



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/039,429	03/03/2011	Marc Rasschaert	TreeKeeper-0801	1888
36787	7590	09/11/2015	EXAMINER	
BLYNN L. SHIDELER THE BLK LAW GROUP 3500 BROKKTREE ROAD SUITE 200 WEXFORD, PA 15090			TSANG, LISA L	
			ART UNIT	PAPER NUMBER
			3643	
			MAIL DATE	DELIVERY MODE
			09/11/2015	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARC RASSCHAERT

Appeal 2013-006242
Application 13/039,429
Technology Center 3600

Before JENNIFER D. BAHR, LISA M. GUIJT, and
JAMES J. MAYBERRY, *Administrative Patent Judges*.

MAYBERRY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Marc Rasschaert (Appellant) seeks review under 35 U.S.C. § 134 of the Examiner's rejections of claims 1–7, 9, 11–13, 15, and 17–19.¹ We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

CLAIMED SUBJECT MATTER

The claims are directed to a trunk-mounted Christmas tree water level measuring and alarm device. Claims 1, 9, and 15 are independent. Claim 1, reproduced below, is illustrative of the claimed subject matter:

¹ Claims 8 and 14 have been objected to and are not under appeal. Appeal Br. 5.

1. A Christmas tree water level measuring and alarm device comprising:
 - a housing configured to be mounted to a Christmas tree;
 - a power supply within the housing;
 - an attaching mechanism for mounting the housing to the Christmas tree;
 - at least one water level sensor extending down from the housing and configured to extend into a water reservoir of a tree stand supporting the Christmas tree and configured to define a low water level within the reservoir;
 - a water level alarm within the housing configured to activate at least when the at least one water level sensor indicates that a water level in the water reservoir is below the low water level;
 - a light sensor within the housing; and
 - an alarm override within the housing, wherein the water level alarm is overridden and will not activate regardless of the water level in the reservoir when the light sensor indicates less than a preset threshold of light around the housing.

REJECTIONS

- I. Claims 1–7, 9, 12, and 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pierce (US 5,493,277, issued Feb. 20, 1996) and Matlen (US 2009/0320363 A1, published Dec. 31, 2009).
- II. Claims 11, 15, and 17–19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pierce, Matlen, and Yoshikawa (US 7,201,333 B2, issued Apr. 10, 2007).

ANALYSIS

Rejection I

Appellant argues claims 1, 3, 4, 6, 7, 9, 12, and 13 as a group. *See* Appeal Br. 11–12. We select claim 1 as representative of this group, and claims 3, 4, 6, 7, 9, 12, and 13 stand or fall with claim 1. *See* 37 C.F.R.

Appeal 2013-006242
Application 13/039,429

§ 41.37(c)(1)(iv) (2015). Appellant argues claim 2 and 5 separately. *See* Appeal Br. 12–13.

Claim 1

Independent claim 1 recites, in relevant part, “an alarm override within the housing, wherein the water level alarm is overridden and will not activate regardless of the water level in the reservoir when the light sensor indicates less than a preset threshold of light around the housing.” Appeal Br. 15, Claims App. The Examiner finds that Pierce discloses much of the subject matter of claim 1, except for “a light sensor within the housing or an alarm override within the housing.” Final Act. 3. The Examiner further finds that Matlen “teaches . . . a light sensor (317) within a housing and an override within the housing . . . wherein the functions of the watering device are overridden and will not activate when the light sensor indicates the presence of less than a preset threshold of light around the housing.” *Id.*

The Examiner reasons that:

It would have been obvious to a person having ordinary skill in the art at the time of [Appellant’s] invention to modify the device of Pierce to comprise a light sensor within the housing and an alarm override within the housing, wherein the water level alarm is overridden and will not activate regardless of the water level in the reservoir when the light sensor indicates the presence of less than a preset threshold of light around the housing, as taught by Matlen, in order to conserve energy.

Id. at 4.

Appellant argues that although Matlen discloses a light sensor and override, the reference fails to disclose an *alarm* override and instead discloses a *pump* override. Appeal Br. 11–12. Appellant disputes the

Examiner's statement that suggests that Matlen discloses an *alarm* override.
Id.

We find Appellant's argument unpersuasive of Examiner error as it is not consistent with the Examiner's rejection. The Examiner's proposed rejection relies on Pierce for disclosing an alarm and Matlen for disclosing a light sensor and *system* override. Final Act. 3; Answer 3. As the Examiner explains, "[m]odifying Pierce to have the system override of Matlen would result in the entire system of Pierce, including the alarm of Pierce, being shut down once the light sensor indicates less than a preset threshold of light around the housing." Answer 3.

In reply, Appellant argues, for the first time, that the Examiner's reason to combine Pierce and Matlen is the product of improper hindsight reasoning. Reply Br. 2–3. As this argument is not in response to an argument made by the Examiner in the Answer and could have been made in the Appeal Brief, and Appellant provides no reason for its late inclusion, we find this argument untimely. *See* 37 C.F.R. § 41.41(b)(2) (2015) ("Any argument raised in the reply brief which was not raised in the appeal brief, or is not responsive to an argument raised in the examiner's answer . . . will not be considered by the Board for purposes of the present appeal, unless good cause is shown.").

Accordingly, we sustain the Examiner's rejection of claim 1, and claims 3, 4, 6, 7, 9, 12, and 13, which fall with claim 1, under 35 U.S.C. § 103(a) as being unpatentable over Pierce and Matlen.

Claim 2

Claim 2 depends from claim 1 and further recites "wherein the attaching mechanism includes a pair of attaching straps configured to secure

the housing to the trunk of the Christmas tree.” Appeal Br. 15, Claims App. The Examiner finds that Pierce discloses a pair of attaching straps—one that attaches Pierce’s structure 20 and one that attaches Pierce’s structure 25. Final Act. 4. The Examiner determines that the “configured to” language of claim 2 is functional language and finds that Pierce’s straps are capable of performing the recited function. *Id.*

Appellant argues that Pierce discloses one-half-inch by one-half-inch VELCRO[®] fasteners that secure the sensor structures to the inside of a tree stand, not the trunk of the tree. Appeal Br. 12. Appellant explains that claim 2 is directed to securing the housing, which is defined in claim 1, to a tree trunk and that the Examiner fails to demonstrate that Pierce’s fasteners are capable of securing the recited housing to the tree trunk. Reply Br. 3.

We find Appellant’s argument persuasive of Examiner error. As claim 1 recites, the housing is configured to mount to the tree trunk and includes the power supply and water level alarm. Appeal Br. 15, Claims App. We agree with Appellant that the Examiner fails to adequately explain how Pierce’s VELCRO[®] fasteners are capable of securing the housing of claim 2 to a Christmas tree trunk as required by claim 2.

Accordingly, we do not sustain the Examiner’s rejection of claim 2 under 35 U.S.C. § 103(a) as being unpatentable over Pierce and Matlen.

Claim 5

Claim 5 depends indirectly from claim 1 and further recites “wherein the first and second water level sensors are user adjustable to provide user definable low and high water levels within the water reservoir.” Appeal Br. 16, Claims App. The Examiner finds that Pierce’s water sensors are user adjustable. Final Act. 4. Appellant argues that Pierce’s sensors are mounted

Appeal 2013-006242
Application 13/039,429

on the tree stand and not the tree, so there is no teaching that a user can adjust the sensors. Appeal Br. 13. Appellant explains that the sensors are secured to the tree stand using VELCRO[®] fasteners, making it clear that the sensors are not meant to be adjustable. Reply Br. 3.

We find Appellant's argument unpersuasive of Examiner error as it is not commensurate with the scope of claim 5. Claim 5 does not require the water level sensors to be continually adjustable. The Examiner correctly finds that a user of Pierce's system can adjust the sensors to define the high and low water levels, such as when they are initially positioned on the tree stand. *See Answer 3.*

Accordingly, we sustain the Examiner's rejection of claim 5 under 35 U.S.C. § 103(a) as being unpatentable over Pierce and Matlen.

Rejection II

Appellant argues claims 11, 15, and 17–19 as a group. *See Appeal Br. 13.* We select claim 11 as representative of this group, and claims 15 and 17–19 stand or fall with claim 11. *See 37 C.F.R. § 41.37(c)(1)(iv) (2015).*

Claim 11 depends from claim 9 and further recites “wherein the first and second water level sensors *are formed as rods* which are user adjustable providing user definable high and low water levels.” Appeal Br. 17, Claims App. (emphasis added). The Examiner finds that “[n]either Pierce nor Matlen discloses that the sensors are formed as rods.” Final Act. 5. The Examiner further finds that Yoshikawa discloses water level sensors formed as rods. *Id.* The Examiner determines that “[i]t would have been obvious to a person having ordinary skill in the art at the time of [Appellant's] invention to modify the sensors of Pierce as modified by Matlen to be formed as rods, as taught by Yoshikawa, in order to improve the aesthetics

Appeal 2013-006242
Application 13/039,429

of the device.” *Id.* at 6; *see also* Answer 3–4 (“[I]t would have been obvious to a person having ordinary skill in the art at the time of [A]ppellant’s invention to modify the sensors of [P]ierce to be formed as rods, as taught by Yoshikawa, in order to meet the specific aesthetic or use preferences of a user.”).

Appellant first argues that the Examiner’s proposed rejection fails to disclose an *alarm* override. Appeal Br. 13. For the reasons discussed above in our analysis of claim 1 under Rejection I, we find this argument unpersuasive of Examiner error.

Appellant next argues that “[t]here is no basis to include [Yoshikawa’s] rods into” Pierce’s apparatus. Appeal Br. 13. Appellant explains that the Examiner’s proposed modification would alter Pierce’s housing and would require further modifications of Pierce’s apparatus. Reply Br. 4. We find this argument unpersuasive of Examiner error.

Appellant’s argument focuses on the modification necessary to employ Yoshikawa’s rods as sensors. The obviousness inquiry, however, focuses on what the combined teachings would have suggested to those of ordinary skill in the art, not whether the features of individual references could be bodily incorporated into one another. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981). The inquiry is not whether *Yoshikawa’s* rods can be incorporated into Pierce’s apparatus but whether it would have been obvious to one of ordinary skill in the art to configure Pierce’s sensors in the shape of rods, as suggested by Yoshikawa. Appellant fails to explain why the Examiner’s proposed modification is anything more than the simple substitution of one known sensor for another to arrive at a predictable result. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) (“[W]hen a patent claims a structure already known in the prior art that is altered by the

mere substitution of one element for another known in the field, the combination must do more than yield a predictable result” to be unobvious.).

Appellant also contends that “[t]here is nothing in the prior art or anywhere to suggest the rods of the intermittent automatic irrigation system of the Yoshikawa reference would be aesthetically preferable to the sensors in the Pierce reference.” We find this argument unpersuasive as it is foreclosed by *KSR Int’l Co.*, in which the Supreme Court rejected the rigid requirement of a teaching, suggestion, or motivation to combine known elements in order to show obviousness. *KSR Int’l Co.*, 550 U.S. at 415. Here, the Examiner has articulated a reason why an artisan of ordinary skill would modify Pierce’s sensors to configure them as rods—for aesthetics or a user preference. *See Answer 3–4*. Appellant fails to point out why this reasoning lacks rational underpinnings.

Accordingly, we sustain the Examiner’s rejection of claim 11, and claims 15 and 17–19, which fall with claim 11, under 35 U.S.C. § 103(a) as being unpatentable over Pierce, Matlen, and Yoshikawa.

DECISION

We affirm the Examiner’s rejection of claims 1, 3–7, 9, 12, and 13 under 35 U.S.C. § 103(a) as being unpatentable over Pierce and Matlen.

We reverse the Examiner’s rejection of claim 2 under 35 U.S.C. § 103(a) as being unpatentable over Pierce and Matlen.

We affirm the Examiner’s rejection of claims 11, 15, and 17–19 under 35 U.S.C. § 103(a) as being unpatentable over Pierce, Matlen, and Yoshikawa.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2015).

Appeal 2013-006242
Application 13/039,429

AFFIRMED-IN-PART

JRG