

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ULRICH B. HOLESCHOVSKY

Appeal No. 2006-1038
Application No. 10/138,994

ON BRIEF

Before GARRIS, PAK and KRATZ, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1, 2 and 4-6.

The subject matter on appeal relates to a composite structure comprising an open weave fabric or backing having fibers and a urethane froth foam comprising a non-Newtonian thickener, wherein the fibers of the fabric or backing are at

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least partially penetrated and/or embedded by the urethane froth. Further details regarding this appealed subject matter are set forth in representative independent claim 1 which reads as follows:

1. A composite structure comprising:
 - (A) an open weave, natural or synthetic fabric or backing having fibers, and
 - (B) a urethane froth foam comprising:
 - (1) at least one polyisocyanate component,
 - (2) at least one isocyanate-reactive component,
 - (3) at least one non-Newtonian thickener,
and
 - (4) at least one catalyst;

wherein the fibers of the fabric or backing are at least partially penetrated and/or embedded by the urethane froth.

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

Holeschovsky et al. (Holeschovsky)	6,264,775 B1	July 24, 2001
Irwin	6,475,592 B1	Nov. 5, 2002 (filed Sep. 23, 1999)

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All of the appealed claims are rejected under 35 U.S.C. § 103(a) as being unpatentable over Irwin in view of Holeschovsky.¹

We refer to the Brief and Reply Brief and to the Answer for a thorough discussion of the opposing viewpoints expressed by the appellant and by the examiner concerning the above-noted rejection.

OPINION

For the reasons which follow, we will sustain this rejection.

Irwin discloses a carpet comprising tufts, back stitches, first backing layer, second backing layer and an adhesive or back coating (e.g., see Figures 1-9 and particularly Figures 5 and 6 as well as the written disclosure relating thereto). The adhesive or back coating may be a polyurethane having each of the appealed claim 1 components except for the non-Newtonian thickener (e.g., see the paragraph bridging columns 10 and 11).

¹ No individual claims have been separately argued by the appellant with any reasonable specificity in accordance with 37 CFR § 41.37(c)(1)(ix) (September 13, 2004). Therefore, in assessing the merits of the rejection advanced by the examiner, we will focus on claim 1, the sole independent claim on appeal, with which the remaining dependent claims will stand or fall.

In this later regard, Holeschovsky discloses a tufted carpet of the type taught by Irwin wherein the polyurethane adhesive includes a non-Newtonian thickener as here claimed (e.g., see the paragraph bridging columns 2 and 3) and wherein the adhesive may be in the form of a froth foam as here claimed (e.g., see the paragraph bridging columns 11 and 12). This polyurethane adhesive with non-Newtonian thickener is disclosed not only as suitable but advantageous due to the viscosity characteristics provided by the non-Newtonian thickener (e.g., again see the paragraph bridging columns 2 and 3 and also see the paragraph bridging columns 4 and 5). For example, under the high shear of application conditions, the viscosity is low which "allows the reactive polyurethane to thoroughly penetrate exposed tufts and primary backing, ensuring adequate tuft bind" whereas, "[u]nder conditions of low shear, however, for example while traversing the curing oven, the viscosity is quite high" (column 5, lines 8-12).

In light of the respective teachings of these references, it is the examiner's basic position that it would have been obvious for one with ordinary skill in this art to provide the tufted carpet of Irwin with an adhesive coating (e.g., see element 26 of

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Figures 5 and 6) in the form of a polyurethane froth foam adhesive with non-Newtonian thickener of the type and for the reasons taught by Holeschovsky. In this way, Irwin's tufted carpet would have been provided with an adhesive evinced by Holeschovsky to be suitable and even advantageous as a back coating for tufted carpets. It is the examiner's additional position that the aforementioned provision would have necessarily and inherently resulted in the fibers of Irwin's fabric or backing being at least partially penetrated and/or embedded by the urethane froth as required by appealed claim 1. This additional position is supported by Irwin (e.g., see lines 47-50 in column 6 wherein patentee teaches that, "[i]f spun fibers are used in the weft direction, such fibers will increase adhesion between backing layer **15** and any adhesive . . . that is used to back coat the carpet") as well as Holeschovsky (e.g., again see lines 7-10 in column 5 wherein patentee teaches that "[t]he low viscosity under these [application] conditions allows the reactive polyurethane to thoroughly penetrate exposed tufts and primary backing, ensuring adequate tuft bind").

The appellant argues that "combining the Irwin reference with the Holeschovsky . . . reference does **not** result in the

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presently claimed composite structures" (Brief, page 6). According to the appellant, this is because "the present invention does not contain tufts of yarn" whereas "[t]ufts of yarn are required by both the Irwin reference and the Holeschovsky . . . reference" (id.). On page 7 of the Brief, the appellant elaborates on this argument as follows:

It is noted by Appellants [sic] that the present claim [i.e., appealed claim 1] uses "comprising" language and thus, in the broadest sense, does not clearly exclude tufts of yarn which are required by the Irwin reference. This is, however, irrelevant! As stated above, this particular combination of references simply does not result in the invention as presently claimed by Appellants [sic], and the required modification of the Irwin reference to "arrive at" Appellants [sic] invention is improper. Thus, one of ordinary skill in the art has no insight into the presently claimed invention upon reading the Irwin reference in combination with the Holeschovsky et al reference.

The appellant does not explain, and we cannot divine, why he considers it "irrelevant" (id.) that claim 1 does not exclude Irwin's tufts of yarn. To the contrary, it seems indisputable to us that the claim 1 recitation "composite structure comprising . . ." includes rather than excludes the tufts of Irwin's carpet. See In re Baxter, 656 F.2d 679, 686, 210 USPQ 795, 802 (CCPA 1981).

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Finally, the appellant contends that, even if a prima facie case of obviousness exists, the rejection still would not be proper because "[t]he composite structures of the present invention have improved properties . . ." (Brief, page 9). However, the appellant has not explained with any reasonable specificity why the asserted "improved properties" (*id.*) are considered to be unexpected in light of the applied references and commensurate in scope with appealed claim 1, thereby evincing nonobviousness. More importantly, the Evidence Appendix filed by the appellant pursuant to 37 CFR § 41.37(c)(1)(ix) unambiguously reflects that no evidence is "relied upon by appellant in the appeal" (§ 41.37 at (ix)). Under these circumstances, we consider the appellant to have advanced on this appeal argument but not evidence in opposition to the examiner's § 103 rejection.

In summary, it is our ultimate determination that the reference evidence adduced by the examiner establishes a prima facie case of obviousness which has not been successfully rebutted by the appellant with argument or evidence of nonobviousness. See In re Oetiker, 977 F.2d 1443, 1444, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). As a consequence, we hereby sustain the examiner's § 103 rejection of all the appealed claims as being unpatentable over Irwin in view of Holeschovsky.

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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)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

AFFIRMED

BRADLEY R. GARRIS)	
Administrative Patent Judge)	
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CHUNG K. PAK)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
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BRG:clm

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