

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARC STAMMER

Appeal No. 95-2175
Application 08/100,332¹

ON BRIEF

Before COHEN, PATE and LEE, Administrative Patent Judges.

PATE, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-5. Claim 6 has been allowed. In the advisory action (Paper No. 16) dated May 17, 1994, the examiner indicated that claims 7-11

¹ Application for patent filed July 30, 1993. According to appellant, this application is a continuation of Application 07/921,673, filed July 30, 1992, now abandoned.

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would stand allowed when the amendment after final rejection was entered upon the filing of an appeal. It is noted that the amendment has not been formally entered as of the time we considered the appeal. However, we regard claims 7-11 as standing allowed as per the examiner's advisory action.

The claimed subject matter is directed to a light waveguide cable comprising two dissimilar portions. A first portion for installation outside of a building contains water blocking materials in the cable. A second portion for installation interiorly of the building does not include the waterblocking materials.

Claim 1 reproduced below is further illustrative of the claimed subject matter.

1. A light waveguide cable, comprising a flame retardant outer jacket holding at least one light waveguide, a first lengthwise portion of the cable located outside of a building holding waterblocking material and a second lengthwise portion of the cable located in a building holding no waterblocking material.

The references of record relied upon by the examiner in his rejection of claims 1-5 under 35 U.S.C. § 103 are as follows:

van der Hoek et al. (van der Hoek)	4,381,140	Apr. 26, 1983
Saito et al. (Saito)	4,752,113	Jun. 21, 1988

The examiner has rejected claims 1-5 under 35 U.S.C. § 103 as unpatentable over van der Hoek in view of Saito.

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According to the examiner, van der Hoek discloses an optical fiber cable comprising a longitudinally extended cylindrical body with helical grooves in the outer surface thereof. The examiner has cited Saito to show that numerous types of waterblocking materials are well know in the fiber optic cable art. It is the examiner's conclusion that it would have been obvious to one of ordinary skill in the art to achieve the advantages of versatility taught by Saito in van der Hoek for the light waveguide cable, as claimed, since van der Hoek mentions that the migration of water through the grooves which accommodate the optical fibers is also adequately prevented. See examiner's answer page 4.

Pursuant to 37 CFR 1.192(c)(7) appellant states that all claims on appeal should stand or fall together. Accordingly, we limit our discussion to claim 1.

OPINION

We have carefully reviewed the rejection on appeal in light of the arguments of the examiner and the appellant. As a result of this review, we will affirm the examiner's rejection of claims 1 through 5. Our reasons follow.

As an initial matter, we must interpret the claims on appeal. The preamble of the independent claim on appeal clearly

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states that the subject matter of the claim is directed to a light waveguide cable *per se*. The preamble evidences no intent to claim the combination of a cable and a building or claim a cable installed in a building. Appellant's brief also states that the invention is an "improved cable as claimed...." Brief at page 4. Appellant's specification is also directed to an improved cable and evidences no intent to claim the cable in combination with a building or an intent of being limited to a cable as finally installed in a building. Accordingly, interpreting appellant's claim as a whole, it is our view that the claimed invention is directed to a cable *per se*, not further limited by its application environment requiring a building in which it is installed, and we will apply the prior art to the independent claim 1 as so interpreted.

We make the following findings of fact. Van der Hoek discloses a cable comprising an elongated body 1 having helical grooves 2, 3, 4 which accommodate optical fibers 5, 6, and 7. In the embodiment of Figure 3, foam or synthetic resin with waterblocking properties is placed in circumferential groove 10 leaving the helical grooves free from waterblocking material except at the intersection with groove 10. Therefore, van der

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Hoek discloses a wave guide cable with alternating portions of waterblocking and non-waterblocking materials.

Saito discloses a light waveguide cable with an outer jacket 10, and an inner core 2 with grooves 4 therein. Waveguides 5 are placed in grooves 4. As shown in Figure 3, waterblocking material 6 is placed in grooves 4 and on waveguides 5 at spaced intervals. Therefore, Saito teaches a waveguide cable with alternate waterblocking and non-waterblocking portions.

Furthermore, appellant admits that the prior art teaches cables that are waterblocked at periodic intervals. Brief at page 4. In view of these references and appellant's statement in the Brief, it is our view that the evidence establishes that van der Hoek and Saito anticipate appellant's claim 1. We further note that the predecessor of our reviewing court sanctioned the practice of nominally basing a rejection on § 103 when, in fact, the actual ground of rejection was that the claims were anticipated by the prior art. The justification for this is that lack of novelty in the claimed subject matter, e.g., as evidenced by a complete disclosure in the prior art, is the ultimate or epitome of obviousness. *In re Fracalossi*, 681 F.2d

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792, 793, 215 USPQ 569, 570 (CCPA 1982)(*citing In re Pearson*, 494
F.2d 1399, 1402, 181 USPQ 641, 644 (CCPA 1974)).

All claims are stated to stand or fall with claim 1.
Accordingly, we affirm the rejection of claims 1 through 5.

No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
1.136(a).

AFFIRMED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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WILLIAM F. PATE, III)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	

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JAMESON LEE)
Administrative Patent Judge)

J. David Abernethy
Siecor Corporation (LE)
P.O. Box 489
Hickory, NC 28603

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