

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ASCHER CHASE

Appeal No. 97-2243
Application 08/222,584¹

ON BRIEF

Before CALVERT, ABRAMS and McQUADE, Administrative Patent Judges.
McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

This appeal is from the final rejection of claims 1 through 4 and 7. Claims 5 and 6, the only other claims pending in the application, stand withdrawn from consideration pursuant to 37 CFR § 1.142(b) as being directed to a non-elected invention.

¹ Application for patent filed April 4, 1994.

The invention relates to an above-ground swimming pool having a light-weight plastic wall which "requires no internal reinforcement or external support of any kind against the outward pressure of the water contained therein" (specification, page 1).

Claim 1 is illustrative and reads as follows:

1. An above-ground frameless swimming pool comprising:

(a) a self-standing flexible semi-rigid upstanding catastrophic failure proof cylindrical plastic wall;

(b) said wall being formed of polypropylene having lamminated thereto a reinforcing woven mesh fabric of polypropylene, said laminated wall having a sufficient weight-to-strength ratio and semi-rigidity that the wall is self-supporting;

(c) a water-retaining right cylindrical liner disposed within and supported by said wall; and

(d) a coping member disposed over the upper part of said wall to secure upper portions of said liner thereto.

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

Jaschek et al. (Jaschek)	4,405,341	Sept. 20, 1983
Trower (British Patent Document)	1,049,272	Nov. 23, 1966
Neuenschwander (German Patent Document) ²	2,145,560	Apr. 19, 1973

² An English language translation of this reference, prepared by the Patent and Trademark Office, is appended hereto.

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The appealed claims stand rejected under 35 U.S.C. § 103 as follows:

a) claim 7 as being unpatentable over Trower in view of Jaschek; and

b) claims 1 through 4 as being unpatentable over Trower in view of Jaschek, and further in view of the German reference.

Reference is made to the appellant's brief (Paper No. 10) and to the examiner's answer (Paper No. 12) for the respective positions of the appellant and the examiner with regard to the merits of these rejections.

Trower discloses an above-ground swimming pool composed of an inner water-tight liner 10, an intermediate layer 14 and an outer support wall 12. The liner 10 is a flexible sheet of polyvinylchloride or polythene, the intermediate layer is a heavy duty, semi-rigid sheet of synthetic plastic, and the outer support wall is a woven, semi-rigid, self-supporting sheet of wire or small diameter rod. A coping in the form of a split-tube hand rail covers the upper peripheral edge of the pool.

As implicitly conceded by the examiner, Trower does not teach and would not have suggested a swimming pool comprising a wall formed of a plastic material having laminated thereto

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a reinforcing woven mesh fabric as is required by independent claims 1 and 7. Although Trower's intermediate layer 14 and outer wall 12 respectively constitute a plastic material and a reinforcing woven mesh material, the outer wall 12 is not laminated to the intermediate layer 14.

Jaschek pertains to coated fabrics featuring enhanced adhesion between the fabric and the coating mix. These fabrics have a high degree of flexibility (see column 1, lines 57 through 60) and are said to "find a great many diverse applications in industry as well as everyday life; e.g. in air-supported structures, stadium roofing/cover, packaging materials, tarpaulins, rubber/pneumatic rafts, roof truss insulations, etc." (column 1, lines 14 through 17). Depending on the particular use, the flexibility or rigidity of the fabric can be adjusted by judicious selection of the coating mix constituents (see column 3, lines 27 through 30).

According to the examiner, it would have been obvious to one of ordinary skill in the art in view of the teachings of Jaschek to laminate Trower's intermediate layer 14 and outer wall 12 to one another, thereby arriving at a swimming pool meeting the above noted limitations in claims 1 and 7 (see pages 3 and 4 in the answer).

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Rejections based on 35 U.S.C. § 103 must rest on a factual basis. In re Warner, 379 F.2d 1011, 1017, 154 USPQ 173, 177-78 (CCPA 1967). In making such a rejection, the examiner has the initial duty of supplying the requisite factual basis and may not, because of doubts that the invention is patentable, resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in the factual basis. Id.

In the present case, Trower and Jaschek do not justify the examiner's conclusion that it would have been obvious to one of ordinary skill in the art to laminate Trower's intermediate layer 14 and outer wall 12 to one another. In short, the semi-rigid, self-supporting pool wall defined by Trower's intermediate layer 14 and outer wall 12 and the highly flexible coated fabrics disclosed by Jaschek have little, if any, meaningful relevance to one another. The only suggestion to combine these two references in the manner proposed by the examiner stems from impermissible hindsight knowledge derived from the appellant's own disclosure. Moreover, this deficiency in the basic Trower-Jaschek combination is not cured by the German reference which discloses a pool wall laminate consisting of a polyurethane foam core sandwiched between polypropylene liners.

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Thus, the references applied by the examiner do not provide the factual basis necessary to support a conclusion that the differences between the subject matter recited in claims 1 and 7, and in claims 2 through 4 which depend from claim 1, and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art. Accordingly, we cannot sustain the standing 35 U.S.C. § 103 rejections of these claims.

The decision of the examiner is reversed.

REVERSED

IAN A. CALVERT)	
Administrative Patent Judge)	
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NEAL E. ABRAMS)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
)	
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JOHN P. McQUADE)	
Administrative Patent Judge)	

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