

The Anywayup Cup

By P.G. Cole (Fellow)

This is the story of a successful individual inventor, how she came to make her invention, what the reaction of the industry initially was, and how she triumphed in the marketplace and in the UK High Court.

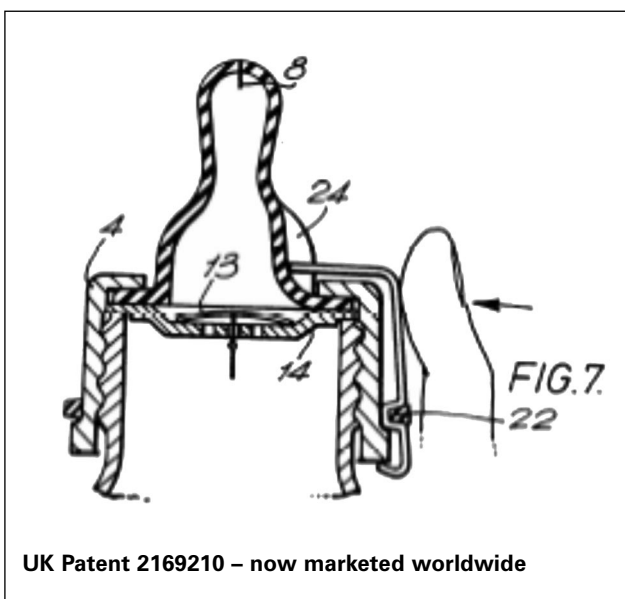
Mrs Mandy Haberman has a degree in graphic design from St Martin's School of Art and subsequently worked in the field of adult literacy. In 1982, she had a baby who suffered from severe feeding problems and could not suck from a bottle. She was dissatisfied with the equipment that was available to deal with the problem, and developed a special feeding bottle called the *Haberman Feeder* which is the subject of UK Patent **2169210** and is now marketed worldwide.

When infants no longer need a feeding bottle, but before they have learned to use an ordinary cup, they use a feeder cup which has a container closed by a lid and has a spout through which the child can suck the liquid contents into his or her mouth. The lumen of the spout is permanently open, and all the products available in the 1970's and 1980's leaked to some degree. Accidental contact between the products infants like at that age (strawberry- or chocolate-flavoured milk) and a carpet can write off the carpet, as happened when my children were young! By the early 1990's although the idea of making a leak-proof trainer

cup was known to manufacturers, nobody had come up with a design that was completely satisfactory. The products that were available fell into the following main categories:

- Cups that simply leaked.
- Cups with lids that could be rotated between ON and OFF states by the parent, but which could leak when ON and required parental intervention to turn them OFF.
- Cups with snap-on leak-resistant covers, again demanding parental intervention.
- Cups with complicated multi-part mechanical valves that were expensive to make and difficult to clean.

The evidence was that although numerous efforts had been made to design a truly leak-proof trainer cup, no existing design worked well, and that the solutions that had been suggested or put into production were complicated.



Author's note: My enthusiasm for **Mrs Haberman's** trainer cup results from an accident at my home in about 1980 involving a prior art upset trainer cup filled with strawberry-flavoured milk left overnight in contact with a natural-coloured wool carpet. The resulting bright pink stain could not be removed and the carpet was replaced. After the article was written, I met **Mrs Haberman** at a 'Tomorrow's World' exhibition in London. Was she one of the *glitterati* on a stage somewhere uttering platitudes about the need to encourage inventors? No way! She had a stand at the exhibition and was promoting her trainer cups with energy and enthusiasm to anybody who would listen.

In the summer of 1990, **Mandy Haberman** visited the home of another parent and watched that parent's child drinking from a trainer cup. Her friend was desperately trying to get the milk into the baby and stop the milk getting onto the floor. As a result, Mandy decided that she could design a better product, and in particular a trainer cup that would not leak, even if it was:

- turned upside-down and shaken vigorously for ten seconds, or
- left upside down overnight.

Her idea was simply to combine a rubber slit valve that was well known for feeding bottle teats with the spout of a trainer cup. When the child wanted a drink, his or her suction would open the valve, and at other times the valve would close. Mandy built a prototype with a slit valve that worked so well that it could be left upside down for weeks on end without spilling any of its contents. In 1992, she filed a patent application to protect her idea of using a rubber slit valve to control the flow of milk through the spout of a trainer cup, and it was granted as patent **GB-B-2266045**.

Claim 1 of her patent, with bullet points added to make the specified features easier to identify, reads as follows:

A drinking vessel suitable for use as a trainer cup or the like, comprising:

- an open-mouthed generally cup-shaped container; and
- a lid for the open mouth of said cup-shaped container,
- the lid having a mouthpiece associated therewith;
- the vessel being provided with valve means comprising a self-closing slit valve adapted to prevent flow of liquid

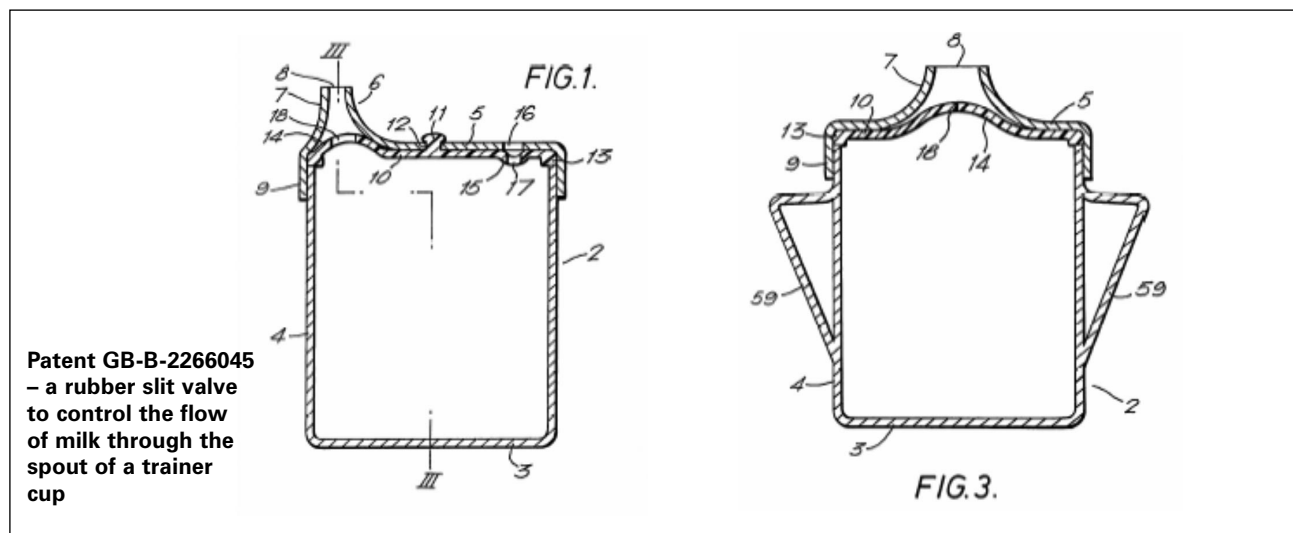
from the interior of the container through the mouthpiece unless a predetermined level of suction is applied to the mouthpiece, and to enable a user to draw liquid through the mouthpiece by the sole application of suction thereto;

- the configuration of the valve means being such that said slit valve is adapted to open upon no more than a predetermined difference of pressure, greater within the vessel than outside, being present across the said valve.

Once she had finalized her prototype, she offered it for licence to 18 companies, mostly British, concerned with the manufacture of products for infants, but they declined to take a licence. Amongst the companies approached were the defendants in the present infringement proceedings, Jackel International Limited. Did they all make a mistake? Of course they did, as subsequent events were to show – a mistake that was smaller in scale, but was similar in kind to that made by record producers who turned down a then unknown pop group called 'The Beatles.' A strategic product planner responsible for developing a range of trainer cups, knowing the limitations of existing designs, and knowing that the trade was looking for a leak-proof product should have taken Mandy's prototype very seriously.

Subsequently, Mandy found support from a company in Wales called V & A Marketing limited. At the time V & A was a very small company employing only five people. The judgment records the following milestones along the road to commercial development.

V & A first went to the market with a version of the trainer cup that was less than glamorous, being described in the judgment as 'dull' and having 'unconsidered aesthetics.' They decided to launch the product at a trade exhibition, but selected the



wrong one, an exhibition for organisers of nursery schools and creches, not for trade buyers of baby products. They learned of their mistake only a few days before the exhibition opened, and because they had already incurred costs they decided to go ahead. To quote from the judgment:

The evidence was that the response was overwhelming. The plaintiffs' stand was besieged by would-be customers. Advance orders for £ 10,000 worth of cups were taken. The plaintiffs also found the correct fair to attend, the Baby & Toddler Fair, and took space there. Once again the product was a success. According to **Mr Victor Davies**, a director of the second plaintiff, the response was very impressive. Although at the time of these two fairs in the Autumn of 1995 the plaintiffs were not in production and therefore had nothing to sell, a total of 8,000 advance orders were taken.

UK sales began in March 1996 and by 1998 had reached 2 million cups, achieved on the basis of an advertising expenditure of £2,100 and expenditure at exhibitions of £15,000, sales being achieved almost entirely by word of mouth and by recommendation from mother to mother. Exceptionally for a new product from a small and unknown source, V & A succeeded in having their product accepted by major supermarket chains such as Safeways and Tesco within a few months from launch. Their tactics are described in the judgment:

Mr Llewelyn-Jones decided to send a cup, filled with a highly coloured fruit drink, Ribena®, to the buyer at Tesco's in a box without internal packing so that the cup rolled about inside the box. He sent the box by post. Inside he enclosed a letter in which he said that if the contents had leaked he had shot himself in the foot. Apparently the contents did not leak.

During a follow-up interview, Tesco's buyer took only ten minutes to decide to buy the Anywayup Cup.

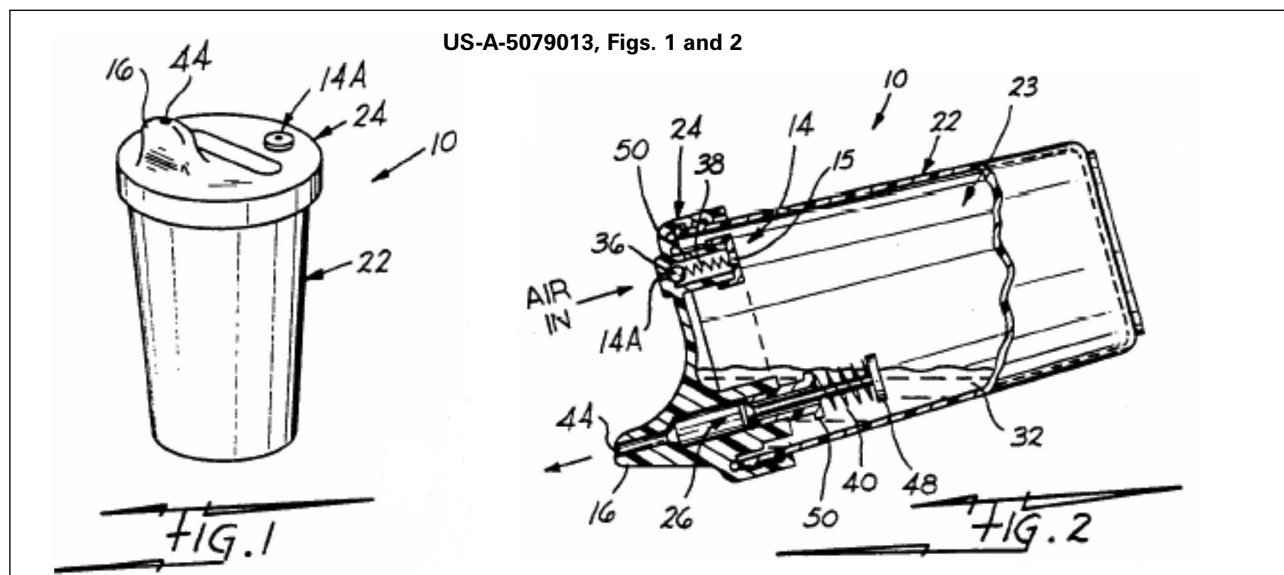
In August 1996, a US company called *The First Years Incorporated* approached Mandy for a licence, and they are now her exclusive US licensee, selling trainer cups under the name *Tumble Mates*.

The Anywayup Cup is now sold through Cow & Gate and through MAPA GmbH.

Once the Anywayup Cup had become established on the market, Jackel decided to market a similar product, taking the view that Mandy's patent was invalid for lack of inventive step. To paraphrase another Mandy (**Rice-Davies**: famous in 1963 for her involvement in the *Profumo* affair): *Well, they would say that, wouldn't they?* Fundamentally Jackel's case was that nothing that Mandy had done was outside the range of normal workshop variation that was available to skilled people, and that she had merely solved a known problem with simple and readily-available expedients, namely a well-known slit valve applied to a well-known form of drinking cup. They referred to a number of prior patent specifications, including in particular **US-A-5079013**, Figs. 1 and 2, which disclosed a trainer cup in which liquid flow through the drinking spout was controlled by a spring-loaded valve. Mandy and V & A denied Jackel's allegations and pointed to the commercial success that they had achieved.

The opinion of **Mr Justice Laddie** is of legal interest because of the way in which he sought to decide between the evidence of experts in the field employed by the opposing parties, both of whom put forward reasonably held but conflicting opinions. It could be difficult to resolve the conflict created by such evidence because:

A problem with evidence from an expert is that he addresses the prior art and the patented development from



his own unique standpoint. An expert with the relevant expertise who thinks that the development would have been obvious at the priority date may be right or he may just have greater insight than the notional uninventive man in the art. Likewise an expert who thinks that the development is inventive may be right or may have a more constricted insight.

Laddie J accepted that the defendants had put forward a strong case of lack of inventive step, but went on to conclude that the key question was:

Does it reflect what an ordinary man in the art, steeped in the folklore, perceptions and prejudices of the trade would have done?

He then went on to produce a systematic list of the matters that were of value in determining whether an invention was obvious or not:

- (a) What was the problem that the patented development addressed?
- (b) How long had that problem existed?
- (c) How significant was the problem seen to be?
- (d) How widely known was the problem and how many were likely to be seeking a solution?
- (e) What prior art would have been likely to be known to all or most of those who would have been expected to be involved in finding a solution?
- (f) What other solutions were put forward in the period leading up to the patentee's development?
- (g) Were there factors that would have held back the exploitation of the solution, even if it was technically obvious?
- (h) How well has the patentee's development been received? Once the product or process was commercialised was it a commercial success?
- (i) Was all or much of the commercial success due to the technical merit of the development – *i.e.* because it solves the problem?

In the present case, there was no dispute about the problem that **Mandy Haberman's** patent sought to solve, nor was it disputed that the problem had existed for a long time. The evidence established that numerous solutions to the problem had been put forward, but that they were all complicated.

These efforts should be set against the simplicity of what **Mrs Haberman** suggested. All the raw materials were readily available. The simplest of valves, used frequently in the same trade, could be used to make a product which had all the virtues which anyone designing a product would wish to achieve. The advantages of such a design would have been immediately apparent, once it was thought of. There was nothing holding anyone back...

On the evidence before me, I accept that the Anywayup cup has been far more successful than the plaintiffs could reasonably have hoped. I also accept that this was almost entirely due to the inclusion within it of the simple slit valve...

Mrs Haberman has taken a very small and simple step, but it appears to me to be a step which any one of the many people in the trade could have taken at any time over at least the preceding ten years or more. In view of the obvious benefits which would flow from it, I have come to the conclusion that had it really been obvious to those in the art it would have been found by others earlier, and possibly much earlier. It was there under their very noses. As it was, it fell to a comparative outsider to see it. It is not obvious.

Based on the above findings Mandy's patent was held to be valid and infringed. Although the decision of **Laddie J** was appealed, the parties reached a settlement and his decision is now definitive, at least so far as the UK is concerned. The decision is of legal interest because of what it says about the *evaluation of evidence as to obviousness*, as well as being an encouragement to private inventors and those working in the small business sector.

What, then, are the lessons that a private individual or small business can derive from Mandy's experience. I suggest that they are as follows:

- An inventor is likely to make a worthwhile invention in a technical field in which he or she has worked or has special experience. Mandy had become alerted to the way in which infants drink and deficiencies in existing equipment for them because of the problems that she had encountered with her own child. It is no coincidence that she made two significant inventions in that field.
- Having a good idea is not enough – the inventor has to have the determination and commitment to see the idea through to development and possibly even into production. **Ron Hickman**, the inventor of the Workmate®, met with initial rejection when he had no more than a prototype to offer and was only

successful in obtaining a licensee after he had started to manufacture the Workmate and had established a small business that industry could recognize as worthwhile expanding. Similarly, Mandy persevered with her product, got it to the attention of the relevant public, and even after it had become successful was on a stand at the *Tomorrow's World* exhibition personally explaining and selling her invention to interested members of the public.

- In order to obtain a sensible decision concerning a product to be licensed, it is vital to make contact, at the appropriate level, with

somebody who can take a strategic view of new product development, who is sufficiently senior not to be influenced by 'not invented here' and has a sufficiently broad viewpoint to appreciate what the invention can do for the potential licensee.

- If the product has been launched and proves successful, the cost of a patent or trade mark infringement action should simply be written into the budget. Hopefully the invention will have a quiet life, in which case the budget earmarked for legal expenses simply becomes part of the profit.

A matter of getting your priorities right

By Chris Revell (Fellow)

EPO Board of Appeal Decision **T0713/02** (to be published in the OJ/EPO) raises an interesting question concerning the extent to which an applicant can rely upon a decision of the EPO, even when the decision is taken by competent officers. It also provides a useful illustration of some of the difficulties that can face an assignee when taking over the prosecution of a patent application.

Background

European patent application number 96933245.1 (**EP0876380**) was filed by Hybridon, Inc., via the PCT, on 4 October 1996, and claiming priority from a US application filed on 9 May 1996. The opening line of the description, typically for many US-derived applications was the statement that 'This application is a continuation-in-part of US Serial Number 08/539,939 filed 6 October 1995.' Hybridon were informed by their US agents that both the 6 October, 1995 and 9 May, 1996 priority dates had been claimed. The most relevant prior art identified in the Search Report was a publication by, *inter alia*, the inventors in the period between 6 October 1995 and 9 May 1996.

In the first office action, the Examining Division rejected the claims for lack of novelty over the inventors' publication. The applicant's response was to disclaim the subject-matter of the prior art to render the claims novel. In the second office action, dated 20 April 2000, the Examining Division rejected the claims for lack of inventive step over the inventors' publication.

In September 2000, the patent application was transferred to Avecia Biotechnology Inc., as part of a wider business acquisition. When preparing instructions for a response to the office action (the case remained with the original representatives pending recordal of the assignment and transfer of representation in-house), the issue with the incorrect priority date was immediately apparent. Correction of the priority date was requested, citing decision **J6/91**, where correction was allowed in very similar circumstances, and the claims broadened to reinstate the subject-matter removed in view of the inventors' publication. On 19 April 2001, we received a 'Brief Communication' from the EPO, issued by the formalities officer, deciding that the requested priority correction was allowed.