Paper No. 29

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL W. GILPATRICK

Appeal No. 1998-2551
Application No. 08/787,624

ON BRIEF

Before NASE, CRAWFORD, and GONZALES, Administrative Patent Judges.

NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 32, 33, 43, 44, 47 and 48. Claims 34 to 38, which are the only other claims pending in this application, have been withdrawn from consideration under 37 CFR § 1.142(b) as being drawn to a nonelected invention.

We AFFIRM-IN-PART.

BACKGROUND

The appellant's invention relates generally to a looped pile fabric which can be employed as the female fabric for receiving an article of manufacture in a pre-selected position of engagement with a male fabric which engages the loops of the loop pile fabric (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims under 35 U.S.C. § 103 are:

Altman	3,266,841	Aug. 16, 1966
Hong et al. (Hong)	4,202,139	May 13, 1980
Eschenbach	4,305,245	Dec. 15, 1981
American Viscose Corp. (American Viscose)	923,184 (United Kingdom)	Apr. 10, 1963

Claims 32, 33 and 47 stand rejected under 35 U.S.C. § 102(b) as being anticipated by American Viscose.

Claims 43, 44 and 48 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hong in view of Altman and the conventional art of loosely woven and knotted threads as may be exemplified by Eschenbach.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (Paper No. 28, mailed December 12, 1997) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 27, filed September 23, 1997) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

The anticipation issue

We will not sustain the rejection of claims 32, 33 and 47 under 35 U.S.C. § 102(b).

To support a rejection of a claim under 35 U.S.C. § 102(b), it must be shown that each element of the claim is found, either expressly described or under principles of inherency, in a single prior art reference. See Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984).

Independent claim 47 reads as follows:

> A loop pile fabric for use as the female connection of a hook and loop interconnection comprising: a plurality of yarns, each comprised of a core and effect yarn, laying adjacent to and spaced from one another, said effect yarns having a plurality of loops projecting therefrom to act as receivers for the hook of a hook and loop interconnection and an adhesive applied to said yarns including the loops of said effect yarns and bridging adjacent yarns such that said adhesive bridges adjacent yarns to maintain said yarns spaced from one another and/or adheres loops of spaced yarns to loops of adjacent yarn.

American Viscose discloses a weftless fabric and in particular a weftless tape formed of strands bonded together in parallel relation and adapted for heavy duty strapping. As shown in Figure 3, each of the strands 17 and 18 each comprise a bundle of substantially parallel continuous filaments having intermediate portions in the forms of loops 22 extending laterally and overlapping and engaging filaments of adjacent strands.[1] American Viscose teaches (page 2, lines 85-91) that the strands can be produced from a yarn composed entirely of aligned continuous filaments passed in a highly relaxed, tensionless state and simultaneously subjecting the yarn to a stream of air that causes some of the filaments to be blown out of the strand to form protruding loops in the finished yarn.

The appellant argues (brief, p. 3) that the yarns of American Viscose are plied yarns, not core and effect yarns as claimed. The examiner's response (brief, pp. 3 and 5) to this

[1] See page 3, lines 53-67, of American Viscose.

argument is that the yarns taught by American Viscose at page 2, lines 85-91, are readable on[2] core and effect yarns.

In proceedings before it, the United States Patent and Trademark Office (USPTO) applies to the verbiage of the claims before it the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the appellant's specification. In re Morris, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). See also In re Sneed, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983).

In this case, the appellant's specification is silent as to what is meant by "core and effect yarn." However, the

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[2] The law of anticipation does not require that the reference teach what the appellants are claiming, but only that the claims on appeal "read on" something disclosed in the reference (see Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984)).

reference of record to Eschenbach clearly teaches what one of ordinary skill in the art would have understood the appellant to mean by his use of the phrase "core and effect yarn." Eschenbach teaches that a "core and effect yarn" is a novelty yarn produced by combining a core yarn 10 and an effect yarn 12 in an air jet 14 such that the combined yarn 16 (i.e., the "core and effect yarn") has slub sections 51, lean sections 52 and nubs 54 containing loops 53. Thus, it is our view that the broadest reasonable meaning of a "core and effect yarn" as used in claim 47 is a yarn combined from a core yarn and an effect yarn.

It is our determination that the yarn taught by American Viscose at page 2, lines 85-91, is not readable on being a core and effect yarn. In that regard, the loops in the yarn taught by American Viscose are formed by a stream of air that causes some of the filaments to be blown out of the strand of aligned filaments. Thus, the yarn taught by American Viscose does not have an effect yarn and therefore is not a "core and effect yarn."

For the reasons set forth above, the decision of the examiner to reject claim 47, and claims 33 and 34 dependent thereon, is reversed.

The obviousness issue

We sustain the rejection of claims 43, 44 and 48 under 35 U.S.C. § 103.

The test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. See In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

Hong discloses a hand sanding pad. As shown in Figure 2, the sanding pad includes a conformable, self-supporting pad 12 having one major surface capable of providing temporary adhesive attachment for a sheet 14 of pressure-sensitive adhesive-coated abrasive material and a handle means for maintaining the pad in contact with the hand of the user during use. Hong teaches (paragraph bridging columns 4 and 5)

that the most preferred handle means is provided by arrangement of three segments of hook-and loop-type fastening materials such as that sold under the trade designations "Velcro" or "Scotch-Mate". As depicted in Figure 2, a strip 20 of the loop-type fastening material is adhesively bonded to the back side of the pad 12 by a suitable adhesive 21. A ring 25 is then formed by overlapping the ends of a segment of loop-type fastening material and a segment 23 of hook-type fastening material so that a portion 24 of the hook-type fastener material is exposed on the outside of the ring. Ring 25 can then be conveniently engaged with the adhered loop-type material strip 20 on the back side of the pad 12. Ring 25 is of a size which will accommodate at least one finger of the user.

Altman discloses a releasably securable protective head-rest cover 10 comprising a sheet of material 11 that can be paper with a thread-like strip material 16 attached thereto. The thread-like strip material 16 is formed with a plurality of loops or knots and can be secured to the material in any

suitable manner (e.g., stitches 17).[3] Altman teaches that the thread-like strip material 16 can be a looped thread formed of fine nylon or any other type so long as it is a loosely woven or knotted material
having loop elements or the like to firmly engage hooks 14.[4] Lastly, Altman's claim 1 recites that the cover has **at least one** strip of material.

The teachings of the conventional art as exemplified by Eschenbach have been set forth above. In summary, Eschenbach discloses a core and effect yarn 16 having loops 53.[5]

After the scope and content of the prior art are determined, the differences between the prior art and the claims at issue are to be ascertained. Graham v. John Deere Co., 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966).

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[3] See column 2, lines 1-12.

[4] See column 2, lines 16-23, and 34-37.

[5] See Figure 3.

Claim 48 reads as follows:

> An abrasive fabric comprising: a substrate having abrasive particles connected to one side thereof and a loop pile fabric adhered to the other side thereof, said loop pile fabric comprising: a plurality of yarns, each comprised of a core and effect yarn, laying adjacent to and spaced from one another, said effect yarns having a plurality of loops projecting therefrom to act as receivers for the hook of a hook and loop interconnection and an adhesive applied to said yarns including the loops of said effect yarns and bridging adjacent yarns such that said adhesive bridges adjacent yarns to maintain said yarns spaced from one another and/or adheres loops of spaced yarns to loops of adjacent yarns.

Based on our analysis and review of Hong and claim 48, it is our opinion that the only difference is the limitation concerning the details of the loop pile fabric (i.e., lines 4-13 of claim 48 above).

With regard to this difference, the examiner determined (answer, p. 4) that

> Altman does not set forth the use of core and effect yarns as the strip 16 therein. However, Altman's statement that any loopy knotted thread-like material is useful as the strip 16 renders obvious the substitution thereof with the polyester core and effect yarns of Eschenbach, motivated by the expectation of being able to control the "loopyness" of the strip material.
>
> As such, it would have been obvious to adhere (as set forth by Hong et al.) the modified strip material of Altman to the abrasive pad of Hong et al., motivated by the inexpensive nature of the construction of the Altman

> strip and the ability to control "loopyness" which enables control of the strength of the releasable bond, especially since Appellant shows no criticality for the use of his yarns on abrasive pads and no unexpected results obtained therefrom.
>
> The orientation of plural strips of loopy material on the pad of Hong et al. would have been within the purview of the skilled artisan motivated by the expectation of optimizing bond strength and surface coverage to provide uniform attachment.

Implicit in this rejection is the examiner's view that the above noted modifications of Hong would result in an abrasive fabric which corresponds to the abrasive fabric recited in claim 48 in all respects.

The appellant argues (brief, pp. 3-4) that the rejection is improper since neither Hong or Altman teach the use of the claimed loop fabric (i.e., a loop fabric made from a series of core and effect yarns held spaced from one another by adhesive on the loops of adjacent yarns holding the yarns in spaced relationship). The appellant then concludes that it cannot be seen "how Hong and Altman can be combined to anticipate [sic, render obvious] the [claimed] invention without the hindsight use[6] of Applicant's specification to make such combination."

We find the appellant's argument unpersuasive for the following reasons. First, the appellant's argument is not based upon the rejection before us. Claim 48 has been rejected based on the combined teachings of Hong, Altman and Eschenbach. The appellant has argued that claim 48 is not rendered obvious from the combined teachings of Hong and

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[6] The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. § 103 is, of course, impermissible. See, for example, W. L. Gore and Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

Altman. The appellant has not provided any argument as to why the rejection under 35 U.S.C. § 103 before us in this appeal based upon the combined teachings of Hong, Altman and Eschenbach is in error.

Second, it is our view that the examiner's rejection of claim 48 is not based on hindsight knowledge derived from the appellant's own disclosure but from the teachings of the applied prior art to one of ordinary skill in the art. We note that while there must be some teaching, reason, suggestion, or motivation to combine existing elements to produce the claimed device, it is not necessary that the cited references or prior art specifically suggest making the combination (see B.F. Goodrich Co. v. Aircraft Braking Systems Corp., 72 F.3d 1577, 1583, 37 USPQ2d 1314, 1319 (Fed. Cir. 1996) and In re Nilssen, 851 F.2d 1401, 1403, 7 USPQ2d 1500, 1502 (Fed. Cir. 1988)) as the appellants would apparently have us believe. Rather, as set forth previously the test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. Additionally, we observe that an artisan must be presumed to

know something about the art apart from what the references disclose (see In re Jacoby, 309 F.2d 513, 516, 135 USPQ 317, 319 (CCPA 1962)) and the conclusion of obviousness may be made from "common knowledge and common sense" of the person of ordinary skill in the art (see In re Bozek, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969)). Moreover, skill

is presumed on the part of those practicing in the art. See In re Sovish, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985).

For the reasons set forth above, the decision of the examiner to reject claim 48 under 35 U.S.C. § 103 is affirmed.

Claims 43 and 44

Dependent claims 43 and 44 have not been separately argued by the appellant. Accordingly, these claims will be treated as falling with their parent claim 48. See In re Young, 927 F.2d 588, 590, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987); and In re Wood, 582 F.2d 638, 642, 199 USPQ 137, 140 (CCPA 1978). Thus, it follows that the decision of the examiner to reject claims 43 and 44 under 35 U.S.C. § 103 is also affirmed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 32, 33 and 47 under 35 U.S.C. § 102(b) is reversed and

the decision of the examiner to reject claims 43, 44 and 48 under 35 U.S.C. § 103 is affirmed.

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

AFFIRMED-IN-PART

JEFFREY V. NASE Administrative Patent Judge	)
MURRIEL E. CRAWFORD Administrative Patent Judge	) BOARD OF PATENT APPEALS AND INTERFERENCES
JOHN F. GONZALES Administrative Patent Judge	)

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