

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JULIO F. RODRIGUES
and KENNETH R. DUMONT

Appeal No. 98-3293
Application 08/650,417¹

ON BRIEF

Before CALVERT, COHEN and FRANKFORT, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's refusal to allow claims 1 through 6, 8 and 9 as amended subsequent to the final rejection in a paper filed November 10, 1997 (Paper No. 6). Claim 10, the only other claim remaining in the application, stands allowed. Claims 7, 11 and 12 have been

¹ Application for patent filed May 20, 1996.

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canceled.

Appellants' invention relates to a spacer for use in spacing a cable (e.g., 50 in Figure 5) from a support member (e.g., 60). A copy of representative claim 1, as it appears in the Appendix to appellants' brief, is attached to this decision.

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

McSherry et al. (McSherry)	4,562,982	Jan. 7, 1986
Murphy	4,899,963	Feb. 13, 1990

Claims 1 through 3, 8 and 9 stand rejected under 35 U.S.C. § 102(b) as being anticipated by McSherry.

Claims 4 through 6 stand rejected under 35 U.S.C. § 103 as being unpatentable over McSherry in view of Murphy.

Rather than attempt to reiterate the examiner's full commentary with regard to the above-noted rejections and the conflicting viewpoints advanced by the examiner and appellants regarding the rejections, we make reference to the examiner's answer (Paper No. 10, mailed April 27, 1998) for the

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reasoning in support of the rejections, and to appellants' brief (Paper No. 9, filed February 27, 1998) and reply brief (Paper No. 12, filed June 5, 1998) for the arguments thereagainst.

OPINION

As a preliminary matter, we observe that on page 3 of the brief appellants have indicated that the claims on appeal "should be considered as one grouping." Thus, we have focused only on independent claim 1 in the following commentary regarding appellants' appeal, with claims 2 through 6, 8 and 9 standing or falling on the outcome of the appeal as to claim 1.

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

Looking at the examiner's rejection of claims 1 through 3, 8 and 9 under 35 U.S.C. § 102(b) as being anticipated by McSherry, we share the examiner's view that McSherry discloses (Figures 1 through 5) a spacer like that defined in appellants' claim 1 on appeal and that the subject

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matter of appellants' claim 1 is anticipated by McSherry. The limitation urged by appellants to distinguish the claimed spacer from that of McSherry is found in claim 1, lines 4-5, which set forth the requirement that the spacer body include

an opposed generally planar cable supporting surface capable of supporting said cable continuously along said spacer body and along an extent of said cable.

In reading this portion of appellants' claim 1 on McSherry, the examiner has pointed to the top surface of the male annular lip (14) of McSherry's spacer seen best in Figures 1, 2 and 3, urging that this surface provides a generally planar cable supporting surface that is capable of supporting said cable "continuously along said spacer body and along an extent of said cable," as set forth in claim 1 on appeal. We agree. Looking at the cable (54) of Figure 1 as the support member and the cable (52) as the supported cable, once attached to the support cable (54) and spacer as shown in Figure 1 of McSherry, the cable (52) is continuously supported along said spacer body and along an extent of said cable by the planar surfaces which define the top face of the male annular lip (16) of the spacer. Similarly, looking at the cable (54) as the supported cable and the cable (52) as the support member, we note that the spacer of McSherry provides continuous support for the cable (54) along the spacer body and along an extent of said cable on the lower edge surface of the female annular lip (16) of the spacer.

Contrary to appellants' arguments, the language of independent claim 1 on appeal does not set forth, or inherently require, that the cable be supported by a supporting surface continuously along the entire length of said spacer body and along an extent of said cable, as appellants have argued. In part,

this is because appellants' claim 1 on appeal does not define over the open, tubular spacer of McSherry by defining a bottom wall (e.g., 33) for the spacer and a cable support surface (35) thereof, as seen in Figures 1 and 2 of the application, that extends continuously from one end wall (26) of the spacer body to the opposite end wall of the spacer body, thereby providing a cable support surface which is clearly capable of supporting a cable continuously along the entire length of the spacer body. While we understand that such an arrangement is structurally what appellants have disclosed in their specification, we must agree with the examiner that the language employed in claim 1 on appeal is subject to a much broader interpretation and is not limited to an arrangement like that disclosed in the specification and shown in the drawings of appellants' application.²

For the above reasons, we will sustain the examiner's rejection of claim 1 on appeal under 35 U.S.C. § 102(b) based on McSherry.

² With regard to a spacer which is apparently similar to that seen in McSherry, but which has a closed bottom wall for contacting a supported cable member, we direct the examiner's attention to the prior art mentioned on page 2, lines 13-19, and page 7, lines 21-23, of appellants' specification. In addition, in the event of any further prosecution, the examiner should also consider the applicability of the spacer seen in Murphy (e.g., Figs. 9 and 10) to the claimed subject matter. Further, the examiner should evaluate the scope to be afforded the "or the like" language found in lines 1 and 9 of appellants' claim 1 and similar recitations in claim 10. For purposes of this appeal, we understand this language in line 1 of claim 1 to encompass "wire, conduit, or other similar transmission means", as has been set forth on page 3 of appellants' specification. As for the recitation in line 9 of claim 1, we understand such language to additionally cover a "strap" as set forth on page 8 of the specification.

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As noted above, appellants have grouped all of the claims on appeal in a single grouping, thus allowing dependent claims 2 through 6, 8 and 9 to fall with claim 1. It follows from this that the examiner's rejection of claims 4 through 6 under 35 U.S.C. § 103 based on McSherry and Murphy is likewise sustained.

In view of the foregoing, the examiner's decision rejecting claims 1 through 3, 8 and 9 under 35 U.S.C. § 102(b) as being anticipated by McSherry is affirmed, as is the examiner's decision rejecting claims 4 through 6 under 35 U.S.C. § 103.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

IAN A. CALVERT)	
Administrative Patent Judge)	
)	
)	BOARD OF PATENT
)	APPEALS AND
IRWIN CHARLES COHEN)	INTERFERENCES
Administrative Patent Judge)	
)	
)	
CHARLES E. FRANKFORT)	
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APPENDIX

1. A spacer for spacing a cable or the like, from a support member, said spacer comprising:
 - a spacer body including:
 - a support member contacting surface;
 - an opposed generally planar cable supporting surface capable of supporting said cable continuously along said spacer body and along an extent of said cable;
 - drainage means extending through said spacer body; and
 - cable tie support structure located on said spacer body,
 - whereby said spacer is capable of being contiguously secured between the cable and the support member by way of a cable tie or the like surrounding said cable and supported by said cable tie support structure of said spacer body.