

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(2) is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HENRY F. BLIND,
DAVID A. DAGE and
ALAN S. PHILIPS

Appeal No. 96-2871
Application 08/352,964¹

ON BRIEF

THOMAS, HAIRSTON and HECKER, Administrative Patent Judges.

HECKER, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of

¹ Application for patent filed December 8, 1994. According to appellants, this application is a continuation of Application 08/103,379, filed August 9, 1993, now abandoned.

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claims 1 through 15, all claims pending in the application.

Appellants' invention relates to a noise absorbing cover for an automotive loudspeaker to prevent exterior noise from being coupled through a loudspeaker to the interior of the automobile.

Representative independent claim 1 is reproduced as follows:

1. A vehicle comprising:

a structural panel disposed between an interior and an exterior of said vehicle and including an aperture having an axis;

a speaker mounted to said structural panel substantially coaxially with said aperture, said speaker having a front surface acoustically coupled with said interior and a rear surface acoustically isolated from said interior; and

a first sound absorbing barrier defining a space substantially enclosing a rear of said speaker and defining an air gap for venting said space to said exterior, said air gap substantially preventing pressurization of said space, and said air gap being oriented to exclude direct sound transmission paths for exteriorly generated noise to said interior.

The reference relied on by the Examiner is as follows:

Erickson

4,928,788

May 29,

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1990

Claims 1 through 15 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. Claims 1, 2, 5 through 9 and 12 through 15 stand rejected under 35 U.S.C. § 102 as being anticipated by Erickson. Claim 3 stands rejected under 35 U.S.C. § 102 as anticipated by or, in the alternative, under 35 U.S.C.

§ 103 as obvious over Erickson. Claim 4 stands rejected under

35 U.S.C. § 103 as being unpatentable over Erickson in view of acknowledged prior art. Claims 10 and 11 stand rejected under 35 U.S.C. § 103 as unpatentable over Erickson.

Rather than repeat the arguments of Appellants or the Examiner, we make reference to the brief and the answer for the respective details thereof.

OPINION

After a careful review of the evidence before us, we agree with the Examiner that claims 1 through 15 are properly rejected under at least one of 35 U.S.C. § 112, second

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paragraph,

35 U.S.C. § 102 and 35 U.S.C. § 103. Thus, we will sustain the rejection of these claims. However, we will reverse the 35 U.S.C. § 102 rejection of claim 7.

At the outset, we note that Appellants have argued the Examiner's objection (under 37 CFR § 1.75(d)(1)) to the language "a non-rigid sound absorbing material" of claim 15. We agree with the Examiner that this is a petitionable matter under 37 CFR § 1.181, not appealable under 37 CFR § 1.191. In addition, we note that the cited language did not appear in an original claim. It first appeared in a proposed amendment after final rejection (not entered) in the parent application, received October 11, 1994, and was not entered until the filing of this continuation

application on December 8, 1994. The cited language may constitute new matter, but this question is not before us.

Also at the outset, we note that the Appellants indicated on page 6 of the brief that claims 3, 4 and 9 through 14 stand or fall together with the claims from which they depend.

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Rejection under 35 U.S.C. § 112, second paragraph

Definiteness problems often arise when words of degree are used in a claim. That some claim language may not be precise, however, does not automatically render a claim invalid. When a word of degree is used we must determine whether the specification provides some standard for measuring that degree. Furthermore, even if some experimentation is needed to determine limits, the claims would not necessarily be unpatentable under section 112. Seattle Box Co. v. Industrial Crating & Packing, Inc., 731 F.2d 818, 221 USPQ 568 (Fed. Cir. 1984).

The Examiner has held that the term "substantially" renders the claims indefinite, in that the metes and bounds of Appellants' claimed invention are unknown. Looking at the claims we find in claim 1, "substantially coaxially with said aperture" and "a space substantially enclosing"; in claim 2, "a footprint substantially coinciding with"; in claim 5, "being substantially perpendicular to said axis"; and in claim 15, "substantially enclosing a space" and "substantially preventing pressurization". A review of the specification reveals no standard of measure of degree for these

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recitations.

Appellants argue on pages 8 and 9 of the brief that "one of ordinary skill would clearly understand the meaning of mounting a speaker coaxially with the aperture so that the direction of speaker cone movement is essentially along the axis of the aperture" (emphasis added); that "it is easily ascertainable whether a barrier substantially encloses the rear of a speaker by examining whether exteriorly generated noises are excluded." (emphasis added); that "it is easily ascertainable whether an air gap substantially prevents pressurization by examining its effect upon the low frequency output of a speaker." (emphasis added); that "it is easily ascertainable whether a foot print substantially coincides with the aperture by ascertaining whether such transmission paths are excluded." (emphasis added); and that "it is easily ascertainable whether a flow path is substantially perpendicular to the axis by examining whether such transmission paths are excluded." (emphasis added).

Appellants' specification is of no help in determining

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the "degree" of the terms claimed. The specification is silent as to how much off axis mounting is tolerable; how one would measure a reduction in exteriorly generated noises and what minimum levels are acceptable (the thrust of the invention itself); what low frequencies should be measured relative to pressurization and how much degradation is acceptable; and how, and to what degree, one would measure for "excluded" transmission paths. We find the Appellants' explanations of "examining" and "ascertaining" amount to so much experimentation that it would be tantamount to reinventing that which Appellants have claimed to invent. For the above reasons, we will sustain the Examiner's rejection under 35 U.S.C. § 112, second paragraph.

Rejections under 35 U.S.C. § 102

To the degree that we can understand the metes and bounds of Appellants' claims, we have come to the following conclusions.

It is axiomatic that anticipation of a claim under § 102 can be found only if the prior art reference discloses every element of the claim. See In re King, 801 F.2d 1324, 1326,

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231 USPQ 136, 138 (Fed. Cir. 1986) and Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co., 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984). "Anticipation is established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention." RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984), *cert. dismissed*, 468 U.S. 1228 (1984), citing Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983).

Appellants argue that Erickson compresses air while their speaker "is substantially prevented from being pressurized" (brief at page 10). We agree with the Examiner (answer, bottom of page 10) that this is not a distinction over Erickson because "substantially " preventing pressure inherently allows for "some" pressure in Appellants' invention.

At page 11 of the brief Appellants argue that Erickson's enclosure is not a "sound absorbing material", re claim 1. Since, as the Examiner contends, all materials absorb some sound, and further since Appellants disclose no degree of

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sound absorption, we find that Erickson's enclosure does meet the claim language.

With regard to claim 2, Appellants argue that Erickson's cover does not have a foot print substantially coinciding with the aperture, without further explanation. After viewing the drawings of Erickson, we agree with the Examiner that cover 20 appears to have the claimed footprint of the aperture in panel 12.

Appellants urge at page 11 of the brief "[i]t [Erickson] lacks the air gap with a flow path substantially perpendicular to the axis recited in claim 5 (in fact, Erickson's exhaust hole 22 is coaxial with the speaker and aperture)." However, claim 5 recites that at least a portion of said flow path be

substantially perpendicular to said axis. We find that arrows A4 in Figure 6 of Erickson clearly show this limitation.

With regard to claim 6, Appellants argue that Erickson lacks the acoustic labyrinth claimed. Noting Appellants' labyrinth as 46 in their Figure 7, we find that the air flow A4 (noted supra) of Erickson, traverses an acoustic labyrinth

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as claimed.

With respect to the "slot adapted to receive speaker wires" of claim 8, we find this is met by Erickson at column 4, lines 56-58 as noted by the examiner.

Regarding claim 15, the arguments relative to claim 1 support Erickson's anticipation of this claim.

For the above reasons we will sustain the Examiner's 35 U.S.C. § 102 rejection of claims 1, 2, 5, 6, 8 and 15. Likewise, since claims 3, 4 and 9 through 14 stand or fall with the claim from which they depend, we will sustain the Examiner's rejections of these claims.

Finally, looking at the 35 U.S.C. § 102 rejection of claim 7, we see the claimed air gap as located "between said sound absorbing cover and said structural panel." (emphasis added). We note that the "air gap" recited in claim 1 (from which claim 7 depends) is defined by the "first sound absorbing barrier" (e.g. Erickson's cover). Also, the claimed air gap vents "said space [behind the speaker] to said exterior". As discussed with regard to claim 5 supra, Appellants acknowledge the air gap as 22 in Erickson. Looking at 22 in Erickson, we cannot find that the claim 7 limitations

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are met since 22 is not adjacent to the structural panel 12.
Thus, we will not sustain the 35 U.S.C.

§ 102 rejection of claim 7.

In view of the foregoing, the decision of the Examiner rejecting claims 1 through 15 under 35 U.S.C. § 112, second paragraph is affirmed; the decision of the Examiner rejecting claims 1, 2, 3, 5, 6, 8, 9 and 12 through 15 under 35 U.S.C. § 102 is affirmed; the decision of the Examiner rejecting claims 3, 4, 10 and 11 (which stand or fall with the claims from which they depend) under 35 U.S.C. § 103 is affirmed; however, the decision of the Examiner rejecting claim 7 under 35 U.S.C. § 102 is reversed.

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

AFFIRMED

JAMES D. THOMAS)	
Administrative Patent Judge)	
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KENNETH W. HAIRSTON)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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STUART N. HECKER)	
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