

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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

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Appeal No. 2003-2126  
Application No. 10/150,318

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ON BRIEF

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Before KIMLIN, GARRIS, and PAWLIKOWSKI, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 1-13 which are all of the claims remaining in the application.

The subject matter on appeal relates to an apparatus comprising a battery, a temperature sensor connected to the battery and a component connected to the battery which heats the temperature sensor when a current is applied to the component. This appealed subject matter is adequately illustrated by independent claim 3 which reads as follows:



It is undisputed that the Melcher apparatus includes a battery having a temperature sensor connected thereto. The point of contention on this appeal is whether patentee's apparatus includes a component which heats the temperature sensor as required by the appealed claims.

According to the examiner, Melcher's resistor 25 (e.g., see figure 3 and the disclosure relating thereto) would necessarily and inherently produce heat to thereby heat the temperature sensor. In support of his contrary view, the appellant points out that patentee's resistor 25 is disclosed as a low resistance shunt resistor and argues that "[c]urrent through such a low resistance shunt resistor would not affect the temperature sensor" (brief, page 8). This argument is not well taken.

As correctly indicated by the examiner (e.g., see page 6 of the answer), the here claimed component, like component 25 in Melcher, comprises a resistor (e.g., see appealed claims 5 and 6) and is disclosed as comprising any component having a non-zero resistance (e.g., see lines 1-2 on specification page 10). Thus, the fact that patentee's component 25 comprises a low resistance shunt resistor does not militate against the examiner's anticipation finding as argued by the appellant. Instead, this finding is supported by the appellant's aforementioned disclosure

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that his heating component may comprise any component having a non-zero resistance which, of course, would include a low resistance shunt resistor of the type taught by Melcher.

It is well settled that, where, as here, the claimed and prior art products are identical or substantially identical, the Patent and Trademark Office can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his claimed product. Whether the rejection is based on "inherency" under 35 U.S.C. § 102, on "prima facie obviousness" under 35 U.S.C. § 103, jointly or alternatively, the burden of proof is the same, and its fairness is evidenced by the inability of the Patent and Trademark Office to manufacture products or to obtain and compare prior art products. In re Best, 562 F.2d 1252, 1255-56, 195 USPQ 430, 433-34 (CCPA 1977).

This reasoning applies to the apparatus claimed by the appellant and disclosed by Melcher. Under the circumstances recounted above, it is reasonable and fair to consider patentee's resistor 25 as possessing the heating characteristic of the here

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claimed component and concomitantly to require the appellant to prove that patentee's resistor does not actually possess this characteristic. On the record of this appeal, no such proof has been proffered by the appellant.

In light of the foregoing and for the reasons expressed in the answer, we hereby sustain the examiner's Section 102 rejection of all appealed claims as being anticipated by Melcher.

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The decision of the examiner 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

EDWARD C. KIMLIN	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
BRADLEY R. GARRIS	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
	)	
	)	
BEVERLY A. PAWLIKOWSKI	)	
Administrative Patent Judge	)	

BRG/hh

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