

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(2) is not binding precedent of the Board.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 CHARLES N. WHICKER, JR.

Appeal No. 97-2716
Application 08/261,772¹

ON BRIEF

Before, CALVERT ***Administrative Patent Judge***,
McCANDLISH ***Senior Administrative Patent Judge***, and
MEISTER, ***Administrative Patent Judge***.

MEISTER, ***Administrative Patent Judge***.

DECISION ON APPEAL

Charles N. Whicker, Jr. (the appellant) appeals from the
rejection of claims 1, 2, 4 and 6-24.²

¹Application for patent filed June 20, 1994.

²Although no final rejection has been issued, the instant application
contains two Office actions wherein claims were rejected in each action

WE REVERSE.

The appellant's invention pertains to a ground position indicator and signaling device. Independent claim 1 is further illustrative of the appealed subject matter and reads as follows:

1. A ground position indicator and signaling device for signaling airborne personnel comprising a substantially pliable heavy, open weave web having a triangular shape with a length ratio of sides to base of at least about 1.5:1 for deployment upon ground including a contrasting arrow on the web and means for contrast between the web and the ground, which contrast means provides a high degree of visibility to the airborne personnel who are in an overhead position adjacent to the ground upon which the web is deployed.

The references relied on by the examiner are:

Wolff	1,937,374	Nov. 28, 1933
Adams	3,334,554	Aug. 08, 1967
Latimer	4,019,271	Apr. 26, 1977
Goff	4,792,258	Dec. 20, 1988
Hadzicki	4,892,272	Jan. 09, 1990
Hull et al. (Hull)	5,245,943	Sep. 21, 1993
Nowell et al. (Nowell)	5,325,798	Jul. 05, 1994

(Filed Dec. 22, 1992)

The claims on appeal stand rejected under 35 U.S.C. § 103 in the following manner:

(1) claims 1, 4, 7 and 9 as being unpatentable over Adams in view of Latimer and Wolff;

(2) claim 20 as being unpatentable over Adams in view of Latimer, Hull and Hadzicki;

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(3) claim 2 as being unpatentable over Adams in view of Latimer, Wolff and Hadzicki;

(4) claims 6, 8, 10, 12, 14 and 18 as being unpatentable over Adams in view of Latimer, Wolff and Hull;

(5) claim 11 as being unpatentable over Adams in view of Latimer, Wolff and Goff;

(6) claim 13 as being unpatentable over Adams, Latimer, Wolff and Nowell;

(7) claims 15 and 16 as being unpatentable over Adams in view of Latimer, Wolff, Hull and Hadzicki;

(8) claims 17 and 19 as being unpatentable over Adams in view of Latimer, Wolff, Nowell and Hull;

(9) 21-23 as being unpatentable over Adams in view of Latimer, Wolff, Hull and Hadzicki; and

(10) claim 24 as being unpatentable over Adams in view of Latimer, Hull, Hadzicki and Nowell.

The examiner's rejections are explained on pages 3-13 of the Office action dated November 2, 1995 (Paper No. 6).

OPINION

Rejections (1) and (3) through (8):

Each of these rejections is bottomed on the examiner's view that it would have been obvious to (A) make the arrow-like

traffic marker or indicator of Adams of a "substantially pliable heavy, open weave" material in view of the teachings of Latimer and (B) provide the triangular portion (i.e., the head of the arrow) with a contrasting arrow in view of the teachings of Wolff.

As to (A), we observe that Adams is directed to a portable "traffic direction marker" of a generally arrow-like configuration (i.e., having a generally triangular head 34 and an elongated, rectangular shaft-like portion 32) which is of such a character that it (1) can be disposed to lie flat upon a supporting surface "such as a roadway or berm without attachment thereto" (see column 1, lines 7-13), (2) is "durable and reliable in use and resistant to displacement upon being subjected to vehicular traffic passing thereover or in close proximity to the same" (column 1, lines 20-22), (3) has the ability to "resist any tendency of wind from passing vehicles to cause the same to fold over upon itself" (column 1, lines 29 and 30) and (4) may be rolled up for ease of portability and storage (column 1, lines 18 and 19). To this end, a plurality of transversely extending ribs 76 are provided "for reinforcing the first portion [i.e., the shaft-like portion 32] against twisting about its longitudinal

axis" (column 1, lines 51 and 52) and the entire marker or indicator is made of a resin and the shaft-like portion 32 is additionally provided with an embedded resilient metal strip to yieldingly resist rolling (column 2, lines 3-8). Additionally, both the triangular head 34 and the shaft-like portion 32 may have a fabric of nylon embedded therein for reinforcement (column 3, lines 33 and 34). From the above, it is readily apparent that Adams goes to great lengths to ensure that his traffic directing marker or indicator (a) is durable and will resist displacement when vehicles pass thereover and (b) will resist the tendency of wind created by passing vehicles from twisting the marker and blowing it about the roadway.

Latimer discloses a portable traffic sign having a sign display portion 14 that is attached by clips or hooks 38 to a hollow mast 12 and cross bar 13 that are oriented in a vertical plane. It is the principal object of Latimer's to provide a portable sign that (1) is constructed from materials that are "light in weight" and (2) can be easily "broken down" (see column 1, lines 65-68). The display portion is

fabricated from an open weave or perforated material, of any color, which is preferably flexible, and can be knitted or woven, a metal, synthetic, or natural material, or the like, that will allow for a passage of air. [Column 3, lines 62-66.]

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Apparently, the sign display portion is "preferably flexible" so that it can be rolled up and stored inside the hollow mast (see column 6, lines 62-68). Although it is also stated that the material "may, of course, be rigid" (see column 8, line 18), it is not altogether clear whether this statement refers to both an open weave material and a perforated material and, in any event, the claims on appeal require that the open weave material be "substantially pliable." The open weave material of Latimer provides air passages in order to minimize wind loads (see column 8, lines 20-25).

In our view, there is nothing in the combined teachings of these two references which would fairly suggest making the traffic direction marker or indicator of Adams of a substantially pliable open weave material in view of the teachings of Latimer. This is especially the case since Latimer's materials are "light in weight" and there is nothing to indicate that the flexible open weave material of Latimer would (a) provide durability and resist movement when vehicular traffic passes over it and (b) resist twisting and folding movements when subjected to the forces of the wind in the manner Adams indicates is necessary to provide an effective traffic marker when it is laid flat on a roadway. In this latter regard, it should be noted that the

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flexible open weave material of Latimer resists twisting and folding movements by virtue of the fact that it is fastened to a rigid supporting structure or frame by means of hooks or clips; there is, however, no such supporting structure or frame in Adams.

The examiner makes much out of the fact that Adams, in lines 19-26 of column 2, indicates that a plurality of openings (apparently openings 73) are provided in order to decrease wind resistance and thus effect a reduced tendency for folding or flopping. We must point out, however, that the openings 73 are on the tail end of the shaft-like portion (rather than the triangular portion as claimed) and, further, these openings (as the examiner apparently recognizes) do not form an "open weave web" as claimed.

As to (B) the examiner has taken the position that it would have been obvious to provide the traffic direction marker or indicator of Adams with a contrasting arrow "since Wolf [sic, Wolff] teaches that a contrasting arrow can be utilized to convey information, and since Latimer teaches that it is known to place information conveying symbols on an open weave material" (answer, page 10). It is true that Latimer teaches the placement of "single or multiple symbols, letters, numers, or the like" (see

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column 2, lines 23-25) on a portable traffic sign having a display portion formed of an open weave material, but there is no teaching of placing a contrasting arrow thereon. While Wolff teaches an arrow, it is in the context of a permanently installed aerial indicator (note Fig. 12) which can be seen from airplanes and is located near a facility such as an airport. More specifically, the arrow of Wolff sits on top of a mat having a plurality of open cells with lights positioned below the cells such that

at night the space below the mat is illuminated and the indicia [e.g., an arrow] thereon appears dark and the mat light, from above, and thus provides easy reading of the indicia [Page 3, lines 34-37.]

Absent the appellant's own teachings we are at a loss to understand why one of ordinary skill in this art would have been motivated to single out the arrow from the disparate teachings of Wolff and incorporate it into the arrow-like traffic indicator of Adams by placing it on the triangular portion thereof (i.e., the head of Adams' arrow-like traffic indicator). This is particularly the case because there appears to be neither reason nor need for placement of an arrow on the indicator of Adams inasmuch as Adams' indicator is already in the shape of an arrow.

With respect to Rejections (3) through (8), we have carefully reviewed the teachings of Hull, Hadzicki, Goff and

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Nowell, but find nothing therein which would overcome the deficiencies of Adams, Latimer and Wolff that we have noted above.

In view of the foregoing, we will not sustain Rejection (1) (i.e., claims 1, 4, 7 and 9 as being unpatentable over Adams in view of Latimer and Wolff); Rejection (3) (i.e., claim 2 as being unpatentable over Adams in view of Latimer, Wolff and Hadzicki); Rejection (4) (i.e., claims 6, 8, 10, 12, 14 and 18 as being unpatentable over Adams in view of Latimer, Wolff and Hull); Rejection (5) (i.e., claim 11 as being unpatentable over Adams in view of Latimer, Wolff and Goff); Rejection (6) (i.e., claim 13 as being unpatentable over Adams, Latimer, Wolff and Nowell); Rejection (7) (i.e., claims 15 and 16 as being unpatentable over Adams in view of Latimer, Wolff, Hull and Hadzicki); and Rejection (8) (i.e., claims 17 and 19 as being unpatentable over Adams in view of Latimer, Wolff, Nowell and Hull).

Rejections (2), (9) and (10):

Independent claim 20 expressly requires, *inter alia*, that the ground position indicator be formed of a "substantially pliable fiberglass mesh web." Although it is not entirely clear how the examiner intends to combine the references in order to

satisfy this limitation, it appears that the examiner considers that it would have been obvious to make the traffic marker or indicator of Adams of an open weave material in view of the teachings of Latimer and to further make the open weave material of a fiberglass mesh web in view of the teachings of Hadzicki. However, for the reasons stated above with respect to Rejections (1) and (3) through (8), we do not believe that it would have been obvious to make the traffic marker or indicator of Adams of an open weave material in view of the teachings of Latimer. With respect to Hadzicki, the answer states that this reference "is relied upon only for the teaching that it is known to make mesh material from fiberglass" (see page 10). However, the mere fact that, generally speaking, that fiberglass mesh is a "known" material does not serve as a sufficient basis for concluding that it would have been obvious to utilize fiberglass mesh in the traffic marker or indicator of Adams, as modified by Latimer. Instead, it is well settled that it is the prior art which must provide one of ordinary skill in the art the motivation to make the proposed modifications needed to arrive at the claimed invention. **See, e.g., In re Lalu**, 747 F.2d 703, 223 USPQ 1257 (Fed. Cir. 1984). Here, the fiberglass mesh of Hadzicki is obviously a light weight material (see column 3, lines 20-27)

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that is used in an entirely disparate environment from that of Adams (i.e., to form a venting screen 24 on the sail of a kite-like flying machine), and there is absolutely nothing in the combined teachings of Adams, Latimer and Hadzicki which would fairly suggest making the traffic marker or indicator of Adams of this lightweight material.

In rejecting independent claim 20 the examiner has additionally relied on the teachings of Hull; however, the examiner has only relied on this reference for a teaching of ground securement means and a storage container.

With respect to Rejections (9) and (10), we have carefully reviewed the teachings of Wolff and Nowell but find nothing therein which would overcome the deficiencies of Adams, Latimer, Hadzicki and Hull that we have noted above. This being the case we will not sustain Rejection (2) (i.e., claim 20 as being

unpatentable over Adams in view of Latimer, Hull and Hadzicki; Rejection (9) (i.e., claims 21-23 as being unpatentable over Adams in view of Latimer, Hull, Hadzicki and Wolff) and Rejection (10) (i.e., claim 24 as being unpatentable over Adams in view of Latimer, Hull, Hadzicki and Nowell).

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All of the above-noted rejections are reversed.

REVERSED

IAN A. CALVERT)	
Administrative Patent Judge)	
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)	
)	BOARD OF PATENT
HARRISON E. McCANDLISH)	APPEALS AND
Senior Administrative Patent Judge)	INTERFERENCES
)	
)	
)	
JAMES M. MEISTER)	
Administrative Patent Judge)	

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