

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 12

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARK ALLAIN and JOSEPH ALLAIN, JR.

Appeal No. 2001-0314
Application No. 09/102,677

ON BRIEF

Before ABRAMS, McQUADE, and NASE, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Mark Allain et al. originally took this appeal from the final rejection of claims 3 through 10, 15 and 16.¹ As the examiner has since withdrawn the rejection of claim 4, which now stands objected to as depending from a rejected claim, the appeal as to claim 4 is hereby dismissed, leaving for review the standing rejections of claims 3, 5 through 10, 15 and 16.

¹ Claim 15 has been amended subsequent to final rejection.

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Claims 11, 13 and 14, the only other claims pending in the application, stand allowed.

THE INVENTION

The subject matter on appeal relates to a motor vehicle flood protection apparatus (claims 3, 5 through 9, 15 and 16) and to a method of folding same after use (claim 10). A copy of the claims at issue appears in the appendix to the appellants' main brief (Paper No. 6).²

THE PRIOR ART

The references relied on by the examiner as evidence of obviousness are:

Battle	4,315,535	Feb. 16, 1982
Lohse	4,930,557	Jun. 5, 1990
Tall 1995	5,458,945	Oct. 17,
Chiang	5,497,819	Mar. 12, 1996

THE REJECTIONS

² The terms "said other end wall" in claims 5 and 6 and "said end and wall panels" in claim 8 lack a proper antecedent basis. Based on preceding claim terminology, it would appear that these terms should be --said end walls-- and --said end and side panels--, respectively.

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Claims 3, 8 through 10, 15 and 16 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Battle in view of Tall and Lohse.

Claims 5 through 7 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Battle in view of Tall, Lohse and Chiang.

Attention is directed to the appellants' main and reply briefs (Paper Nos. 6 and 10) and to the examiner's answer (Paper No. 9) for the respective positions of the appellants and the examiner with regard to the merits of these rejections.³

DISCUSSION

Battle, the examiner's primary reference, discloses a multi-layer, water-proof, unitary container for protecting a vehicle from flood water. The multi-layer construction consists of an outer layer 62 of a flexible rubber-base

³ In the final rejection (Paper No. 4), claims 3, 4, 15 and 16 stood rejected under 35 U.S.C. 112, second paragraph, as being indefinite. The examiner has since withdrawn this rejection in view of the amendment of claim 15 subsequent to final rejection (see page 3 in the answer).

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compound, a middle layer 63 of a canvas-like material, and an inner layer 64 of a flexible rubber-base compound. The container 10 includes a rectangular floor surface portion 16, four collapsible side portions 12 through 15 and a drawstring 28 associated with the opening 40 defined by the upper edges of the side portions. After a vehicle has been driven over the collapsible side portions and onto the floor surface portion, the side portions are lifted up around the vehicle and the opening is gathered via the drawstring

so that the vehicle would then be completely encased by the multi-layered flood-proof material with a singular opening located above the vehicle to afford air entrance and release from the bag when the force of rising flood waters ensue[s], and possibly avoid air trapment within the bag which may result in floating of the entire apparatus [column 2, lines 28 through 34].

As conceded by the examiner (see pages 5 and 6 in the answer), Battle does not respond to the limitations in independent claims 8 and 15 requiring the claimed flood protection apparatus to comprise (1) end and side panels of a vertical height less than the height of a vehicle to be protected and (2) fore and aft tether means for securement to a stationary object, or the limitations in independent claim 5 requiring the claimed apparatus to comprise a top cover panel

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and a flexible plastic container having side and end walls, with the top cover panel having four lateral perimetrical edges which are overlapped and positioned below the upper edges of the container walls when the walls are pulled snugly against the vehicle. The examiner's reliance on Tall, Lohse and Chiang to cure these deficiencies is not well taken.

Tall discloses a removable protective cover 10 sized and shaped to enclose the cowling of a snowmobile to prevent snow from accumulating in the engine compartment. Lohse discloses a flexible, tube-like covering for storing military equipment, armored cars, vehicles and the like, with the covering having a plurality of loops 26 for temporary cooperation with means for lifting the covering into a deployment configuration. Chiang discloses a protective modular car cover 10 comprising a cab covering member 12 and a skirt 14. In proposing to combine these references with Battle to reject the appealed claims (see pages 5 and 6 in the answer), the examiner concludes that it would have been obvious to one of ordinary skill in the art to modify Battle's flood protection container by (1) reducing the height of its walls in view of Tall to lower costs, (2) adding fore and aft tether means in view of Lohse to permit securement

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to a stationary object, and (3) including a separate top cover in view of Chiang to prevent damage to the top of the vehicle. Presumably, the Battle container as so modified would meet all of the limitations in independent claims 5, 8 and 15.

The mere fact that prior art can be modified in a manner proposed by an examiner would not have made the modification obvious absent some suggestion in the prior art of the desirability of the modification. In re Gordon, 733 F.2d 900, 901, 221 USPQ 1125, 1127 (Fed. Cir. 1984). In the present case, the above noted teachings of Tall, Lohse and Chiang have little meaningful relevance to the vehicle flood protection container disclosed by Battle and would not have suggested the particular modifications proposed by the examiner. Specifically, Tall's disclosure of a snowmobile cowling cover would not have suggested making the end and side panels of Battle's container of a vertical height less than the height of the vehicle to be protected in order to lower costs, Lohse's cover lifting loops, intended for temporary use to deploy the cover, would not have suggested adding fore and aft tether means to Battle's container in order to secure the container to a stationary object, and Chiang's modular vehicle cover, with

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its cab cover component, would not have suggested adding to Battle's container a top cover panel having four lateral perimetrical edges which are overlapped and positioned below the upper edges of the container walls when the walls are pulled snugly against the vehicle in order to prevent damage to the top of the vehicle. Indeed, Battle's stated objectives of providing a container which is unitary and designed to completely encase the vehicle and to deter flotation seemingly would have led the artisan away from such changes. It therefore is apparent that the only suggestion for combining the references in the manner proposed by the examiner stems from impermissible hindsight knowledge derived from the appellants' disclosure.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) of claims 8 and 15, and dependent claims 3, 9, 10 and 16, as being unpatentable over Battle in view of Tall and Lohse, or the standing 35 U.S.C. § 103(a) rejection of claim 5, and dependent claims 6 and 7, as being unpatentable over Battle in view of Tall, Lohse and Chiang.

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SUMMARY

The decision of the examiner to reject claims 3, 5 through 10, 15 and 16 is reversed.

REVERSED

NEAL E. ABRAMS)	
Administrative Patent Judge)	
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)	
)	
)	BOARD OF PATENT
JOHN P. McQUADE)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
JEFFREY V. NASE)	
Administrative Patent Judge)	

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REVERSED

July 16, 2002