

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

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES J. BARRY
and MARIA PALASIS

Appeal No. 2004-2035
Application 09/978,763

ON BRIEF

Before WARREN, KRATZ and PAWLIKOWSKI, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

Decision on Appeal

This is an appeal under 35 U.S.C. § 134 from the decision of the examiner finally rejecting claims 75 through 78 and 80 through 95, all of the claims in the application.

Claim 75 illustrates appellants' invention of a patterned stent coated with a polyvinyl aromatic polymer coating containing a substantially water-insoluble drug wherein the drug is released over a time frame of at least about seven days in an amount sufficient to prevent or inhibit undesired cellular proliferations, and is representative of the claims on appeal:

75. A patterned stent for delivering a substantially water-insoluble drug at a desired location within a body, comprising

a polyvinyl aromatic polymer coating containing the substantially water-insoluble drug provided on at least a portion of said patterned stent, wherein the substantially water-insoluble drug is released over a time frame sufficient to thereby prevent or inhibit undesired cellular proliferations, wherein the time frame is at least about seven days.

The references relied on by the examiner are:

Palmaz	4,733,665	Mar. 29, 1988
Gianturco	4,800,882	Jan. 31, 1989
Wiktor	4,886,062	Dec. 12, 1989
Berg et al. (Berg)	5,464,650	Nov. 7, 1995
Hunter et al. (Hunter)	5,716,981	Feb. 10, 1998

(filed Jun. 7, 1995)

The examiner has advanced the following grounds of rejection on appeal:

claims 75, 76, 78, 80 through 82, 84 through 87 and 90 through 94 stand rejected under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as being obvious over Berg (Office action mailed April 16, 2003, pages 2-3;¹ answer, pages 4-7);

claims 83, 89 and 95 stand rejected under 35 U.S.C. § 103(a) as being obvious over Berg (Office action mailed April 16, 2003, page 3); and

claims 77 and 88 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Berg in view of Hunter (Office action mailed April 16, 2003, pages 3-4).

Berg acknowledges Palmaz, Gianturco and Wiktor as prior art (col. 1, ll. 30-36) and further refers to the stents disclosed in these references as those that “could be used in the present invention” (col. 3, ll. 32-35). These references are of record and are referred to in argument by the examiner (Office action mailed April 16, 2003, page 2; answer, e.g., pages 6-7) and by appellants (brief, e.g., pages 3-4; reply brief, e.g., pages 4 and 5-6). These references are necessary to support the examiner’s grounds of rejection and therefore, ordinarily, the failure to include these references in the statements of the rejection is clearly impermissible. *See In re Hoch*, 428 F.2d 1341, 1342 n. 3, 166 USPQ 406, 407 n.3 (CCPA 1970); *cf. Ex parte Raske*, 28 USPQ2d 1304, 1304-05 (Bd. Pat. App. & Int. 1993). However, in this instance, on the record before us, the examiner’s failure to include Palmaz, Gianturco and Wiktor along with Berg in the statements of the grounds of rejection is harmless error.

Appellants state that the appealed “claims are addressed collectively” (brief, page 3). Thus, we decide this appeal based on appealed claims 75, 77 and 83 as representative of the three

¹ The examiner states in the answer (pages 3-4) that the grounds of rejection are stated in the Office action mailed April 16, 2003.

grounds of rejection. 37 CFR § 1.192(c)(7) (2003); *see also* 37 CFR § 41.37(c)(1)(vii) (effective September 13, 2004; 69 Fed. Reg. 49960 (August 12, 2004); 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)).

We affirm the grounds of rejection under U.S.C. § 103(a) and reverse the ground of rejection under 35 U.S.C. § 102(b). Accordingly, the decision of the examiner is affirmed.

Rather than reiterate the respective positions advanced by the examiner and appellants, we refer to the answer and to the brief and reply brief for a complete exposition thereof.

Opinion

As an initial matter, we find that when the claim terms are given their broadest reasonable interpretation in light of the written description in the specification as interpreted by one of ordinary skill in the art, and without reading into the claims any limitation or particular embodiment disclosed in the specification, *see, e.g., In re Morris*, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989), the plain language of claim 75 specifies a patterned stent comprising at least any patterned stent coated on at least a portion thereof with any coating containing at least any polyvinyl aromatic polymer(s) and any water-insoluble drug(s) that will prevent or inhibit undesired cellular proliferation when released from the coated stent within a body over a time frame of at least about seven days in an amount sufficient to prevent or inhibit undesired cellular proliferation. The transitional term “comprising” opens the claim to include patterned stents that at least have the limitations specified in the claim and *any* additional materials and component(s). *See generally, Exxon Chem. Pats., Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1555, 35 USPQ2d 1801, 1802 (Fed. Cir. 1995) (“The claimed composition is defined as comprising - meaning containing at least - five specific ingredients.”); *In re Baxter*, 656 F.2d 679, 686-87, 210 USPQ 795, 802-03 (CCPA 1981) (“As long as one of the monomers in the reaction is propylene, any other monomer may be present, because the term ‘comprises’ permits the *inclusion* of other steps, elements, or materials.”). We further find that the term “containing” used in the definition of the “polyvinyl aromatic polymer coating” has the same effect as the transitional term “comprising.” *See Exxon, supra; In re Panagrossi*, 277 F.2d 181, 185, 125 USPQ 410, 413 (CCPA 1960). This transitional term opens the “polyvinyl aromatic polymer coating” to the

inclusion of any additional materials and layers in any amount, including the presence of other drugs than that specified.

The alternative grounds of rejection under §§ 102(b) and 103(a) require separate consideration under each statutory provision, and accordingly, we consider the application of Berg to appealed claim 75 on this basis. *See generally, In re Spada*, 911 F.2d 705, 707 n.3, 15 USPQ2d 1655, 1657 n.3 (Fed. Cir. 1990). We first consider the ground of rejection of claim 77 as anticipated by Berg under § 102(b). Appellants submit that while Berg “mentions a Palmaz stent (i.e., a patterned stent) and lists polyvinyl aromatics as one of the polymers that could be used to coat the stent, [Berg] does not teach or suggest that such stents release a drug over a time frame of at least about seven days that is sufficient to prevent or inhibit undesired cellular proliferation” as required by the claim (brief, page 4). Appellants point out in this respect, that the stents of Berg Examples 6 and 7 are “Wiktor wire stents”² coated with a different polymer tested for time release in buffered saline, and that no time period is stated for the release of drugs in testing of control stents in the coronary arteries of pigs in the latter Example (*id.*, pages 4-6). The examiner responds that because appellants have not exemplified in their specification a patterned stent specified in claim 77, they should not be heard to argue that the allegedly analogous coil stents in Berg Examples 6 and 7 are not anticipatory (answer, pages 4-6). We agree with appellants that the “comparison of Berg with the Appellants’ specification has no place in a proper anticipation analysis” (reply brief, pages 2-4).

Indeed, it is well settled that in order for the examiner to establish a *prima facie* case of anticipation, each and every element of the claimed invention, arranged as required by the claim, *must be found in a single prior art reference*, either expressly or under the principles of inherency, in a manner sufficient to have placed a person of ordinary skill in the art in possession thereof. *See generally, Spada*, 911 F.2d at 708, 15 USPQ2d at 1657. Whether the teachings and inferences that one skilled in this art would have found in the disclosure of an applied reference

² We note here that appellants disclose that “[s]tents are generally configured in one of two configurations: patterned or coil. Coil-type stents, include, for example, wire stents in the form of coils, spirals or the like, with or without spines, an example of which is the subject of” Wiktor (specification, page 26). Wiktor illustrates the stints as a coil in **FIGs. 1** and **2** thereof.

would have placed this person in possession of the claimed invention, taking into account this person's own knowledge of the particular art, is a question of fact. *See generally, In re Graves*, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995), and cases cited therein (a reference anticipates the claimed method if the step that is not disclosed therein "is within the knowledge of the skilled artisan."); *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968) ("[I]n considering the disclosure of a reference, it is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom.").

Here, there is no showing by the examiner that one skilled in the art would have been directed to appellants' claimed invention encompassed by claim 75 by the teachings of Berg (*see* Office action mailed April 16, 2003, page 2). *See generally, In re Arkley*, 455 F.2d 586, 587, 172 USPQ 524, 526 (CCPA 1972) ("[F]or the instant rejection under 35 U.S.C. 102(e) to have been proper, the . . . reference must clearly and unequivocally disclose the claimed compound or direct those skilled in the art to the compound without *any* need for picking, choosing, and combining various disclosures not directly related to each other by the teachings of the cited reference. Such picking and choosing may be entirely proper in the making of a 103, obviousness rejection, where the applicant must be afforded an opportunity to rebut with objective evidence any inference of obviousness which may arise from the *similarity* of the subject matter which he claims to the prior art, but it has no place in the making of a 102, anticipation rejection.").

Accordingly, in the absence of a *prima facie* case of anticipation, we reverse the rejection of claims 75, 76, 78, 80 through 82, 84 through 87 and 90 through 94 under 35 U.S.C. § 102(b).

However, the same facts in a reference that do not provide a description of a claimed invention under § 102(b) may constitute "evidence of obviousness under § 103 for all it fairly suggests to one of ordinary skill in the art." *In re Wiggins*, 488 F.2d 538, 543, 179 USPQ 421, 425 (CCPA 1973); *see also Arkley*, 455 F.2d at 587, 172 USPQ at 526.

We have carefully reviewed the record on this appeal and based thereon find ourselves in agreement with the examiner that the claimed patterned stent encompassed by appealed claim 75 would have been obvious over the teachings of Berg to one of ordinary skill in this art at the time the claimed invention was made (*see* Office action mailed April 16, 2003, page 2).

The examiner finds, and we agree, that Berg is directed to stents coated with a polymer matrix containing a drug that are used to treat injuries to blood vessels, including restenosis, which is a well known cellular proliferative disease as acknowledged by appellants (specification, page 28; appealed claim 94), by “sustained release of the drug to vascular tissue” (e.g., col. 1, ll. 5-16, and col. 2, ll. 13-21). Berg would have taught one of ordinary skill in the art that the polymer matrix “slows the administration of the drug following implantation,” wherein “[t]he amount of drug to be included on the stent can be readily controlled by applying multiple thin coats” of drug-polymer matrix, and “the rate at which the drug is delivered can be controlled by the selection of an appropriate . . . polymer and by the ratio of drug to polymer” (e.g., col. 2, ll. 30-67). The stent can be, among others, patterned as disclosed by Palmaz; the polymer can be, among others, “polyvinyl aromatics, such as polystyrene;” and the drug can be, among others, an antimitotic agent, such as, among others, methotrexate (e.g., col. 2, ll. 55-62, col. 3, ll. 32-35, col. 4, ll. 56-64, and col. 5, lines 19-39).

Thus, Berg provides substantial evidence supporting the examiner’s position because one of ordinary skill in this art routinely following the direction therein to use patterned stents coated with layers of a polyvinyl aromatic polymer matrix containing an antimitotic drug for slow and measured release *in-vivo* to treat proliferative diseases in vessels would have routinely arrived at the claimed invention encompassed by claim 75, as we have interpreted this claim above, without recourse to appellants’ disclosure. *See generally, Merck & Co., Inc. v. Biocraft Labs., Inc.*, 874 F.2d 804, 807, 10 USPQ2d 1843, 1845-46 (Fed. Cir. 1989) (“That the ‘813 patent discloses a multitude of effective combinations does not render any particular formulation less obvious. This is especially true because the claimed composition is used for the identical purpose. [Citations omitted.]”); *In re Lemin*, 332 F.2d 839, 841, 141 USPQ 814, 815-16 (CCPA 1964) (“Generally speaking there is nothing unobvious in choosing ‘some’ among ‘many’ indiscriminately.”). Indeed, Berg would have reasonably suggested to one of ordinary skill in the art that the amount of drug released in a desired time frame can be readily determined and controlled by, among others, “varying the ratio of drug to polymer in the multiple layers” (e.g., col. 2, ll. 62-67). Thus, this person routinely working within the teachings of Berg would have reasonably arrived at a workable or optimum time frame to suite his or her desires in this respect, including the time frame of at least seven days to prevent or inhibit undesired cellular

proliferations as claimed in claim 75. *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955) (“[W]here general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.”).

In view of the *prima facie* case of obviousness established by the examiner, we again consider the record as a whole with respect to this ground of rejection in light of appellants’ rebuttal arguments in the brief and reply brief, including the evidence in the specification as relied on in the brief and reply brief. *See generally, In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992); *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984).

Appellants submit that Berg does not teach the claimed time frame of seven days and that there is no reasonable expectation of success in attaining the claim limitation of a time frame for drug release of seven days specified in claim 75 by following the teachings of Berg, pointing to the differences between claim 75 and Berg Example 6 with respect to the type of stent, the type of polymer, and the fact that the testing was done in buffered saline and not “within a body” as claimed (brief, pages 4-7). We cannot agree. We recognize that the wire or coil stent of Berg Example 6 differs from the claimed stent encompassed by appealed claim 75 as appellants point out. However, the teachings of the reference are not limited to such a preferred embodiment, *see generally, Merck v. Biocraft Labs.*, 874 F.2d at 807, 10 USPQ2d at 1846 (quoting *In re Lamberti*, 545 F.2d 747, 750, 192 USPQ 278, 280 (CCPA 1976) (“But in a section 103 inquiry, ‘the fact that a specific [embodiment] is taught to be preferred is not controlling, since all disclosures of the prior art, including unpreferred embodiments, must be considered.’”), and we fail to find in Berg Example 6 any teaching which detracts from the clear direction in the reference to arrive at a desired sustained drug release by employing coatings of the polymer and drug on the stent according to the teaching therein that we found above, including the stents, polymers and drugs encompassed by claim 75. *See, e.g., Lamberti*, 545 F.2d at 750, 192 USPQ at 280 (“The fact that neither of the references expressly discloses asymmetrical dialkyl moieties is not controlling; the question under 35 USC 103 is not merely what the references expressly teach, but what they would have suggested to one of ordinary skill in the art at the time the claimed invention was made. [Citation omitted.]”).

Appellants further contend that “[t]he present specification teaches that the use of patterned stents as opposed to non-patterned stents leads to surprisingly superior results,” pointing to the disclosure at page 29, ll. 1-8, of the specification (brief, pages 7-8), which statement is not specific with respect to the coating of “a polymer/paclitaxel matrix” used or the construction of the patterned and coil stents on which the allegation of unexpected results are based. The examiner takes the position that the alleged difference between patterned and coil stents is not surprising because of the difference in the exterior surface area of the two stents, as seen from a comparison of the patterned stent of Palmaz and the coil stent of Wiktor, and the corresponding difference in available coating area (answer, pages 6-7).

In support of their position, appellants point to the results obtained with patterned stents in specification Examples 11-13 compared with the results obtained with a coil stent in specification Comparative Example 14 with “the same amount of the *same* drug” (reply brief, pages 5-6; emphasis supplied). Appellants further characterize this comparison as “these examples compare use of a patterned stent and coiled stent using *substantially the same* drug (200 µg of paclitaxel used for the patterned stents and 175-200µg of Taxol used for the coiled stent. *See* Example 11 and Comparative Example 14)” (reply brief, page 7; emphasis provided). Appellant thus argues that “notwithstanding the differences in uncovered surface area of the two types of stents, the stents can be prepared to carry the same amount of drugs (*i.e.* the coiled stent can be covered with any number of layers of polymers to increase the surface area over which the drug is deposited)” (*id.*). Appellants further points to specification Example 15 but not in the context of a comparison (reply brief, page 6).

We find that specification Examples 11-13 all use “a stent prepared as set forth in Example 10” wherein a “9 mm long balloon-expandable stainless steel NIR® stent” is coated with a polylactic acid/polycaprolactone (PLA/PCL) copolymer/paclitaxel matrix containing 200 µg of paclitaxel, wherein paclitaxel “comprised approximately 30% by weight of the matrix” (specification, pages 41-42). No other description of the stent is provided. The stents were implanted in porcine coronary arteries in Example 11 and in a rabbit iliac in Examples 12 and 13, and the results stated in comparison to the same stent having no coating (*id.*, pages 42-43). In Examples 11 and 12, the results after 2-3 µg/day of paclitaxel over 28 days was 50% and

70%, respectively, reduction in neointimal hyperplasia, while in Example 13, the result after 2-3 µg/day of paclitaxel over 56 days was 60%, compared to the uncoated stent (*id.*).

We further find that the experimentation disclosed as specification Comparative Example 14 was not performed by appellants and in fact comprises the experiments and results reported by a third party based on an undescribed coil stent coated with an undescribed “biocompatible polymeric coating incorporating 175-200 µg of TAXOL® and exhibiting in vitro release kinetics of 0.75 µg/day for the first thirty days,” which “stents were placed in porcine coronary arteries” (specification, pages 43-44). Appellants state in the specification, that “the results obtained with a coil stent and paclitaxel (placed in a porcine coronary artery) show a neointimal hyperplasia reduction of only 40%” as calculated by appellants, and such result is compared only with specification Example 11 (page 44). Similarly, in specification Comparative Example 15, the experimentation and results “of another study” by the same third party using low-dose and high-dose TAXOL® in an unspecified polymer coated on unspecified coil stents, with no indication of in vitro release kinetics and even the manner of testing as “coated coronary stents,” is reported with appellants calculating the results as 30% and 39%, respectively, and comparing the result to specification Examples 11-13 (pages 45-46). Appellants acknowledge that “TAXOL® is a commercially available form of paclitaxel” (*id.*, page 18).

It is well settled that the burden of establishing the practical significance of data in the record with respect to unexpected results rests with appellants, which burden is not carried by mere arguments of counsel. *See generally, In re Geisler*, 116 F.3d 1465, 1470, 43 USPQ2d 1362, 1365-66 (Fed. Cir. 1997); *In re Merck*, 800 F.2d 1091, 1099, 231 USPQ 375, 381 (Fed. Cir. 1986); *In re Longi*, 759 F.2d 887, 897, 225 USPQ 645, 651-52 (Fed. Cir. 1985); *In re Lindner*, 457 F.2d 506, 508, 173 USPQ 356, 358 (CCPA 1972); *In re Klosak*, 455 F.2d 1077, 1080, 173 USPQ 14, 16 (CCPA 1972); *In re D'Ancicco*, 439 F.2d 1244, 1248, 169 USPQ 303, 306 (1971). In our view, appellants have not carried this burden.

It is immediate apparent on mere inspection of the stents and the coatings thereon as disclosed for the Examples and Comparative Examples in the written description in appellants’ specification that the proposed comparisons of appellants’ Examples 11-13 with the third party’s Comparative Examples 14 and 15 do not constitute direct, “side-by-side” comparisons of embodiments of the claimed invention encompassed by appealed claim 75, which is a patterned

stent of Palmaz coated with at least “a polyvinyl aromatic coating containing the substantially water-insoluble drug,” with the closest prior art of Berg, which is a coil stent of Wiktor coated with the *same* drug containing polyvinyl aromatic coating, wherein the difference is solely the patterned stent vis-à-vis the coil stent, and appellants do not contend otherwise. *See generally, In re Baxter Travenol Labs.*, 952 F.2d 388, 392, 21 USPQ2d 1281, 1285 (Fed. Cir. 1991) (“[W]hen unexpected results are used as evidence of nonobviousness, the results must be shown to be unexpected compared to the closest prior art. [Citation omitted.]”); *In re Burckel*, 592 F.2d 1175, 1179, 201 USPQ 67, 71 (CCPA 1979) (the claimed subject matter must be compared with the closest prior art in a manner which addresses the thrust of the rejection); *In re Dunn*, 349 F.2d 433, 439, 146 USPQ 479, 483 (CCPA 1965) (“[W]e do not feel it an unreasonable burden on appellants to require comparative examples relied on for non-obviousness to be truly comparative. The cause and effect sought to be proven is lost here in the welter of unfixed variables.”).

Thus, at best, appellants are left with relying on the comparisons in the specification as indirect evidence of nonobviousness, and therefore, have the further burden of presenting analysis based on established scientific principles demonstrating how such evidence indirectly distinguishes the claimed patterned stents over the teachings of Berg. *See, e.g., In re Best*, 562 F.2d 1252, 1254, 195 USPQ 430, 432 (CCPA 1977) (“[I]ndirect comparisons, based on established scientific principles, can validly be applied to distinguish a claimed chemical process or product from that disclosed in the prior art.”); *In re Blondel*, 499 F.2d 1311, 1317, 182 USPQ 294, 297-98 (CCPA 1974) (“Appellants’ brief goes through a detailed, step-by-step analysis of the evidence in support of the conclusion to be drawn from the indirect comparison . . . ,” establishing that the indirect evidence provided a reliable indication of the performance of the closest claimed and prior art compounds).

On this record, and in the absence of an explanation or evidence establishing the practical significance of the evidence relied on with respect to the ground of rejection, including analysis establishing that the indirect evidence is reliable, we find that appellants have not carried the burden of demonstrating any difference between the claimed stents and those of Berg based solely on the type of stent that is coated. It is readily apparent that there are substantial differences between the specification Examples and Comparative Examples in that the polymeric

coating material is not identified for the Comparative Examples, no delivery rate of Taxol® stated in µg/day is disclosed for either of the Comparative Examples, and the stents used in these examples are a balloon expandable NIR® patterned stent in the Examples and an undescribed coil stent in the Comparative Examples. Appellants have presented no scientific explanation or objective evidence explaining the practical significance of the PLA/PCL copolymer/paclitaxel matrix coatings vis-à-vis the unidentified polymeric/Taxol® coatings of the third party stents, and certainly not with the polyvinyl aromatic/different drug coatings taught by Berg, which does not disclose either paclitaxel or Taxol®. In these respects, we found above that Berg clearly teaches that the delivery rate of the polymer/drug matrix depends on the polymer and the drug, and all that appealed claim 75 requires is a delivery rate over at least seven days of a drug in an amount that prevents or inhibits undesired cellular proliferation.

Accordingly, on this record we are of the opinion that the evidence in the specification as relied on by appellants in the brief and reply brief, is entitled to little, if any, weight. *See Lindner*, 457 F.2d at 508, 173 USPQ at 358 (“The affidavit and specification do contain allegations that synergistic results are obtained with all the claimed compositions, but those statements are not supported by any factual evidence other than that limited amount of evidence discussed above. This court has said . . . that mere lawyers’ arguments unsupported by factual evidence are insufficient to establish unexpected results. [Citations omitted.] Likewise, mere conclusory statements in the specification and affidavits are entitled to little weight when the Patent Office questions the efficacy of those statements. [Citations omitted]”).

Accordingly, based on our consideration of the totality of the record before us, we have weighed the evidence of obviousness found in Berg with appellants’ countervailing evidence of and argument for nonobviousness and conclude that the claimed invention encompassed by appealed claims 75, 76, 78, 80 through 82, 84 through 87 and 90 through 94 would have been obvious as a matter of law under 35 U.S.C. § 103(a).

As the examiner points out (answer, page 7), appellants have not separately argued in the brief the grounds of rejection under § 103(a) of claim 77 over the combined teachings of Berg and Hunter and of claim 83 over Berg alone, and we find no argument in these respects in the reply brief. Accordingly, we summarily conclude that the claimed invention encompassed by

appealed claims 77 and 88 and by appealed claims 83, 89 and 95 would have been obvious as a matter of law under 35 U.S.C. § 103(a).

In summary, we have affirmed all of the grounds of rejection under 35 U.S.C. § 103(a) and have reversed the ground of rejection under 35 U.S.C. § 102(b).

The examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective September 13, 2004; 69 Fed. Reg. 49960 (August 12, 2004); 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)).

AFFIRMED

CHARLES F. WARREN)	
Administrative Patent Judge)	
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