

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 10

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte EDWARD STOVALL JR.

Appeal No. 2002-2103
Application No. 09/597,683

ON BRIEF

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

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 to 10, which are all of the claims pending in this application.

BACKGROUND

The appellant's invention relates to a method and apparatus for inhibiting grass from overgrowing pavement and fences (title). A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

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

Landis	456,995	August 4, 1891
Turnbo	1,529,329	March 10, 1925

Claims 1 to 4 stand rejected under 35 U.S.C. § 103 as being unpatentable over Landis.

Claims 5 to 10 stand rejected under 35 U.S.C. § 103 as being unpatentable over Landis in view of Turnbo.

Rather than reiterate the conflicting viewpoints advanced by the examiner and

June 7, 2002) for the examiner's complete reasoning in support of the rejections, and to the brief (Paper No. 7, filed April 3, 2002) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 1 to 10 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention.

The claimed subject matter

Claims 1, 5 and 8 (the independent claims on appeal) read as follows:

1. Apparatus for inhibiting grass from overgrowing the side edge of pavement which comprises
a length of concrete laid along the side of the pavement that has a top surface at least a portion of which slopes downwardly away from the pavement, a strip of plastic overlaying said length of concrete, and
fastening means for fastening said strip of plastic to said length of concrete.

 5. A method of forming and installing apparatus for inhibiting grass from overgrowing the side edge of pavement which comprises the steps of
digging a trench along the pavement side edge,
at least partially filling the trench with a concrete slurry,
shaping the concrete slurry with a top surface that slopes down and away from the top surface of the pavement,
overlaying the shaped concrete slurry with a plastic strip having an array of holes,
securing the plastic strip to the concrete slurry with anchor bolts passes through the strip holes and into the concrete slurry, and
allowing the concrete slurry to dry and harden beneath the plastic strip.

 8. A method of forming and installing apparatus for inhibiting grass from overgrowing the side edge of pavement which comprises the steps of
digging a trench along the pavement side edge,
placing a strip of wire mesh on the bottom of the trench,
forming a concrete foundation over the strip of wire mesh,
placing a form with an upright member upon the concrete foundation,
filling the trench to the side of the form distal the pavement with sod,
filling the trench to the side of the form proximal to the pavement with a concrete slurry overlaid upon the foundation,
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The teachings of the applied prior art

Landis' invention relates to metallic curbing. Figure 1 represents a transverse sectional view of a roadway between two curbs and their adjacent sidewalks. As shown in Figure 1, the metal curbing a has a horizontally portion, a curved portion and a vertical portion. The vertical portion of the metal curbing a is riveted at suitable intervals to metallic frames c under the sidewalk. The metallic frames c are filled with rocks or stones to assist in anchoring and steadying the curbing and preventing tilting thereof. Curbing on the two sides of the roadway are connected together by rods b which are riveted or bolted to the curbing. In addition, at suitable intervals, anchors (as shown in Figure 2 or 3) d are provide to further secure the curbing in place.

Turnbo's invention relates to roads, and more specifically to an improved track-block and block formed tracks. As shown in Figures 1, 6 and 8, a road-bed 18 is provided between curb-plates 12 which are connected together with tie-rods 17. Curb-plates 12 are formed in blocks 10 which are assembled together to form the curbing. The blocks 10 may have a reinforcing structure of wire embedded therein as illustrated in Figure 9.

The differences between the claimed subject matter and Landis

After the scope and content of the prior art are determined, the differences between the prior art and the claims at issue are to be ascertained. Graham v. John Deere Co., 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966).

With respect to claim 1, Landis lacks (1) a length of concrete laid along the side of the pavement that has a top surface at least a portion of which slopes downwardly away from the pavement, (2) a strip of plastic overlaying the length of concrete, and (3) fastening means for fastening the strip of plastic to the length of concrete.

With respect to claim 5, Landis lacks the steps of (1) at least partially filling a trench dug along the pavement side edge with a concrete slurry, (2) shaping the concrete slurry with a top surface that slopes down and away from the top surface of the pavement, (3) overlaying the shaped concrete slurry with a plastic strip having an array of holes, (4) securing the plastic strip to the concrete slurry with anchor bolts passes through the strip holes and into the concrete slurry, and (5) allowing the concrete slurry to dry and harden beneath the plastic strip.

foundation over the strip of wire mesh, (3) placing a form with an upright member upon the concrete foundation, (4) filling the trench to the side of the form distal the pavement with sod, (5) filling the trench to the side of the form proximal to the pavement with a concrete slurry overlaid upon the foundation, (6) shaping the top of the slurry to have at least a portion which slopes down and away from the top surface of the pavement, and (7) permitting the concrete slurry to dry and harden beneath a plastic strip.

The obviousness of the claimed subject matter over the applied prior art

In our view, a prima facie case of obviousness has not been established by the examiner in the rejection of claims 1 to 10 before us in this appeal. In that regard, the evidence presented by the examiner clearly would **not** have led one of ordinary skill in the art to combine the relevant teachings of the references to arrive at the claimed invention for the reasons set forth by the appellant in the brief.

With regard to claims 1 to 7, while it may have been obvious at the time the invention was made to a person of ordinary skill in the art to have made Landis' sidewalks and roadbed from concrete and to have made the curbing of Landis from

Thus, the rivets taught by Landis do not fasten the curbing a to either the roadbed or the sidewalk. Moreover, such would not have been suggested by the teachings of Turnbo.

With regard to claims 8 to 10, the steps of placing a strip of wire mesh on the bottom of a trench dug along the pavement side edge and then forming a concrete foundation over the strip of wire mesh is not suggested or taught by either Landis or Turnbo. In that regard, while Figure 9 of Turnbo discloses a wire mesh, Turnbo teaches only that such wire mesh may be embedded in the illustrated blocks. Thus, Turnbo does not teach or suggest the steps of placing a strip of wire mesh on the bottom of a trench dug along the pavement side edge and then forming a concrete foundation over the strip of wire mesh.

For the reasons set forth above, the applied prior art does not suggest the claimed subject matter. In our view, the only suggestion for modifying Landis in the manner proposed by the examiner (final rejection, pp. 2-5) to meet the above-noted limitations stems from hindsight knowledge derived from the appellant's own disclosure.

1983), cert. denied, 469 U.S. 851 (1984). It follows that we cannot sustain the examiner's rejection of claims 1 to 10.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1 to 10 under 35 U.S.C. § 103 is reversed.

REVERSED

IRWIN CHARLES COHEN
Administrative Patent Judge

CHARLES E. FRANKFORT
Administrative Patent Judge

JEFFREY V. NASE

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