

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARK ALLAIN and JOSEPH ALLAIN, JR.

Appeal No. 1999-0052
Application 08/660,663¹

ON BRIEF

Before PATE, McQUADE and NASE, Administrative Patent Judges.
McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Mark Allain et al. originally took this appeal from the final rejection dated June 25, 1997 (Paper No. 6). The

¹ Application for patent filed June 5, 1996.

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appellants subsequently canceled finally rejected claims 1 and
12

and amended finally rejected claims 2, 9, 10, 14 and 18 (see
the paper filed March 17, 1998, Paper No. 14). In response,
the examiner withdrew the 35 U.S.C. § 112, second paragraph,
rejection which had been set forth in the final rejection and
allowed claims 2, 9, 11, 14 and 18 through 20 (see the
advisory action dated March 27, 1998, Paper No. 16). As a
result, this appeal now involves the standing prior art
rejections of claims 3 through 7, 10, 13 and 15 through 17.
Claim 8, the only other claim pending in the application,
stands objected to as depending from a rejected base claim.

The subject matter on appeal relates to "an apparatus and
method for protecting automotive vehicles from damage by flood
waters" (specification, page 1). Claims 3 and 15 are
illustrative and read as follows:²

²The terms "said other end wall" in claim 10, "said lower
plastic container" in claims 16 and 17, and "said . . . wall
panels" in claims 16 and 17 lack a proper antecedent basis.
These informalities are deserving of correction in the event

3. A motor vehicle flood protection apparatus, comprising a lower plastic container member having a rectangular bottom panel and integrally joined end, and side panels that have lateral edges joined to form a vehicle container, said end and side panels having a vertical height that is less than the height of a vehicle to be flood protected but well above the float level for the vehicle type and of sufficient height that, when surrounded by flood waters, said container floats with the vehicle carried therein, a cover member joined to said container to prevent rain water from entering said container, and an anchor means for securing said lower plastic container member to a stationary object.

15. A motor vehicle flood protection method, comprising providing a water-impervious flexible lower container having a bottom panel, said bottom panel having a perimetrical edge with two long sides and two short sides,

providing a top cover member having a perimetrical edge,

mating said lower container and cover member along the perimetrical edges thereof to enclose a vehicle therebetween such that the vehicle and water-impervious flexible lower container float when flood waters are at a predetermined level, and

anchoring said water-impervious lower container to a stationary object with a flexible member having a predetermined length.

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

Battle	4,315,535	Feb. 16, 1982
Jones et al. (Jones)	4,979,339	Dec. 25, 1990
Fasiska	5,176,421	Jan. 5, 1993
Ballard	5,282,502	Feb. 1, 1994

of further prosecution before the examiner.

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Claims 3 through 5 and 15 through 17 stand rejected under 35 U.S.C. § 103 as being unpatentable over Battle in view of Ballard and Jones, and claims 6, 7, 10 and 13 stand rejected under 35 U.S.C. § 103 as being unpatentable over Battle in view of Ballard, Jones and Fasiska.

Reference is made to the appellants' main and reply briefs (Paper Nos. 11 and 15) and to the examiner's answer (Paper No. 13) for the respective positions of the appellants and the examiner with regard to the merits of these rejections.

Battle, the examiner's primary reference, discloses a multi-layer, water-proof container for protecting a vehicle from flood water. The container 10 includes a rectangular floor surface portion 16, four collapsible side portions 12 through 15 and a drawstring 28 associated with the opening 40 defined by the upper edges of the side portions. After a vehicle has been driven over the collapsible side portions and onto the floor surface portion, the side portions are lifted

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up around the vehicle and the opening is gathered via the drawstring

so that the vehicle would then be completely encased by the multi-layered flood-proof material with a singular opening located above the vehicle to afford air entrance and release from the bag when the force of rising flood waters ensue, and possibly avoid air trapment within the bag which may result in floating of the entire apparatus [column 2, lines 28 through 34].

As conceded by the examiner (see page 7 in the answer), Battle does not respond to the limitations in independent claims 3 and 15 through 17 requiring an anchor means (claim 3), an anchoring step (claim 15) or a tether means (claims 16 and 17) for securing the container member to a stationary object. The examiner's reliance on Jones to overcome this deficiency is not well founded.

Jones pertains to "coverings for protecting the surface of automobiles and more particularly to the means for holding said coverings in place in resistance to wind forces when the covered cars are left unattended" (column 1, lines 11 through 15). To this end, Jones discloses hold down devices 24 for

use with a cover 2 which is adapted to be draped over a vehicle. Each hold down device consists of an elastic cord 3 having at one end a weighted bottle 5 filled with water, sand, gravel or the like and at the other end a clip 4 for attachment to the lower margin of the cover (see Figure 1). According to Jones, "[t]he elastic cord 3 is a yielding attachment for the weight so that a sudden gust of wind puts a less abrupt force on the clip. Furthermore, a forceful wind will lift the weight instead of tearing the [cover] fabric" (column 2, lines 42 through 46).

The relationship between Battle's container 10 and the vehicle enclosed therein indicates that the container would not be subject to the wind-generated hold down problem addressed by Jones. Indeed, in the absence of impermissible hindsight there is no reasonable indication in the combined teachings of these references that Battle's container would be subject to any type of hold down problem. In this light, it is not apparent, nor has the examiner cogently explained, why one of ordinary skill in the art would have found it obvious to provide the apparatus and method disclosed by Battle with

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the anchoring/tethering features disclosed by Jones, much less with the anchoring/tethering features actually recited in claims 3 and 15 through 17.

Since the foregoing flaw in the proposed Battle-Jones combination finds no cure in Ballard's disclosure of a bicycle cover or in Fasiska's disclosure of a automobile cover containment system, we shall not sustain the standing 35 U.S.C. § 103 rejections of independent claims 3 and 15 through 17 or of claims 4 through 7, 10 and 13 which depend either directly or indirectly from claim 3.

Accordingly, the decision of the examiner to reject claims 3 through 7, 10, 13 and 15 through 17 is reversed.

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REVERSED

WILLIAM F. PATE III)
Administrative Patent Judge)
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)
) BOARD OF PATENT
JOHN P. McQUADE)
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