

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. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAY SAWICKI and MARY JO SAWICKI

Appeal No. 2004-2347
Application No. 09/839,519

ON BRIEF

Before ABRAMS, FRANKFORT, and NASE, Administrative Patent Judges.
ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-17, which are all of the claims pending in this application.

We AFFIRM.

BACKGROUND

The appellants' invention relates to a ladder step safety guard. An understanding of the invention can be derived from a reading of exemplary claim 1, which has been reproduced below.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Jankowski	5,038,889	Aug. 13, 1991
Hardy	5,638,915	Jun. 17, 1997
Weller	5,749,437	May 12, 1998

The following rejections are before us:

- (1) Claims 1 and 3-7 under 35 U.S.C. § 102(b) as being anticipated by Hardy.
- (2) Claims 12, 13 and 15-17 under 35 U.S.C. § 102(b) as being anticipated by Weller.
- (3) Claim 2 under 35 U.S.C. § 103(a) as being unpatentable over Hardy in view of Jankowski.
- (4) Claims 8-11 under 35 U.S.C. § 103(a) as being unpatentable over Weller in view of Jankowski.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the Answer (Paper No. 15) for the examiner's reasoning in support of the rejections, and to the Brief (Paper No. 14) for the appellants' arguments thereagainst.

OPINION

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

The appellants' invention "relates to a ladder step safety guard used to help prevent a user of a step ladder from stepping on a top step and on the top of a ladder when in use" (Specification, page 1). It should be noted, however, that the claims are not so limited, in that all three independent claims recite in their preambles that the invention is "used with a step ladder and other types of ladders." The invention is manifested in claim 1 in the following manner:

1. A ladder step safety guard used with a step ladder and other types of ladders, the safety guard designed to prevent a ladder user from stepping on a top step and the top of a ladder top, the safety guard comprising:

a front cover, said front cover dimensioned to cover a space between the top step and the ladder top of the ladder;
and

means for releasably attaching said front cover to the ladder and next to the top step and the ladder top.

(1)

Independent claim 1 and dependent claims 3-7 stand rejected as being anticipated by Hardy. Anticipation under 35 U.S.C. § 102(b) is established only when a single prior art reference discloses, either expressly or under the principles of inherency, each and every element of the claimed invention. See In re Paulsen, 30 F.3d 1475, 1480-1481, 31 USPQ2d 1671, 1675 (Fed. Cir. 1994) and In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990). Anticipation by a prior art reference does not require either the inventive concept of the claimed subject matter or recognition of inherent properties that may be possessed by the reference. See Verdegaal Brothers Inc. v. Union Oil Co. of California, 814 F.2d 628, 633, 2 USPQ2d 1051, 1054 (Fed. Cir. 1987). Nor does it require that the reference teach what the applicant is claiming, but only that the claim on appeal "read on" something disclosed in the reference, *i.e.*, all limitations of the claim are found 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).

Evaluating the rejection in the light of this guidance from our reviewing court leads us to conclude that it should be sustained. Our reasoning follows.

Hardy is directed to a portable tool storage apparatus capable of being installed across the top of a step ladder (Figures 5 and 6) or an extension ladder (Figures 3 and 4). The only argument set out by the appellants in opposition to this rejection is that

Hardy “does not disclose a ladder guard dimensioned for covering the space between the top step and the ladder top in front of the ladder” (Brief, page 5). We find this argument not to be persuasive, for a number of reasons. First, Hardy discloses in Figure 3 a front view of a ladder in which the top of the ladder and at least the first step downwardly therefrom are covered by the front skirt of the tool holder. Thus, the disputed limitation of claim 1 clearly reads upon the extension ladder embodiment of the Hardy invention, which is shown in Figures 3 and 4.

In addition, claim 1 states only that “a” space, not “the” space, between the top step and the top of the ladder, be covered by the front cover. That is, the claim does not require that the entire space between the top step and the top of the ladder be covered, as the appellants’ argument would appear to suggest. Such being the case, the disputed limitation also is readable on skirt 106 of the Hardy step ladder embodiment shown in Figure 1. With regard to this embodiment, when installed as shown in Figures 5 and 6, skirt 102 covers “a” space between the top step and the top of the ladder (See Figure 6). Furthermore, the Hardy device is capable of being installed with skirt 102 over the front of the ladder, in which case it would cover the entire space between the top step and the top of the ladder.

Thus, while the stated use of the Hardy device is not the same as that of the appellants’ invention, the language of the claim is readable on both embodiments disclosed in the reference, and therefore the claim is anticipated thereby and the

Section 102 rejection is sustained. In this regard, it should be noted that the appellants' device is equipped with pockets so it also functions as a tool holder.

Since the appellants have chosen to group dependent claims 3-7 with claim 1 (Brief, page 5), the rejection of these claims also is sustained.

(2)

Independent claim 12 and dependent claims 13 and 15-17 stand rejected as being anticipated by Weller which, like Hardy, is directed to a tool holder that is to be installed over the top of a ladder. Claim 12 also recites a front cover "dimensioned to cover a space between the top step and the ladder top" (emphasis added). The argument advanced by the appellants here is that Weller does not disclose a safety ladder guard in which the front cover "covers only the top of the space between the top step and the ladder top" (Brief, page 6).

However, this argument fails because it is not commensurate with the limitations recited in claim 12. As was the case with claim 1, claim 12 requires merely that "a" space between the top step and the top of the ladder be covered by the front cover, which clearly is the case with the front cover in Weller (see Figure 1). Also, while Weller has not labeled his invention as a ladder safety device, the structure recited in claim 12 reads on it and therefore the claim is anticipated.

The rejection of independent claim 12 and dependent claims 13 and 15-17 is sustained.

(3)

Claim 2 has been rejected as being unpatentable over the combined teachings of Hardy and Jankowski. This claim adds to claim 1 the limitation that the means for attaching the device to the ladder comprises hook and loop fasteners. Jankowski has been applied by the examiner for its teaching of using such a means to attach a cover to a structure in order to secure such means together (Answer, page 2). The question under 35 U.S.C. § 103 is what the references would have suggested to one of ordinary skill in the art at the time the invention was made. See Merck & Co. v. Biotech Labs., Inc. 874 F.2d 804, 807, 10 USPQ2d 1843, 1846 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

Considering Hardy in the light of Section 103 does not cause us to alter our conclusion that it discloses all of the subject matter required by claim 1, from which claim 2 depends. Inasmuch as the appellants have not presented arguments directed to the separate patentability of claim 2, the examiner's conclusion stands uncontroverted and we will sustain this rejection.

(4)

Independent claim 8 and dependent claims 9-11 stand rejected as being unpatentable over Weller in view of Jankowski. As was the case with the other independent claims, claim 8 requires a front cover "dimensioned to cover a space between the top step and the ladder top" which, as we concluded above with regard to

the Section 102 rejection of claim 12, reads on the tool holder disclosed by Weller. The argument advanced by the appellants with regard to claim 8 is the same as that which we found not to be persuasive when considered against the rejection of claim 12 as being anticipated by Weller. We find it equally unpersuasive here. The appellants having not disputed the examiner's combining of Jankowski with Weller, it is our conclusion that the combined teachings of the references establish a prima facie case of obviousness with regard to the subject matter recited in claim 8, and we will sustain this rejection. It follows that we also will sustain the like rejection of claims 9-11, which depend from claim 8, and which were not separately argued.

CONCLUSION

All of the rejections are sustained.

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

NEAL E. ABRAMS
Administrative Patent Judge

CHARLES E. FRANKFORT
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

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Appeal No. 2004-2347
Application No. 09/839,519

Page 10

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