

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte THOMAS WALTER ODORZYNSKI and JOEL SCOTT SHERMAN

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Appeal No. 2001-0644  
Application No. 09/250,204

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ON BRIEF

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Before STAAB, MCQUADE, and NASE, Administrative Patent Judges.  
STAAB, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final rejection of claims 52-113, all the claims in the application.

The Invention

Appellants' invention pertains to an absorbent article, such as a disposable diaper, for absorbing body fluids and exudates, such as urine. More particularly, the inventive absorbent article includes a garment facing surface constructed of a substantially vapor permeable material that is designed to

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transfer water vapor from the interior of the diaper at a rate that helps to control the humidity level within the article.

Claim 52 is representative of the claims on appeal and reads as follows (with emphasis added):

52. A disposable absorbent article which defines a front waistband section, a rear waistband section and an intermediate section which interconnects said front and said rear waistband sections, said absorbent article comprising:

a) a vapor permeable backsheet which includes a *first zone of vapor permeability which defines a water vapor transmission rate of at least about 100 g/sq.m/24 hr as determined according to a Water Vapor Transmission Rate test set forth herein and a second zone of vapor permeability which defines a water vapor transmission rate of at least about 3000 g/sq.m/24 hr as determined according to said Water Vapor Transmission Rate test;*

b) a liquid permeable topsheet which is positioned in facing relation with said backsheet;

c) an absorbent body located between said backsheet and said topsheet; and

d) a pair of fasteners which are located in one said front and said rear waistband sections and which are configured to refastenably secure said absorbent article about a waist of a wearer in use.

#### The Rejection

There are no references cited against the claims in the final rejection.

Claims 52-113 stand rejected under 35 U.S.C. § 112, second paragraph,

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due to their recitation of a vapor permeable backsheet having two zones with vapor permeability values calculated as a Water Vapor Transmission Rate (WVTR). The examiner is of the opinion that those skilled in the art would not be reasonably apprised of the metes and bounds of these claims since the specification does not disclose how the film samples were prepared from which the claims WVTR values were measured, i.e., what patterns were used and how thick were the coatings. [Answer, page 3.]

The examiner further posits (answer, page 6) that:

For one to determine whether a particular backsheet meets the terms of these claims, i.e., infringes these claims, one would need to know, inter alia if that backsheet possesses [a] WVTR value in appellants['] claimed range. It is not disputed that the specification of the instant application does not disclose how to prepare the sample films used to measure the WVTR value. Thus, resort to the specification of the instant application will not aid in determining the scope of the rejected claims.

#### Appellants' Position

The appellants' position may be fairly summarized by reference to the paragraph spanning pages 4 and 5 of the brief, wherein the following view is expressed:

Contrary to the Examiner, Appellants assert that the language in the claims of the instant application, read in light of the teachings set forth in the specification, is sufficient to define the metes and bounds of the invention as required by 35 U.S.C. [§] 112, second paragraph. In particular, Appellants' direct the Examiners [sic, Examiner's] attention to page 2, line 31 - page 3, line 2, of the specification wherein the water vapor transmission rate value of a material is described as being determined by the Water

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Vapor Transmission Rate Test set forth in the specification at page 17, line 16, through page 18, line 11. Appellants assert that the Water Vapor Transmission Rate Test specifically describes the Test procedure, including the equipment and conditions, which are required to determine the water vapor transmission rate of any sample backsheet material regardless of how it is produced. Moreover, Appellants assert that one skilled in the art, after reading the specification including the Test procedure, would be able to reproduce . . . and test the backsheet of their absorbent product to determine whether their product potentially infringes the claims.

Discussion

The test for compliance with the second paragraph of Section 112 is "whether the claim language, when read by a person of ordinary skill in the art in light of the specification, describes the subject matter with sufficient precision that the bounds of the claimed subject matter are distinct." *In re Merat*, 519 F.2d 1390, 1396, 186 USPQ 471, 476 (CCPA 1975). In other words, does a claim reasonably apprise those of skill in the art of its scope. *In re Warmerdam*, 33 F.3d 1354, 1361, 31 USPQ2d 1754, 1759 (Fed. Cir. 1994).

We have reviewed both the positions taken by the examiner in the answer in rejecting the appealed claims under 35 U.S.C. § 112, second paragraph, and the arguments thereagainst advanced by appellants in the brief that the rejection is not warranted.

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After review of the claims under appeal and the underlying specification supporting said claims, we find ourselves in agreement with appellants' position in this matter.

Specifically, we are in full agreement with appellants' position that one skilled in the art, after reading appellants' specification including the Test procedure found therein at page 17, line 16, through page 18, line 11, would be able to reproduce appellants' WVTR Test procedure in order to test the backsheet of *an absorbent product already within the possession of the skilled artisan* to determine whether *that product* potentially infringes the claims. In this regard, the composition and construction of the "samples" referenced on page 17, lines 19, 20, and elsewhere in the explanation of the Test procedure do not need to be known in order to successfully conduct appellants' Test procedure to determine the WVTR of a particular sample.<sup>1</sup> The examiner's focus on the circumstance that the specification does not set forth any details of the "samples" being tested is simply misplaced.<sup>2</sup>

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<sup>1</sup>By analogy, it is not necessary to know the composition and construction of a given "sample" in order to use a scale to determine its weight.

<sup>2</sup>At several places in the answer the examiner makes statements that would appear to indicate doubt on the examiner's part as to whether appellants' disclosure complies with the enablement requirement found in the first paragraph of 35 U.S.C. § 112. See, for

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In view of the above, we conclude that claims 52-113 do define the metes and bounds of the claimed invention with a reasonable degree of precision and particularity.

Conclusion

The decision of the examiner is reversed.

REVERSED

LAWRENCE J. STAAB	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
JOHN P. MCQUADE	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
	)	
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JEFFREY V. NASE	)	
Administrative Patent Judge	)	

LJS:hh

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example, page 6, lines 4-5 (" . . . here appellant [sic] has not disclosed how to specifically make the invention."), and page 6, lines 10-13 ("The claims are rejected because when one of ordinary skill in the art looks to the specification to determine the scope of the claims, there is nothing there to specifically describe how to make appellants [sic, appellants'] claimed vapor permeable backsheets."). However, no rejection under 35 U.S.C. § 112, first paragraph, is currently before for review.

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