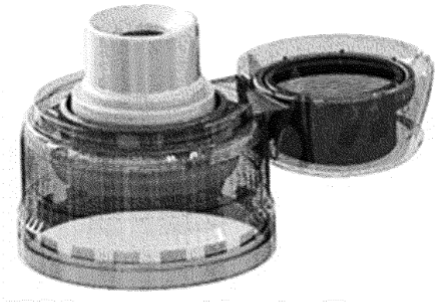


Figure 1

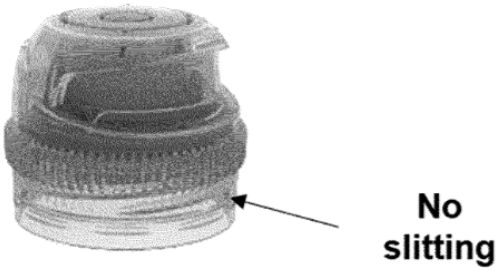


Figure 3

6 The present claims were filed on 28 February 2022. Claims 1 and 2 are independent claims and read as follows:

> *1. A non-removable, tamper-evident flip-top sports closure, the closure comprises a base, a lid and a dispensing spout, the base and lid being connected by a hinge, the base includes a side skirt and the side skirt includes means for non-removable engagement with a container neck, in which there is no slitting of the base, in which the non-removable engagement means comprises one or a plurality of upturned flaps, in which the closure comprises tamper-evident means.*
>
> *2. A non-removable, tamper-evident flip-top sports closure, the closure comprises a base, a lid and a dispensing spout, the base and lid being connected by a hinge, the base includes a side skirt and the side skirt includes means for non-removable engagement with a container neck, in which there is no slitting of the base, in which the non-removable engagement means comprise a snap bead, in which the closure comprises tamper-evident means.*

The law

7 Section 1 of the Patents Act 1977 ("the Act") sets out the requirements for patentable inventions. The relevant provisions are:

> *Section 1(1)*
> *A patent may be granted only for an invention in respect of which the following conditions are satisfied, that is to say –*
>
> *(a) the invention is new;*
> *(b) It involves an inventive step;*
> *...*

and references in this Act to a patentable invention shall be construed accordingly

8 Section 2 of the Act relates to novelty, and states:

> *2.-(1) An invention shall be taken to be new if it does not form part of the state of the art.*
>
> *(2) The state of the art in the case of an invention shall be taken to comprise all matter (whether a product, a process, information about either, or anything else) which has at any time before the priority date of that invention been made available to the public (whether in the United Kingdom or elsewhere) by written or oral description, by use or in any other way.*

Assessment

Extension of the compliance period and the filing of amendments

9 Before considering the patentability questions, I will first consider a request made by Mr Jones at the hearing to extend the compliance period so that amendments can be filed. It is not possible to make amendments to the specification once the compliance period has expired. Following the hearing Dr Greenwood filed a Form 52 requesting a discretionary extension to the compliance period along with amended claims and description pages. In the accompanying letter he argued that the comptroller has discretion to accept these and requested that the comptroller do so.

10 Section 20(1) of the Act states:

> *20.-(1) If it is not determined that an application for a patent complies before the end of the prescribed period with all the requirements of this Act and the rules, the application shall be treated as having been refused by the comptroller at the end of that period, and section 97 below shall apply accordingly.*

11 Rule 30 of the Patents Rules 2007 ("the Rules") prescribes the period for the purpose of section 20(1) in defining a "compliance period" and states:

> *30.—(1) The period prescribed for the purposes of sections 18(4) and 20(1) (failure of application) is the compliance period.*
>
> *(2) For the purposes of paragraph (1), subject to paragraphs (3) and (4), the compliance period is—*
>
> *(a) four years and six months beginning immediately after—*
>
> *(i) where there is no declared priority date, the date of filing of the application, or*
>
> *(ii) where there is a declared priority date, that date; or*
>
> *(b) if it expires later, the period of twelve months beginning immediately after the date on which the first substantive examination report is sent to the applicant.*

….

12 The period prescribed by rule 30 is extendible in certain circumstances specified in rule 108. Rule 108 is a complex rule. According to rule 108(2) the compliance period may be extended once by two months as-of-right upon filing the relevant form and paying the relevant fee. The comptroller may then further extend the compliance period under rule 108(3), but such further extensions are discretionary, and evidence is normally required. Dr Greenwood highlighted rule 108(6) which states:

> *(6) An extension may be granted under paragraph (1) or (3) notwithstanding the period of time prescribed by the relevant rule has expired.*

13 Extension of the compliance period is also however restricted by rule 108(7) which states:

> *(7) But no extension may be granted in relation to the periods of time prescribed by the rules listed in Part 3 of Schedule 4 after the end of the period of two months beginning immediately after the period of time as prescribed (or previously extended) has expired.*

14 Rule 30 is listed in Part 3 of Schedule 4 and rule 108(7) therefore applies to extensions of the compliance period.

15 In the present case the compliance period, as extended under rule 108(2), expired on 28 February 2023. Whilst rule 108(6) does allow retrospective requests for extensions, in accordance with rule 108(7) any request for a further discretionary extension must be made within two months of the date the period expired, namely the 28 February 2023 date. The applicant made no such request within that period and the compliance period cannot therefore now be extended under rule 108. In the present case there are no other relevant provisions which could be used as a basis for extending the compliance period. The compliance therefore expired on 28 February 2023 and cannot be further extended. It is not therefore possible to amend the application at this stage. I will therefore consider the application in its present form in my decision.

Priority date

16 As noted above, at filing, priority was claimed from three earlier GB applications. The examination report of 27 February 2023 noted that there was no support in any of these documents for the “upturned flaps” feature of claim 1. Consequently, according to the examiner, the priority date of claim 1 is the date of filing, 26 April 2019. Independent claim 2 does not however include this feature but rather includes an alternative “snap bead” feature, which the examiner accepted as being supported in the later two of the three priority documents cited. They therefore concluded that the priority date of claim 2 was 1 October 2018. Similar considerations apply to the claims currently under consideration.

17 At the hearing Mr Jones confirmed that he did not dispute the examiner’s assessment as regards priority, and I also agree with the examiner’s assessment. I therefore find that present claim 1 has a priority date of 26 April 2019, and present claim 2 a priority date of 1 October 2018. These priority dates are not of consequence in relation to my

considerations of novelty, but the examiner has relied on documents for inventive step which become part of the state of the art on the basis of this finding.

Construction of the claims

18 Before I consider the validity of the claims, it is necessary to construe the claims. There are several terms in the claims which require consideration. It is important to view these terms through the eyes of the person skilled in the art. The examiner, in their pre-hearing report, identified the person skilled in the art as "the designer of sports closures/cap, but they would have knowledge of the design and features of bottle closures used for other purposes". Mr Jones did not provide an alternative view, and this seems to me to be a reasonable definition of the person skilled in the art.

19 Mr Jones considered that the term "sports closure" should be construed to mean that a user can drink 'on the go', the enclosure having a spout which can (comfortably) be put into the mouth, and which can be drunk from by sucking and/or by squeezing the bottle. He gave an example of it being based on the type of bottle from which a racing cyclist might drink whilst riding.

20 Construction of this term will be important for novelty and inventive step considerations. The description refers to a "Sport Cap concept" which includes a "hinged sports enclosure", and also to a "Secure Flip concept" with a "hinged enclosure". The difference between these "concepts" is not apparent from the description. Figures 1-5 are said to relate to the "Sport Cap concept" and figures 6-8 to the "Secure Flip concept". A beer bottle cap is also discussed. The description does not at any point provide any further information as to what is meant by a sport cap or sport enclosure. Claims 1 and 2 refer to a "dispensing spout" but this is also nowhere defined in either the description or the dependent claims and is not explicitly restricted to a spout adapted to be drunk directly from. I note that drinks marketed as sports drinks can be provided in all kinds of bottles with all kinds of closures.

21 In the light of these considerations, I consider that the term "sports closure" should be construed broadly. In my view the person skilled in the art would not consider the term "sports closure" to be restricted to an enclosure with a spout which can comfortably be put in the mouth, or one which can be drunk from by sucking and/or squeezing. For example it could be drunk from by pouring from the spout into the mouth, as is common in many bottles for drinks. Moreover the specification does not define the term "sports closure" in any more specific manner. I therefore conclude that the term defines an intended use of the claimed invention rather than an essential feature of the invention. The intended use is for use in sports. I accept that this means that the closure must be capable of being directly drunk from by the user, but, in the absence of any more specific definition anywhere in the specification, do not consider the term to prescribe any further limitations on the nature of the closure.

22 Claims 1 and 2 refer to "tamper-evident means". There are no details in the claims as to what these means are, and I construe this term to include any mechanism which ensures that there is evidence of any tampering of the closure.

23 During the examination process the examiner pointed out that there is little detailed disclosure in the description of some of the putative inventive aspects defined in the claims, particularly in relation to the "non-removable engagement means", which comprises "one or a plurality of upturned flaps" in claim 1 and "a snap bead" in claim 2. I agree that this is the case and will therefore construe these in general terms.

Novelty

24 A large number of prior art documents have been considered at different stages during the prosecution of the application, including those cited against the PCT application in the international phase, those found by the GB examiner in national phase search updates, and those cited in the third-party observation letters received. I have reviewed all of this prior art in reaching my decision, but discussion at the hearing, and the substance of my decision, focuses on those documents cited in the examiner's pre-hearing report of 03 April 2023.

25 Mr Jones discussed in some detail developments in drinking bottles and their caps at the priority date. According to Mr Jones one driver for this development was a 2018 proposed European directive 'on the reduction of the impact of certain plastic products on the environment', particularly emphasising the proportion of single use plastic (SUP) in marine litter, and which specifically encouraged product design for drink bottles with tethered caps.

26 Mr Jones alluded to a proliferation of patent applications, earlier than and after the present application, including tethered caps on drinking bottles – this being an obvious way to meet the requirements of the directive. He noted that the present invention removes the need for tethering of the bottle top as the top provides a drinking spout which is opened without removal from the bottle. He suggested that there is a difference between the invention and what everyone else was doing, and that whilst it is perhaps small, it is neither trivial nor obvious. He argued that an understandable but impermissible use of hindsight is required to arrive at the invention from the prior art.

27 The examiner cited the following documents in their pre-hearing report in relation to novelty:

D1: US 2011/0100948 A1 (LOHRMAN) (relevant to claim 1)

D2: WO 98/57864 A1 (APTARGROUP) (relevant to claim 2)

D3: US 4487324 (OSTROWSKY) (relevant to claim 2)

D1: US 2011/0100948 A1 (LOHRMAN)

28 D1 discloses a non-removable, tamper-evident flip top bottle closure comprising a base 34h, a lid and a dispensing spout (pouring lip 132). The base and lid are connected by hinge 166. The base includes a side skirt 40i with means for non-removable engagement with a container neck. Importantly it is apparent from the teaching of D1 that there is no slitting of the base. The tamper-evident means is provided by a tamper-proof tear-away membrane 35h. The non-removable engagement means comprises one or more upturned flaps, shown in the upturned position as 49i in Figure 39.

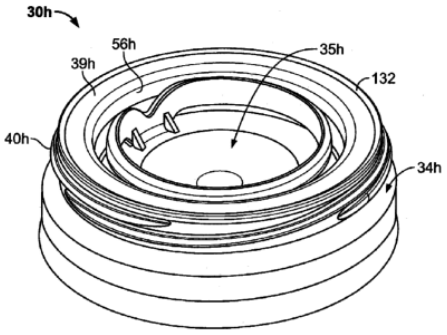


FIG. 36

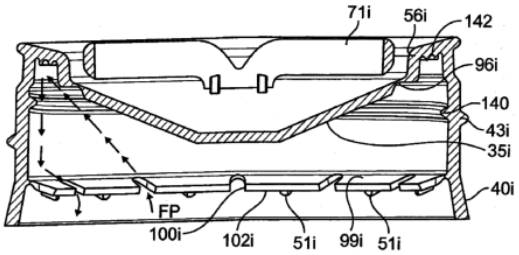


FIG. 38A

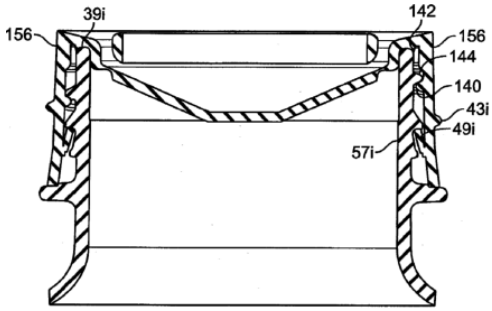


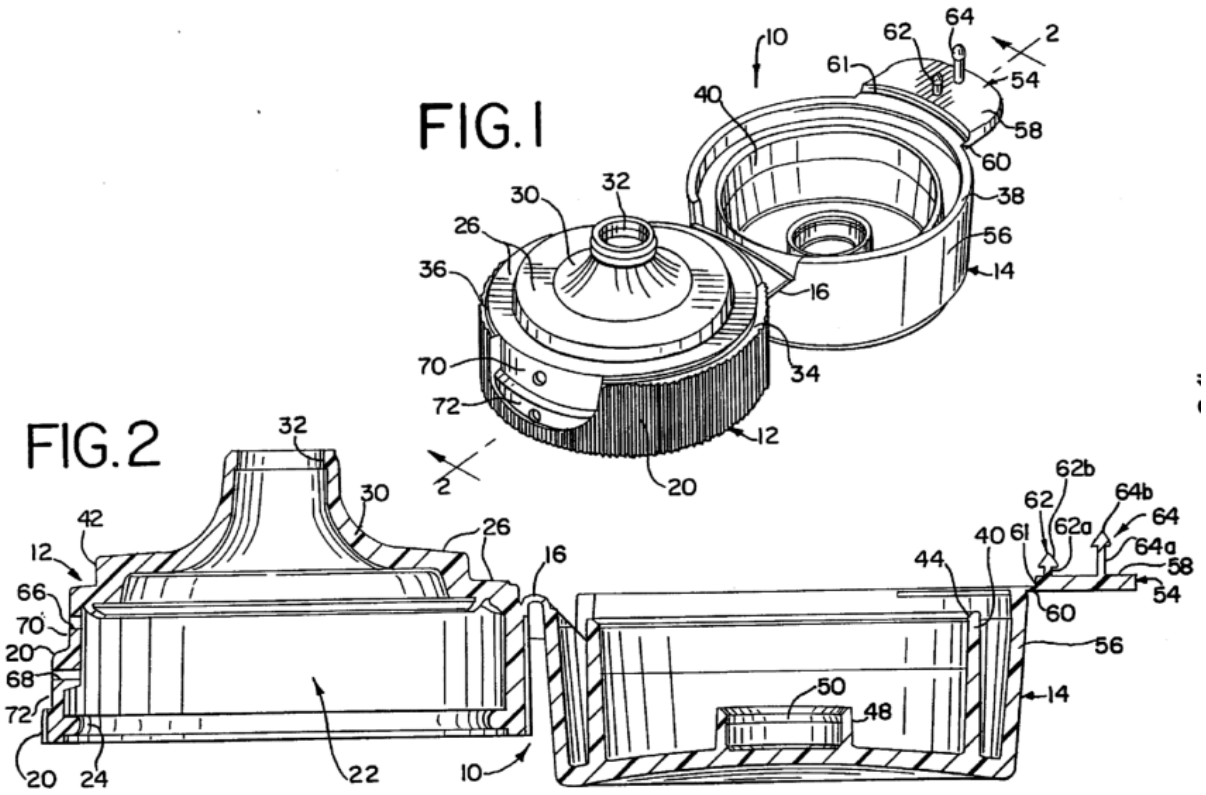
FIG. 39

29 There is no explicit disclosure in D1 that the bottle is specifically designed to be directly drunk from. Disclosed uses include “gable-top juice containers” and vegetable oil containers. There is however reference to use in a “school milk container or other type of single serving container”, albeit in the context of the need for a resealable or reclosure cap. This is not a sports use but does suggest that, for such a use, the closure could be used to drink directly from the bottle. I also note that, in paragraph 178, the pouring lip is dimensioned and configured to reduce run-off of liquids flowing from the container down the outer skirt.

30 Whilst there is no explicit reference to the closure being designed for use in sports, it is apparent that the closure is certainly capable of being drunk from via pouring lip 132, as is further supported by the reference to use in a school milk container. Given my construction of the term “sports closure” D1 therefore discloses all the features of claim 1 and claim 1 therefore lacks novelty over D1.

D2: WO 98/57864 A1 (APTARGROUP)

31 D2 discloses a closure 10 comprising a base 12, lid 14 and dispensing spout 32, the base and lid being connected by hinge 16. The closure may either be attached to the top of a threaded container or may be formed as a unitary part of the container. The base includes a side skirt 20 including a non-removable engagement means comprising a bead or snap ring 24. It is evident from Figures 1 and 2 that there is no slitting at the base. A tamper-indicating member 54 includes a plug 62 and anchor member 64, comprising elongated stems (62a, 64a) and enlarged conical heads (62b, 64b).



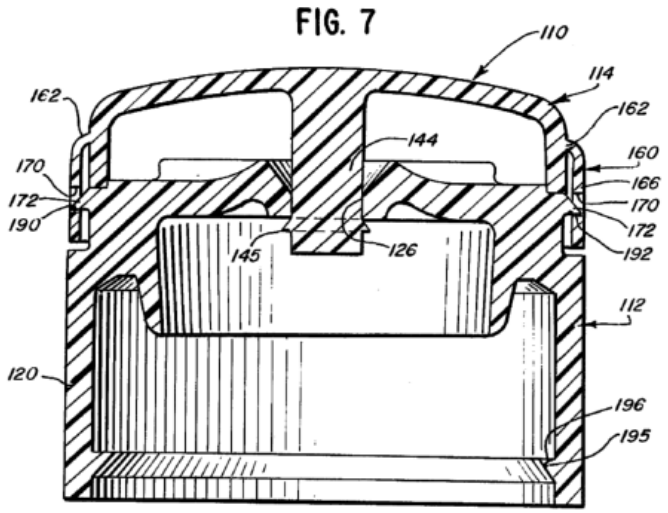
32 Mr Jones acknowledged that APTARGROUP includes a snap bead, but he argued that it is not properly a sports closure. He submitted that a sports top implicitly includes a screw thread. Whether or not that is so, I note that there is in any case reference to the skirt of the closure being attached to the container with a threaded connection in page 6 of D2.

33 The construction of the term “sports closure” in claim 1 of the present invention is of less significance when considering D2 as the dispensing orifice (32) of D2 clearly provides a spout which may be conveniently drunk through ‘on the go’ and is of a type whereby the closure can be drunk from by sucking and/or by squeezing the bottle.

34 D2 therefore discloses all the features of claim 2. Claim 2 therefore lacks novelty over D2.

D3: US 4487324 (OSTROWSKY)

35 D3 discloses, in the embodiment of Figure 7, an enclosure with base 112 which has no slitting, lid 114 hinged to the base, the base having a side skirt 120. It has a discharge orifice 126. It also discloses an annular snap-bead engagement means 195 and a tear-away tamper-evident strip 160.



36 Mr Jones considered his arguments made in relation to D2 also to apply to D3. Once again the construction of the term “sports enclosure” is of less significance here as the discharge orifice shown in the drawings would appear to satisfy Mr Jones’ construction of “sports enclosure”. I note that the skirt is connected to the container by a screw thread in D3.

37 D3 therefore discloses all the features of claim 2 and claim 2 therefore lacks novelty over D3.

Other matters

38 I have found that the compliance period cannot be further extended, and it is not therefore possible to file any further amendments to the claims. Thus, even if I am wrong in my construction of “sports closure” and my consequential findings on the novelty of claim 1, my findings in relation to claim 2 are not impacted by my construction of this term and claim 2 would still lack novelty. The patent cannot therefore be granted.

39 The examiner also argued that the claimed invention does not make an inventive step, based on an argument that claims 1 and 2 are both collocations of known features. I have however found that claims 1 and 2 lack novelty and I do not therefore need to consider inventive step in relation to these claims.

40 Moreover, as I have found that the compliance period cannot be further extended, and it is not therefore possible to file any further amendments to the claims, there is no need to go on to consider the dependent claims.

Conclusion

41 In conclusion the invention claimed in claim 1 lacks novelty in the light of the disclosure of prior art document D1 and the invention claimed in claim 2 lacks novelty in the light of the disclosure of prior art documents D2 and D3. No further amendments may be made to the specification. I therefore refuse the application under section 18(3).

Appeal

42 Any appeal must be lodged within 28 days after the date of this decision.

B Micklewright

Deputy Director, acting for the Comptroller